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## The Intercountry Adoption Act of 2000: The United States' Ratification of the Hague Convention on the Protection of Children, and its Meager Effect on International Adoption

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# The Intercountry Adoption Act of 2000: The United States' Ratification of the Hague Convention on the Protection of Children, and its Meager Effect on International Adoption

## ABSTRACT

*This Note explores the effect of the United States' ratification of the Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption (Hague Convention) via passage of the Intercountry Adoption Act of 2000 (IAA). Through intercountry adoption, countless children have been given homes and opportunities in the U.S. that would not have been available to them in their countries of origin. With the increased popularity of intercountry adoption, however, have come tragic consequences for many children in foreign countries, who are exploited by those involved in the adoption process. This Note contends that the IAA, as currently written, does not sufficiently address these problems. After examining the history of intercountry adoption, the Hague Convention, and the IAA, the Note proposes certain changes in the IAA that would help combat the problems posed by intercountry adoption and allow its beneficial aspects to continue.*

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1612
II.	THE DEVELOPMENT OF INTERCOUNTRY ADOPTION DURING THE TWENTIETH CENTURY: A SOLUTION BORN OUT OF TRAGEDY, ITS HARMS, AND THE ATTEMPTS TO HEAL THEM.....	1615
A.	<i>The Role of National Disaster and Hardship in Intercountry Adoption.....</i>	1615
B.	<i>The Harmful Results of the High Demand for Intercountry Adoption.....</i>	1618
C.	<i>Regulation of Intercountry Adoption: The Hague Convention on Protection of Children</i>	

	<i>and Cooperation in Respect of Intercountry Adoption and the United States' Attempt to Implement with the Intercountry Adoption Act of 2000</i> .....	1625
	1. International Recognition and Regulation: The Stepping Stones for the Hague Convention. ....	1625
	2. The U.S. Implementation of the Hague Convention: The Intercountry Adoption Act of 2000.....	1629
III.	THE U.S. TAKES FINAL STEPS TOWARD IMPLEMENTING THE INTERCOUNTRY ADOPTION ACT .....	1630
	A. <i>The U.S. State Department Regulations</i> .....	1630
	B. <i>The Effects of the IAA Once the Hague Convention is Ratified</i> .....	1631
IV.	SOLUTION .....	1638
V.	CONCLUSION.....	1641

## I. INTRODUCTION

On December 26, 2004, an underwater earthquake off the coast of the Indonesian island of Sumatra caused a tsunami tidal wave that devastated countries across Southeast Asia.<sup>1</sup> The effects of the tsunami were felt as far as three thousand miles away on the eastern coast of Africa<sup>2</sup> and resulted in approximately 216,000 deaths spanning eleven countries across Africa and Asia.<sup>3</sup> As news of the tragedy reached the rest of the world, many people were touched by the vast numbers of children left orphaned by the natural disaster.<sup>4</sup> The U.S. State Department and international adoption organizations fielded calls pouring in from U.S. families interested in providing homes for the orphaned children.<sup>5</sup>

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1. *Huge Quake Spawns Tremors and Tsunamis in Southeast Asia*, N.Y. TIMES, Dec. 26, 2004, at 1.25.

2. Michael Elliot, *Sea of Sorrow*, TIME, Jan. 10, 2005, at 22.

3. Elisabeth J. Ryan, *For the Best Interests of the Children: Why the Hague Convention on Intercountry Adoption Needs To Go Farther, as Evidenced by Implementation in Romania and the United States*, 29 B.C. INT'L & COMP. L. REV. 353, 353 (2006). Countries reporting deaths from the tsunami include Indonesia, Sri Lanka, India, Thailand, Somalia, Burman, Maldives, Malaysia, Tanzania, Bangladesh, and Kenya. Elliot, *supra* note 2.

4. See Ryan, *supra* note 3, at 353–54 (noting that over 216,000 people were killed in the disaster).

5. Chris Echegaray, *Tsunami Orphans' Adoption Restricted*, TAMPA TRIB., Jan. 7, 2005, at 1.

The need to identify and reunite family members, the variance in adoption procedures in different countries, and a desire to protect the children from mistreatment made adoption of the young victims of the tsunami impractical in the immediate aftermath of the disaster, and many of the countries affected by the disaster shut down their borders to adoption altogether.<sup>6</sup> However, the tsunami disaster is one recent example in a history of economic, social, and political crises that have facilitated the advance of intercountry adoption in the United States.<sup>7</sup> U.S. families were prompted to adopt children from war-damaged countries following World War II, as well as after the Korean and Vietnam wars.<sup>8</sup> The end of the Communist reign of Nicolae Ceausescu and the fall of the Soviet Union caused an influx of adopted children from Romania and Russia. Because of government-imposed family planning restrictions, China has ranked either first or second in number of children adopted into the United States each year for the past decade.<sup>9</sup>

Proponents of intercountry adoption advocate the process for its ability to provide children with permanent homes when such homes are not available to them in their countries of origin.<sup>10</sup> Critics, meanwhile, present the process as being “exploitative, imperialistic, and detrimental to children because of the separation from their home culture and society.”<sup>11</sup> They point to instances of child trafficking, where poverty-stricken families are persuaded to accept relatively small amounts of money in exchange for their children, who are then forced to live in dreadful conditions until they are adopted by wealthy foreigners for large sums.<sup>12</sup> Although domestic adoption is always considered to be in the best interest of the child when available, opponents also emphasize certain instances when intercountry adoption is given preference because of the higher prices that foreigners are willing and able to pay to adoption agencies.<sup>13</sup>

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6. *Id.*

7. 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, 561 (2004).

8. *Id.*

9. Linda J. Olsen, Comment, *Live or Let Die: Could Intercountry Adoption Make the Difference?*, 22 *PENN ST. INT'L L. REV.* 438, 501 (2004).

10. D. Marianne Blair, *Safeguarding the Interests of Children in Intercountry Adoption: Assessing the Gatekeepers*, 34 *CAP. U. L. REV.* 349, 349 (2005).

11. Ryan, *supra* note 3, at 357.

12. See Blair, *supra* note 10, at 355–74 (discussing “baby buying” scams that have been uncovered in Cambodia, India, and Guatemala, among other countries).

13. See *id.* at 374–75.

Even though Indian national law requires that at least 50% of adoptions must be intra-country and creates a preference for domestic adopters, Indian scholars as well as anti-adoption advocates assert that Indian adoption agencies and facilitators favor Western couples because of the high fees involved and thus violate the preference guidelines.

Efforts have been made in the last two decades to create standards for intercountry adoption, and to make the process safe and worthwhile when it is the best option for a child.<sup>14</sup> The United Nations Convention on the Rights of the Child first recognized children's rights in 1989.<sup>15</sup> The subsequent Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (Hague Convention) was enacted in 1993 with the purpose of setting minimum standards to be followed in adoptions occurring between contracting countries.<sup>16</sup> Currently, seventy-four countries have achieved either ratification of or accession to the Hague Convention; the United States is not yet among them, despite adopting more children from abroad than all other countries in the world combined.<sup>17</sup>

The United States signed the Hague Convention in March of 1994, signaling its intent to become a party, but is only now taking the final steps toward enacting it.<sup>18</sup> Congress adopted the Intercountry Adoption Act of 2000 (IAA) in an attempt to implement the Hague Convention, but ratification has been delayed by the State Department's review of public comments to the proposal and by opposition to the IAA's requirements by international adoption agencies.<sup>19</sup> In February of 2006, the State Department announced publication in the Federal Register of the finalized rules on "accreditation of adoption agencies and other matters required to enable U.S. ratification of the Convention."<sup>20</sup> The Hague Convention

*Id.*

14. Kimball, *supra* note 7, at 562.

15. *Id.* at 562–63.

16. *Id.* The Conventions' stated objectives are

to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for its fundamental rights, and a system of cooperation among Contracting States to ensure respect for those safeguards and thereby prevent to abduction, the sale of, or traffic in children, and to secure the recognition of adoptions made in accordance with the Convention.

Hague Conference on Private International Law, May 29, 1993, 32 I.L.M. 1134, 1135 [hereinafter Hague Conference].

17. Hague Conference on Private International Law, Status Table, [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=69](http://www.hcch.net/index_en.php?act=conventions.status&cid=69) (last visited Oct. 12, 2007) [hereinafter Status Table]; *Hague Convention on International Adoptions: Status and the Framework for Implementation: Hearing Before the Subcomm. on Africa, Global Human Rights and International Operations*, 109th Cong. 2 (2006) [hereinafter *Hearing*] (statement of New Jersey Rep. Christopher Smith).

18. Status Table, *supra* note 17; Kimball, *supra* note 7, at 563, 568–69.

19. Kimball, *supra* note 7, at 574.

20. John R. Crook, *U.S. Takes Domestic Measures to Implement Hague Adoption Convention*, 100 AM. J. INT'L L. 461 (2006). The official titles of the relevant regulations are "Accreditation of Agencies and Approval of Persons Under the Intercountry Adoption Act of 2000 (IAA)" and "Intercountry Adoption—Preservation of Convention Records." 22 C.F.R. pt. 96 (2007); 22 C.F.R. pt. 98 (2007).

is currently expected to be ratified and enter into force in the United States in 2007.<sup>21</sup>

While efforts have been made to regulate international adoption, an efficient international system is far from being in place. The Hague Convention is a step in the right direction, but its requirements are difficult to comply with, and many countries will be unable or unwilling to invest the time and resources necessary to conform to them. The United States is only now on the brink of ratifying the Convention, nearly thirteen years after signing it. Part II of this Note discusses the increase in international adoptions resulting from various political, social, and economic events in the years since World War II, the problems that arose out of the enhanced demand for adoptable children, and the attempts at regulation that have ensued. Part III discusses the United States' impending ratification of the Hague Convention through the implementation of the IAA and its inadequacy with respect to many of the countries from which U.S. families currently, or will be likely to, adopt children. Looking specifically at the orphan crisis in sub-Saharan Africa, this section discusses how countries dealing with national disasters may be both unable to care for their orphan population and unable to fulfill the requirements necessary to become a party to the Hague Convention. In such cases, the IAA will offer no protection to the children involved. Part IV discusses options by which the United States can better facilitate safe international adoption practices where the Hague Convention does not apply, and more specifically, the additional efforts that the U.S. must make to ensure the safety of the intercountry adoption process when sending countries are unable to do so.

## II. THE DEVELOPMENT OF INTERCOUNTRY ADOPTION DURING THE TWENTIETH CENTURY: A SOLUTION BORN OUT OF TRAGEDY, ITS HARMS, AND THE ATTEMPTS TO HEAL THEM

### A. *The Role of National Disaster and Hardship in Intercountry Adoption*

Intercountry adoption is a relatively new practice in the United States, essentially unheard of prior to World War II.<sup>22</sup> Its increasing popularity since that time—the number of adoptions in the United States of children from abroad doubled from 11,340 to 22,739 in the past decade alone<sup>23</sup>—has been largely in response to political, social,

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21. Crook, *supra* note 20.

22. Olsen, *supra* note 9, at 496–97.

23. *Hearing, supra* note 17. The number of immigrant visas issued to orphans coming into the United States was 7093 in 1990; 8987 in 1995; 17,718 in 2000; and

and economic upheaval in the adopted children's countries of origin.<sup>24</sup> After World War II, some in the U.S. motivated by the stories brought home by military personnel were moved to adopt the orphaned and refugee children from war-ravaged countries such as Greece, Italy, Germany, and Japan.<sup>25</sup> Due in part to the Displaced Persons Act, which allowed three thousand displaced children to enter the U.S. in spite of their countries' immigration quotas, families in the U.S. adopted 1,845 German children and 2,987 Japanese children between 1948 and 1962.<sup>26</sup>

Similar increases in adoption occurred after both the Korean and Vietnam Wars.<sup>27</sup> Prior to the Korean War, foreigners were very rarely permitted to adopt Korean orphans, as it was perceived to be in conflict with the strong sense of family heritage inherent in the Korean culture.<sup>28</sup> However, the tragedy of war and the large number of babies fathered by U.S. soldiers during the conflict forced a change in the Korean attitude toward intercountry adoption.<sup>29</sup> In the wake of the war, the United States allowed military personnel to obtain non-quota visas for adopted children, and the adoption of Korean children by families in the U.S. increased steadily throughout the following decades.<sup>30</sup> It is estimated that between the early 1950s and the mid-1980s, more than 100,000 Korean children were adopted by foreign families, a large number of them in the U.S.<sup>31</sup>

An increase in intercountry adoption also followed the United States' occupation of Vietnam, which culminated in a withdrawal of troops in 1973.<sup>32</sup> By 1975, North Vietnamese troops were taking over the previously U.S.-occupied South Vietnam, and refugees were fleeing the country at an astonishing rate; an estimated 132,000 refugees immigrated to the United States alone by the end of that year.<sup>33</sup> On April 3, 1975, the United States government announced Operation Babylift, a two million dollar undertaking designed to lift thirty flights full of some of the 70,000 orphans in Vietnam to safety.<sup>34</sup> Of the refugee children, an estimated 2000 were flown to

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22,728 in 2005. U.S. Dept. of State, Immigrant Visas Issued to Orphans Coming to the U.S., [http://travel.state.gov/family/adoption/stats/stats\\_451.html](http://travel.state.gov/family/adoption/stats/stats_451.html) (last visited Oct. 12, 2007) [hereinafter Immigrant Visas].

24. Kimball, *supra* note 7, at 561.

25. Olsen, *supra* note 9, at 497.

26. *Id.*

27. *Id.* at 497-99.

28. *Id.* at 497.

29. *Id.*

30. *Id.* at 497-98.

31. *Id.* at 498.

32. *Id.*

33. Allison Martin, *The Legacy of Operation Babylift*, <http://www.adoptvietnam.org/adoption/babylift.htm> (last visited Oct. 12, 2007).

34. *Id.*

the United States;<sup>35</sup> 655 Vietnamese children were adopted by U.S. families in 1975 alone.<sup>36</sup>

In addition to war, political unrest within countries has also acted as a catalyst for intercountry adoption. When Communist rule in Romania ended with the overthrow of Nicolae Ceausescu in 1989, tens of thousands of orphans were discovered in orphanages throughout that country.<sup>37</sup> During his reign, which began in 1944, Ceausescu banned abortion and birth control and mandated that all Romanian women bear at least five children.<sup>38</sup> Due to poverty, teen pregnancies, and limited access to family planning,<sup>39</sup> an estimated 140,000 children were abandoned during this time and forced to live in the unsanitary conditions of the corrupt state-run institutions.<sup>40</sup> Since the conditions were exposed, some 30,000 Romanian children have been adopted internationally, 8,300 of them in the United States.<sup>41</sup>

Beginning in 1979, the Chinese government has responded to rampant overpopulation by imposing a one-child-per-family policy.<sup>42</sup> Exceptions do exist, but for many Chinese citizens permission must be obtained from the local government before a second child can be conceived.<sup>43</sup> This policy, combined with the cultural preference for sons, has resulted in an estimated 150,000 abandoned baby girls each year.<sup>44</sup> Since 2000, more children have been adopted into the United States from China than from any other country; China has ranked either first or second in adoptions every year since 1995, surpassed only by Russia from 1997 through 1999.<sup>45</sup>

The adoption of Russian children escalated after the fall of the Soviet Union in 1991.<sup>46</sup> The process has since been regulated such

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35. *Id.*

36. Olsen, *supra* note 9, at 499.

37. Ryan, *supra* note 3, at 359.

38. *Id.*

39. *Id.* at 360.

40. Susan M. Bisignaro, Comment, *Intercountry Adoption Today and the Implications of the 1993 Hague Convention on Tomorrow*, 13 DICK. J. INT'L L. 123, 128–29 (1994).

41. Ryan, *supra* note 3, at 359–60. In 1991 alone, 2594 Romanian children were adopted in the United States. Due to limits on adoption imposed by the Romanian government shortly thereafter, that number dropped to 121 in 1992 and 97 in 1993. Immigrant Visas, *supra* note 23; *see also* Olsen, *supra* note 9, at 499. Numbers increased after that, until Prime Minister Natase took office in December 2000 and announced a moratorium on adoptions that is still currently in place. Olsen, *supra* note 9, at 500.

42. Kimball, *supra* note 7, at 566.

43. *Id.*; Nili Luo & David M. Smolin, *Intercountry Adoption and China: Emerging Questions and Developing Chinese Perspectives*, 35 CUMB. L. REV. 597, 599–602 (2005).

44. Kimball, *supra* note 7, at 565.

45. Immigrant Visas, *supra* note 23.

46. Olsen, *supra* note 9, at 501.



that no child can be considered for intercountry adoption until it has been shown that no Russian citizen is interested in adopting him or her.<sup>47</sup> However, due to the economic hardships in that country, many children are found eligible and adopted out of Russia each year.<sup>48</sup>

Social and economic conditions in Guatemala make it a prime sending country for intercountry adoptions; the average Guatemalan woman gives birth to six children in her lifetime, and 200,000 children were orphaned by the thirty-six-year civil conflict that afflicted the country from 1960-1996.<sup>49</sup> U.S. adoptions from Guatemala have skyrocketed in the last decade, rising steadily from 427 in 1996 to 4,135 in 2006.<sup>50</sup>

### B. *The Harmful Results of the High Demand for Intercountry Adoption*

As intercountry adoptions have increased in the last sixty years, concerns have arisen regarding the safety of the process for the children involved. From demand springs opportunism, and a process that was once largely philanthropic has become one that is sometimes treated as a for-profit venture, resulting in corrupt practices, black market trades, and child trafficking.<sup>51</sup>

Circumstances in children's countries of origin are only part of the story; cultural changes at home have also contributed to U.S. interest in intercountry adoption.<sup>52</sup> Unmarried mothers in the U.S. are far more likely to retain custody of their children than in the past, and increased birth control use and legalized abortion have contributed to a decrease in the number of children available domestically for adoption.<sup>53</sup> The intercountry adoption process has become such a desirable one for many hopeful adoptive parents that fees for international adoptions regularly amount to anywhere between \$12,000 to \$30,000, and the waiting period to receive a child ranges from one to three years.<sup>54</sup> Even in countries where adoption practices have not been found to include trafficking or black market operations, concerns abound that international adoptions are too often given preference over domestic ones due to their lucrative

47. *Id.*

48. *Id.*; see also Immigrant Visas, *supra* note 23.

49. Jennifer Banks, *The U.S. Market for Guatemalan Children: Suggestions for Slowing the Rapid Growth of Illegal Practices Plaguing International Child Adoptions*, 28 SUFFOLK TRANSNAT'L L. REV. 31, 39 n.45 (2004).

50. IMMIGRANT VISAS, *supra* note 23.

51. Blair, *supra* note 10, at 352.

52. Banks, *supra* note 49, at 37-38.

53. *Id.*

54. Kimball, *supra* note 7, at 565.

economic benefits, drawing children out of their countries of origin even where willing adoptive parents exist.<sup>55</sup>

Social and political circumstances, the booming market for adoptable children, and a lack of uniform laws regarding adoption led to some tragic practices during the 1990s.<sup>56</sup> In 1991, economic measures implemented by the government in Peru forced millions of Peruvian citizens into extreme poverty.<sup>57</sup> Living amongst “rising prices, increasing malnutrition, epidemics of cholera, rabies and tuberculosis, and an escalating guerilla war,”<sup>58</sup> desperate Peruvians were susceptible to the cash offers from adoptive parents, who willingly paid between \$10,000 and \$17,000 in exchange for fast, easy adoptions.<sup>59</sup> Horrific reports surfaced of adoption representatives who would “rent” a woman’s womb, pay her minimal compensation for her service, and earn an enormous profit by selling the baby to adoptive parents.<sup>60</sup>

Romanian orphans were similarly exploited after the fall of Ceausescu’s regime in 1990.<sup>61</sup> Because so many of the children in Romania’s orphanages had been abandoned, it was impossible, in the absence of proof that a child’s parents were deceased, to meet the requirement that parental consent be obtained before a child could be adopted.<sup>62</sup> Children with families were represented as being orphans and were auctioned off to the highest bidder.<sup>63</sup> In one unbelievable case, Romanian nuns persuaded unwed mothers to relinquish their parental rights, and then sold their children for upwards of \$15,000.<sup>64</sup>

The trafficking scandal in Romania was significantly diminished by the creation of a centralized adoption system and tighter regulations in the mid-1990s, but that was not the end of corrupt adoption practices.<sup>65</sup> The system was developed such that adoption agencies received children according to the financial contribution that the agency had made to a central fund for child welfare programs.<sup>66</sup> However, because domestic adoptions were processed for free, agencies had incentive to encourage foreign adoptions in order to create a profit, thus being able to give a greater donation to the fund

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55. Blair, *supra* note 10, at 374–75.

56. Amy Grillo Kales, *The Intercountry Adoption Act of 2000: Are Its Laudable Goals Worth Its Potential Impact on Small Adoption Agencies, Independent Intercountry Adoptions, and Ethical Independent Adoption Professionals?*, 36 GEO. WASH. INT’L L. REV. 477, 483 (2004).

57. Bisignaro, *supra* note 40, at 128.

58. *Id.*; see also Kales, *supra* note 56, at 483–84.

59. Bisignaro, *supra* note 40, at 128.

60. *Id.*

61. *Id.* at 128–29.

62. *Id.* at 129.

63. *Id.*

64. *Id.*

65. Blair, *supra* note 10, at 376.

66. *Id.*

and have more children allocated to their service.<sup>67</sup> A Romanian law requiring a sixty-day preference period for domestic adoption was essentially ignored, and children were often placed in orphanages for foreign adoption even when other options for domestic adoption, foster care, or family reunification existed.<sup>68</sup> Concerns about adoption practices escalated to the point that a moratorium was placed on international adoptions out of Romania in 2001<sup>69</sup> and remains in place today.<sup>70</sup>

Adoption scandals have been reported repeatedly in the Indian state of Andhra Pradesh in the past decade.<sup>71</sup> A number of adoptions were delayed by the U.S. Embassy in 1995 and 1996 due to suspect practices by one particular orphanage.<sup>72</sup> In 1999, another scandal was uncovered with the arrest of two women who were accused of buying babies from the Lambada, a poor nomadic farming tribe.<sup>73</sup> The women would allegedly pay the Lambada between fifteen and forty-five dollars to relinquish their children;<sup>74</sup> the children were then sold to orphanages for between \$220 and \$440, and the orphanages would receive anywhere between \$2000 and \$3000 when those children were placed with foreign adoptive parents.<sup>75</sup> In response to these discoveries, the directors of two implicated orphanages were imprisoned and 228 children were removed from their care.<sup>76</sup> However, attempts to reunite the children found in the orphanages with their families were unsuccessful, as many of the relinquishment documents found in the orphanages had been forged and gave inaccurate information regarding the identities and origins of the children.<sup>77</sup>

The most widespread adoption scandal in India broke in 2001.<sup>78</sup> Numerous orphanages, at least one of which had been implicated in the 1999 scandal, were found to be purchasing children from the Lambada in Andhra Pradesh and the neighboring state of Karnataka.<sup>79</sup> At least three orphanages representing themselves as Christian-run institutions were allegedly taking children under false pretenses and putting them up for adoption with forged identities and

67. *Id.* at 376–77.

68. *Id.*

69. *Id.* at 377.

70. Olsen, *supra* note 9, at 500.

71. Blair, *supra* note 10, at 365.

72. David M. Smolin, *The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals*, 35 SETON HALL L. REV. 403, 456 (2005).

73. *Id.* at 456–57.

74. *Id.* at 456–58.

75. *Id.* at 457.

76. *Id.* at 457–58.

77. *Id.* at 458.

78. *Id.* at 459.

79. *Id.*

false background information.<sup>80</sup> The director of one orphanage was accused of taking in older children under false pretenses, promising to provide education for them or jobs for their mothers, and then immediately changing the children's names and offering them up for intercountry adoption.<sup>81</sup>

The fate of the more than 200 children removed from the offending orphanages became a hotly debated issue; activists advocated that the children stay in India where they would either be returned to their birth parents or adopted domestically, while prospective adoptive parents from abroad who had already begun the adoption process felt entitled to the children that had been promised to them.<sup>82</sup> The children remained in government-run orphanages while the two sides battled over their rightful placement.<sup>83</sup> Tightened regulations eventually led to a shutdown of all international adoptions from that region.<sup>84</sup>

Investigations into the Andhra Pradesh adoption scandals revealed that in a number of Indian states prospective domestic adoptive parents were often subject to stricter requirements than were foreigners.<sup>85</sup> This occurred while the Indian press reported a shortage of children available for domestic adoption in states where high numbers of foreign adoptions occurred.<sup>86</sup> The state of Maharashtra, neighbor to Andhra Pradesh, was responsible for forty percent of all intercountry adoptions in India in 2004, despite constituting only nine percent of the country's population and generating reports of a lack of children available for domestic adoptions.<sup>87</sup>

Circumstances similar to those in India were discovered in Cambodia in the fall of 2001.<sup>88</sup> A human rights organization in Cambodia alerted the U.S. Embassy there to the abductions of two children, one of whom was ultimately found in an orphanage awaiting adoption by U.S. citizens.<sup>89</sup> At least one orphanage involved in placing children internationally was implicated in a subsequent police raid of a clinic that turned up twelve children suspected of

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80. *Id.* at 460–62.

81. *Id.* at 462.

82. *Id.* at 464–65.

83. *Id.* at 464–65, 470.

84. See Blair, *supra* note 10, at 365–66 (comparing the Andhra Pradesh scandal with the Cambodian scandal).

85. *Id.* at 374.

86. *Id.*

87. Smolin, *supra* note 72, at 474. Maharashtra's small city of Pune accounted for roughly 25% of intercountry adoptions, despite constituting somewhere between 2.5% and 3.75% of the country's population. *Id.*

88. Blair, *supra* note 10, at 356.

89. *Id.* at 356.

having been taken illegally.<sup>90</sup> Inconsistencies in the children's paperwork made their places of origin unclear and status as orphans questionable.<sup>91</sup> Twelve different U.S. families that had traveled to Cambodia for the purpose of meeting and bringing home their adopted child were delayed and, at one point, issued Notices of Intent to Deny their applications.<sup>92</sup> On December 21, the U.S. Immigration Service granted humanitarian visas to those families before immediately declaring a moratorium on all adoptions from Cambodia.<sup>93</sup>

A task force consisting of members of the U.S. State Department, the U.S. Immigration Service, and the Cambodian government was created in early 2002 to investigate all potential adoptions of Cambodian children by U.S. citizens that had been pending prior to the moratorium.<sup>94</sup> Simultaneously, a criminal investigation was launched by members of the U.S. Immigration and Customs Enforcement Office (ICE) into the possibility of U.S. involvement in the scandal.<sup>95</sup> The report of this investigation described a scheme whereby recruiters would approach families in local villages and test their willingness to sell their babies.<sup>96</sup> When a willing family was discovered, the recruiter would sell the information for about fifty dollars to a "baby buyer", who would offer the family "a fifty-kilogram bag of rice and payments ranging from \$20-\$200" in exchange for the child.<sup>97</sup> The child's natural parents were often told that the child was being taken to a local orphanage where they would be allowed visitation, or that the child would be raised by a wealthy U.S. family and would eventually be able to petition for the parents' immigration.<sup>98</sup> Once relinquished, the child was given a new name and false documentation and was offered for intercountry adoption.<sup>99</sup>

As a result of the ICE investigation, federal felony charges of visa fraud and money laundering were brought in the United States against two U.S. sisters who ran an agency that handled the majority

90. Trish Maskew, *Child Trafficking and Intercountry Adoption: The Cambodian Experience*, 35 CUMB. L. REV. 619, 621 (2005).

91. *Id.* at 621-22.

92. *Id.*

93. *Id.* at 623; see also Press Release, U.S. Dep't of Justice, Immigration and Naturalization, INS Announces Suspension of Cambodian Adoptions and Offer of Parole in Certain Pending Cases (Dec. 21, 2001), available at [http://www.uscis.gov/files/pressrelease/CambAdop\\_122101.pdf](http://www.uscis.gov/files/pressrelease/CambAdop_122101.pdf) [hereinafter Suspension of Cambodian Adoptions].

94. Maskew, *supra* note 90, at 623.

95. *Id.* at 624; Blair, *supra* note 10, at 366-67. ICE is a division of the Department of Homeland Security and was formerly the Immigration and Naturalization Service. *Id.*

96. Blair, *supra* note 10, at 357.

97. *Id.*

98. *Id.* at 357-58.

99. *Id.* at 358.

of U.S. adoptions from Cambodia.<sup>100</sup> Their prosecution was not the end of Cambodian adoption scandals, however. In March of 2004, reports surfaced that “baby buyers” were active in poor areas of Cambodia.<sup>101</sup> In the past three years, nations including France, the Netherlands, Switzerland, Belgium, Canada, and the United Kingdom have suspended adoptions from Cambodia due to the corrupt practices there.<sup>102</sup>

Nightmares similar to those in Cambodia have also occurred in Guatemala,<sup>103</sup> which has been one of the top five countries from which U.S. families have adopted children since 1992 and one of the top three since 2002.<sup>104</sup> In 1999, the U.N. Special Rapporteur of the Commission on Human Rights on the Sale of Children, Child Prostitution, and Child Pornography investigated conditions of adoption in Guatemala and reported that coercion, payments to parents for the relinquishment of their children, and kidnapping were rampant in the country.<sup>105</sup> The U.N. report said that the notaries, who are the starting point for adoptions in Guatemala, would often arrange an adoption before a child was even born.<sup>106</sup> The notary would hire a “recruiter” to pay a midwife around fifty dollars to register the birth of a child using a false name for the mother, and then pay another woman to act as the birth mother and bring the child to the notary to be put up for adoption.<sup>107</sup>

Guatemala acceded to the Hague Convention in 2002, but Canada, the Netherlands, Germany, Spain, and the United Kingdom all objected on the grounds that the necessary means of implementation were not in place.<sup>108</sup> The Netherlands, Spain, Ireland, and Iceland have all suspended adoption dealings with Guatemala in the past five years, and although the United States has not, adoptions into the U.S. from Guatemala now require DNA testing of a child before an adoption occurs in an attempt to dissuade providers from abducting children and falsifying their identities.<sup>109</sup>

Trafficking of children is in no way limited to the countries discussed here. When the U.S. declared a suspension of adoptions from Cambodia in 2001, it also announced an investigation into

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100. *Id.* at 359.

101. *Id.*

102. *Id.* at 362.

103. *Id.* at 366–67.

104. IMMIGRANT VISAS, *supra* note 23.

105. Blair, *supra* note 10, at 367–68. The Commission on Human Rights on the Sale of Children, Child Prostitution and Child Pornography is Optional Protocol of the CRC.

106. Banks, *supra* note 49, at 41.

107. *Id.* at 41–42.

108. Blair, *supra* note 10, at 369.

109. *Id.* at 368–69.

pending adoptions in Vietnam.<sup>110</sup> Trafficking has also been discovered recently in Madagascar, and an adoption agency in Texas was recently convicted of smuggling Mexican mothers over the U.S. border in exchange for relinquishment of their infants once they had reached safety.<sup>111</sup>

Another concern of policy makers is that, for financial reasons, intercountry adoptions are often given preference over legitimate domestic options.<sup>112</sup> Even in countries such as China, where trafficking has never been an overwhelming problem, concerns exist that intercountry adoptions displace domestic adoptions too often.<sup>113</sup>

The population control issues discussed in regard to China's one-child policy are also behind the country's widespread use of intercountry adoption.<sup>114</sup> As a country with high population density and low natural resources to serve that population, China has used the institution of intercountry adoption to restrict population growth.<sup>115</sup> Since instituting adoption laws and beginning to capitalize on the international interest in adoptable children in 1992, China has placed between 7,000 and 10,000 children per year in homes throughout the world.<sup>116</sup> Adoption fees and donations made by foreign adoptive parents have been used to make significant improvements to the social welfare system, and the institution of intercountry adoption has alleviated one of the biggest problems created by China's population control efforts: the abandonment of female infants.<sup>117</sup>

Despite the positive effects that intercountry adoption has had on the Chinese adoption system, critics argue that viable domestic options are sometimes ignored in favor of foreign options.<sup>118</sup> The initial adoption laws passed in the early 1990s restricted adoption of abandoned children to childless parents over the age of thirty-five.<sup>119</sup> While the laws were strictly enforced domestically due to population concerns, international enforcement was far more lenient, making it much easier for foreign families to adopt than for Chinese families.<sup>120</sup> The laws were updated in 1999, lowering the minimum age to thirty and allowing adoptions by families with healthy children; however,

110. Suspension of Cambodian Adoptions, *supra* note 94.

111. Blair, *supra* note 10, at 372-73.

112. See discussion *supra* Part II.A (discussing the development of intercountry adoption during the twentieth century).

113. Blair, *supra* note 11, at 377, 379.

114. Luo & Smolin, *supra* note 43, at 599-600.

115. *Id.*

116. *Id.* at 602-03.

117. *Id.* at 603.

118. See, e.g., Blair, *supra* note 10, at 377-82 (noting several policies and practices that serve as barriers to domestic adoption and are in favor of foreign adoption).

119. *Id.* at 378.

120. *Id.*

many argue that the new regulations have not been well publicized and that the requirement that interested families obtain written permission from family planning officials deters many domestic adoptions.<sup>121</sup> In addition, some orphanages require the same fees for both domestic and international adoptions, about 25,000 yuan or \$3000, a price that many Chinese cannot afford.<sup>122</sup>

C. *Regulation of Intercountry Adoption: The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption and the United States' Attempt to Implement with the Intercountry Adoption Act of 2000*

1. International Recognition and Regulation: The Stepping Stones for the Hague Convention.

The first international recognition of the rights of children, the Declaration of Geneva, was adopted by the General Assembly of the League of Nations on September 20, 1924, and recognized that children are "entitled to special care and protection."<sup>123</sup> The document was drafted years before intercountry adoption was common, but it is the foundation upon which later developments regarding the rights of children were built, and its focus on the best interest of the child permeates the language of subsequent international adoption instruments.<sup>124</sup> In 1959, after World War II and the Korean War had begun to shape the concept of international adoption, the newly formed United Nations (U.N.) adopted the ideals of the Geneva Declaration in the Declaration of the Rights of the Child, which declared that "mankind owes to the child the best it has to give."<sup>125</sup>

The first international instrument that specifically addressed international adoption was the U.N.'s 1986 Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children with Special Reference to Foster Placement and Adoption Nationally and Internationally.<sup>126</sup> The document addressed concerns regarding abandoned and orphaned children and laid out general guidelines for international adoptions; however, it also expressed a belief that has been echoed repeatedly since: that "children should be considered for international adoption only if they cannot be placed in a foster or adoptive family in their own country."<sup>127</sup>

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121. *Id.* at 379.

122. *Id.* at 381.

123. Kimball, *supra* note 7, at 568; Olsen, *supra* note 9, at 492.

124. Olsen, *supra* note 9, at 492-93.

125. *Id.* at 493-94.

126. *Id.* at 494.

127. *Id.* at 494-95.



In response to the many cases of trafficking that surfaced as intercountry adoption became more popular, the U.N. adopted the Convention on the Rights of the Child (CRC) on November 20, 1989.<sup>128</sup> Rooted in the ideals of the Geneva Declaration, the CRC “establishes a set of globally defined children’s rights and provides that in all actions concerning children, the best interests of the child shall be a primary consideration.”<sup>129</sup> However, a definition of what constitutes the “best interest” of a child exists nowhere in the document.<sup>130</sup>

The CRC is currently the most universally adopted treaty dealing with children’s rights and has been ratified by 193 countries as of July 2007.<sup>131</sup> The United States is one of only a few countries that have not ratified it, and one of only two countries that have signed it but not ratified it.<sup>132</sup> One objection that the U.S. has to the CRC is its lack of any language establishing an obligation for countries to take “appropriate measures to facilitate permanent adoption of the child.”<sup>133</sup> The drafters omitted such language due to a belief that adoption was not the only way of providing children with families, and that sometimes adoption worked against the best interests of the child.<sup>134</sup> The CRC does, however, cite every child’s right to civil, political, social, and economic rights.<sup>135</sup> Adoption has been read into the CRC as a means of achieving these rights.<sup>136</sup> The CRC calls on accepting states to “recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development,” a phrase that has been

128. Kimball, *supra* note 7, at 568.

129. Olsen, *supra* note 9, at 507–08.

130. *Id.* at 487–88.

131. *Id.* at 508; *see also* Office of the United Nations High Commissioner for Human Rights, Convention on the Rights of the Child New York, 20 November 1989, <http://www.ohchr.org/english/bodies/ratification/11.htm> [hereinafter OHCHR] (last visited Sept. 30, 2007) (naming every country that has ratified the CRC through July 13, 2007).

132. OHCHR, *supra* note 131. The other non-ratifying signatory is Somalia. *Id.*

133. Ryan, *supra* note 3, at 358. Other major issues that the U.S. has in implementing the CRC involve conflicts with American laws. Article 37(b) holds that imprisonment of a child should be used only “as a measure of last resort” which conflicts with juvenile detention practices in the U.S. Bisignaro, *supra* note 40, at 137–38.

134. Ryan, *supra* note 3, at 359. The final version of the CRC does not require that countries permit adoption, either domestically or internationally. It does provide that countries that choose to recognize or permit adoption “take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it.” Olsen, *supra* note 9, at 512; *see also* Blair, *supra* note 10, at 382–83 (quoting Convention on the Rights of the Child, G.A. Res. 44/25, art. 21(d), U.N. Doc. A/44/49 (Nov. 20, 1989) [hereinafter CRC]).

135. Olsen, *supra* note 9, at 508.

136. *Id.*

interpreted to incorporate the Convention's idea of the "best interests" of the child.<sup>137</sup>

The ability of the U.N. to control corrupt adoption practices was questioned after the Romanian trafficking scandal broke in 1990.<sup>138</sup> Despite requiring that contracting countries take measures to "prevent the abduction of, the sale of, or traffic in children for any purpose or in any form," the CRC carried little weight in the actual regulation of intercountry adoption because it left the ultimate enforcement of legal measures to each individual nation's government.<sup>139</sup>

The need for binding and enforceable legal standards and better communication between countries involved in adoptions was addressed by the Hague Convention, produced by the Hague Conference of Private International Law in May of 1993.<sup>140</sup> The Conference was attended by nearly all of the thirty-eight member states, and by thirty non-member states invited due to their particular involvement in intercountry adoption.<sup>141</sup> The Hague Convention seeks to establish minimum standards for intercountry adoption procedures that apply to all adoptions between ratifying states.<sup>142</sup> Seventy-four countries have ratified the Hague Convention as of April, 2007; the United States signed the Convention in March of 1994, but has yet to ratify it.<sup>143</sup>

The fundamental purpose of the Hague Convention is not to unify international adoption laws, but rather to create standards for intercountry adoption, a system to enforce them, and a forum for communication between the countries involved in an adoption.<sup>144</sup> The Convention directly addresses the problems of the adoption system by seeking to minimize the falsification of documents, the abduction and sale of children, and the general corruption created when unregulated organizations control the adoption process.<sup>145</sup> The Convention recognizes that every child, "for the full and harmonious development of his or her personality, should grow up in a family environment" and that intercountry adoption may be a viable option for a child when a "suitable family cannot be found in his or her State of origin."<sup>146</sup> It applies when a child who is "habitually resident" in a

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137. *Id.* (quoting CRC, *supra* note 134, art. 27).

138. Bisignaro, *supra* note 40, at 134.

139. *Id.* (quoting CRC, *supra* note 134, art. 35).

140. Ryan, *supra* note 3, at 357-58.

141. *Id.* at 358. There were thirty-eight member states in 1993; there are currently fifty-one. Status Table, *supra* note 17.

142. Ryan, *supra* note 3, at 358.

143. Status Table, *supra* note 17.

144. Ryan, *supra* note 3, at 357.

145. *Id.* at 359.

146. Hague Convention, *supra* note 16, pmbl.

contracting country is being moved to another contracting country through adoption.<sup>147</sup>

Under the Hague Convention, each contracting state must establish a Central Authority "to discharge the duties which are imposed by the Convention" and to cooperate with the Central Authorities of other contracting states to "protect children and to achieve the other objects of the Convention."<sup>148</sup> Certain country responsibilities can either be carried out by the Central Authority or delegated to certain authorized bodies, such as the accreditation of agencies and individuals involved in the adoption process.<sup>149</sup> The accreditation process is addressed only briefly by the Hague Convention. Accredited bodies must: (1) have demonstrated their "competence to carry out properly the tasks with which they may be entrusted"; (2) "pursue only non-profit objectives" according to the conditions and limits established by the Central Authority; (3) "be directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of intercountry adoption"; and (4) be subject to supervision by the Central Authority.<sup>150</sup>

The duties of the officials in a child's country of origin are to determine: (1) that a child is adoptable by that country's standards; (2) that there is no option available for the child domestically; (3) that consent has been obtained from the necessary parties, that such parties have been duly informed, and that such consent is gained freely, expressly, and without coercion or incentive; and (4) that, where applicable due to maturity, the child has consented to the adoption freely, expressly, and without coercion or incentive, and that the wishes and opinions of the child have been taken into consideration.<sup>151</sup> It is likewise the duty of the authorities in the receiving country to determine that: (1) "the prospective adoptive parents are eligible and suited to adopt"; (2) "the prospective parents have been counseled as may be necessary"; and (3) that the child will be authorized to live permanently in the receiving country.<sup>152</sup>

Prospective parents must apply to the Central Authority in their home country to be considered for an intercountry adoption.<sup>153</sup> The Central Authority must then provide a report to the sending country containing relevant information about the prospective parents and their eligibility to adopt.<sup>154</sup> Likewise, the Central Authority of the

147. *Id.* art. 2.

148. *Id.* arts. 6-7.

149. *See id.* arts. 8-9.

150. *Id.* arts. 10-11.

151. *Id.* art. 4.

152. *Id.* art. 5.

153. *Id.* art. 14.

154. *Id.* art. 15. The report must include information about "identity, eligibility and suitability to adopt, background, family and medical history, social environment,

sending country must supply the receiving country with a report on the adoptability of any prospective child.<sup>155</sup> The Convention also declares that “no improper financial or other gain” shall be derived from an intercountry adoption, and the only charges should be “costs and expenses, including reasonable professional fees of persons involved in the adoption.”<sup>156</sup>

## 2. The U.S. Implementation of the Hague Convention: The Intercountry Adoption Act of 2000

The United States expressed its intent to ratify the Hague Convention when it became a signatory on March 31, 1994,<sup>157</sup> but no steps were taken to officially ratify until 1998, when President Clinton recommended to the Senate that consent to the ratification be given.<sup>158</sup> Advice and consent was given in September of 2000, and Clinton signed the IAA into law on October 6, 2000.<sup>159</sup> The stated purposes of the legislation are threefold:

- (1) to provide for the implementation by the United States of the [Hague] Convention;
- (2) to protect the rights of, and prevent abuses against, children, birth families, and adoptive parents involved in adoptions (or prospective adoptions) subject to the Convention, and to ensure that such adoptions are in the child’s best interest; and
- (3) to improve the ability of the Federal Government to assist United States citizens seeking to adopt children from abroad and residents of other countries party to the Convention seeking to adopt children from the United States.<sup>160</sup>

Under the IAA, the U.S. State Department is to serve as the central authority in charge of overseeing the accreditation and approval process for agencies and individuals.<sup>161</sup> The duties of the

reasons for adoption, ability to undertake an intercountry adoption and the characteristics of children for whom they are qualified to care.” *Id.*

155. *Id.* art. 16. The report must include information about identity, adoptability, background, social environment, family history, medical history of the child and his or her family, special needs, and must give due consideration to the child’s upbringing and to his or her ethnic, religious and cultural background. *Id.*

156. *Id.* art. 32.

157. Status Table, *supra* note 17; *see also* Olsen, *supra* note 9, at 491 n.52 (explaining that “[c]ountries signing declarations are evidencing their intent to comply with the principles set forth in that declaration. Thus, declarations become a kind of moral code upon which nations can act.”).

158. Olsen, *supra* note 9, at 521.

159. *Id.*

160. Intercountry Adoption Act of 2000, 42 U.S.C. § 14901 (2000).

161. *Id.* §§ 14911(a), 14912(c).

Secretary of State include providing information to the central authorities of other countries, soliciting information from other countries regarding their specific adoption requirements, and ensuring the provision of a home study on prospective parents to a child's country of origin.<sup>162</sup>

Under the IAA, no person can provide adoption services in relation to an adoption covered by the Convention without being either accredited, approved, or under the supervision of an accredited agency or approved person.<sup>163</sup> Accreditation will be granted only to non-profit organizations,<sup>164</sup> and approval will only be granted to for-profit organizations or individuals.<sup>165</sup> The Secretary of State must choose "qualified entities" to assume the duty of accrediting agencies or approving individuals to perform adoption services in accordance with the regulations set out by the Secretary.<sup>166</sup> Accrediting entities also must monitor the compliance of all accredited agencies or approved individuals, review complaints against them, take actions in regard to violations of the IAA, and collect data and reports for the State Department.<sup>167</sup> The standards and procedures for both accreditation and approval are to be prescribed by the Secretary of State in regulations.<sup>168</sup>

### III. THE U.S. TAKES FINAL STEPS TOWARD IMPLEMENTING THE INTERCOUNTRY ADOPTION ACT

#### A. *The U.S. State Department Regulations*

In order to fully implement the IAA and comply with the Hague Convention, the U.S. first needs to finalize regulations regarding how the requirements of the IAA, particularly the accreditation process, will be carried out and enforced.<sup>169</sup> This process began on September 15, 2003, when the State Department published proposed rules on

162. *Id.* § 14912(a), (b).

163. *Id.* § 14921(a).

164. *Id.* § 14923(b)(1)(G).

165. *Id.* § 14923(b)(2).

166. *Id.* §§ 14922(a), 14923(a). A "qualified entity" is either (A) a nonprofit private entity that has expertise in developing and administering standards for entities providing child welfare services and that meets such other criteria as the Secretary may by regulation establish; or (B) a public entity (other than a Federal entity), including an agency or instrumentality of State government having responsibility for licensing adoption agencies, that – (i) has expertise in developing and administering standards for entities providing child welfare services; (ii) accredits only agencies located in the State in which the public entity is located; and (iii) meets such other criteria as the Secretary may by regulation establish. *Id.* § 14922(a).

167. *Id.* § 14922(b).

168. *Id.* § 14923(a)(1).

169. *Id.*; see also Kimball, *supra* note 7, at 576.

accreditation and approval in the Federal Register.<sup>170</sup> Beginning in September of 2004, the State Department began reviewing public comments on the regulations<sup>171</sup> and, in total, received input from about 1,500 individuals and organizations involved in the intercountry adoption process.<sup>172</sup> Final regulations were published in February of 2006, establishing the requirements and procedures necessary for the designation of accrediting agencies, setting standards that agencies and individuals must comply with in order to receive either accreditation or approval from the accrediting agencies, and governing the registration process by which non-profit organizations can obtain temporary accreditation.<sup>173</sup>

The final regulations officially went into effect on March 17, 2006, and while the accreditation and approval of adoption agencies must be completed and other less paramount regulations must be finalized before ratification is complete, the issuance of the regulations was a huge step toward ratification for the United States.<sup>174</sup> During the summer of 2006, the State Department designated the Council on Accreditation and the Colorado Department of Human Resources as accrediting agencies.<sup>175</sup> A November 17, 2006 deadline was set for agencies and individuals to apply to these entities for accreditation or approval, after which the State Department expected to be able to “better project when in 2007 we will be able to complete our ratification of the Hague Convention.”<sup>176</sup>

### B. *The Effects of the IAA Once the Hague Convention is Ratified*

It stands to be seen what effect the United States’ ratification of the Hague Convention, through the implementation of the IAA, will have on the safety of the intercountry adoption process for the children involved. Two inherent issues in the fundamentals of the Hague Convention may hinder the usefulness of the legislation as it now stands: (1) the standards of the Hague Convention do not apply where only one of the countries involved in an adoption is a party to the Convention; and (2) the required establishment of a Central Authority to oversee the regulation of adoptions may prove to be an

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170. Kimball, *supra* note 7, at 575–76.

171. *Id.* at 574.

172. *Hearing, supra* note 17, at 15.

173. Press Release, U.S. Dept. of State, Hague Convention on Intercountry Adoption: Accreditation/Approval Regulations Published in Federal Register (Feb. 15, 2006); *see also* 22 C.F.R. § 96 (2006).

174. Press Release, U.S. Dept. of State, State Department Issues Final Rules on Intercountry Adoption (Feb. 16, 2006).

175. Press Release, U.S. Dept. of State, U.S. Closer to Implementing International Adoption Convention (July 27, 2006).

176. *Hearing, supra* note 17, at 16.

insurmountable hurdle in some countries where the adoption process is most in need of repair.<sup>177</sup>

The Hague Convention states explicitly that it applies only when an adoption involves a child from a country that is a party to the Convention who is being adopted by someone in another country that is a party to the Convention.<sup>178</sup> The Hague Convention does not prohibit contracting parties from participating in adoptions with non-party countries where the requirements of the Convention do not apply.<sup>179</sup> The IAA contains no limit on adoptions with non-party countries either, its purposes being limited to implementing the Hague Convention in the United States and protecting the rights of the parties involved in adoptions “subject to the Convention.”<sup>180</sup>

This provision greatly weakens the effect of the IAA, as the United States currently participates in adoptions with many countries that are not parties to the Convention. Of the 19,797 children that were adopted into the United States in 2006 from the top twenty sending countries, only 7,848 of their adoptions would have been covered by the Hague Convention had the IAA already been in effect in the U.S.<sup>181</sup>

Since 1997, the top four countries from which families in the U.S. have adopted have been China, Russia, South Korea, and Guatemala.<sup>182</sup> Of these four, only China has ratified the Hague Convention and is in good standing; Guatemala is a party to the Convention, but is currently in violation of its standards; Russia signed the Convention in 2000 but has not yet ratified it; and South Korea has neither signed nor ratified the Convention.<sup>183</sup>

New Jersey Representative Christopher Smith, who in November of 2006 chaired the discussion of the Hague Convention in the Hearing of the Africa, Global Human Rights, and International Operations Subcommittee of the House Committee on International Relations, addressed the “serious concerns about things like baby selling and trafficking, abandonment and fraud” that the U.S. has

177. See *supra* notes 147–48 and accompanying text.

178. See *supra* note 147 and accompanying text.

179. Kimball, *supra* note 7, at 572.

180. Intercountry Adoption Act of 2000, 42 U.S.C. § 14901(b) (2000).

181. Status Table, *supra* note 17; Immigrant Visas, *supra* note 23. These numbers cover the majority of foreign children adopted into the United States—fifty-six children were adopted from the twentieth country on the list, Thailand, compared to 6493 from the first country, China. *Id.* Although Guatemala acceded to the Hague Convention, adoptions from Guatemala are not included in the adoptions that would be covered by the Convention because Guatemala is in violation of it. *Id.*

182. Immigrant Visas, *supra* note 23.

183. Status Table, *supra* note 17. China is one of the newest parties to the Convention, having ratified it on Nov. 16, 2005. *Id.* The Convention is not in effect with regard to the five countries that have objected to Guatemala’s ratification of the Convention—Canada, Germany, Netherlands, Spain and the United Kingdom. *Id.*

with regard to the top four sending countries.<sup>184</sup> However, the ratification of the Hague Convention will not alleviate these concerns in connection with South Korea or Russia. Guatemala is currently in violation of the Hague Convention and, thus, once the U.S. ratifies the Convention, U.S. adoption from that country will be forced to cease until standards are met.<sup>185</sup>

Furthermore, taking evidence from history, a number of countries that are candidates to have an outpouring of adoptable children in the near future due to social, political, and economic upheaval, are also not parties to the Hague Convention. As discussed earlier, many of the countries affected by the tsunami in 2004 closed off their borders to adoption in the wake of the disaster, due in part to the inability to identify whether children were in fact orphans and in part due to fears of trafficking.<sup>186</sup> If those moratoria are lifted, the Hague Convention will only apply in limited circumstances. Indonesia, the country most severely devastated by the tsunami, is not a party to the Convention.<sup>187</sup> Of the eleven countries that suffered fatalities from the tsunami, only Sri Lanka, India, and Thailand are contracting members of the Convention.<sup>188</sup>

As evidenced by past trends, war-ravaged countries often become prime sending countries for intercountry adoptions in the aftermath of conflict.<sup>189</sup> From this standpoint, it can be imagined that countries such as Iraq, Afghanistan, Lebanon, and Israel may have a need for the institution of adoption in the coming years. Of these four countries, only Israel is a contracting member state to the Convention; none of the other three have even indicated an intent to ratify by signing.<sup>190</sup>

Perhaps the largest and fastest growing concentration of orphans is in sub-Saharan Africa, where civil war, poverty, and disease are taking an enormous toll on the population.<sup>191</sup> Sub-Saharan Africa is home to over forty-eight million orphans, one-fourth of them

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184. *Hearing, supra* note 17, at 11.

185. Elizabeth Bernstein, *Want to Adopt Abroad? Rules Changing: New Certification Process Meant to Protect Kids*, CHI. SUN-TIMES, Nov. 5, 2006, at A32.

186. *See* discussion *supra* Part I.

187. Elliot, *supra* note 2; Status Table, *supra* note 17.

188. Elliot, *supra* note 2. Countries affected by the tsunami that are not parties to the Hague Convention include: Somalia, Burma, Maldives, Malaysia, Tanzania, Bangladesh, and Kenya. *Id.*; Status Table, *supra* note 17.

189. *See* discussion *supra* Part II.A.

190. Status Table, *supra* note 17. Instituting adoption as an option for the children in some of these countries may be hindered by the governance of Islamic law and its prohibition on adoption. Adoption is currently not permitted in Afghanistan. *See* Olsen, *supra* note 9, at 503.

191. Jini L. Roby & Stacey A. Shaw, *The African Orphan Crisis and International Adoption*, 51 SOCIAL WORK 199 (2006).



orphaned by the AIDS virus.<sup>192</sup> While the total number of orphans in Latin America and Asia has decreased since 1990, the number in sub-Saharan Africa has increased by more than 50% in that same period.<sup>193</sup> An estimated 12% of all children in the area have lost at least one parent, and in eight countries, this number reaches more than 15%.<sup>194</sup> More than half of these children are under the age of twelve, and while many children who lose one parent continue to live with the surviving parent, this is not always the case.<sup>195</sup> Recent data from seven sub-Saharan countries indicate that between 56% and 65% of children who lose their fathers continue to live with their mothers, and only between 25% and 52% of children who lose their mothers continue to live with their fathers.<sup>196</sup>

Between the years 2000 and 2005, more than 40% of deaths occurring in southern Africa were of people between the ages of twenty and thirty-nine, up from just over 10% between 1985 and 1990.<sup>197</sup> Estimates based on current HIV infection rates and the availability of medications indicate that by 2010, sub-Saharan Africa will be home to 53 million orphans, 15.7 million of whom will be orphaned by AIDS.<sup>198</sup>

Traditionally, there was “no such thing as an orphan in Africa,” as children were routinely cared for by extended family after losing their parents.<sup>199</sup> While the majority of children who have either lost both parents or are not living with their surviving parent are cared for by other family members, this solution is not as definite as it once was.<sup>200</sup> The increase in the number of orphans and the decrease in the number of available caregivers due to drought, war, and disease are breaking down the once infallible support system of extended family members.<sup>201</sup> Providing for orphans is a strain on families, and studies have shown that orphans are often less likely to possess basic

192. UNICEF, *Africa's Orphaned and Vulnerable Generations: Children Affected by AIDS 2* (2006), available at [www.unicef.org/publications/index\\_35645.html](http://www.unicef.org/publications/index_35645.html).

193. *Id.* at 3.

194. *Id.* at 3–5. The countries where the orphan population has met or exceeded fifteen percent are: Côte d'Ivoire, Rwanda, Central African Republic, Swaziland, Lesotho, Botswana, Zambia, and Zimbabwe. *Id.* at 5.

195. *Id.* at 8.

196. *Id.* at 15. The countries included in the data source are Burkina Faso, Cameroon, Ghana, Kenya, Mozambique, Nigeria, and Tanzania. *Id.*

197. UNAIDS, *2006 Report on the Global AIDS Epidemic Executive Summary 23* (2006), available at [www.unaids.org/en/HIV\\_data/2006GlobalReport/default.asp](http://www.unaids.org/en/HIV_data/2006GlobalReport/default.asp).

198. UNICEF, *supra* note 192, at 9. While it is indicated that certain countries should see a slight decline in the orphan population in the near future, eight countries—Chad, Gabon, Guinea-Bissau, Malawi, Mozambique, Namibia, South Africa and Swaziland—are expected to see at least a fifteen percent increase. *Id.*

199. Geoff Foster, *Supporting Community Efforts to Assist Orphans in Africa*, 346 NEW ENG. J. MED. 1907, 1907 (2002).

200. UNICEF, *supra* note 192, at 15.

201. Foster, *supra* note 199, at 1907; Emily Wax, *Young and Homeless Fill Africa's City Streets*, WASH. POST, Dec. 23, 2005, at A1.

material goods such as shoes, blankets, and extra clothes than other children.<sup>202</sup> Orphans are more likely than their peers to be deprived of education, socialization, and nutrition, and they are more prone to crime, abuse, neglect, child labor, prostitution, HIV infection, depression, and long-term mental health problems.<sup>203</sup> Furthermore, there is some indication that orphaned children experience discrimination in their new homes and are given different food and clothing than other children, especially where resources are particularly scarce.<sup>204</sup>

In some extreme cases, children who do not have extended family able or willing to care for them end up supporting themselves and siblings.<sup>205</sup> Orphans in child-headed households are even more prone to the symptoms listed above than other orphans, often forced to leave school in order to care for younger siblings or earn any small amount of money that will allow for their survival.<sup>206</sup> Africa's urban areas have seen an explosion of homeless youth living on the streets, beginning when coffee prices crashed in the 1980s and many children of large families were forced to go out and make money, and the number of homeless youth grew rapidly due to AIDS and regional conflicts.<sup>207</sup> There is no dependable estimate for how many homeless children there are, but there could be as many as one million living on the city streets, panhandling or shining shoes for money, "vulnerable to drug addiction, bullying, sexual abuse and devastating health conditions."<sup>208</sup> Still other children are forced to live in delinquency homes, temporary makeshift facilities, or institutional settings until a better solution can be found.<sup>209</sup> In some countries, orphanages are overcrowded and unable to accommodate the many children on their waiting lists.<sup>210</sup>

Limited public funds and the numerous challenges facing the countries of sub-Saharan Africa have contributed to a lack of response to the orphan crisis.<sup>211</sup> Local community-based organizations and non-governmental organizations have been providing support to children for several years through self-help groups, burial associations, grain-loan schemes, payment of school

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202. UNICEF, *supra* note 192, at 13.

203. Roby & Shaw, *supra* note 191, at 199–200.

204. UNICEF, *supra* note 192, at 13.

205. *Id.* at 16–17.

206. Roby & Shaw, *supra* note 191, at 200; see also Emily Wax, *A Generation Orphaned by AIDS; Kenyan Children Struggle to Survive as Relatives Shun Them or Take Advantage*, WASH. POST, Aug. 13, 2003, at A1.

207. Wax, *supra* note 201.

208. *Id.*

209. Roby & Shaw, *supra* note 191, at 201.

210. See Emily Wax, *A Crushing Choice for Ethiopian Mothers with HIV; Facing Death, Women Leave Children at Orphanages*, WASH. POST, Feb. 19, 2005, at A1.

211. UNICEF, *supra* note 192, at 26.

fees, and supplying food and clothing.<sup>212</sup> While many of these organizations have grown significantly since their inception, inadequate funding keeps them from meeting the need in their communities.<sup>213</sup> Some orphan care programs have been developed at the national level, but financial constraints, lack of awareness about orphans, and the stigma attached to the AIDS virus has limited this trend such that only six countries in sub-Saharan Africa—15% of all countries in the region—had developed programs as of 2003.<sup>214</sup> International support for orphans is a newer development, but many of the agencies involved have little experience in providing support for children, and few of the resources actually reach the neediest communities.<sup>215</sup>

Thus far, most of the funding for orphans in Africa has been directed at easing the strain on families who are supporting their own kin, as has been the tradition in sub-Saharan African countries.<sup>216</sup> However, with the growing numbers of orphans, family members are finding themselves caring for multiple orphans with resources that are seriously inadequate.<sup>217</sup> The traditional family-based system for orphan care is deteriorating, with some extended family members abandoning orphans or fighting over who will bear the burden of them.<sup>218</sup>

Only recently has discussion arisen regarding adoption as an option for African children, as it has never been widely practiced due to the strong network of family care.<sup>219</sup> However, increased need has changed cultural preferences against adoption in other countries and is likely to do the same in sub-Saharan Africa, where the resources in the area simply cannot support the multitude of orphans. The cultural barriers that have prevented non-kin adoptions in the past and the economic strains that are preventing families from supporting their own orphans will likely make any large growth in domestic adoptions difficult to achieve.<sup>220</sup>

Significant concerns exist regarding the adoption of African children into U.S. homes, stemming largely from the lingering effects of slavery and the importance of maintaining cultural identity.<sup>221</sup> Additionally, certain Islamic countries in Africa may have ethnic and

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212. Foster, *supra* note 199, at 1908.

213. *Id.* at 1908–09.

214. Roby & Shaw, *supra* note 191, at 200–01.

215. Foster, *supra* note 199, at 1908.

216. Roby & Shaw, *supra* note 191, at 200–02; Foster, *supra* note 199.

217. Roby & Shaw, *supra* note 191, at 200.

218. *See* Wax, *supra* note 206, at A1.

219. Roby & Shaw, *supra* note 191, at 205–06; Anthony Mitchell, *Ethiopia Puts Its Young Up for Adoption; Many Orphaned by AIDS*, WASH. POST, Jan. 2, 2005, at A24.

220. *See* Roby & Shaw, *supra* note 191, at 207–08.

221. *Id.* at 202–05

religious restrictions against adoption.<sup>222</sup> However, history indicates that it is fathomable, if not likely, that those in the United States will respond to the current orphan crisis with a willingness to adopt, and that at least some of the cultural aversions to adoption may change. The U.S. has already seen an increase in adoptions from one African country, Ethiopia, which sent the fifth-most children to the United States for adoption in 2006.<sup>223</sup> Ethiopia is not, however, a party to the Hague Convention.<sup>224</sup> In fact, of the forty-four countries that make up the area considered sub-Saharan Africa, only eight are parties to the Convention, and not one of the eight countries where the orphan population is at or above fifteen percent has even signed the Convention.<sup>225</sup>

The United States is on the brink of implementing the Hague Convention thirteen years after first indicating its intention to do so, and it is likely to have only a limited effect on intercountry adoptions into the U.S. Many of the countries from which Americans adopt, or are likely to do so in the future, are not parties to the Hague Convention. Moreover, the requirements of the Convention will make it difficult to ratify, and with no prohibition on adoptions between contracting and non-contracting countries, there is little incentive for countries to do so. The United States, despite its wealth of resources, took nearly thirteen years to complete the entire process.<sup>226</sup> Many of the countries that are at the forefront of intercountry adoption, or may be in the near future, will likely find the requirements of the Hague Convention impossible to comply with. With governments that are unstable or grappling with war, poverty, unrest, and disease, implementing a central authority, formulating and enforcing an accreditation scheme, and fulfilling the research and reporting requirements before a child can be adopted will be too much of a drain on scarce government resources. The circumstances that make it difficult for these countries to support their children also make the burden of complying with the Convention overwhelming. Without implementation of the Convention, there is no authority ensuring the valid adoptability of children, no restrictions on exorbitant fees for intercountry adoptions, and nothing to prevent the same tragic

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222. Olsen, *supra* note 9, at 524.

223. Immigrant Visas, *supra* note 23. Seven-hundred-thirty-two children were adopted into the United States from Ethiopia in 2006, up from 441 in 2005, 289 in 2004 and 135 in 2003. *Id.*

224. Status Table, *supra* note 17.

225. *Id.*; UNAIDS, *2006 Report on the Global AIDS Epidemic, A Global View of HIV Infection: 2006 Global Report Prevalence Map* (2006), available at [http://www.unaids.org/en/HIV\\_data/2006GlobalReport/default.asp](http://www.unaids.org/en/HIV_data/2006GlobalReport/default.asp). For the eight countries where the orphan population has reached or exceeded 15%, see *supra* note 194.

226. Status Table, *supra* note 17.

practices that have been rampant in intercountry adoption in the past.

#### IV. SOLUTION

Had the IAA been in effect in 2006, it would have governed adoptions from one of the top five sending countries, three of the top ten sending countries, and nine of the top twenty sending countries.<sup>227</sup> Furthermore, judging from historical trends whereby political, social, and economic upheaval has led to an influx of orphans into the United States from afflicted countries, there is distinct potential for an increase in adoptions from countries throughout sub-Saharan Africa and the Middle East that are not parties to the Hague Convention. These countries will likely be unable to become parties to the Convention given its strict bureaucratic and organizational requirements. The result is legislation that will allow thousands of children to be adopted into the United States each year without its protection, potentially taken or purchased from their families unlawfully, and mistreated before being "sold" into adoption. As the country that adopts more children from outside its borders than all other countries in the world combined, the United States has an obligation to protect the children and families involved in adoptions not covered by the Hague Convention, even once the IAA is fully implemented.

One potential solution would be to alter the IAA to prohibit the United States from engaging in adoptions from countries that are not parties to the Convention. Such a tactic has been used by some countries in the past; certain frequent-sending countries who are parties to the Convention have prevented U.S. citizens from adopting their children due to the United States' failure to ratify.<sup>228</sup> Critics of the Hague Convention have pointed to its omission of a similar provision as a major failure in its drafting and an impediment to its successful implementation.<sup>229</sup> Their theory is that such a requirement would "provide an incentive and motivation for both sending and receiving countries to comply with the Hague Convention regulations."<sup>230</sup> According to such a rationale, a prohibition in the IAA would likely have a similar effect to one in the Hague Convention. As the principal receiving country for intercountry adoptions in the world, a threat to the availability of adoptions into the United States would have considerable influence

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227. *Id.*; Immigrant Visas, *supra* note 23.

228. Kimball, *supra* note 7, at 572-73.

229. *Id.* at 572.

230. *Id.*

on incentive and motivation for sending countries to ratify the Hague Convention.

Advocating the addition of a prohibition clause into the IAA, however, ignores the difficulty that many countries face in implementing the Hague Convention. In many cases, a failure to ratify is due to inability, not unwillingness. For governments struggling to overcome war, poverty, and disease, complying with the Hague Convention is impossible. A provision in the IAA prohibiting adoptions with countries that are not parties to the Convention would not provide an incentive for ratification, but would effectively shut down the intercountry adoption process, at least into the United States, for countries that may have extreme need.

Rather than eliminating the possibility of adoption for many countries, the goal of the United States should be to encourage and facilitate adoptions from foreign countries, even those that are not parties to the Hague Convention, when the process is in the best interest of the child. The fact that key sending countries are not parties to the Convention, most notably Russia and South Korea (who sent a combined 5,082 children to the United States in 2006), accentuates the need for the U.S. to take further measures than those provided for in the IAA.<sup>231</sup> Where sending countries are unable to institute the infrastructure necessary to implement the Hague Convention, the U.S. must take on more responsibility to ensure the safety and validity of adoptions with such countries.

One solution is to have the State Department and the accredited agencies involved in adoptions with countries that are not parties to the Hague Convention assume the duties that would be performed by the Central Authority in the sending country if it were a party. In order to participate in adoptions with the U.S., sending countries would be required to give representatives from the U.S. access to the necessary information regarding the adoptability of children. Such a system, however, would prove to be logistically difficult, time consuming, and expensive to maintain. U.S. agencies would have to obtain proof of the adoptability of a child, lack of a domestic option for the child, and all necessary consent.<sup>232</sup> Obtaining this information and ensuring its accuracy would be more difficult for far-removed U.S. authorities than for local ones, especially where the information is not held by the local government, but by agencies and individuals who stand to gain from the child's adoption. It may be complicated for U.S. authorities, who are not familiar with the laws of foreign countries and the forms of documentation issued at birth, to avoid being duped by dishonest parties. Furthermore, the process may be

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231. Status Table, *supra* note 17; Immigrant Visas, *supra* note 23.

232. For the duties of the sending country under the Hague Convention, see discussion *supra* Part II.C.1.

objected to as being an intrusion by U.S. authorities into the privacy of foreign citizens and the dealings of the foreign government or private agencies.

A better tactic is to provide an incentive for individuals involved in the adoption process to comply with the ideals of the Hague Convention rather than an incentive for ratification by the entire country. Where the governments of sending countries are unable to implement the public authority needed to regulate the process and comply with the Hague Convention, the United States must go directly to the source of the exploitation and trafficking problems: the individuals and agencies that profit at the expense of innocent families. Rather than cutting off all adoptions from a country that is not a party to the Convention, the U.S. should include in the IAA a provision whereby agencies in the U.S. will be prohibited from engaging in adoption procedures with any foreign entity or individual that has been found to be in violation of the ideals of the Convention. For example, any orphanage, adoption agency, or individual adoption agent in a sending country that is found to be recruiting and purchasing children from their families, taking children under false pretenses, falsifying documents, or receiving "improper financial or other gain" from the sale of children<sup>233</sup> should be permanently prohibited from participating in adoptions with any agency in the United States.

Critical to the success of such a provision is that the benefits of complying substantially outweigh the potential gains from a violation. The IAA should call for a permanent ban on all future adoptions in return for a single violation, making the repercussions for violation severe enough that being caught would end any and all profits from the large U.S. market. Equally as important is a liberal interpretation of the Convention language allowing for "professional fees for persons involved in the adoption."<sup>234</sup> If agencies stand to make nominal or no profit from intercountry adoptions, the risk of being found in violation of the provision may be worth the potential 1000% mark-up that some adoptions yield.<sup>235</sup> Some profit must be gained from intercountry adoptions by the entities in the sending country, such that agencies will find it preferable to obey the provisions of the IAA and be assured steady income rather than violate and earn a much larger, but riskier, profit.

To give teeth to such a provision, the State Department must form a relationship with local governments whereby random and periodic investigations of entities can be conducted in non-member

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233. See *supra* note 156 and accompanying text (noting the Convention's limits on financial or other gain for intercountry adoption).

234. *Id.*

235. See *supra* notes 74-75 and accompanying text (discussing the adoption price mark up by orphanages in the case of the Lambada children).

countries. Such investigations should be similar to those conducted in Cambodia in 2002, when the State Department and the Immigration Service worked with the Cambodian government to uncover the corrupt adoption practices in that country.<sup>236</sup> Cooperation will validate U.S. intrusion upon private entities, and the knowledge and insight of the local governments will make the process run more smoothly. Obviously, there is no realistic way to investigate all entities in all countries with which the U.S. may interact, and there would be no assurance of compliance. However, a provision whereby agencies in the U.S. would be prohibited from engaging in adoption procedures with any foreign entity that has been found to be in violation of the ideals of the Convention would act as an incentive to at least some entities to provide adoption services in a manner that protects the safety of the children involved and satisfies the goals of the Hague Convention.

## V. CONCLUSION

In the sixty-plus years since its emergence at the end of World War II, intercountry adoption has become a highly popular practice in the United States and one that, when correctly managed, is beneficial to both the children and the adopting families involved. Through intercountry adoption, countless children have been given homes and opportunities that would not have been available to them in their countries of origin.

With the increased popularity of intercountry adoption, however, have come tragic consequences for many children in foreign countries, who are exploited by those involved in the adoption process. While the United States' implementation of the Hague Convention through the IAA is commendable, its effects on the safety of the thousands of foreign-born children who are adopted by U.S. families each year may prove to be very limited. A substantial number of the countries that families in the U.S. adopt from are not parties to the Convention and, therefore, its protections will not apply to them. Because these countries will likely find it very difficult, if not impossible, to ratify the Convention, and because the availability of adoption is so vital to the children of these countries, the United States must be willing to use its resources to ensure the safety of these adoptions. By prohibiting U.S. agencies from partaking in adoptions with entities that have engaged in exploitative practices, the United States can motivate agencies in foreign countries to choose safe adoption

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236. See *supra* notes 88–102 and accompanying text (discussing the Cambodian scandal and subsequent U.S. investigations).



processes, even without the oversight of a central government authority under the Hague Convention.

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