

Comment,  
THE HAGUE CONVENTION ON  
PROTECTION OF CHILDREN AND  
CO-OPERATION IN RESPECT OF  
INTERCOUNTRY ADOPTION: ARE ITS  
BENEFITS OVERSHADOWED BY ITS  
SHORTCOMINGS?

## I. Introduction

To combat the exploitation of children, the international community has constructed a legal framework with the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (hereinafter the Hague Convention) to encourage international adoption when it is in a child's best interest and to prevent the illicit trade of children.<sup>1</sup> While the Hague Convention does establish numerous safeguards, it fails to address many crucial issues that are essential to successfully regulating the international adoption process.

## II. History of International Adoption and Background on the Hague Convention

Intercountry adoption began developing on an extensive scale at the end of World War II and expanded after the Korean War, in response to the abundance of orphaned or abandoned children.<sup>2</sup> However, the drastic increase in the amount of intercountry adoptions led to the creation of an international black market for babies.<sup>3</sup> For the most part, international adoptions were unregulated until the 1980's and 1990's when several disturbing child trafficking stories made headlines in the international media, generating a political response.<sup>4</sup> Left unregulated,

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<sup>1</sup> ADOPTION 44 (Allen Verbrugge ed., Thompson Gale 2006).

<sup>2</sup> Hague Conference on Private International Law, *Report on Intercountry Adoption*, Preliminary Document Number 1, 49 (Permanent Bureau of the Conference April 1990) (prepared by J.H.A. van Loon).

<sup>3</sup> Gabriela Marguez, *Transnational Adoption: The Creation and Ill Effects of an International Black Market Baby Trade*, 21 J. JUV. L. 25.

<sup>4</sup> ADOPTION, supra note 1, at 46.

intercountry adoptions have the potential to lead to children being treated as commodities and to abusive adoption practices related to market behavior.<sup>5</sup> The international adoption system has been criticized as diminishing children to objects to be sold to the highest bidder; generating corrupt practices such as kidnapping and child trafficking.<sup>6</sup>

In the late 1980's, the United Nations initiated multilateral discussions to develop a standard framework for adoption.<sup>7</sup> The UN General Assembly adopted the Convention on the Rights of the Child (CRC) in 1989, which distinguished child trafficking from legitimate adoptions.<sup>8</sup> The CRC was entered into force on September 2, 1990.<sup>9</sup> The CRC states that intercountry adoption should only be resorted to if care cannot be provided for the child in a suitable manner in his or her country of origin, including foster care or institutional care.<sup>10</sup>

### **III. The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption**

#### *A. Background*

The Seventeenth Session of the Hague Convention expanded on the general principals of the United Nation's CRC with the Hague Convention which was adopted on May 29, 1993 in the Netherlands. The Hague Conference entered into force on May 1, 1995.<sup>11</sup> In contrast with the CRC's preference for domes-

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<sup>5</sup> Laura McKinney, *International Adoption and the Hague Convention: Does Implementation of the Convention Protect the Best Interest of Children?*, 6 WHITTIER J. CHILD & FAM. ADVOC. 361, 368.

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

<sup>7</sup> ADOPTION, *supra* note 1 at 48.

<sup>8</sup> *Id.*

<sup>9</sup> *Convention on the Rights of the Child*, U.N. Doc A/44/25 (Sep. 2, 1990).

<sup>10</sup> ADOPTION, *supra* note 1, at 46; Catherine M. Bitzan, *Our Most Precious Resource: How South Korea is Poised to Change the Landscape of International Adoption*, 17 MINN. J. INT'L L. 121, 139.

<sup>11</sup> Hague Conference on Private International Law: Final Act of 17th Session, Including the Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption, May 29, 1993, S. Treaty Doc. No. 105-51 (1998), reprinted in 32 *I.L.M.* 1134 (1993) [hereinafter Hague Convention]; Holly C. Kennard, *Curtailing the Sale and Trafficking of Children: A Discussion*

tic solutions (even if that means placing the child in foster care or in institutional care), the Hague Convention, in keeping with the “best interests of the child” standard, maintains that placing the child in a “family environment” is the ultimate objective, which may be better served by a foreign adoptive family than by a domestic orphanage.<sup>12</sup> “The Hague Convention is the most significant international agreement regarding the regulation of intercountry adoptions.”<sup>13</sup>

The Hague Convention is in force in approximately seventy-five member countries.<sup>14</sup> The United States signed the Hague Convention on March 31, 1994.<sup>15</sup> Beginning on December 12, 2007, the United States has been a full member of the Hague Convention, which entered into force in the United States on April 1, 2008.<sup>16</sup> Once a country has ratified the Hague Convention, it is considered a member state and is legally obliged to apply the terms and conditions of the Hague Convention in its domestic and international law.<sup>17</sup> However, by signing the Hague Convention, a nation only indicates its intent to become a party but is not obligated to take any steps toward ratifying the Hague Convention.<sup>18</sup> If that state does not ratify the Hague Convention, it is not bound by its terms despite the state’s commitment to accede to the Convention.<sup>19</sup>

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*on the Hague Convention in Respect of Intercountry Adoptions*, 14 U. PA. J. INT’L ECON. L. 623.

<sup>12</sup> ADOPTION, *supra* note 1, at 49; Bitzan, *supra* note 10, at 139.

<sup>13</sup> Laura Beth Daly, *To Regulate or Not to Regulate: The Need for Compliance with International Norms by Guatemala and Cooperation by the United States in Order to Maintain Intercountry Adoptions*, 45 FAM. CT. REV. 620, 622.

<sup>14</sup> U.S. Department of State, *Intercountry Adoption: Convention Countries*, <http://adoption.state.gov/hague/overview/countries.html>.

<sup>15</sup> Daly, *supra* note 13, at 622.

<sup>16</sup> U.S. Department of State, *Intercountry Adoption: Overview*, <http://adoption.state.gov/hague/overview.html>.

<sup>17</sup> McKinney, *supra* note 5, at 385.

<sup>18</sup> Lindsay K. Carlberg, *The Agreement Between the United States and Vietnam Regarding Cooperation on the Adoption of Children: A More Effective and Efficient Solution to the Implementation of the Hague Convention on Intercountry Adoption or Just Another Road to Nowhere Paved with Good Intentions?*, 17 IND. INT’L & COMP. L. REV. 119, 130.

<sup>19</sup> *Id.*

### B. *Application to Member States*

Two types of countries are involved in international adoptions: (i) sending countries, which are the country of origin of the children and have high birth rates and large numbers of orphaned or abandoned children and are typically underdeveloped or developing nations, and (ii) receiving countries, which are the countries of the adoptive families and frequently have lower birth rates and small numbers of orphaned or abandoned children and are more economically stable.<sup>20</sup> In intercountry adoptions, the Hague Convention only applies to sending and receiving countries that have ratified the treaty.<sup>21</sup> In child abduction situations, the provisions of the Hague Convention only apply where, prior to abduction, the child was a habitual resident of a contracting state and was then taken to another contracting state.<sup>22</sup> The provisions of the Hague Convention do not apply to non-signatory states.<sup>23</sup> Unfortunately, the Hague Convention is not applicable when the abductor flees to or from a non-signatory country.<sup>24</sup> Lack of applicability of the Hague Convention in non-member states leaves only a small number of options for the child's return.<sup>25</sup> This lack of Hague Convention-applicability is taken advantage of by many abductors; almost half of the children abducted from the United States are taken to non-Hague Convention states.<sup>26</sup>

### C. *Purpose and Objectives of the Hague Convention*

The Hague Convention was developed in response to international concerns regarding abuse of the intercountry adoption

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<sup>20</sup> Notesong Srisopark Thompson, *Hague is Enough?: A Call for More Protective, Uniform Law Guiding International Adoptions*, 22 WIS. INT'L L. J. 441, 444.

<sup>21</sup> Caeli Elizabeth Kimball, *Barriers to the Successful Implementation of the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption*, 33 DENV. J. INT'L L. & POL'Y 561, 569.

<sup>22</sup> Smita Aiyar, *International Child Abductions Involving Non-Hague Convention States*, 21 EMORY INT'L L. REV. 277, 279.

<sup>23</sup> McKinney, *supra* note 5, at 385.

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

<sup>25</sup> *Id.*

<sup>26</sup> Laura McCue, *Left Behind: The Failure of the United States to Fight for the Return of Victims of International Child Abduction*, 28 SUFFOLK TRANS-NAT'L L. REV. 85, 86.

system and the lack of legal protection for parties involved in the process.<sup>27</sup> The international community has acknowledged the importance of international adoption and is striving toward the creation of a more efficient, stable, and ethical system through the cooperation of member states.<sup>28</sup> The Hague Convention serves as a multilateral driving force for nations to establish governing regulations and cooperative framework between the sending countries and receiving countries to ensure the best interests of the child are safeguarded during the adoption process, a definitive event in the lives of adopted children and their adoptive families.<sup>29</sup> The goal of the Hague Convention is to protect adoptive children, birth parents, and adoptive parents from exploitation.<sup>30</sup> In cases of international abductions, Hague Convention aims to assist in the rapid and safe return of the child to the country from which they were abducted in an effort to, hopefully, minimize the negative effects that the child may suffer stemming from such abduction.<sup>31</sup> By striving for a prompt return to the state from which the child was taken, this objective of the Hague Convention works toward its best interests of the child standard. Safeguards are provided by the Hague Convention to help ensure that free and informed consent is sought from, and given by, the birth parents and the child, if practical; that consent is not induced by bribery; that the views of the child, where viable, have been sought; and that the adoptive parents have received such counseling as necessary and are suitable persons to adopt.<sup>32</sup> Unfortunately, many sending countries do not have the resources available to make certain that these safeguards are in place. In reality, the requirement of ensuring appropriate consent, uncompromised by financial irregularities, is often actually not viable.<sup>33</sup>

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<sup>27</sup> McKinney, *supra* note 5, at 365.

<sup>28</sup> Katherine Sohr, *Difficulties Implementing the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption: A Criticism of the Proposed Ortega's Law and an Advocacy for Moderate Adoption Reform in Guatemala*, 18 PACE INT'L L. REV. 559, 561.

<sup>29</sup> Kimball, *supra* note 21, at 562; Margaret C. Jasper, *International Adoption* 29 (Oceana Publications, Inc. 2003).

<sup>30</sup> Jasper, *supra* note 29, at 29.

<sup>31</sup> Aiyar, *supra* note 22, at 283.

<sup>32</sup> Kerry O'Halloran, *The Politics of Adoption* 280 (Springer 2006).

<sup>33</sup> *Id.*

A key feature of the Hague Convention is its requirement that each signatory country designate a Central Authority.<sup>34</sup> The Central Authority oversees and monitors the adoption process in its own country, including the implementation of the Hague Convention's Directives through new domestic legislature and the coordination of adoption matters between sending and receiving countries.<sup>35</sup> People residing in a member country who wish to adopt a child from another member country must apply to the Central Authority in their own country.<sup>36</sup> Through the Central Authority, parties are held accountable for their actions which effectually could reduce the risk of bribery and baby selling in intercountry adoptions.<sup>37</sup> The Central Authority also controls accreditation of adoption agencies.<sup>38</sup> The Central Authority designated in the United States is the Department of State.<sup>39</sup>

#### **IV. Weaknesses of the Hague Convention and Suggestions for Improvement**

Although the Hague Convention does establish safeguards and some level of uniformity, it does not address a number of fundamental issues that are crucial to the regulation of international adoption. In order to provide the orphaned or abandoned child, birth parents, and adoptive families with greater protection throughout the international adoption process, the Hague Convention needs to be modified to incorporate more detailed protective measures.<sup>40</sup>

##### *A. Definitions or Clarification of Important Terminology*

The international community needs clarification of terms in the Hague Convention to create a "more protective and globally uniform international law."<sup>41</sup> One of the primary limitations of the Hague Convention is the absence of clear-cut, unambiguous,

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<sup>34</sup> *Adoption*, *supra* note 1, at 49.

<sup>35</sup> Jasper, *supra* note 29, at 29; *Adoption*, *supra* note 1, at 49.

<sup>36</sup> Carlberg, *supra* note 18, at 133.

<sup>37</sup> Bitzan, *supra* note 10, at 147.

<sup>38</sup> Jasper, *supra* note 29, at 32.

<sup>39</sup> Hague Conference on Private International Law, *Authorities*, [http://www.hcch.net/index\\_en.php?act=authorities.details&aid=757](http://www.hcch.net/index_en.php?act=authorities.details&aid=757).

<sup>40</sup> Thompson, *supra* note 20, at 462.

<sup>41</sup> *Id.*, at 443.

and concise definitions of important adoption terms and procedures.<sup>42</sup> The language of the treaty is too broad and imprecise and leaves many terms undefined.<sup>43</sup> In order for the Hague Convention to be effective, these terms must be defined by all states that have ratified the treaty.<sup>44</sup> However, a certain amount of imprecision is necessary to provide flexibility to the different member states in applying the provisions.<sup>45</sup> The Hague Convention should be revised to include clear definitions of significant terminology and to clarify language already contained in the treaty so all participating countries have a harmonized understanding of key terms. Leaving the interpretation of key terms up to individual countries could lead to significantly different meanings that could possibly result in confusion between the parties involved and disorder in the outcomes.<sup>46</sup>

The primary objective of the Hague Convention is to “take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children.”<sup>47</sup> However, the treaty provides a very general idea but does not provide a standardized criterion of what is actually considered the “best interest of the child” that states which have ratified the Convention can follow or utilize. Setting a strict, absolute standard would be too limiting but the general idea the Hague Convention does provide is too vague. The only attempt at any form of an explanation is found in the preamble of the Hague Convention, which states that “the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love, and understanding.”<sup>48</sup> The treaty grants the Central Authority of each member state, under Article 16, the authority to determine whether the placement is in the best interests of the child.<sup>49</sup> In effect, this leaves the determination of the child’s best interests

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<sup>42</sup> *Id.* at 461.

<sup>43</sup> *Id.* at 462.

<sup>44</sup> Kennard, *supra* note 11, at 648.

<sup>45</sup> Thompson, *supra* note 20, at 462.

<sup>46</sup> *Id.* at 463

<sup>47</sup> Hague Convention, *supra* note 11, at 1139.

<sup>48</sup> *Id.*; Thompson, *supra* note 20, at 465.

<sup>49</sup> Hague Convention, *supra* note 11, at 1141.

up to the individual countries, providing no uniform standard or even any sort of guidelines in the treaty that countries can look to for direction and opening up the possibility of approximately seventy-five different interpretations. According to the Explanatory Report of the Hague Convention “the aim is to prevent different interpretations from being given in the various Contracting States, and to prevent them from restricting the concept of fundamental rights of the child to those sanctioned by their own constitutional rules.”<sup>50</sup> While conceding that each country is likely to have differing beliefs about what is in the child’s best interests depending on its economic and social status, religious beliefs, and cultural views, there is a need for some minimal standard or suggested guidelines on which member countries can base their interpretation or some method by which they can reference or determine how other countries have chosen to interpret what that phrase means.<sup>51</sup>

Although Article 23 of the treaty explains what shall be recognized as an “adoption,” the Hague Convention does not provide a solid definition of what actually constitutes the meaning of an adoption.<sup>52</sup> In practice, the failure of the treaty to explicitly state anything regarding the absolute transfer of parental rights and responsibilities creates more complication in the adoption process.<sup>53</sup> As it stands, each country’s Central Authority is responsible for determining the legal rights of the adoptive and biological parents in each case. If the Hague Convention contained a clear-cut and specific definition of what it considers to be an adoption, it would create a uniform interpretation of the term among the member states.<sup>54</sup> It may be argued that a single definition is too restrictive on member states. If this is the case, at a minimum, there should be some form of recording system to document each member country’s definition and treatment of the

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<sup>50</sup> Hague Conference on Private International Law, *Explanatory Report on the 1993 Hague Inter-country Adoption Convention* 62 (HCCH Publications 1994), (prepared by G. Parra-Aranguren), <http://hcch.e-vision.nl/upload/expl33e.pdf> (hereinafter *Explanatory Report*).

<sup>51</sup> Thompson, *supra* note 20, at 465.

<sup>52</sup> *Id.* at 460; Lisa M. Katz, *A Modest Proposal? The Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption*, 9 EMORY INT’L L. REV. 283, 305.

<sup>53</sup> *Id.* at 306.

<sup>54</sup> *Id.* at 305

term to be made available for other member states to view as a reference to see where it stands and as a regulation to make sure its interpretation does not go against the objectives of the Hague Convention.<sup>55</sup> The Second Special Commission on the Practical Operation of the Hague Convention, to improve the operation of the Hague Convention, has recommended that the Permanent Bureau collect certain information from member states and make it available to all other member states so each country can see where other countries stand on certain issues or how they interpret certain provisions.<sup>56</sup> The recommendations of the Special Commission are still works-in-progress.<sup>57</sup>

While, according to Article 4, it is up to the Central Authorities of the country of origin to determine that the child being considered for adoption is in fact “adoptable,” there is no language in the text of the treaty to serve as a guideline on how to interpret this term.<sup>58</sup> This lack of definition could create additional delays in the adoption process, causing children to languish in orphanages longer. The Hague Convention leaves the task of defining this term up to the individual sending countries.<sup>59</sup> In the Explanatory Report of the treaty, during the Special Committee meetings, many countries criticized the term “adoptable” because it suggests the idea of “availability” as if the child is a product to be bought and sold.<sup>60</sup> However, the term was kept because no better alternative word could be agreed upon.<sup>61</sup> The Hague Convention also does not contain any language defining the term “orphan.”<sup>62</sup> To define the term “adoptable,” a number of countries have chosen to require that the child be legally abandoned but the process used to establish that this requirement has been

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<sup>55</sup> *Id.* at 306; Kennard, *supra* note 11, at 642.

<sup>56</sup> Report and Conclusions of the Second Special Commission on the Practical Operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect on Intercountry Adoption 51 (17-23 September 2005) [August 2006], [http://hch.e-vision.nl/upload/wop/adop2005\\_rpt-e.pdf](http://hch.e-vision.nl/upload/wop/adop2005_rpt-e.pdf) [hereinafter *Special Committee*].

<sup>57</sup> *Id.*

<sup>58</sup> Thompson, *supra* note 20, at 460.

<sup>59</sup> McKinney, *supra* note 5, at 395.

<sup>60</sup> *Explanatory Note*, *supra* note 50, 117.

<sup>61</sup> *Id.*

<sup>62</sup> Thompson, *supra* note 20, at 460.

met is lengthy and expensive.<sup>63</sup> Most sending countries do not have the resources required to work toward legal abandonment for the plethora of children trapped in institutional care, which render these children unadoptable.<sup>64</sup> Another problem that arises with this method is that individual counties' definition of "legally abandoned" may vary significantly. Misinterpretations, or even varying interpretations, of these crucial terms could lead to problems and perhaps even exploitation of vulnerable children.<sup>65</sup>

The Hague Convention needs to be amended to further clarify the language regarding who has the authority to set standards and to define improper financial gain. Article 32(1) of the Hague Convention states that "no one shall derive improper financial or other gain from an activity related to an intercountry adoption."<sup>66</sup> While this provision seems to have a good intention, it provides no standard for what would be considered improper gain. If this determination is left to the individual countries, what one country views to be a "reasonable" amount could be viewed by a different state as improper and the amount would vary widely state to state. The treaty should provide language that establishes a minimum standard of how to determine what is considered an improper gain. In spite of this, the language of Article 32 sections 2 and 3, which respectively provide "only costs and expenses, including reasonable professional fees of persons involved in the adoption, may be paid or charged" and "the directors, administrators, and employees of bodies involved in an adoption shall not receive remuneration which is unreasonably high in relation to services rendered," seem to provide a way around the language of the first section. As a result, this section prohibits improper financial gain while tolerating payments to be made without making any acknowledgement of who should be regulating these payments.<sup>67</sup> The treaty also fails to define the

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<sup>63</sup> McKinney, *supra* note 5, at 395.

<sup>64</sup> *Id.*

<sup>65</sup> Thompson, *supra* note 20, at 460.

<sup>66</sup> Hague Convention, *supra* note 11, at 1143.

<sup>67</sup> Kennard, *supra* note 11, at 644. *See also*, David Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping, and Stealing Children*, 52 WAYNE L. REV. 113 (2006)

boundaries of “reasonable” fees in Article 32 section 2 or “unreasonably high” in Article 32 section 3.<sup>68</sup> In addition, Article 32 fails to offer any insight into what services are commonly provided in the adoption process.<sup>69</sup> Bearing in mind the Hague Convention’s emphasis on preventing the sale of children as a profit-making activity, these absences turn out to be rather significant weaknesses. It would not be feasible or reasonable to expect the language of the Hague Convention to cover all possible situations for what is reasonable or appropriate there needs to be some way of creating a balance or setting some way to establish how each country should come up with its guidelines. Although it is already burdened with many significant responsibilities, perhaps it should be up to the Central Authority of the member states to set what they believe to be a reasonable standard and then provide this information to the Hague Convention to be readily accessible to all member states so other countries are able to know where each country stands and be able to evaluate and regulate the standards.

Article 24 of the Hague Convention acts like an escape clause, providing that “a state may refuse to recognize an adoption if it is manifestly contrary to the public policy when taking the child’s best interests into consideration.”<sup>70</sup> The phrase “public policy” is not clearly discussed anywhere in text of the treaty. It appears this opportunity to invalidate an adoption would be very helpful in putting a stop to illegal adoptions and allow member states to only permit those adoptions that are in line with its own public policy.<sup>71</sup> However, without establishing the scope of what is covered by the term “public policy,” this unrestrained opportunity to nullify the adoption could be interpreted in any number of ways by the various member states. These varying interpretations could be used to advance very different public policies and any kind of agenda that those states may be trying to advance.<sup>72</sup> What one country may find acceptable may be in complete opposition to the public policy of another country.<sup>73</sup>

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

<sup>69</sup> *Id.*

<sup>70</sup> Thompson, *supra* note 20, at 460.

<sup>71</sup> Katz, *supra* note 52, at 324.

<sup>72</sup> Thompson, *supra* note 20, at 460.

<sup>73</sup> Katz, *supra* note 52, at 324.

The exception is to provide for the differences in public policy but there needs to be some way of harmonizing this so adoptions are not taking place that fellow member states may consider to be significantly out of line with the intentions of the Hague Convention.

Despite the need for uniformity and establishment of clear standards, the Hague Convention still needs to tolerate some level of flexibility in defining key terms to take such economical, cultural, and social differences into consideration. However, too much flexibility will create more problems and non-uniformity that could potentially lead to adoptions are not in harmony with the objectives of the Hague Convention and more difficulty and confusion for participants involved in legitimate adoption procedures. It may not be practical for the Hague Convention to lay out exact procedures that must be strictly followed to no exception as this would be too limiting which could lead to some states refusing to ratify the treaty. However, the treaty should provide some sort of minimum standard for the control from which the individual member countries could base their standards.<sup>74</sup> The countries would be required to provide at least those minimum protections but would be free to raise its standard to provide greater protection.<sup>75</sup>

#### 1. *Enforcing compliance with Hague Convention provisions*

Another major problem that exists with the Hague Convention is its failure to address any form of assessment for which participating states can depend on to make certain the orphaned or adopted children are amply protected and that the driving force of the member state's actions is the best interests of these children. The Hague Convention needs to set up some sort of enforcement mechanism body to ensure treaty compliance by participating states. As it presently stands, Article 6 of the Hague Convention designates the Central Authority of each country as responsible for enforcing the provisions of the treaty in its own country, just as it is accountable for determining what is in the best interest of the child. This technique does not provide adequate protection for the children nor does it contribute to any

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<sup>74</sup> *Id.* at 325

<sup>75</sup> *Id.*

kind of uniformity. A governmental system in a country that would allow for child-trafficking or corrupt adoption procedures could simply appoint a corrupt Central Authority that would look the other way or justify such procedures allowing them to continue or expand.

Some may argue that the Hague Convention reduces disagreements and promotes cooperation between countries that have ratified the treaty by acknowledging the independent rights of each member country in allowing each Central Authority to be the exclusive form of enforcement in those states. However, this does not create any uniformity in the way compliance is enforced. The Hague Convention needs to establish a technique to assess whether procedures of the Central Authority of each country are consistent with the treaty's safeguarding objective.<sup>76</sup> The Hague Convention could develop an international committee of participating member states that would oversee the Central Authorities of each state to ensure its compliance and apply pressure to states to abide by the provisions of the treaty. This committee could supervise the Central Authorities as opposed to entrusting them to impartially monitor their own behavior.

A further shortcoming of the Hague Convention is its failure to include a section addressing possible penalties or sanctions for violating treaty provisions and should be amended to include language to implement consequences for such violations.<sup>77</sup> The treaty needs to be modified to incorporate sanctions against member countries for non-compliance with international adoption law.<sup>78</sup> To guarantee compliance with its provisions, the Hague Convention should include a section imposing criminal sanctions on citizens of member states who violate its terms.<sup>79</sup> As it stands, the Hague Convention leaves the duty of dealing with violations of treaty provisions to the Central Authority of each member state. It also allows each country to determine how or whether to handle such violations through its own legislation.<sup>80</sup> In essence, by allowing this, the Hague Convention is relying on

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<sup>76</sup> Thompson, *supra* note 20, at 467.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 468.

<sup>79</sup> Marguez, *supra* note 3, at 38.

<sup>80</sup> Kimball, *supra* note 21, at 572.

self-regulation to accomplish its objective.<sup>81</sup> When trying to ensure the best interests and protection of children, self-regulation is insufficient. The problem that arises with leaving punishment of member states that allow individuals to violate the treaty's provisions to the states as individuals is, yet again, that this self-regulation could encourage corrupt adoption practices that will go unpunished. Self-regulation will also likely lead to inconsistencies among what types of sanctions are administered or how they are applied, if at all. This will just intensify the lack of uniformity in the process. One way to address this issue is to develop or appoint an international tribunal or body, perhaps the Permanent Bureau of the Hague Conference, to supervise the member countries to determine if they are complying with the terms of the treaty. If such a tribunal determines that a member state is not compliant, it would enforce compliance with the provisions or enforce sanctions.<sup>82</sup>

As has been discussed, a great deal of the responsibility and enforcement of standards in the international adoption process falls on the Central Authority of each of the member states. This allows states that have ratified the Hague Convention to retain sovereignty over its own international adoption law. However, subjecting an adoption to the nuances of each of the member states that are involved has the effect of complicating the process even further.<sup>83</sup> While a single, uniform system may be too restrictive, the Hague Convention should be amended to provide a minimum standard with which the Central Authority of the member countries must comply. As the member states are regulating and making progressions in their own adoption process, they must take into account the fact that it is just an element of an overall international arrangement.<sup>84</sup> By doing this, the Hague Convention will still acknowledge each member state's right to establish and enforce its own adoption requirements.<sup>85</sup>

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<sup>81</sup> Kennard, *supra* note 11, at 646.

<sup>82</sup> Kimball, *supra* note 21, at 572.

<sup>83</sup> Katz, *supra* note 52, at 324.

<sup>84</sup> *Id.* at 327.

<sup>85</sup> *Id.* at 324.

## 2. Cases involving non-member states

The Hague Convention does not prohibit individual citizens of member states from being involved in intercountry adoptions with non-member countries anywhere in its text.<sup>86</sup> Furthermore, the treaty lacks a requirement that countries that sign the treaty have to take any steps toward ratifying or acceding to the treaty, which imposes no obligation on non-member countries.<sup>87</sup> Including a requirement that member countries could only deal with other member countries would provide motivation and incentive for both receiving and sending countries to ratify the Hague Convention and comply with its regulations.<sup>88</sup> Conversely, such a requirement may also result in non-party countries refusing to comply and dealing only with other non-member countries with no regulations or safeguards. One potential and devastating repercussion could be the exacerbation of the problem of child trafficking.

The Hague Convention does not specify how member countries should interact with non-member countries. As it stands, intercountry adoptions between member countries and non-member countries are not prohibited and are not bound by the procedures, rules, and restrictions of the Hague Convention. Hague Convention member states all have remarkably different methodologies in dealing with cases involving nations that are not members of the Hague Convention.<sup>89</sup> This lack of uniformity could result in providing child abductors an incentive to move the abducted child from country to country, significantly decreasing the likelihood of the child's rapid return, or possibly any return at all. The Hague Convention needs to provide a uniform approach, or, at a minimum, a set of guidelines for member states to utilize in managing cases involving non-member countries.<sup>90</sup> Such a provision would not only serve as a point of reference for member states, but also result in increased homogeneity in member states' interactions with non-member states. One place to start would be to amend the Hague Convention to include language requiring that the best interest of the child be the foremost

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<sup>86</sup> Kimball, *supra* note 21, at 572.

<sup>87</sup> *Id.*

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

<sup>89</sup> Aiyar, *supra* note 22, at 314.

<sup>90</sup> *Id.* at 315.

consideration in all cases involving non-Hague Convention states.<sup>91</sup> However, as it presently stands, this recommendation is severely attenuated by the fact that, as discussed above, the “best interest of the child” has not been clearly defined in the language provided by the Hague Convention.

### 3. *Implementation of the Hague Convention*

Incorporating the provisions of the Hague Convention into a country’s system of law is not an easy or expeditious process. Several difficulties present themselves in trying to incorporate an international treaty in the varying legal systems of each of the member states. Implementation efforts generate bureaucratic, political, and financial obstacles which states are forced to overcome in order to become signatories to the Hague Convention.<sup>92</sup> Although a sending or receiving country may agree with the objectives of the Hague Convention, the economic costs and other responsibilities required for compliance with the treaty may be excessively burdensome.<sup>93</sup> Economically, the cost of compliance is high. International adoptions are already expensive on their own and compliance with the Hague Convention increases this financial burden on the Central Authority to maintain supervision over each adoption.<sup>94</sup> Opponents of the Hague Convention claim that the detailed procedures of the Hague Convention create further burdens in the intercountry adoption process by generating additional delays and obstacles, which could result in significantly decreasing, or completely shutting down, international adoptions, particularly in sending countries.<sup>95</sup> Unfortunately, these bureaucratic obstructions could create a delay in children being placed for adoptions. The Hague Convention has not made any statement that countries try not to create unnecessary bureaucratic obstructions which may result in children languishing in orphanages.<sup>96</sup> The language of the Hague Convention provides no instruction to member countries directing them to be expeditious in making the child available for

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

<sup>92</sup> McKinney, *supra* note 5, at 391.

<sup>93</sup> Kimball, *supra* note 21, at 572.

<sup>94</sup> *Id.* at 573

<sup>95</sup> McKinney, *supra* note 5, at 366.

<sup>96</sup> *Id.* at 389-390.

intercountry adoptions before institutionalization causes developmental problems in the child.<sup>97</sup> The Second Special Commission on the Practical Operation of the Hague Convention has suggested an implementation assistance program to provide information, advice, and training to countries who wish to implement the treaty.<sup>98</sup> The Special Commission has also discussed a pilot program to assist the governments of two countries who wish to ratify or accede to the Hague Convention but are having problems implementing it.<sup>99</sup> If this is successful, it may become more widespread.<sup>100</sup> The amount of organization to alter domestic legislation regarding international adoption regulations required to comply with the treaty takes significant amounts of time and effort.<sup>101</sup> This could cause some non-member countries to postpone ratifying the Hague Convention or even forego compliance completely.

The struggles and inabilities of many countries that make implementing the terms of the Hague Convention difficult are further displayed in these countries' lack of resources to place children internationally. This leads to children deteriorating in institutions for indefinite periods of time, which is contrary to the primary goal of serving the best interests of these children.<sup>102</sup> Children who have spent significant periods of time in institutional care have been determined to suffer more psychological and physical problems than children placed into adoption during their infancies.<sup>103</sup> Bureaucratic setbacks, unsuccessful waiting lists for placement, and costly procedural requirement increase the likelihood that children will languish in institutions and suffer detrimental effects.<sup>104</sup>

Receiving countries are more likely to forego or postpone compliance with the terms of the Hague Convention than sending countries are. This is not to say that sending countries do not

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<sup>97</sup> *Id.* at 390.

<sup>98</sup> Special Committee, *supra* note 56, 59.

<sup>99</sup> *Id.* at 57.

<sup>100</sup> *Id.*

<sup>101</sup> Kimball, *supra* note 21, at 573 (citing Jeff D. Opdyke, *Changes in Global Rules Toughen Process*, WALL STREET J., Oct. 14, 2003, available at <http://www.lgri.org/news/article.php?newsID=578>).

<sup>102</sup> McKinney, *supra* note 5, at 396.

<sup>103</sup> *Id.*

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

face significant challenges in implementing the Hague Convention. Many sending countries lack the financial resources and political will to successfully implement the provisions of the Hague Convention.<sup>105</sup> Sending countries suffer a heavy burden of responsibility placed on them by the Hague Convention.<sup>106</sup> In order to meet this burden, sending countries need to have money, political support, and practical expertise, areas in which many of these countries are deficient.<sup>107</sup> Sending countries are frequently developing nations and, as such, lack a strong, advanced infrastructure. Realistically, many of the safeguards of the Hague Convention are too expensive and time-consuming for many sending nations to adequately provide to the extent desired by the provisions set forth in the Hague Convention.<sup>108</sup> Even if they are able to bring the provisions into effect, the amount of time it will take these countries to effectively put all the safeguards into place only increases the length of time it takes to complete the entire adoption process. However, if sending countries choose not to accede to or ratify the Convention and member countries refuse to work with them, they still have options. A non-compliant sending country can still collaborate with non-compliant receiving countries or attempt to place the child in a domestic adoption or keep the child in a domestic orphanage. However, receiving countries are less likely to place restrictions on countries from where they may receive children, unless the sending country is notorious for child trafficking.<sup>109</sup> On the other hand, non-member receiving countries face a rather different situation. Domestically, only a limited number of children are available for adoption. Sending countries have the ability to be more particular in choosing which countries they will allow to adopt their orphaned or abandoned children. If compliant sending states refuse to send children to non-compliant receiving countries, the sending country is left with extremely limited options. It seems the only avenue available to them is through non-member sending countries where they run the risk of dealing with a child obtained through illegal means.

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<sup>105</sup> *Id.* at 392.

<sup>106</sup> *Id.* at 402.

<sup>107</sup> *Id.*

<sup>108</sup> Bitzan, *supra* note 10, at 139.

<sup>109</sup> McKinney *supra* note 5, at 392.

#### 4. DNA Testing to Prevent Abductions and Improper Adoption Practices

Although there are numerous safeguards in place, the Hague Convention should include a provision requiring DNA testing to further ensure the prevention of child abduction. DNA testing should be completed on both the child being placed up for adoption and the alleged mother placing the child up for adoption to ensure that the child is in fact her biological child. This is necessary to ensure that children are not being stolen or sold and put up for adoption.

When the United States was processing adoptions from Guatemala, it had adopted DNA testing requirements. Before the Hague Convention was ratified by the United States in 2008, U.S. Citizenship and Immigration Services in the Department of Homeland Security (DHS/USCIS) required two DNA tests be completed before a child could be adopted from Guatemala.<sup>110</sup> While these DNA tests lengthened the adoption process, they were implemented with the intention of preventing child abductions or illegally placing children up for adoption. The DHS/USCIS at the U.S. Embassy in Guatemala took DNA tests in all cases where an identifiable birth mother was alleging to have released the child.<sup>111</sup> If either DNA test resulted in a negative match, the case was immediately terminated.<sup>112</sup> The initial set of DNA tests are taken from both the child being put up for adoption and the alleged birth mother to ensure the woman is the biological mother of the child. This procedure was put in place because the use of a false mother to release a child that she claimed to be hers when in reality it was not is a just one of the numerous ways to get around following the correct procedures to relinquish a child.<sup>113</sup> Many documents had to be supplied before the DHS/USCIS could even perform the first DNA test, including the hospital record of the birth.<sup>114</sup> If the DNA result con-

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<sup>110</sup> U.S. Department of State, *Intercountry Adoption: Guatemala*, [http://travel.state.gov/family/adoption/country/country\\_389.html](http://travel.state.gov/family/adoption/country/country_389.html).

<sup>111</sup> *Id.*

<sup>112</sup> U.S. Department of State, *U.S. Embassy in Guatemala Adds Second DNA Test to Adoption Procedure*, [http://travel.state.gov/family/adoption/intercountry/intercountry\\_3751.html](http://travel.state.gov/family/adoption/intercountry/intercountry_3751.html).

<sup>113</sup> *Intercountry Adoption: Guatemala*, *supra* note 110.

<sup>114</sup> *Id.*

firmed that the woman is the biological mother of the child, DHS/USCIS would either approve the adoption or refer it for additional investigation.<sup>115</sup> If DHS/USCIS determined that further investigation was needed, it could require a confirmation, through an interview with the birthmother, that she was consenting to allow her child to be adopted by United States citizens.<sup>116</sup>

On August 6, 2007, the United States Embassy in Guatemala instated its requirement for a second DNA test which was used to verify that the child for whom the immigrant visa was being requested was the same child who was given the initial DNA test and matched the birth mother.<sup>117</sup> This second test was enacted in response to widespread unease about Guatemala's unregulated adoption process.<sup>118</sup>

## V. Adoption Procedures in Guatemala: Past and Present

### A. Guatemala under the Notarial System

Guatemala acceded to the Hague Convention in March of 2003; however, at that time, Guatemala did not amend its adoption procedures to meet the requirements set forth by the Hague Convention.<sup>119</sup> In August of 2003, the Constitutional Court of Guatemala found Guatemala's accession to the Hague Convention to be unconstitutional.<sup>120</sup>

While operating under a notarial system, Guatemala provided the second highest number of children, following China, that were adopted by American families.<sup>121</sup> However, adoptions were handled by private agencies, and, unfortunately, were not regulated by the Guatemalan government.<sup>122</sup> This lack of structure and oversight played a significant role in contributing to the

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

<sup>116</sup> *Id.*

<sup>117</sup> *U.S. Embassy in Guatemala Adds Second DNA Test to Adoption Procedure*, *supra* note 112.

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

<sup>119</sup> Sohr, *supra* note 28, at 562.

<sup>120</sup> *Id.*

<sup>121</sup> Daly, *supra* note 13, at 624.

<sup>122</sup> *Id.*

high number of adoption between the United States and Guatemala. Many adoptive families are looking to adopt infants and, due to its lack of regulation, the wait-time to receive a Guatemalan child was considerably shorter than those in other countries, particularly those that are members of the Hague Convention.<sup>123</sup> This lack of regulation also led to illegitimate and corrupt adoptions. Under such conditions, Guatemalan children were easily reduced to commodities to be bought and sold.

#### B. *Allegations of Corruption in the Guatemalan Adoption System*

In recent years, many forms of popular media have been saturated with stories of corruption, coercion, and illegal activity in Guatemalan adoptions practices, particularly kidnapping and baby brokering. Stories were reported of baby brokers seeking out poor, pregnant women who would likely be unable to raise her child and buying her baby from her to be put up for adoption. The New York Times reported that, according to the US State Department, there was extensive evidence of Guatemalan lawyers paying women to get pregnant solely to put the child up for adoption and of lawyers pressuring and persuading birth mothers into putting their child up for adoption.<sup>124</sup> Reports of fraudulent adoption documents and raids on orphanages have also been publicized.<sup>125</sup> In August 2007, Guatemalan officials raided Casa Quivira, an adoption agency in Guatemala. Among other problems, they allege illegal payments to birth mothers, fraudulent documents, and stolen or false identities of both birth mothers and children.<sup>126</sup> In May 2008, similar raids took place at two other Guatemalan adoption agencies, Semillas de Amor and Lucida de los Flores.<sup>127</sup> Knowing that American families are willing to pay significant amounts of money for a baby, Guatema-

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<sup>123</sup> *Id.*

<sup>124</sup> Lynette Clemetson, *Adoptions from Guatemala Face an Uncertain Future*, N.Y. TIMES, May 16, 2007, at A12.

<sup>125</sup> Juan Carlos Llorca, *Guatemala Cracks Down on Adoptions: Authorities Find Fraud in Search for Babies' True Identities*, GRAND RAPIDS PRESS, Mar. 12, 2008, at A5.

<sup>126</sup> *Id.*

<sup>127</sup> U.S. Department of State, *Updates on Casa Quivira, Semillas de Amor and Santa Lucia de los Flores Cases*, <http://www.adoption.state.gov/news/guatemala.html>.

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lan attorneys were able to turn extremely high profits. By 2009, several petitions for adoptions of children taken into custody during these raids were still pending.<sup>128</sup>

### C. Law 3735 and The Hague Convention in Guatemala

On December 11, 2007, Guatemala passed legislation, law 3735, designed to put into action its obligations under the Hague Convention.<sup>129</sup> Before this legislation was passed, Guatemala operated under a notarial system that was inconsistent with the provisions and requirements of the Hague Convention.<sup>130</sup> The Hague Convention entered into force in Guatemala on December 31, 2007.<sup>131</sup> Under law 3735, the National Council on Adoptions (CNA) was created to serve as the Central Authority of Guatemala and to generate safeguards to protect children and adoptive families during international adoptions from Guatemala.<sup>132</sup> Under the new law, cases already pending or in progress before December 31, 2007 will be allowed to be processed and completed under the old notarial system.<sup>133</sup> Other than those cases, Guatemala has closed its adoption processes while it restructures its adoption system to comply with the requirements of the Hague Convention.<sup>134</sup> A campaign has been initiated, called "Guatemala 900," to call attention to the stagnation of approximately 900 grandfathered cases and encourage immediate action be taken to process these adoptions.<sup>135</sup>

Beginning April 1, 2008, the United States Department of State began advising potential adoptive parents and adoption agencies not to commence new adoptions from Guatemala be-

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

<sup>129</sup> U.S. Department of State, *Guatemalan Congress Passes Adoption Legislation*, [http://travel.state.gov/family/adoption/intercountry/intercountry\\_3903.html](http://travel.state.gov/family/adoption/intercountry/intercountry_3903.html); Families Thru International Adoptions, *Current Hot News for Guatemala*, <http://www.ftia.org/hotnews/default.aspx?set=guatemala>.

<sup>130</sup> *Intercountry Adoption: Guatemala*, *supra* note 110.

<sup>131</sup> Families Thru International Adoptions, *supra* note 129.

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

<sup>133</sup> U.S. Department of State, *Warning: Adoptions Initiated in Guatemala on or After April 1, 2008*, [http://travel.state.gov/family/adoption/country/country\\_4198.html](http://travel.state.gov/family/adoption/country/country_4198.html).

<sup>134</sup> Kristin Collins, *Road to Foreign Adoption Grows Longer and Bumpier*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 18, 2008, at A1.

<sup>135</sup> Guatemala 900: Due Process Due Now, <http://guatemala900.org>.

cause of uncertainty in the future of Guatemala's adoption system.<sup>136</sup> Although Guatemala has acceded to, and ratified, the Hague Convention, it has not fully implemented function Hague-compliant adoption procedures as set forth in the Hague Convention for the protection of children, their families, and potential adoptees.<sup>137</sup> The regulations and infrastructure required to meet the obligations laid out in the Hague Convention have yet to be established in Guatemala.<sup>138</sup> Furthermore, Guatemala has not provided any information on when it expects or hopes to complete the establishment of the required procedures and legislation. Due to the fact Guatemala does not yet comply with all of the requirements set forth by the Hague Convention, the United States is not currently processing new adoptions from Guatemala nor is the United States Citizenship and Immigration Services able to issue or approve the necessary documents to obtain immigrant visas for children adopted internationally.<sup>139</sup>

Before Guatemala passed legislation to implement the Hague Convention, most of the world was outraged at the allegations of abuse and coercion that seemed so prevalent in its adoption system. Nevertheless, it seems that these allegations did not play a significant role in many American adoptive families' decisions to continue their plans to adopt from Guatemala. These families were so excited and eager to adopt a child and expand their families that they either ignored or refused to believe these allegations. In fact, after reviewing numerous adoption websites, it is apparent that many potential adoptive families are upset by the indefinite cessation of Guatemalan adoption and feel that the restructuring of the adoption system will be to the detriment of the children, who are languishing in adoption homes or orphanages while the system implements Hague-compliant procedures. However, it seems that if Guatemala does not take action in updating its adoption procedures, some adoptive families could become discouraged by the seemingly endless delays and uncertainty now prevalent in intercountry adoptions. While, in the end, implementing the Hague Convention will be beneficial

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<sup>136</sup> Collins, *supra* note 134.

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

<sup>138</sup> Warning: *Adoptions Initiated in Guatemala on or after April 1, 2008*, *supra* note 133.

<sup>139</sup> *Id.*

to the safety of adoptive families, birth parents, and the children, the process of converting Guatemala's adoption system into one that is Hague-compliant will take time and be a source of extreme difficulty and frustration for everyone involved. Adding to this delay, frustration, and difficulty is the fact that Guatemala is a fairly poor country. Completely reorganizing the country's entire infrastructure to meet Hague Convention requirements will be extremely difficult, if not nearly impossible, and could take a tremendously lengthy period of time without some outside help. Perhaps other member states could provide assistance or support to Guatemala, either financially or in other ways. It seems likely that Guatemala will eventually adjust its adoption system to comply with the Hague Convention; now it is just a matter of when this will be achieved.

## **VI. Conclusion**

While the Hague Convention does make significant improvements in the international community through its establishment of safe practices and procedures in international adoptions and working towards the prompt return of children abducted internationally, it would benefit considerably from amendments or modifications addressing many fundamental issues that are crucial to the success of establishing guidelines for safe intercountry adoptions and in handling international abductions.

Erica Briscoe