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COMMENT

International Adoption: Improving on the 1993 Hague Convention*

JENNIFER A. RATCLIFF[†]

I. INTRODUCTION

The 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (Hague Convention or Convention) addresses the need to protect internationally adopted children and promote global recognition of international adoptions.¹ The Convention acts as a guide to states for building a legal structure to govern such adoptions² with the ultimate goal of promoting the creation of legal systems that end practices such as child selling and child sex trafficking.³ While emphasizing the importance of safety in

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1. Hague Conference on Private International Law: Final Act of the 17th Session, Including the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, May 29 1993, 32 I.L.M. 1134–46 (1993) [hereinafter *Hague Adoption Convention*].

2. *Id.*

3. *Hague Adoption Convention*, *supra* note 1, at 1139 (“The States signatory to the present Convention [are] . . . convinced of the necessity to take measures to

international adoption, the Convention also makes clear that states' first priority should be keeping children within their own families or at least placing them with families in their country of origin; international adoption should be used only as a last resort.⁴ These goals are a step toward protecting the rights of internationally adopted children, but the Convention itself does little to ensure that they can be successfully implemented in the real world.⁵ Since the drafting of the Convention, serious problems have become apparent. Many individual countries lack the resources and strong governmental support needed to create and maintain a Central Authority on adoption.⁶ Also, the language of the Convention is vague, subject to broad interpretation,⁷ and devoid of sanctions for countries that violate its mandates.⁸ These problems leave room for individual states to enact policies that do not support an adoption program that prioritizes the Convention's main goal: placing children with families within their own countries before looking to international adoption.⁹ Nowhere is this clearer than in China, where parents are restricted to one child and often have no choice but to give up any additional children.¹⁰ The only chance these abandoned babies have to grow up outside an orphanage is to be adopted by a foreign family,¹¹ an endeavor made more difficult with the passage of a new law severely restricting who is allowed to adopt Chinese children.¹² By examining these Chinese policies in further detail, one can see more plainly that governments can, and do, pass laws in direct opposition to the Convention's goal of minimizing the institutionalization of children.¹³

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.”).

4. *Id.* (“The States signatory to the present Convention . . . [recall] that each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin . . . [and recognize] that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin.”)

5. *See infra* Part IV.

6. *See infra* Part IV.A.

7. *See infra* Part IV.B.

8. *See infra* Part IV.C.

9. *See infra* Part V.

10. *See infra* Part V.A.

11. *See infra* Part V.A.

12. *See infra* Part V.B.

13. *See infra* Part V.

II. OVERVIEW OF INTERNATIONAL ADOPTION

International adoption began in the middle of the twentieth century, following the end of World War II, when American soldiers arrived back home and shed light on the problem of children displaced by the war.¹⁴ In the Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption,¹⁵ the United Nations (UN) drew attention to the need that arises for adoptive homes following calamities. The UN General Assembly expressed concern with “the large number of children who are abandoned or become orphans owing to violence, internal disturbance, armed conflicts, natural disasters, economic crises or social problems.”¹⁶ During the 1950s, proxy adoptions, which allowed U.S. citizens to adopt by designating a proxy agent to take their place in foreign courts, were the most widely publicized means of international adoption.¹⁷ Since that time, international adoptions have become increasingly popular, particularly among Americans.¹⁸ There were about 15,000 foreign children adopted by U.S. families between 1953 and 1962,¹⁹ compared with 17,495 in 2008 alone.²⁰

While international adoption was once generally motivated by the aftermath of wars, it is now much more a product of the gap between the world’s poor and privileged populations.²¹ Receiving countries

14. Ellen Herman, International Adoptions, The Adoption History Project, July 11, 2007, <http://www.uoregon.edu/~adoption/topics/internationaladoption.htm> [hereinafter The Adoption History Project: International Adoptions].

15. G.A. Res. 41/85, U.N. Doc. A/RES/41/85 (Dec. 3, 1986).

16. *Id.* annex.

17. Ellen Herman, Proxy Adoptions, The Adoption History Project, July 11, 2007, <http://www.uoregon.edu/~adoption/topics/proxy.htm>. This practice gained traction after 1955 when Harry and Bertha Holt, an evangelical couple from Oregon, adopted eight Korean War orphans. *Id.* The Holts went on to arrange many similar adoptions for other American families. The Adoption History Project: International Adoptions, *supra* note 14.

18. Elizabeth Bartholet, Family Bonds: Adoption, Infertility, and the New World of Child Protection 143 (Beacon Press ed., 1999) (1993).

19. The Adoption History Project: International Adoptions, *supra* note 14.

20. The United States Department of State, Office of Children’s Issues, Intercountry Adoption: Total Adoptions to the United States, http://adoption.state.gov/news/total_chart.html (last visited Apr. 18, 2010) [hereinafter Chart: Total Adoptions to the United States (by country)]. This number includes 4,123 children from Guatemala, 3,909 from mainland China, 1,861 from Russia, 1,725 from Ethiopia and 1,065 from South Korea. *Id.*

21. BARTHOLET, *supra* note 18, at 141–43.

have low birthrates and few children in need of homes; conversely, sending countries have high birthrates and many homeless children.²² In industrialized receiving countries the demand for foreign children has risen as the availability of children to adopt domestically has dropped.²³ This decrease is due to various factors that have emerged in recent decades, such as the use of contraception, the legalization of abortion, and the increased acceptance of single parents.²⁴ On the other hand, the practice of giving up children to international parents is common in countries where both families and government itself cannot care for the abandoned or orphaned children.²⁵ For families, the reasons could be as basic as the economic inability to afford a child; however, there may be more complex social and political factors at play. Poignant examples include Confucian beliefs in Korea that promote continuing the family through an unbroken bloodline (this stopped many Koreans from adopting displaced children following the Korean War);²⁶ the Ceausescu regime in Romania, which forced women to have at least four children for the state;²⁷ and the one-child policy in China, which leads many families to give up or even abort “extra” children.²⁸ For some governments, the incapacity to care for their children could be the temporary result of a war or an economic downturn.²⁹ For others, the problem might be more permanent,³⁰ as is the case in economically underdeveloped countries that experience a combination of population explosion and

22. *Id.* at 141.

23. *Id.*

24. *Id.*

25. MARY KATHLEEN BENET, *THE POLITICS OF ADOPTION* 121 (1976).

26. Sam Jameson, *Keeping Them Home, Orphan—A Shame Fades in South Korea*, L.A. TIMES, Sept. 1, 1989, at A1.

27. Jini L. Roby, *Understanding Sending Country's Traditions and Policies in International Adoptions: Avoiding Legal and Cultural Pitfalls*, 6 J.L. & FAM. STUD. 303, 314 (2004). As many as 140,000 children were institutionalized as a result of this policy; all because Ceausescu saw children as a symbol of national pride and power. *Id.* In furtherance of this policy Ceausescu outlawed birth control and abortion. Catharine Dunphy, *The Romania Adoptions: New Lives for the Children of Turmoil*, TORONTO STAR, Aug. 22, 1993, at B1. Impoverished Romanian families often could not support so many children and had no choice but to give them up. *Id.*

28. Alexa Olesen, *China Sticking to One-Child Policy*, WASH. POST, Jan. 23, 2007 (noting that many couples give up or abort female babies so they can have the opportunity to try for a son).

29. BENET, *supra* note 25, at 121–22.

30. *Id.* at 121.

depression.³¹ For the families and countries faced with these harsh realities, international adoption might be the only solution.³²

III. THE 1993 HAGUE CONVENTION

The Hague Convention on Protection of Children and Co-Operation of Respect of Intercountry Adoption was adopted on May 29, 1993³³ and applies to all international adoptions between member states.³⁴ As of February 2010, eighty-one countries have ratified the Convention and an additional three, Ireland, Nepal, and the Russian Federation, are signatories but are not party to the treaty.³⁵

The Convention's main success was its ability to bring together such a large number of interested parties, both to acknowledge the need for, and to commit to working towards, international adoption regulations.³⁶ Previous UN declarations and conventions have touched on international adoption, such as the Declaration of the Rights of the Child;³⁷ the Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption;³⁸ and the Convention

31. *Id.* at 122.

32. *Id.* at 121–22.

33. Hague Adoption Convention, *supra* note 1, at 1134.

34. *Id.*

35. Hague Conference on Private International Law, *Status Table, 33: Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=69 (last visited Apr. 18, 2010). See generally United Nations Treaty Collection, Treaty Reference Guide: Definitions, http://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page1_en.xml (last visited Apr. 18, 2010) [hereinafter Treaty Reference Guide] (describing the difference between “signatories” to a treaty and “parties” to a treaty which are “[s]tates and other entities with treaty-making capacity which have expressed their consent to be bound by a treaty and where the treaty is in force for such States and entities”).

36. See BARTHOLET, *supra* note 18, at 150.

37. Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), princ. 6, U.N. Doc. A/4354 (Nov. 20, 1959) (“The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable.”).

38. Declaration on Social and Legal Principles Relating to Adoption and Foster Placement of Children Nationally and Internationally, G.A. Res. 41/85, art. 17,

on the Rights of the Child;³⁹ but the 1993 Convention is noticeably different.⁴⁰ First, it focuses solely on international adoption.⁴¹ Second, nearly all countries that engage in international adoption played a role in drafting and approving it.⁴² Finally, it shows a different attitude towards the idea of a child's being adopted outside of his or her native country. The Convention represents a "far more enthusiastic

U.N. Doc. A/RES/41/85 (Dec. 3, 1986) (acknowledging international adoption as an option for abandoned children, but only as a last resort: "If a child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the country of origin, intercountry adoption may be considered as an alternative means of providing the child with a family.").

39. Convention on the Rights of the Child, G.A. Res. 44/25, art. 20, U.N. Doc. A/RES/44/25 (Nov. 20, 1989):

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State. 2. States Parties shall in accordance with their national laws ensure alternative care for such a child. 3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

See also *id.* art. 21:

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall: (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary; (b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin; (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption; (d) 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; (e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

40. Elizabeth Bartholet, *International Adoption: Propriety, Prospects and Pragmatics*, 13 J. AM. ACAD. MATRIMONIAL L. 181, 192 (1996).

41. See generally Hague Adoption Convention, *supra* note 1.

42. Bartholet, *supra* note 40, at 192.

endorsement of international adoption as a good solution for children without parents than any previous international agreement.⁴³ It shifts the focus from keeping children within their country of origin at all cost, to finding abandoned or orphaned children a permanent family, wherever that family may reside.⁴⁴ The Preamble states that international adoption may be the best option for a child “for whom a suitable family cannot be found in his or her [s]tate of origin.”⁴⁵ This change in tone establishes international adoption as a preferable alternative to several worst case scenarios, such as institutionalization and homelessness, while still urging countries to take “appropriate measures to enable the child to remain in the care of his or her family”⁴⁶ or, if this is not possible, to make efforts to find the child a family within his or her own country of origin.⁴⁷ Despite a hierarchy that placed international adoption near the bottom, the Convention sought to create, at a minimum, a foundation for cooperative international adoption law.⁴⁸

The Convention has three main objectives: to ensure international adoptions take place in the best interests of the child, to establish cooperation among countries so as to ensure safeguards are put in place to prevent the exploitation of children, and to promote recognition of adoptions that conform to the Convention’s standards.⁴⁹ The Convention first sets out the requirements for international adoptions.⁵⁰ The state of origin must establish that: the child is adoptable, international adoption is in the child’s best interest, and the child’s parents (or the institution where the child resides) have consented to the adoption.⁵¹ Additionally, the Convention places a duty on the receiving state to determine that: the prospective parents are eligible and suitable, they be counseled if necessary, and the child is, or will be, allowed to enter the country and permanently reside there.⁵²

43. *Id.*

44. *Id.*

45. Hague Adoption Convention, *supra* note 1, at 1134–35.

46. *Id.* at 1139.

47. *Id.*

48. BARTHOLET, *supra* note 18, at 150.

49. Hague Adoption Convention, *supra* note 1, at 1139.

50. *Id.*

51. *Id.* at 1139–40.

52. *Id.* at 1140.

Chapter III of the Convention requires contracting states⁵³ to “designate a Central Authority⁵⁴ to discharge the duties which are imposed by the Convention upon such authorities.”⁵⁵ Among other things, Central Authorities are required to work cooperatively with one another, to prevent any gain, financial or otherwise, in connection with adoption and to fulfill the requirements listed above as either a state of origin or a receiving state.⁵⁶ Chapter IV lists more specific procedures that the Central Authority must follow with respect to individual adoptions.⁵⁷ The Central Authority of the receiving state must conduct an investigation and compile a report on the potential adoptive parent or parents.⁵⁸ If it concludes that this person or couple is suitable, it will transmit the report to the Central Authority of the desired country of origin, which then evaluates the report and makes a determination on the prospective parent or parents.⁵⁹ If the country of origin’s Central Authority is satisfied, it will transmit information about the prospective adopted child to the new family.⁶⁰ Finally, both Authorities must ensure that the child will be able to leave his or her country of origin and enter the receiving country.⁶¹ Thus, the Convention not only consolidates authority and streamlines adoption practices in member states, but also creates a

53. The UN defines contracting states as “States and other entities with treaty-making capacity which have expressed their consent to be bound by a treaty where the treaty has not yet entered into force or where it has not entered into force for such States and entities.” Treaty Reference Guide, *supra* note 35. Once the treaty has entered into force for the state or entity it becomes a “party” to the treaty. *Id.*

54. The Central Authority is described as follows:

The Central Authority is the governmental body that is responsible for implementing the Convention. It may delegate many of its duties to other authorities, as provided for by the convention. For the U.S., the Department of State will provide the Central Authority, to be located in the Office of Children’s Issues. The U.S. Central Authority is expected to delegate many of its responsibilities concerning specific adoption cases to accredited bodies or approved persons (for example, preparing home studies, educating parents, and referring specific children for adoption).

Holt International, Hague Convention Definitions, <http://www.holtintl.org/hague/HagueConvDef.pdf> (last visited Apr. 18, 2010).

55. Hague Adoption Convention, *supra* note 1, at 1140.

56. *Id.* at 1140–41.

57. *Id.* at 1141–42.

58. *Id.* at 1141.

59. *Id.*

60. *Id.*

61. *Id.*

process of cooperation between the two concerned countries.⁶²

Chapter V of the Convention concerns the recognition and effects of the adoption.⁶³ Among other things, it mandates that an adoption may only be refused if it “is manifestly contrary to [the state’s] public policy.”⁶⁴ Chapter V also asserts the Convention’s recognition of the legal relationship between a child and his or her adoptive parents and the termination of this relationship, upon the finalization of the adoption, between the child and his or her birth parents.⁶⁵ Chapter VI lists general provisions.⁶⁶ Perhaps most notably, it states that “[n]o one shall derive improper financial or other gain from an activity related to an intercountry adoption” and limits any fees to “costs and expenses.”⁶⁷

IV. PROBLEMS ARISING FROM THE HAGUE CONVENTION

The Hague Convention was the first declaration of its kind to acknowledge the reality that international adoption is sometimes a positive solution for abandoned and orphaned children.⁶⁸ In bringing so many nations together to address this singular issue, the Convention also brought international attention to both the virtues of the system and the problems it still faces. Despite these achievements, however, the Convention is deficient in several areas, and it has left holes in the international adoption system that have permitted further abuses.

A. Many Countries Lack the Resources or Governmental Support Necessary for Creating and Maintaining a Central Authority

The Convention’s requirement for a Central Authority in each contracting state was designed to ensure that each country that participated in international adoption had a medium through which the UN’s adoption standards could be promoted and enforced.⁶⁹ This idea is sound in theory, but in practice it has proven unrealistic.⁷⁰

62. *See supra* Part III.

63. Hague Adoption Convention, *supra* note 1, at 1142.

64. *Id.*

65. *Id.*

66. *Id.* at 1143–44.

67. *Id.* at 1143.

68. *See supra* notes 36–40 and accompanying text.

69. Hague Adoption Convention, *supra* note 1, at 1140.

70. *See supra* Part IV.A.

Such an endeavor requires funding and a revamping of the adoption systems of most countries, a goal which may be impossible for underdeveloped nations to achieve.

In Romania, one of the first countries to ratify the Convention, the failure to fix the severely crippled adoption system has effectively led to the end of all international adoptions of Romanian children.⁷¹ In 1997, prospective adoptive parents began to complain that the system had become too slow and overly bureaucratic;⁷² unfortunately, when Romania attempted to simplify and improve it, the results were disastrous. The newly implemented laws opened the door to corruption that the government was not equipped to address.⁷³ When Romania applied for membership to the European Union (EU), the EU demanded that it overhaul its entire adoption system as a prerequisite for joining.⁷⁴ In an attempt to reevaluate and reform the system, Romania issued, in June 2001, a “temporary” moratorium on all international adoptions.⁷⁵ The U.S. agreed with this decision at the time and acknowledged that Romania’s legal framework had not always protected the best interest of the child.⁷⁶ The U.S. made recommendations on how Romania’s adoption procedures could be improved and reiterated that the child’s interest is paramount.⁷⁷ Within a month of the moratorium, Romania passed a law that banned international adoption of Romanian children by anyone other than grandparents.⁷⁸ Political changes, political opposition, uncertainty regarding international adoptions, and a lack of finances

71. Maura Harty, Assistant Sec’y of State for Consular Affairs, Testimony to the Comm’n on Sec. and Cooperation in Eur. (Sept. 14, 2005) (discussing how Romania’s adoption laws failed to protect their children and how this led to their moratorium on international adoption), *available at* http://www.passportsusa.com/law/legal/testimony/testimony_2635.html.

72. Molly S. Marx, *Whose Best Interests Does it Really Serve? A Critical Examination of Romania’s Recent Self-Serving International Adoption Policies*, 21 EMORY INT’L L. REV. 373, 383 (2007).

73. *Id.* at 384.

74. *Id.* at 386–87.

75. On the Protection and Promotion of the Rights of the Child, Law No. 272/2004, Rom. O.G. (2004). For a summary of this law in English, see The Library of Congress Global Legal Information Network, <http://content.glin.gov/summary/140306> (last visited Apr. 18, 2010).

76. Harty, *supra* note 71.

77. *Id.*

78. On Legal Status of Adoption, Law No. 273/2004, Rom O.G. (2004). For a summary of this law in English, see The Library of Congress Global Legal Information Network, <http://content.glin.gov/summary/118895> (last visited Apr. 18, 2010).

kept Romania from reforming the system to bring it in line with the Convention;⁷⁹ and, as a result, both laws remain in force to this day. This policy has left more than 80,000 Romanian children to live in orphanages or foster care without a permanent family.⁸⁰

The situation is perhaps even worse in Cambodia, where the government's inability to effectively regulate has led to the adoption of countless kidnapped or purchased children for profit.⁸¹ Despite being aware of rampant fraud within the system, the Cambodian government was not able to create a way to successfully evaluate visa applications on behalf of orphans.⁸² The child trafficking problem in Cambodia, which was most prevalent between 1997 and 2001,⁸³ is "the most documented instance of large-scale child laundering within the intercountry adoption system."⁸⁴ In fact, it is likely that most of the 1,609 Cambodian children that were adopted in the U.S. during that time were laundered.⁸⁵ As a result, on December 21, 2001,⁸⁶ the U.S. government suspended all adoptions from Cambodia.⁸⁷

The Convention's Central Authority requirement is instrumental to setting and maintaining standards for international adoption in each

79. H.R. Res. 578, 109th Cong. (2005).

80. UNICEF, Romania: Background, http://www.unicef.org/infobycountry/romania_background.html (last visited Apr. 18, 2010).

81. David M. 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, 145 (2006).

82. *Id.*

83. *Id.* at 144–45.

84. *Id.* at 135. See Ethica, Cambodian Adoption Investigation/Prosecution Documents, <http://www.ethicanet.org/item.php?recordid=camdocs&pagestyle=default> (last visited Apr. 18, 2010) (showing many of the relevant U.S. government documents concerning criminal prosecutions in the Cambodian adoption laundering scandal).

85. *Id.* at 137.

86. The U.S. government suspended all adoption of Cambodian children on December 21, 2001. However, at that time, there were a number of adoptions already underway and at various stages of the process. These "pipeline" cases continued to be evaluated and, if appropriate, were approved. As a result, there is data available on Cambodian adoptions to the U.S. as late as 2003. Trish Maskew, *Child Trafficking and Intercountry Adoption: The Cambodian Experience*, 35 CUMB. L. REV. 619, 621–25 (2005).

87. Press Release, U.S. Dep't of Justice, Immigration and Naturalization Serv., INS Announces Suspension of Cambodian Adoptions and Offer of Parole in Certain Pending Cases (Dec. 21, 2001), available at http://www.uscis.gov/files/pres_release/CambAdop_122101.pdf.

contracting state.⁸⁸ While the theory behind this mandate makes sense, in practice it is clear that the Convention's demand for adoption system reform does not automatically make such reform happen. Both the Romanian and Cambodian governments have proven unable or unwilling to carry out reforms they agreed to when they signed on to the treaty, leaving tens of thousands of children institutionalized following the passage of laws that ended their chances of adoption. These laws prove that the systems at issue are deeply flawed, and major improvements must be made to bring them in line with the Convention. The Convention, however, provides no support to help these countries achieve those improvements.⁸⁹

B. *The Convention Is Vague and Subject to Broad Interpretation*

While the Convention clearly describes the duties of the Central Authority,⁹⁰ many other aspects of the Convention are not so straightforward. Much of the ambiguity has to do with the definition of certain words.⁹¹ For instance, while the Convention explicitly states that it is up to the Central Authority in the country of origin to determine if the child in question is “adoptable,”⁹² it gives no indication as to what that means.⁹³ It does not even list minimum requirements for finding a child adoptable.⁹⁴ In many countries the system is burdened by practices such as forcing a parent or guardian to surrender his or her legal rights to the child so others can sell the child to be adopted.⁹⁵ The primary means by which launderers in Cambodia persuaded parents to give up their children were false statements such as: “a rich family will raise your baby in the United States; . . . [w]hen your child becomes an adult, he can petition for

88. *See supra* Part III.

89. *See* Smolin, *supra* note 81, at 145–47 (discussing the Cambodian government's inability to screen out cases of purchased or stolen children). *See generally* Harty, *supra* note 71 (discussing the problems within the Romanian adoption system and how the government could not cope with them).

90. *See supra* Part III.

91. *See generally* Hague Adoption Convention, *supra* note 1.

92. *Id.* at 1139 (“An adoption within the scope of the Convention should take place only if the competent authorities of the State of origin . . . have established that the child is adoptable . . .”).

93. *See generally* Hague Adoption Convention, *supra* note 1.

94. *Id.*

95. Smolin, *supra* note 81, at 115–17 (discussing the practice of launderers who buy or steal children from their birth families; thus, blurring the line between “true orphans” and “paper orphans”).

you to immigrate to the United States.”⁹⁶ Alternatively, and perhaps more cruelly, some parents were told that their child would be given a better life in Cambodia and that they could visit and/or take the child back at any time.⁹⁷ The Convention does not mandate that countries look into the background of how a child came to be an orphan and, left unchecked, many governments might find such a laundered child to be “adoptable” simply by virtue of the fact that he or she no longer has a legal guardian. By allowing such crucial terms to remain undefined and open to interpretation, the Convention runs the risk that some Central Authorities might be uncertain as to which children are appropriate candidates for adoption.

C. The Convention Is Difficult to Enforce and Does Not Impose Sanctions

While the Convention is the international community’s first attempt to set a standard that emphasizes the child’s interest within the international adoption system, it does little to ensure that contracting states adhere to that standard or other mandates.⁹⁸ One reason for this problem is the Central Authority system itself. According to Article 6 of the Convention, the Central Authority is responsible for enforcing the Convention in each individual country, and the government is in charge of supervising the Central Authority.⁹⁹ This practice allows each country to police its own international adoption system however it chooses, despite the Convention’s intention that every government should look first to its children’s best interests.¹⁰⁰

Not only are Central Authorities inadequately scrutinized, but there

96. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, BACKGROUND: OPERATION BROKEN HEARTS (2004).

97. *Id.*

98. *See generally* Hague Adoption Convention, *supra* note 1.

99. *Id.* at 1140. Article 6 provides:

(1) A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

(2) Federal States, States with more than one system of law or States having autonomous territorial units shall be free to appoint more than one Central Authority and to specify the territorial or personal extent of their functions. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State.

Id.

100. *See generally* Hague Adoption Convention, *supra* note 1.

are no sanctions contained in the Convention that can be used to punish a country that violates its requirements.¹⁰¹ Issuing moratoriums on adoptions from countries with systems that do not meet the Convention's requirements is the only recourse that has been used.¹⁰² This "solution" is ill-advised for three reasons. First, there is no broad authority that can end all adoptions from a particular country. Instead, either the country itself must decide that its system is so in need of reform that it cannot continue with international adoptions, or other individual countries must refuse to adopt from the deficient country. Second, the decision to end all adoptions often is not reached until the problem is out of hand, such as with the baby laundering epidemic in Cambodia.¹⁰³ This is likely a direct result of allowing only self-regulation. Finally, ending international adoptions is not an ideal solution; while it may temporarily stop a corrupt system, it will lead many children to end up in institutions because sending countries generally have more children in need than they do domestic families willing to adopt.¹⁰⁴ The focus must be on helping countries to reform rather than forcing them to shut down. The situation as it is will continue as long as there is no overarching authority to oversee the practices and procedures of individual Central Authorities.¹⁰⁵

V. STATE POLICIES INCONSISTENT WITH THE CONVENTION: FOCUS ON CHINA

It is clear that the Convention is far from flawless.¹⁰⁶ While the discussion thus far has focused on problems that arise because countries either will not or cannot reform their adoption systems to meet the standards of the Convention,¹⁰⁷ there is an additional problem. Many complex issues arise as a result of state policies that directly contradict the Convention's goals. Nowhere is this problem more evident than in China where the one-child policy and new

101. *Id.*

102. *See supra* Part IV.A.

103. *See supra* Part IV.A.

104. S. Res. 359, 109th Cong. (2006) (urging the government of Romania to reform their adoption system and resume international adoptions to ensure all Romanian children are raised in permanent families); Harty, *supra* note 71 (discussing the need to urge the government of Romania to resume intercountry adoptions for the sake of Romanian children in need).

105. *See infra* Part VI.

106. *See supra* Part IV.

107. *See supra* Part IV.

adoption requirements actually increase the number of children in need of a home while simultaneously preventing more children from being adopted.¹⁰⁸ In doing so, China goes against the Convention's prioritizing of adoption over institutionalization.¹⁰⁹

A. *China's One-Child Policy Is in Direct Tension with the Convention*

China enacted its famous one-child policy in 1980 to address the problem of overpopulation.¹¹⁰ The policy restricts families to having only one child unless their regional government permits them to have more.¹¹¹ Even if such permission is granted, the couple will still be penalized.¹¹² Penalties include the "loss of state benefits, housing or employment," which most poor families cannot afford.¹¹³ As a result, China has a notorious problem with abandoned and orphaned children. As of 2008, there were at least twenty million orphaned children living there.¹¹⁴ Since 1992, when China first began to allow

108. *See infra* Part V.A–B.

109. *See infra* Part V.A–B.

110. The Marriage Law of the People's Republic of China was adopted by the Third Session of the Fifth National People's Congress on April 10, 1980 and became effective on January 1, 1981. For the English text of the law, see LEGISLATIVE AFFAIRS COMMISSION OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS OF THE P.R.C., *THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA* 184–86 (1987). Article 2 of the Marriage Law states in part: "Family planning shall be practised." *Id.* Article 12 of the Marriage Law states: "Both husband and wife shall have the duty to practise family planning." *Id.*

111. CHRISTOPHER BAGLEY ET AL., *INTERNATIONAL AND TRANSRACIAL ADOPTIONS: A MENTAL HEALTH PROSPECTIVE* 188–89 (1993).

112. *Id.*

113. *Id.* Aside from the problems the one-child policy causes the international adoption system, it has serious human rights implications as well. *See* Forced Abortion and Sterilization in China: The View From the Inside: Hearing Before the Subcomm. On Int'l Operations and Human Rights of the H. Comm. On Int'l Rel., 105th Cong. (1998) (discussing the Chinese government's use of forced abortions and sterilizations to enforce their one-child policy); Olesen, *supra* note 28 (pointing out the huge disparity between boys and girls in China as a result of couples aborting or giving up female babies); *see The Earthquake*, N.Y. TIMES, May 18, 2008 (reporting that most parents who lost children in the devastating earthquake in May 2008 lost their only child because of the one-child policy). *See generally* Jim Yardley, *China to Reconsider One-Child Limit*, N.Y. TIMES, Feb. 29, 2008 (reporting that China is considering alternative ways to control their population in an attempt to soften their human rights image).

114. *NPR Weekend Edition Saturday: Considering China's One-Child Policy* (National Public Radio May 24, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=90801479>.

international adoption,¹¹⁵ it has become one of the world's leading sources for internationally adopted children.¹¹⁶

The one-child policy puts a strain on China's adoption system by increasing the number of institutionalized children in three ways. The first is the most obvious: families are allowed only one child so that, unless they are among the few that can afford to pay for more, they are forced to give up any subsequent children.¹¹⁷ Second, the policy makes any domestic adoption system effectively impossible. Because all Chinese couples are limited to one child, the overwhelming majority of couples, aside from those who are unable to have children, will choose to have their own baby rather than adopt.¹¹⁸ Finally, cultural ideas about gender have led to a surplus of abandoned baby girls.¹¹⁹ A higher value has traditionally been placed on sons than on daughters.¹²⁰ While this archaic belief has begun to change, it still prevails, particularly in rural China where the majority of the population lives.¹²¹ As a result, many families give up daughters (even firstborns) so that they can try for a son.¹²² This leads to a disproportionate number of girls in orphanages and to a general

115. Although China began to formally allow international adoptions in 1992, the practice was suspended later that year for 10 months as a result of corruption within the system. Chris Yeung, *New Agency to Monitor Child Adoption*, S. CHINA MORNING POST, Feb. 14, 1994, at 7. International adoption in China has continued uninterrupted since this ban was lifted. *Id.*

116. United States Department of State, Office of Children's Issues, Intercountry Adoption: China—Country Information, <http://adoption.state.gov/country/china.html> (last visited Apr. 18, 2010) [hereinafter Adoptions from China to the United States] (indicating that over 54,000 children have been adopted from China by U.S. families in the last ten years); Chart: Total Adoptions to the United States (by country), *supra* note 20 (showing that China has been the nation with the most adoptions to the U.S. for four out of the last five years).

117. Olesen, *supra* note 28.

118. Nili Luo, *Intercountry Adoption and China: Emerging Questions and Developing Chinese Perspectives*, 35 CUMB. L. REV. 597, 610–11 (2004). In 1999, China revised its adoption law to say that a family's one child quota would not be effected by any children they might adopt; only their biological child. *Id.* at 610–13. While this is a step in the right direction, the law has a gaping loophole: it applies only to children who passed through the social welfare system. *Id.* Any other children adopted by a Chinese couple counts as that couple's "one-child." *Id.*

119. Olesen, *supra* note 28.

120. Bagley, *supra* note 111, at 188–89 (explaining that many people still subscribe to old beliefs that favor male children in order to ensure that parents receive better support in their old-age and the carrying on of the family name).

121. *Id.*

122. *Id.*

increase in the number of children in need of adoption. It is bad enough that families are forced to give up any children following their first, but the problem severely worsens if couples keep abandoning their babies in order to get the one that they want. What if a couple has two, three, five, or more girls before they have a boy? They will ultimately relinquish many more children in this pursuit than if they had kept their first child and had to give up more only in the event of a subsequent unplanned pregnancy.

This policy and its effects directly conflict with the principles of the Convention. While the strong cultural attachment of the Chinese to bloodlines falls within the Convention's first choice scenario—that is, that a child be raised within his or her birth family—the laws enacted by the government that place a limit on children make this goal next to impossible to achieve. The Convention's second-best option, domestic adoption, is difficult for the reasons already mentioned. Additionally, it may be unacceptable to some as a result of their affinity for blood relations in families.¹²³ Short of institutionalization, international adoption becomes the only choice. The Convention obviously recognizes such adoption as a viable option,¹²⁴ but reliance on it to such an extent is contrary to the Convention's goal of keeping children at least within their country of origin.

B. *China's New, More Restrictive Adoption Laws May Reduce Foreign Adoptions Without Encouraging Domestic Adoptions*

On May 1, 2007, the China Center for Adoption Affairs enacted a law that set strict guidelines for prospective adoptive parents.¹²⁵ The law includes age and income restrictions as well as a requirement that each child be adopted by a heterosexual married couple.¹²⁶ It also restricts people with certain "health" conditions including AIDS, mental disability, blindness in either eye, severe facial deformation or a body mass index of forty or more.¹²⁷ As a result, the number of

123. Luo, *supra* note 118 at 613–14.

124. *See generally* Hague Adoption Convention, *supra* note 1.

125. Adoptions from China to the United States, *supra* note 116.

126. *Id.* The law requires that both parents be thirty to fifty years old (thirty to fifty-five if they are adopting a disabled child) and that they have a collective annual income of at least \$80,000. *Id.* In addition, it requires couples to be married for two years (five years if either has been previously divorced) and does not allow more than two divorces in the couple's past. *Id.*

127. *Id.*

Chinese adoptions in the U.S. has dropped from 6,492 in 2006 to 5,453 in 2007 to 3,911 in 2008, and finally, to 3,001 in 2009.¹²⁸ The law is still very new, but it is already having an effect on Chinese adoption. Every abandoned child that is not adopted is institutionalized. While it is true that China has the autonomy under the Convention to determine if particular prospective parents are “suitable,”¹²⁹ one could make the argument that this new law restricts many couples that would be deemed suitable under the Convention’s interpretation of that word. By preventing these people from adopting, the Chinese government is allowing some children to be put in an institution rather than be placed with a family, which is against the priorities established by the Convention.¹³⁰

VI. INTERNATIONAL OVERSIGHT TO AMELIORATE DEFICIENCIES OF THE HAGUE CONVENTION

While it is impossible to address all of the problems within the international adoption system, especially all at once, an overarching UN international central authority to supervise each of the individual Central Authorities could go a long way in alleviating some of these issues. The Convention was the first of its kind and was intended to create at least a foundation for cooperative international adoption law.¹³¹ It is hard to imagine how any new set of laws will apply in real world situations, but now that so many countries have implemented or attempted to implement the Convention’s principles, the gaps and problems within these mandates are more apparent.

Romania and Cambodia are just two examples of an unfortunate trend: countries ending their adoption programs because they cannot reform them to meet the Convention’s standards.¹³² These moratoriums are not an acceptable solution; they hurt the children in these countries more than anyone else,¹³³ which is in direct opposition to the Convention’s principle that one act “in the best interest of the child.”¹³⁴ If there were a UN appointed body to oversee this, it could look at the individual problems within each of these struggling countries and work with them to devise a plan that would be feasible

128. Chart: Total Adoptions to the United States (by country), *supra* note 20.

129. Hague Adoption Convention, *supra* note 1, at 1141.

130. *Id.* at 1134–35.

131. BARTHOLET, *supra* note 18, at 150.

132. *See supra* Part IV.A.

133. *See supra* Part IV.A.

134. Hague Adoption Convention, *supra* note 1, at 1139–40.

within their individual frameworks. Similarly, this body could address the ambiguity of the Convention.¹³⁵ Rather than waiting for a new Convention to convene on this issue, which may not happen in the near future, the UN body would be in charge of interpreting and construing the language of the Convention. This would provide all countries with one clear, uniform standard on which to base the respective systems.¹³⁶ Lastly, rather than leave the enforcement of the Convention to each individual country, this solution would allow for a more impartial implementation of the law.¹³⁷ Not only would the UN body make sure that the Convention is being applied correctly, it would also exact an appropriate penalty on countries whose international adoption systems do not meet the UN's requirements.

In attempting to put the Convention's central principles into practice most effectively, one must be optimistic but also realistic as to what can be done. While a UN-appointed authoritative body would be a step in the right direction, there is only so much it could do to eradicate the problems in international adoption. Powerful countries like China, whose policies create more abandoned children and fewer adoptive parents, are extremely unlikely to reform their laws to bring them in line with the Convention's standards. This is especially true of the one-child policy, which has been ingrained in the Chinese legal system for almost thirty years.¹³⁸ In countries where the government genuinely wants to reform international adoption, however, the addition of a new authoritative body could make a significant difference. The same could be said for countries that did not actively enact laws contrary to the Convention's principles but which nonetheless violate its mandates. An international body put in place to oversee the individual Central Authorities would go a long way in making the Convention's abstract policies more of a reality.

VII. CONCLUSION

The greatest achievement of the 1993 Hague Convention is that it identified and brought attention to the problems within the international adoption system. Unfortunately, it also brought along problems of its own.¹³⁹ The Convention fails to provide support for

135. *See supra* Part IV.B.

136. *See supra* Part IV.B.

137. *See supra* Part IV.C.

138. *See supra* note 110.

139. *See supra* Part IV.

countries that lack the infrastructure to reform their adoption systems and to create a Central Authority;¹⁴⁰ it lacks clear, specific guidelines;¹⁴¹ and it contains no effective enforcement strategies or sanctions to ensure compliance.¹⁴² Perhaps most troublesome is the fact that certain countries, such as China, enact measures that are in direct opposition to the Convention's goals.¹⁴³ One way to address these issues would be to create a central authoritative body to oversee each adoption system, help countries struggling to reform, and penalize countries that refuse to comply with the Convention's standards.¹⁴⁴ The 1993 Hague Convention is the first treaty of its kind to both address international adoption specifically and endorse it as a preferred alternative to institutionalization.¹⁴⁵ The international community must do all it can to ensure that those countries that engage in international adoption maintain it as an institution worthy of such an endorsement.

140. *See supra* Part IV.A.

141. *See supra* Part IV.B.

142. *See supra* Part IV.C.

143. *See supra* Part V.

144. *See supra* Part VI.

145. Hague Adoption Convention, *supra* note 1, at 1134–35.