

Members Only: The Need for Reform in U.S. Intercountry Adoption Policy

*Colin Joseph Troy**

I. INTRODUCTION

In the last five years, Americans have adopted nearly seventy thousand children from foreign countries.¹ The trend of intercountry adoption, “the process by which a married couple or single individual of one country adopts a child from another country,”² is representative of the new globalized world, where families are formed and dissolved beyond the bounds of national borders.³ Although intercountry adoption has enabled many adoptive parents to form loving families and provide caring living environments for countless children, intercountry adoption is not without its share of problems. Corruption and abuse, such as child trafficking, have in many cases marred the process of intercountry adoption.⁴

These impediments to safe intercountry adoption led the international community to pass the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption in 1993.⁵ By signing the Convention, countries agree to “ensure that intercountry adoptions are made in the best interest of the child and with respect for

* J.D. Candidate, Seattle University School of Law, 2012; B.A. Western Washington University, 2003. Special thanks to Christina Mach for her encouragement, the *Seattle University Law Review* for its assistance, and F. Takatsui for his inspiration.

1. Bureau of Consular Affairs, U.S. Dep’t of State, *Statistics*, INTERCOUNTRY ADOPTION, http://adoption.state.gov/about_us/statistics.php (last visited May 14, 2012) [hereinafter *Statistics*].

2. Rachel J. Wechsler, *Giving Every Child a Chance: The Need For Reform and Infrastructure in Intercountry Adoption Policy*, 22 PACE INT’L L. REV. 1, 1 (2010).

3. Ann Laquer Estin, *Families Across Borders: The Hague Children’s Conventions and the Case For International Family Law in the United States*, 62 FLA. L. REV. 47, 47 (2010).

4. Melissa Long, Comment, *Guatemala Passes Domestic Legislation to Implement Hague Adoption Convention; But Does it Help the Children?*, 15 L. & BUS. REV. AM. 631, 635 (2009).

5. Hague Conference on Private International Law, Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, S. Treaty Doc. No. 105-51 [hereinafter Hague Convention], available at http://www.hcch.net/index_en.php?act=conventions.text&cid=69. Throughout the paper I will refer to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption as the “Convention.”

his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children.”⁶ The Convention requires its members, who have signed and ratified the treaty, to follow certain protocols and procedures for intercountry adoptions between two countries that are members to the Convention. However, the Convention does not prohibit member countries from engaging in intercountry adoptions with nonmember countries.⁷ Thus, although the United States officially joined the Convention on December 12, 2007, and the Convention’s rules went into effect on April 1, 2008,⁸ the United States still allows intercountry adoptions from countries that are nonmembers to the Convention.⁹

This Comment will examine the Convention in the context of intercountry adoption in the United States. Specifically, this Comment will focus on the effect that permitting the United States to continue intercountry adoption with nonmember countries has on attaining the Convention’s goals. This Comment will argue that to effectuate the goals of the Convention, the United States must encourage nonmember countries to join the Convention and must eventually cease intercountry adoptions with nonmember countries that refuse to join. But to promote the best interests of the prospective adoptive children in nonmember countries, such a cessation must be done through a long-term, structured withdrawal, allowing nonmember countries time to develop their adoption infrastructure.

Part II of this Comment presents a brief history of intercountry adoption in the United States and explains problems associated with the growth of intercountry adoption. Part III examines the Convention’s formation and its requirements, and finishes by summarizing the United States’ ratification of the Convention. Part IV focuses on issues related to countries that are nonmembers to the Convention, including the lack of incentives nonmember countries have to join the Convention, the impracticality of the United States discontinuing adoptions from nonmember countries, and the difficulties developing nations have in implementing the Convention. Part IV closes by examining efforts by both the international community and the United States to encourage nonmembers to join the Convention. Part V proposes that the United States Department of State create a committee to encourage nonmember countries to join

6. *Id.*

7. Caeli Elizabeth Kimball, Student Article, *Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, 33 DENV. J. INT’L L. & POL’Y 561, 563 (2005).

8. Long, *supra* note 4, at 636.

9. Annette Schmit, Note, *The Hague Convention: The Problems with Accession and Implementation*, 15 IND. J. GLOBAL LEGAL STUD. 375, 388 (2008).

the Convention and also proposes that the United States begin a long-term withdrawal of intercountry adoptions from nonmember countries that refuse to join the Convention.

II. A HISTORY OF INTERCOUNTRY ADOPTION AND THE FORMATION OF THE CONVENTION

This Part begins by discussing the growth of intercountry adoptions within the United States and then examines problems that developed internationally as a result of the rise of intercountry adoption.

A. *The Rise of Intercountry Adoption in the United States*

In the United States, the rise of intercountry adoption began after World War II, when large numbers of children orphaned or abandoned abroad as a result of the war were adopted in America.¹⁰ The trend of Americans adopting foreign children continued to grow as more wars, natural disasters, and medical epidemics led to more children losing their biological parents and becoming orphans.¹¹ Currently, the United States is the country that receives the largest number of children through intercountry adoption, almost half of all children internationally adopted in a given year.¹² The trend of the United States adopting large numbers of foreign children is indicative of the larger trend in intercountry adoption of wealthier countries adopting children from poorer developing nations.¹³

Over time, social and legal changes within the United States have also fueled intercountry adoption.¹⁴ Within the United States, the advent and increased use of contraception, the legalization of abortion, and the

10. Erica Briscoe, Comment, *The Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption: Are Its Benefits Overshadowed by its Shortcomings?*, 22 J. AM. ACAD. MATRIM. LAW. 437, 437 (2009).

11. Rebecca Worthington, Note, *The Road to Parentless Children is Paved with Good Intentions: How the Hague Convention and Recent Intercountry Adoption Rules are Affecting Potential Parents and the Best Interests of Children*, 19 DUKE J. COMP. & INT'L L. 559, 560 (2009). The popularity of intercountry adoption spiked after the Korean War. Wechsler, *supra* note 2, at 2. More recently, the AIDS epidemic in sub-Saharan Africa has left millions of children orphaned. Worthington, *supra* note 11, at 560-61.

12. Long, *supra* note 4, at 632-33.

13. Worthington, *supra* note 11, at 561. Among Convention members, the five countries receiving the most children through intercountry adoption are Canada, France, Italy, Spain, and the United States. INT'L SOC. SERV., THE GREY ZONES OF INTERCOUNTRY ADOPTION 4 (2010), available at http://www.hcch.net/upload/wop/adop2010_info6e.pdf.

14. Lindsay K. Carlberg, Note, *The Agreement Between the United States and Vietnam Regarding Cooperation on the Adoption of Children: A More Effective and Efficient Solution to the Implementation of the Hague Convention on Intercountry Adoption or Just Another Road to Nowhere Paved with Good Intentions?*, 17 IND. INT'L & COMP. L. REV. 119, 126 (2007).

increase in single parents opting to keep their children instead of putting them up for adoption have led to fewer domestic infants being available for adoption.¹⁵ The resulting decrease in the number of American babies available for adoption led many parents seeking to adopt to choose intercountry adoption.¹⁶ This influx of parents seeking intercountry adoption, coupled with a realization by “sending countries”¹⁷ that intercountry adoption could reduce high orphan populations, led to the increase of intercountry adoption in the United States.¹⁸ Generally, the increase in intercountry adoptions by United States citizens is mutually beneficial to both the United States and the various sending countries; adoptive parents in the United States get a child they wish for and the poverty burden in the sending country is lessened by providing an orphan with a suitable home abroad.¹⁹

B. Problems with and Reactions to the Growth of Intercountry Adoption

As the number of intercountry adoptions in the United States has increased, so has the number of problems associated with the adoption process. For example, conflicting laws between the United States and sending countries, along with bureaucratic red tape, have made intercountry adoption more difficult.²⁰ Problems obtaining visas, increased bureaucracy, constantly changing laws, and an increased demand for adoptions have all led to corruption in the intercountry adoption process.²¹ The increase in intercountry adoptions²² and the resulting corruption eventually led to the creation of a black market for babies,²³ which was fueled by corrupt practices like kidnapping and child trafficking.²⁴ In these black markets, “baby brokers” pay birth mothers or women posing as mothers and then place the children into the adoption market for sale

15. *Id.*

16. *Id.*

17. For the purposes of this article, “sending countries” are those countries that have large numbers of their children adopted abroad through intercountry adoptions. “Receiving countries” are those countries that adopt a large number of children from abroad.

18. Carlberg, *supra* note 14, at 126. The number of registered intercountry adoptions steadily grew until 2004 when the United States registered nearly 23,000 intercountry adoptions. *Statistics, supra* note 1. Since 2004, the number of intercountry adoptions has gradually waned, with the United States registering 11,058 adoptions in 2010. *Id.*

19. Carlberg, *supra* note 14, at 125.

20. *Id.*

21. *Id.* at 129.

22. *Id.* at 125.

23. Briscoe, *supra* note 10, at 437.

24. *Id.* at 438.

as a commodity.²⁵ Because of their illicit nature, the black markets lack any law or regulation ensuring the safety or best interests of the children involved.²⁶ Following emergencies and natural disasters that lead to a spike in the number of orphans, vulnerable children may be abducted and trafficked through the intercountry adoption process.²⁷ The Internet has also bolstered the intercountry-adoption black market because it ultimately makes finding an adoptive child cheaper, which in turn makes baby trafficking more profitable for child traffickers.²⁸ Authorities have an even more difficult time catching child traffickers when black market adoptions are conducted through the Internet.²⁹

Strong reactions to news stories about child trafficking and tales of a black market where children were being sold as commodities led to international efforts to create a more regulated system for international adoption.³⁰ The United Nations General Assembly adopted the Convention on the Rights of the Child in 1989.³¹ More recently, in 1993, the international community, recognizing the need for a multilateral approach,³² responded to the challenges posed by intercountry adoption through the Convention.³³

III. THE HAGUE CONVENTION

On May 29, 1993, the seventeenth session of The Hague Conference on Private International Law adopted the Convention.³⁴ The Convention served as a large step by the international community to legitimize and attempt to regulate intercountry adoption on an international level.³⁵ A watershed event in intercountry adoption, the treaty was the first to provide formal multinational recognition of intercountry adoption.³⁶ The Convention improved upon preceding international instru-

25. Worthington, *supra* note 11, at 562.

26. *Id.*

27. *Id.* at 563.

28. Carlberg, *supra* note 14, at 127.

29. *Id.*

30. Briscoe, *supra* note 10, at 437–38. International recognition of the problems involved with international adoption has led sending and receiving nations to implement stricter intercountry adoption policies, which has contributed to the recent reduction in intercountry adoptions. Wechsler, *supra* note 2, at 3.

31. Briscoe, *supra* note 10, at 438.

32. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, EXPLANATORY REPORT ON THE 1993 HAGUE INTERCOUNTRY ADOPTION CONVENTION 62 (1994), <http://www.hcch.net/upload/exp133e.pdf> [hereinafter Explanatory Report].

33. Hague Convention, *supra* note 5.

34. Briscoe, *supra* note 10, at 438.

35. Long, *supra* note 4, at 635.

36. *Id.*

ments such as the 1989 United Nations Convention on the Rights of the Child, and added new safeguards to the intercountry adoption process by regulating both sending and receiving countries.³⁷ The Convention has been called “the most significant international agreement regarding the regulation of intercountry adoptions”³⁸ and lauded as “the most ambitious and monumental action taken . . . regarding the need to protect children, birth parents, and adoptive parents involved in intercountry adoptions from child trafficking and other abuses.”³⁹

A. *The Framework of the Convention*

The Convention is founded on the belief that all children should be raised in a family environment.⁴⁰ The Convention’s first priority is for children to stay with their biological families, but the Convention recognizes that in certain cases intercountry adoption is necessary to provide children the family environment the Convention promotes.⁴¹ Thus, the Convention prefers that a child be adopted internationally when the alternative is for the child to reside in an institution or orphanage within the child’s own country.⁴² The Convention’s preference for intercountry adoption over institutionalization marks a change from earlier approaches, like UNICEF’s, which prioritized in-country foster care as preferable to intercountry adoption.⁴³

The Convention sought to achieve three specific objectives. First, the Convention sought to establish safeguards to ensure that intercountry adoptions are in the best interest of the child being adopted.⁴⁴ Second, the Convention sought to establish a system for contracting states to prevent child abduction and child trafficking.⁴⁵ Finally, the Convention aimed to secure recognition of adoptions under the Convention by all member states.⁴⁶ To achieve these objectives, the Convention established guidelines for adoptions between two Convention member countries.⁴⁷

37. See Hague Convention, *supra* note 5.

38. Laura Beth Daly, Note, *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 (2007).

39. Carlberg, *supra* note 14, at 129.

40. Long, *supra* note 4, at 636.

41. *Id.*

42. *Id.*

43. *Id.*

44. Hague Convention, *supra* note 5, art. I.

45. *Id.*

46. *Id.*

47. See *id.* art. II.

First, the Convention requires that member countries establish a “central authority” to oversee their own intercountry adoption processes and enforce the Convention’s provisions domestically.⁴⁸ The United States designated the Department of State as its central authority when it implemented the Convention.⁴⁹ Generally, a country’s central authority will oversee and monitor the adoption process within its own country—including the implementation of the Convention’s requirements through legislation—and also act as a coordinating body for adoptions with other countries.⁵⁰ The central authority is also responsible for accrediting adoption agencies for purposes of intercountry adoption.⁵¹

Second, the Convention regulates the intercountry adoption process for sending countries that are members to the Convention. Article 4 of the Convention lays out the responsibilities of sending countries during an intercountry adoption.⁵² Sending countries must first determine if the prospective adoptive child is actually adoptable and if so, whether intercountry adoption is in the best interest of the child.⁵³ In determining whether the child is adoptable, the sending country’s central authority must ensure that the birth mother of the child freely consented to giving the child up for adoption without being induced by payment.⁵⁴ The Convention also requires that authorities in the sending country consider the child’s own wishes when deciding whether or not to allow a potential intercountry adoption.⁵⁵ Under the Convention, sending countries must also prepare a report outlining general information on the prospective adopted child and submit that report to the central authority of the receiving country.⁵⁶

Finally, the Convention establishes requirements for receiving countries.⁵⁷ A receiving country’s central authority must determine the eligibility and suitability of potential adoptive parents, ensure that potential adoptive parents receive necessary counseling, and determine that the

48. *Id.* art. VI.

49. Bureau of Consular Affairs, U.S. Dep’t of State, *Intercountry Adoption: Our Role*, http://adoption.state.gov/about_us/role.php (last visited May 14, 2012).

50. Briscoe, *supra* note 10, at 442.

51. *Id.*

52. Hague Convention, *supra* note 5, art. IV.

53. *Id.*

54. *Id.*

55. *Id.*

56. Hague Convention, *supra* note 5, art. XVI. The report on the potential adoptee must include “information about his or her identity, adoptability, background, social environment, family history, medical history including that of the child’s family and any special needs of the child.” *Id.*

57. *Id.* art. V.

child can legally enter and live in the receiving country.⁵⁸ Just as the sending country must report information concerning the adoptive child, the receiving country must prepare and transmit a report to the sending country's central authority detailing the potential adoptive parents.⁵⁹

By signing the Convention, a country indicates its intention to eventually become a member of the treaty, but does not obligate itself to ratify the treaty.⁶⁰ Thus, a country can accede to the Convention, instead of ratifying it, thereby affirming its commitment to the Convention's goals without binding itself to the Convention's terms.⁶¹ Countries that choose to sign but not ratify the Convention remain nonmembers without any obligations under the Convention.⁶² Thus, to ensure full compliance with the Convention, it is critical that nonmember countries not only sign the Convention, but also ratify it so that they are held to the heightened standards required of member countries.

B. The United States' Response to the Convention

After participating in the seventeenth session of the Hague Conference on Private International Law,⁶³ the United States manifested its intent to become a party to the Convention by signing the Convention in March of 1994.⁶⁴ The United States then began drafting legislation between 1994 and 1998 to implement the Convention.⁶⁵ These efforts eventually led to Congress enacting the Intercountry Adoption Act (IAA) in 2000.⁶⁶ The IAA established the Department of State as the central authority within the United States and required that any person or group wishing to provide international adoption services be accredited.⁶⁷ The IAA also set out provisions for enforcing the Convention and provided that the Convention and the IAA would preempt any inconsistent state

58. *Id.*

59. *Id.* art. XV. The report must contain "information about their identity, eligibility and suitability to adopt, background, family and medical history, social environment, reasons for adoption, ability to undertake an intercountry adoption, as well as characteristics of the children for whom they would be qualified to care." *Id.*

60. Kimball, *supra* note 7, at 568-69.

61. *Id.*

62. *Id.* at 572.

63. Explanatory Report, *supra* note 32, at 4.

64. Kate O'Keefe, Note, *The Intercountry Adoption Act of 2000: The United States' Ratification of the Hague Convention on the Protection of Children, and its Meager Effect on International Adoption*, 40 VAND. J. TRANSNAT'L L. 1611, 1614 (2007).

65. Estin, *supra* note 3, at 81.

66. *Id.* at 83.

67. Carlberg, *supra* note 14, at 138.

laws.⁶⁸ After passing the IAA, the United States eventually ratified the Convention in December 2007, and the Convention came into effect in the United States on April 1, 2008.⁶⁹

Notably, the IAA does not prohibit families in the United States from adopting children from countries that are nonmembers to the Convention.⁷⁰ Any country that ratifies the Convention has a legal obligation to incorporate the Convention's terms into its domestic and international law.⁷¹ Because the Convention does not prohibit adoption from nonmember countries, however, the United States' policy of continuing adoptions from nonmember countries is legal.⁷²

IV. U.S. RELATIONS WITH NONMEMBER COUNTRIES UNDER THE CONVENTION

While the United States is now a member to the Convention, the United States continues to adopt children from countries that are nonmembers of the Convention.⁷³ Although the Convention regulates adoptions that take place between member countries that have mutually ratified the Convention,⁷⁴ it does not specify how member countries should interact with nonmember countries.⁷⁵ Thus, the Convention does not expressly prohibit adoptions between member countries and nonmember countries.⁷⁶ Member countries therefore have the freedom to establish their own intercountry adoption laws to affect their public policy goals beyond the standards required by the Convention.⁷⁷ This freedom allows member countries to deal with intercountry adoptions from nonmember countries several ways.⁷⁸ One option is for member states to ban adoptions from nonmember countries in an effort to ensure that the Convention's goals are met.⁷⁹ Another option, and the one followed by the United States, is to engage in intercountry adoptions with fellow member

68. U.S. Dep't of Health & Human Servs., *Intercountry Adoption Act of 2000*, CHILD WELFARE INFORMATION GATEWAY, http://www.childwelfare.gov/systemwide/laws_policies/federal/index.cfm?event=federalLegislation.viewLegis&id=51 (last visited May 14, 2012).

69. Estin, *supra* note 3, at 84.

70. Schmit, *supra* note 9, at 377.

71. Carlberg, *supra* note 14, at 130.

72. *See generally* Hague Convention, *supra* note 5.

73. *Statistics*, *supra* note 1..

74. Long, *supra* note 4, at 635.

75. Briscoe, *supra* note 10, at 451.

76. Long *supra* note 4, at 640.

77. Andrew C. Brown, Comment, *International Adoption Law: A Comparative Analysis*, 43 INT'L LAW. 1337, 1344–45 (2009).

78. Briscoe, *supra* note 10, at 451.

79. Long, *supra* note 4, at 640.

countries under the Convention, but to also allow intercountry adoptions from countries that are nonmembers to the convention.⁸⁰

Section A of this Part examines the high cost of implementing the Convention and the disincentives for nonmember countries to join the Convention. Section B explains why abruptly discontinuing adoptions with nonmember countries is not a viable option for the United States. Section C examines the practical difficulties developing nations have in unilaterally implementing the Convention requirements and discusses whether joining the Convention is worth enduring these difficulties. Section D explores efforts by both the Hague Conference and the United States to encourage nonmember countries to join the Convention.

A. The Disincentives to Join the Convention

The high cost of implementing Convention requirements and the United States' continued adoption of children from nonmember countries create a disincentive for nonmember countries to join the Convention. No incentive exists for nonmember sending countries to substantially change their lucrative adoption systems to more regulated, costlier systems that would meet Convention standards.⁸¹ Because the economic cost of implementing a system that conforms to the Convention's standards deters nonmember sending countries from joining the Convention,⁸² and because the Convention does not prohibit adoptions between member and nonmember countries, adoptions between member and nonmember countries will continue even if nonmember countries do not ratify the Convention.⁸³ By effectively ensuring that adoptions continue between countries that are not parties to the Convention, the Convention's goals are undermined.⁸⁴

The United States inhibits the goal of ending abuses within the intercountry adoption system on a global scale by continuing to adopt children from nonmember countries. To achieve the Convention's goal of ending abuses within the intercountry adoption system, the Convention must be signed and ratified by a majority of sending countries.⁸⁵ As long as the United States continues to adopt children from nonmember countries, nonmember countries have no incentive to spend valuable re-

80. See 42 U.S.C. §14921 (2000).

81. Carlberg, *supra* note 14, at 136.

82. Kimball, *supra* note 7, at 564.

83. *Id.*

84. *Id.*

85. Carlberg, *supra* note 14, at 146. See generally Hague Convention, *supra* note 5.

sources in efforts to join the Convention.⁸⁶ Thus, the United States' continued adoption of children from nonmember sending countries ultimately undermines the principles and provisions of the Convention.⁸⁷

This disincentive to join the Convention is exacerbated by the fact that if the nonmember country joins the Convention, it will not be allowed to continue adoptions with the United States or other member countries until it fully complies with all of the Convention's standards.⁸⁸ The threat of member countries discontinuing intercountry adoptions because of noncompliance with the Convention's regulations will cause nonmember countries that are considering joining the Convention to delay efforts at compliance with the Convention, perhaps indefinitely.⁸⁹ Thus, instead of joining the Convention, nonmember countries are more likely to draft their own treaties or provisions governing their adoption processes.⁹⁰

B. The Problem with the United States Banning Adoptions from Nonmember Countries

Although the United States must cease intercountry adoptions with nonmember countries to fully effectuate the goals of the Convention and to create an incentive for nonmember countries to join the Convention, abruptly ceasing adoptions from nonmember countries would lead to increased institutionalization and homelessness of potential adoptees.⁹¹ Because the Convention prefers intercountry adoption over institutionalization,⁹² abruptly banning intercountry adoption from nonmember countries and causing more children to be institutionalized runs contrary to the Convention's goals.⁹³ UNICEF concluded that when children are placed in institutions unnecessarily or for too long, they receive less stimulation and individual attention, which they require to grow to their full potential.⁹⁴ These institutionalized children are subject to physical, mental, and emotional challenges.⁹⁵ Studies have found that children who spent significant periods of time in institutional care suffer more psycho-

86. Kimball, *supra* note 7, at 583.

87. Brown, *supra* note 77, at 1364.

88. *Id.*

89. *Id.*

90. *Id.*

91. *See generally* Hague Convention, *supra* note 5, pmb1.

92. *See id.*

93. *See id.*

94. Worthington, *supra* note 11, at 570.

95. *Id.* at 571.

logical and physical problems than children adopted during infancy.⁹⁶ Those psychological and physical disabilities may make the children more difficult to parent later in life if they are ever adopted.⁹⁷ The potential outcome of a complete ban on adoption from nonmember countries—increased homelessness and institutionalization—could detrimentally affect children and families that the Convention was designed to protect.⁹⁸

The threat of member countries discontinuing adoptions from member countries that have not sufficiently implemented the Convention's requirements is real. From 2006 to 2008, Americans adopted over 4,000 children per year from Guatemala.⁹⁹ This high rate of adoption was largely due to the lack of regulation of intercountry adoptions within Guatemala.¹⁰⁰ Guatemala ratified the Convention in May of 2007 and the Convention entered into force in December of 2007.¹⁰¹ Since Guatemala and the United States have both become parties to the Convention, adoptions to the United States from Guatemala have dropped to just 754 in 2009 and to only 50 in 2010.¹⁰² Currently, the United States has ceased adoptions from Guatemala because Guatemala has failed to "create a Convention-compliant adoption process, and as a result, Guatemala cannot meet its Convention obligations."¹⁰³ The risk of losing an existing adoption relationship with a member country due to insufficient implementation of Convention standards is enough to keep nonmember countries from joining the Convention and jeopardizing their current stream of adoptions.¹⁰⁴

By abruptly discontinuing intercountry adoptions with sending countries, the United States adversely affects the children in those coun-

96. Briscoe, *supra* note 10, at 453.

97. Long, *supra* note 4, at 657–58.

98. Worthington, *supra* note 11, at 582.

99. Bureau of Consular Affairs, U.S. Dep't of State, *Guatemala Country Information*, INTERCOUNTRY ADOPTION, http://adoption.state.gov/country_information/country_specific_info.php?country-select=guatemala (last updated Nov. 2009) [hereinafter *Guatemala Info*].

100. Daly, *supra* note 38, at 624.

101. Long, *supra* note 4, at 650.

102. *Guatemala Info*, *supra* note 99. Though the United States has largely halted adoptions with Guatemala, certain pending cases were grandfathered in after the ban, which accounts for the continuing, although limited, number of adoptions from Guatemala after the ban. Bureau of Consular Affairs, U.S. Dep't of State, Office of Children's Issues Trip to Guatemala, INTERCOUNTRY ADOPTION (Feb. 3 2011), http://adoption.state.gov/country_information/country_specific_alerts_notices.php?alert_notice_type=notices&alert_notice_file=guatemala_3.

103. *Guatemala Info*, *supra* note 99.

104. See Schmit, *supra* note 9, at 388. In 2010, four of the top five countries (Ethiopia, Russia, South Korea, and Ukraine) from which the United States received children through intercountry adoptions were nonmembers to the Convention. *Statistics*, *supra* note 1.

tries. In December 2002, the United States ceased adoptions with Cambodia because of suspicions of child trafficking.¹⁰⁵ Some regarded the United States' measure as "the equivalent of condemning children without families to institutional life."¹⁰⁶ Similarly, after adoptions ceased between the United States and Guatemala, some lamented the fact that thousands of potential adoptees were prevented from joining adoptive homes in the United States because of political and legislative reasons¹⁰⁷ and were instead destined to a life in a Guatemalan orphanage or an unsuitable life in the countryside where children's survival rates are significantly lower.¹⁰⁸

When the United States, the world's number one recipient of intercountry adoptions,¹⁰⁹ ceases adoptions from another country, it will greatly affect the number of children adopted from that country. Many of the top ten nations from which the United States has received adoptees—Russia, Kazakhstan, South Korea, the Ukraine, and Ethiopia—are non-members to the Convention.¹¹⁰ If the United States abruptly discontinued adoptions from any of these countries, these countries would likely have more children to take care of because domestic families would not adopt all of the children.

Some countries, such as South Korea, restricted intercountry adoptions and discovered that domestic adoption did not increase enough to offset the loss of international adoptions.¹¹¹ There are now roughly 17,000 children living in public orphanages in South Korea.¹¹² Although it was a unilateral decision by a nonmember country to limit intercountry adoptions and not a decision by the receiving country to halt adoptions, South Korea's actions show the dangers of abruptly stopping intercountry adoption. The limited demand for domestic adoptions will likely result in unadopted children living in orphanages or on the street because many sending countries' social welfare systems do not have the resources to handle these children domestically.¹¹³ And children living on

105. Wechsler, *supra* note 2, at 35.

106. *Id.* at 15.

107. Daly, *supra* note 38, at 626.

108. *Id.* at 624–25.

109. Wechsler, *supra* note 2, at 15.

110. *Statistics*, *supra* note 1. This webpage's interactive world map supports this proposition.

111. Worthington, *supra* note 11, at 572.

112. Wechsler, *supra* note 2, at 13.

113. Worthington, *supra* note 11, at 581.

the street are at risk of becoming victims of child trafficking,¹¹⁴ which is antithetical to the Convention's goals.¹¹⁵

Romania, motivated by its acceptance into the European Union being conditioned on reform of its adoption system, banned intercountry adoption in 2001.¹¹⁶ As a result, intercountry adoptions to the United States dropped from 1119 children in 2000 to just 5 children in 2009.¹¹⁷ Since the ban, children have been forced to live with destitute families and placed in orphanages.¹¹⁸ UNICEF statistics from 2006 estimated that there were 77,866 abandoned children in private or public care in Romania.¹¹⁹ Of those, roughly a third ended up in institutions, while less than five hundred were placed in an adoption system.¹²⁰ Because Romania's social welfare system was insufficient to care for the influx of abandoned children, and domestic adoption was not enough to compensate for the ban on intercountry adoptions, many children were forced to live on the streets of Romania.¹²¹ The United States recognized that Romania's outright ban on intercountry adoptions, while intended to help protect the children and families involved, ultimately ended up doing greater harm to the children than good.¹²²

C. Difficulties Implementing the Convention

Many developing nonmember sending countries willing to join the Convention will be unable to implement all the Convention's requirements on their own because of financial, social, and political limitations. "Implementation efforts generate bureaucratic, political, and financial obstacles which states are forced to overcome in order to become signatories to the Hague Convention."¹²³ The Convention places formidable burdens on sending countries. Sending countries are required to "regulate the process of matching children with adoptive parents, protect the rights of the children and their biological parents, investigate ways for the chil-

114. *Id.* at 569.

115. See Hague Convention, *supra* note 5, pmbl.

116. Worthington, *supra* note 11, at 581.

117. Bureau of Consular Affairs, U.S. Dep't of State, *Romania Country Information*, INTERCOUNTRY ADOPTION, http://adoption.state.gov/country_information/country_specific_info.php?country-select=romania (last updated July 2010). Although there is a general ban on intercountry adoption, there is an exception allowing grandparents, aunts, and uncles of potential children to adopt children abroad, which explains the five adoptions in 2008 despite the ban. *Id.*

118. Worthington, *supra* note 11, at 581.

119. *Id.*

120. *Id.*

121. *Id.* at 581-82.

122. *Id.* at 582.

123. Briscoe, *supra* note 10, at 452.

dren to remain in their birth country, and combat illegal adoption practices.”¹²⁴

Nonmember sending countries’ limited financial resources and political instabilities often make it difficult for them to implement the Convention’s many provisions.¹²⁵ The dearth of money, political support, and practical expertise in many countries makes implementation in developing nations at best arduous and at worst impossible.¹²⁶ Developing countries’ inability to handle the administrative burdens associated with implementing the Convention is problematic because these countries usually have the most orphans and the greatest amount of corruption in their adoption processes,¹²⁷ making them hotbeds for the problems in the intercountry adoption process that the Convention sought to address. In other words, the countries in most need of the Convention are the countries least able to implement it. These developing countries, which receive criticism for child trafficking, are at the same time unable to successfully implement the Convention’s standards that address this problem.¹²⁸

For instance, after Guatemala acceded to the Convention in November of 2002, Canada, Germany, the Netherlands, Spain, and Great Britain, all Convention members, objected and discontinued intercountry adoptions with Guatemala because its adoption practices were inconsistent with the Convention’s requirements.¹²⁹ At the time of accession, Guatemala lacked the resources and adoption infrastructure to comply with and join the Convention.¹³⁰ Nevertheless, Guatemala affirmed its commitment to the Convention’s goals by acceding to the Convention only to have prominent member countries discontinue intercountry adoptions with Guatemala.¹³¹ Developing nonmember countries with the desire but not the means to implement the Convention will be loath to accede to the Convention for fear that its intercountry adoptions will be stopped like Guatemala’s. But the Convention’s effectiveness is contingent on getting countries—especially developing countries with large numbers of orphans and high levels of corruption in their adoption processes—to become parties to the Convention. Therefore, member countries should encourage developing nations to accede to the Convention,

124. Wechsler, *supra* note 2, at 28.

125. Briscoe, *supra* note 10, at 454.

126. *Id.*

127. Wechsler, *supra* note 2, at 27.

128. Worthington, *supra* note 11, at 566.

129. Daly, *supra* note 38, at 626.

130. *See generally* Daly, *supra* note 38.

131. Long, *supra* note 4 at 646.

and should offer assistance in implementing the Convention's requirements.

In addition to financial barriers complicating implementation, implementation also imposes social costs for children in the sending countries. There are legitimate concerns that if a government begins to implement the Convention's standards through the legislative process, potential adoptees in need of homes would have to wait prolonged periods of time to be adopted.¹³² Because of this, some have argued that less regulation in the intercountry adoption process makes it easier to provide children with caring adoptive homes in a shorter period of time.¹³³ This view recognizes the short-term detrimental effects on children when countries try to comply with the Convention and the likelihood that "many of the children who may have previously been adopted by foreigners will not be adopted domestically and, instead, will be without a permanent home and family."¹³⁴ Although this view correctly emphasizes the social costs Convention implementation can have on children, it ignores the adverse effects, such as child trafficking, that under-regulation has on many children.

Despite the potential for short-term social costs to children, the Convention's regulations can serve children's interests in the long term if implemented in more countries. For example, the Convention requires that both sending and receiving nations have a designated central authority to oversee the adoption process by communicating with the other countries involved, ensuring that the adoption is truly in the best interest of the child, and establishing the legitimacy of the adoption by proving informed consent of the parents and the children where applicable.¹³⁵ This requirement operates as a bulwark against child-trafficking and other abuses caused by under-regulation.

D. Past Efforts to Encourage Compliance

The Hague Conference and the United States have both tried to encourage nonmember countries to comply with Convention standards and to join the Convention. In 2000, the Hague Conference's secretariat, the Permanent Bureau, formed a "Special Commission" to review the practical operation of the Convention.¹³⁶ The Special Commission unanimous-

132. See Daly, *supra* note 38, at 625.

133. *Id.* at 624.

134. Worthington, *supra* note 11, at 573.

135. See generally Hague Convention, *supra* note 5.

136. See generally REPORT AND CONCLUSIONS OF THE SPECIAL COMMISSION ON THE PRACTICAL OPERATION OF THE HAGUE CONVENTION OF 29 MAY 1993 ON PROTECTION OF

ly recommended that member countries apply Convention principles to nonmember countries and encourage nonmember countries to join the Convention.¹³⁷ Later Commissions that reviewed the practical operation of the Convention again in 2005¹³⁸ and in 2010 reiterated this recommendation.¹³⁹ Thus, while the text of the Convention is silent on how member countries should deal with intercountry adoptions from nonmember countries,¹⁴⁰ the Hague Conference's Special Commissions have stated that member countries must engage with nonmember countries to encourage them to join the Convention.¹⁴¹

To assist nonmember nations in implementing and applying Convention standards, the Hague Conference's Permanent Bureau developed a Guide to Good Practice aimed "at policy makers involved in short-term and long-term planning to implement the Convention in their country."¹⁴² This guide is meant to assist nonmember nations seeking to join the Convention to implement the Convention at the local, national, and international level.¹⁴³ "The Guide is intended to be a practical and hands on guide—one that would give practical advice and authentic examples from the current national practices to assist countries to prepare for implementation and to actually perform their obligations and procedures after ratification or accession."¹⁴⁴

CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION (2001), *available at* http://www.hcch.net/index_en.php?act=publications.details&pid=2273&dtid=2 [hereinafter SPECIAL COMMISSION 2000].

137. *Id.*

The Special Commission recommends that States Parties, as far as practicable, apply the standards and safeguards of the Convention to the arrangements for intercountry adoption which they make in respect of non-Contracting States. State Parties should also encourage such States without delay to take all necessary steps, possibly including the enactment of legislation and the creation of a Central Authority, so as to enable them to accede to or ratify the Convention.

Id. at 31.

138. 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 OF INTERCOUNTRY ADOPTION 52 (2006), *available at* http://www.hcch.net/index_en.php?act=publications.details&pid=3835&dtid=2 [hereinafter SPECIAL COMMISSION 2005].

139. CONCLUSIONS AND RECOMMENDATIONS OF THE SPECIAL COMMISSION ON THE PRACTICAL OPERATION OF THE HAGUE CONVENTION OF 29 MAY 1993 ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION 9 (2010), *available at* http://www.hcch.net/upload/wop/adop2010_rpt_en.pdf [hereinafter SPECIAL COMMISSION 2010].

140. *See generally* Hague Convention, *supra* note 5.

141. SPECIAL COMMISSION 2000, *supra* note 136, at 31.

142. SPECIAL COMMISSION 2005, *supra* note 138, at 15.

143. *Id.*

144. *Id.*

Following the Guide to Good Practice with a more hands-on approach, the Permanent Bureau established the Intercountry Adoption Technical Assistance Programme (ICATAP), which provides assistance directly to governments of nonmember countries that are going to ratify or accede to the Convention, or those countries that are having difficulties implementing the Convention.¹⁴⁵ The ICATAP works to identify weaknesses or needs in a particular country seeking to join the Convention, and then considers what resources the Hague Conference can offer in terms of training and technical assistance.¹⁴⁶ The United States has supported ICATAP with grants to help with running costs.¹⁴⁷ The Special Commission has acknowledged the value of ICATAP and the technical assistance it has provided to countries such as Nepal in their efforts to join the Convention.¹⁴⁸ But the limited resources available to the Permanent Bureau bind the ICATAP, and the Special Commission has encouraged member countries to make financial or in-kind contributions to maintain the program.¹⁴⁹ Because of the limited resources available to ICATAP, there is a need for member states, such as the United States, to either continue to fund the ICATAP or unilaterally assist developing nations seeking to implement the Convention.

Like the Hague Conference, the United States has encouraged sending countries to conform to the Convention. Although these efforts demonstrate the United States' interest in other countries joining and implementing standards that conform to the Convention, the ineffective results demonstrate that the United States needs to alter its approach to encouraging other states' compliance with the Convention. For example, before Guatemala became a member to the Convention, the U.S. State Department regularly issued notices concerning intercountry adoptions with Guatemala and expressed hope that the Guatemalan government would pass legislation implementing the Convention.¹⁵⁰ Further, government officials visited Guatemala to push the Guatemalan government to implement the Convention.¹⁵¹ Although Guatemala ultimately ratified the Convention,¹⁵² it did so before it instituted a Convention-compliant

145. THE HAGUE CONFERENCE INT'L CTR. FOR JUDICIAL STUDIES & TECHNICAL ASSISTANCE, THE INTERCOUNTRY ADOPTION TECHNICAL ASSISTANCE PROGRAMME, 4 (2009) [hereinafter ASSISTANCE PROGRAMME], available at http://www.hcch.net/upload/icatap_e.pdf.

146. *Id.* at 2.

147. *Id.* at 4.

148. *Id.*

149. *Id.*

150. Daly, *supra* note 38, at 625.

151. Long, *supra* note 4, at 649.

152. *See id.* at 650.

adoption process, forcing the United States, as a Convention member, to discontinue intercountry adoptions with Guatemala.¹⁵³

The United States has also used bilateral treaties to encourage sending nations to comply with Convention standards. The Convention desired to take “into account the principles set forth in international instruments, in particular the *United Nations Convention on the Rights of the Child*, of 20 November 1989,”¹⁵⁴ which required the parties to “ensure that the best interests of the child shall be the paramount consideration”¹⁵⁵ and to “take all appropriate national, bilateral and multilateral measures to prevent the abduction, the sale of or traffic in children for any purpose or in any form.”¹⁵⁶ Although the Convention does not explicitly encourage bilateral treaties between member countries and non-member countries, the Convention’s Special Commission has recognized such treaties as long as they do not supplant the Convention.¹⁵⁷

Although bilateral treaties between countries encouraging safe intercountry adoption may be a means to encourage nonmember countries to comply with the Convention’s safeguards, they should not be a substitute for joining the Convention. Prior to joining the Convention, the United States entered into a bilateral agreement with Vietnam, a non-member country, to ensure safe adoptions between the two countries.¹⁵⁸ Recognizing Vietnam’s history of lax intercountry adoption regulations¹⁵⁹ and the need to shore up Vietnam’s adoption process, the United States and Vietnam entered into a bilateral treaty in June of 2005 to encourage Vietnam to develop safeguards.¹⁶⁰ But after this bilateral agreement expired in October 2008, evidence of fraud and a lack of sufficient legal safeguards in Vietnam’s adoption system led the United States and Vietnam to jointly suspended adoptions from Vietnam until a new bilateral agreement is reached or until Vietnam joins the Convention.¹⁶¹

Both countries recognize that intercountry adoptions from Vietnam to the United States will not resume until Vietnam undertakes major reforms in its child welfare system to prioritize the best interests of chil-

153. *Guatemala Info*, *supra* note 99.

154. Hague Convention, *supra* note 5, pmb1.

155. Convention on the Rights of the Child, G.A. Res. 44/25, art. XXI, U.N. Doc. A/Res/44/25 (Nov. 20, 1989), available at <http://www.un.org/documents/ga/res/44/a44r025.htm>.

156. *Id.* art XXXV.

157. SPECIAL COMMISSION 2000, *supra* note 136, at 42.

158. Carlberg, *supra* note 14, at 124.

159. Worthington, *supra* note 11, at 578.

160. *Id.*

161. Bureau of Consular Affairs, U.S. Dep’t of State, *Vietnam Country Information*, INTERCOUNTRY ADOPTION, http://adoption.state.gov/country_information/country_specific_info.php?country-select=vietnam (last updated Mar. 2012).

dren and protect participating parties' fundamental rights.¹⁶² Although Vietnam has approved legislation to improve its intercountry adoption process and intends to become a party to the Convention, it has not announced a date for joining the Convention.¹⁶³ Thus, while the bilateral treaty between the United States and Vietnam signified efforts by the United States to get a nonmember country to conform to the Convention's standards, ultimately bilateral treaties are best used as a means to eventually get countries to conform with and join the Convention, not as a substitute for the Convention.

Member countries must encourage nonmember countries to implement Convention guidelines and eventually join the Convention because the Convention provides a uniform international and intergovernmental set of minimum standards for member countries to adhere to in their international adoption processes.¹⁶⁴ Adhering to the Convention's standards will further the goal of stopping child trafficking across international borders.¹⁶⁵ Additionally, the Convention mandates the recognition of adoptions by operation of law for any adoption in compliance with its regulations, easing the recognition of adoptions performed in other countries.¹⁶⁶ Thus, it is important for the United States to further the goals of the Convention by encouraging other nonmember countries to join the Convention.

V. PROPOSAL

The Convention's goals of providing a safer and more regulated process for people seeking to adopt and children involved in intercountry adoption can only be met if countries participating in intercountry adoption join the Convention. Yet nonmember sending countries are unlikely to join the Convention when member countries, such as the United States, continue to adopt from them despite their failure to join the Convention. Additionally, many nonmember sending countries are developing countries without the necessary resources to implement the Convention's standards. The Convention imposes burdens on member countries without providing sufficient help to countries trying to implement the Convention's regulations on a domestic level.¹⁶⁷ Therefore, in accord with the principles of the Convention, the United States must implement

162. *Id.*

163. *Id.*

164. Carlberg, *supra* note 14, at 133–34.

165. *Id.* at 134.

166. *Id.*

167. *Id.* at 148.

a long-term policy to encourage and help nonmember countries to join the Convention, while phasing out adoptions from countries that refuse to join the Convention.

The United States could use its own central authority, the Department of State, to form a committee similar to the ICATAP to work with nonmember countries that are willing but unable to implement an adoption framework that complies with the Convention's requirements. The United States has the resources and experience to aid sending countries in developing effective laws, regulations, and adoption systems that comply with the Convention's requirements.¹⁶⁸ Additionally, the United States receives a large number of intercountry adoptions from nonmember sending countries¹⁶⁹ and could use its familiarity with the adoption processes of these states to better help them implement the Convention's requirements. For nonmember countries successfully using the Hague Conference's Guide to Good Practice to comply with the Convention's requirements, the State Department's committee could act as a supplementary resource for help and instruction.

Helping nonmember countries with limited adoption infrastructure implement the Convention's requirements may take a long period of time. But by working together with the sending nonmember country through the long implementation process, the committee could help lower the risk of a nonmember country prematurely ratifying the Convention before it establishes an adoption system that complies with the Convention, thereby ensuring that nonmembers do not inadvertently isolate themselves from intercountry adoptions with other member nations as Guatemala did.

This long-term approach coincides with the Permanent Bureau's stance on progressive implementation, which recognizes that at the outset, some countries with limited economic resources can "only fulfill their Convention obligations at a basic level."¹⁷⁰ The State Department's committee could work with willing nonmember countries individually to assess their intercountry adoption programs and determine what measures need to be taken to conform with the Convention. The committee and the nonmember country could then cooperate to establish an individualized plan to implement the Convention, and they could agree on a challenging but realistic timeline for completion. By assessing each nonmember country individually, the committee will be able to better evaluate the needs of each country and to better craft a workable, realis-

168. Worthington, *supra* note 11, at 585.

169. *Statistics*, *supra* note 1.

170. SPECIAL COMMISSION 2005, *supra* note 138, at 15.

tic plan to bring each country into accord with the Convention. Once the nonmember country successfully implemented and ratified the Convention, the United States could deal with it as a fellow Convention member.¹⁷¹ By aiding nonmember sending countries in their efforts to join the Convention and thereby enlarging the number of member countries, the United States would strengthen the Convention and ultimately make intercountry adoption safer for more children and parents throughout the world, in accordance with its commitment under the Convention.

Although forming an American committee to assist other nonmember countries in implementing the Convention would likely be more expensive than continuing to fund the ICATAP, the committee model is more advantageous to the United States. Under the committee model, any money and resources spent by the committee would be at the discretion of the United States alone. Conversely, any funding given to the ICATAP would be subject to expenditure by the Permanent Bureau of the Hague Conference.¹⁷² Thus, the committee model offers the United States greater freedom in how it chooses to use its resources. This freedom would allow the committee to spend its resources on nonmember countries with established intercountry adoption ties to the United States, such as Ethiopia, or to help Guatemala get its adoption infrastructure in line with the Convention's requirements.

To ensure that nonmember countries have ample incentive to work towards joining the Convention, the Department of State's committee could work with nonmember countries to phase out intercountry adoptions. Abruptly discontinuing intercountry adoptions with nonmember countries would lead to increased institutionalization and homelessness, results antithetical to the Convention's goal of ensuring the best interests of the children. To avoid these results, the United States could institute a withdrawal of intercountry adoptions from nonmember countries, spread out over time. The Department of State's committee could work with the nonmember countries to negotiate the withdrawal, taking into account the number of children affected, the ability of the nonmember country to care for the increase in domestic orphans, and the status of pending cases. By working together with the nonmember country, the United States could set up an effective plan to discontinue intercountry adoptions over a period of time deemed reasonable by the Department of State's committee and avoid the overnight spike in domestic orphans that often overwhelms domestic infrastructure when receiving countries discontin-

171. See Daly, *supra* note 38, at 628.

172. ASSISTANCE PROGRAMME, *supra* note 145, at 4.

ue adoptions. Ideally, the sending countries would join the Convention in response to the United States' plan to eventually discontinue intercountry adoptions. Even if the nonmember countries choose not to join the Convention and eventually lose the opportunity to place children with families in the United States, the State Department's committee and the nonmember countries could work together during the withdrawal period to develop strategies, such as modifying the nonmember country's domestic infrastructures, to accommodate the increased burden of more domestic orphans. Although the limited resources of sending nations would still make providing sufficient homes for these children difficult, the long-term withdrawal would allow for a smoother and more prepared transition to effectively deal with the increase in domestic orphans than would an abrupt cessation of adoptions.

VI. CONCLUSION

The United States has demonstrated its desire to safeguard the process of intercountry adoption by ratifying the Convention. The Convention's goal of curbing child trafficking through a more regulated intercountry adoption process is a worthy goal for all nations to strive for. Although the Convention does not bar adoptions between member countries and nonmember countries, by continuing to adopt children from nonmember countries, the United States takes away any incentive for nonmember countries to commit to the goals of the Convention by becoming members. Yet a wholesale cessation of adoptions from these countries would cause an increase in child institutionalization and homelessness, neither of which are in the best interests of the children. Thus, it is necessary for the United States to implement a long-term policy to aid and encourage nonmember countries in their efforts to join the Convention, while slowly eliminating intercountry adoptions from countries that refuse to join the Convention.