

The Relationship between Intercountry Adoption and Human Trafficking



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Introduction to the Debate

There are two major criticisms of intercountry adoption pertaining to human trafficking:

- 1) Intercountry adoption, even when conducted in an ethical and legitimate manner, is a form of human trafficking in and of itself and is a violation of both the child's and the child's community's human rights.
- 2) The practice of intercountry adoption incentivizes and therefore facilitates the trafficking of children by obtaining control over children illegally and then laundering them through an otherwise legitimate practice. Therefore, intercountry adoption should only be practiced as a last resort when other alternative forms of care are not available. There are some critics that even go as far as to argue for a moratorium on all intercountry adoptions.

Introduction to the Debate

1) Intercountry Adoption as a Human Rights Violation:

- Individual right violation
- Collective right violation

This particular criticism of intercountry adoption fails to recognize the supremacy of the best interests of the child, which is required by the Convention on the Rights of the Child.

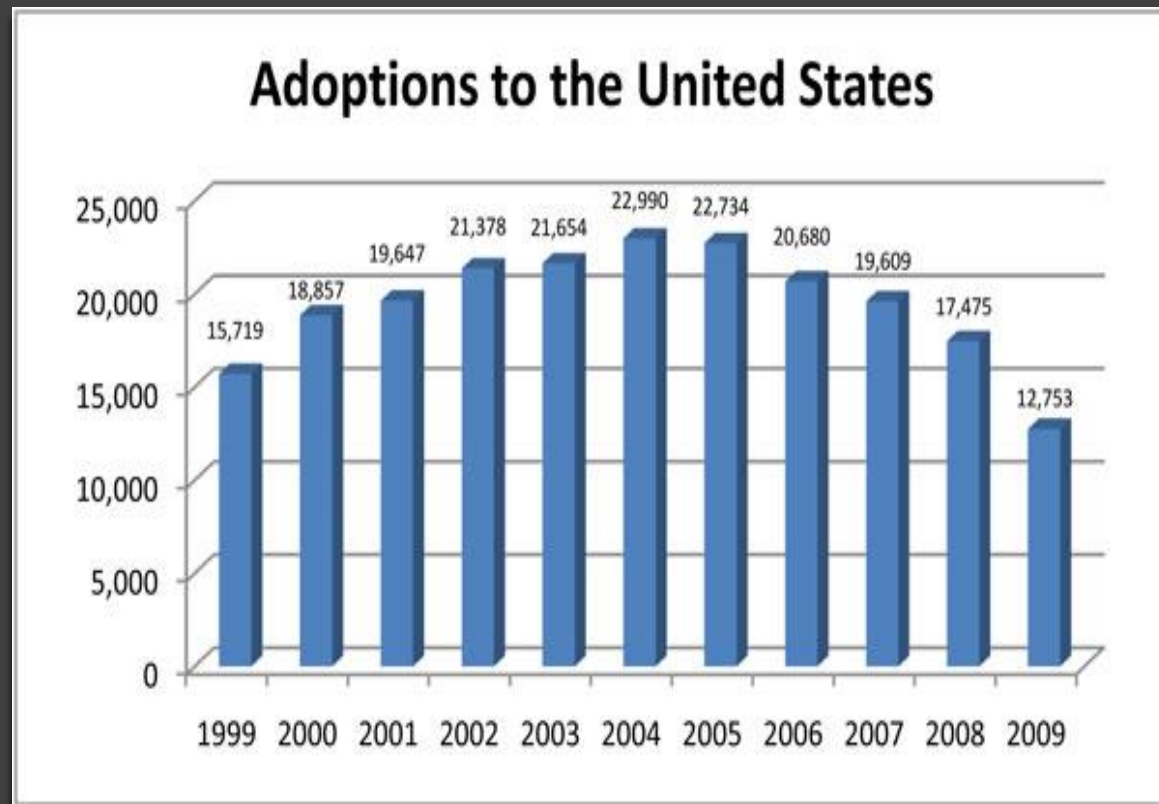
Introduction to the Debate

2) Intercountry Adoption as a Form of Human Trafficking:

- “Benavil tells you that he can ‘arrange’ the papers *to make it look as if you’ve adopted the child*. That will make it easier to take your purchase home. He offers you a thirteen year old girl.”

— *A Crime So Monstrous: Face to Face with Modern-Day Slavery*
By: E. Benjamin Skinner (emphasis added)

Trends in Intercountry Adoptions into the United States



- Office of Children's Issues, U. S. Dept. of State

Presentation Outline

- Key International Law instruments and relevant legal definitions
- Status of the world's children and reasons for vulnerability
- Legal Analysis
- Recommendations

International Law on Adoption

- Is there an international legal regime which regulates the practice of intercountry adoption?

International Law on Adoption

- **U.N. Declaration on Social and Legal Principles Relating to Foster Placement and Adoption Nationally and Internationally (1986)**
- **Convention on the Rights of the Child (CRC)** (entered into force September 2, 1990)
 - The Optional Protocol on the sale of children, child prostitution and child pornography
- **Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention)** (entered into force January 5, 1995)
- **U.N. Guidelines for the Alternative Care of Children** (adopted by the G.A. November 2009)

International Law on Adoption

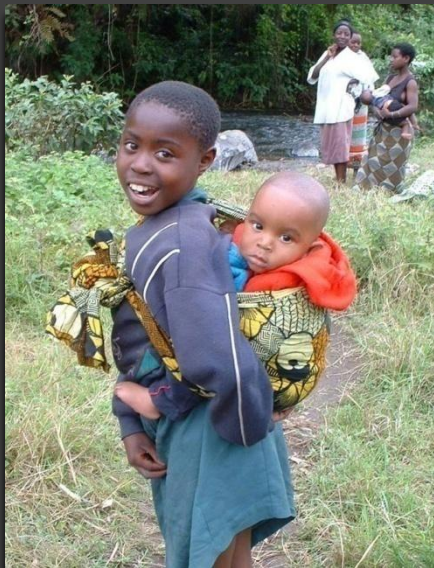
- There is NO international legal instrument currently in force that explicitly requires state parties to open their borders to international adoption.
- There is no explicit recognition of an orphaned child's right to an intercountry adoption.

Relevant International Legal Definitions:

- **CHILD:**

“[A] child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”

- **Art. 1 of the Convention on the Rights of the Child**



Relevant International Legal Definitions:

- **INTERCOUNTRY ADOPTION:**

"[A] child habitually resident in one Contracting State ("the State of origin") has been, is being, or is to be moved to another Contracting State ("the receiving State") either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin."

- **Art. 2(1) of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption**

Relevant International Legal Definitions:

- **ORPHAN:**

- There is currently NO international codified definition of an orphan.
- UNICEF defines an orphan as “a child who has lost one or more parents.” A double orphan, is a “child who has lost both parents.”

- **CHILD WITHOUT PARENTAL CARE:**

“[A]ll children not in the overnight care of at least one of their parents, for whatever reason and under whatever circumstances.”

— **UN Guidelines for the Alternative Care of Children**
(adopted by the General Assembly in November of 2009)

Current Status of the World's Children

- The UNODC estimates that 20% of trafficking victims are children
- The US State Department estimates that as many as half of all trafficking victims are children.
- According to UNICEF there are currently approximately 145 – 210 million orphaned children living in the world and 15 million double orphans



Children of the Thai orphanage, Safe Haven.

Children in an orphanage in Romania.



Street children in the Philippines.

Living Situations of Double Orphans

- Institutional care
- With employers/exploiters (without their parents)
- On the streets (without their parents)
- Child only households
- Juvenile detention



Reasons for Vulnerability

- War, Genocide, and other Armed Conflicts



Iraqi children orphaned by the War.

A Rwandan orphanage supporting mostly HIV/AIDS and genocide orphans.



Reasons for Vulnerability

- HIV/AIDS Epidemic



Two orphanages established to provide alternative care solely to those children whose caretakers perished from AIDS.
(Above: Kenya) (Left: Zambia)

Reasons for Vulnerability

- Natural Disasters



134 Tsunami orphans in Sri Lanka



Children orphaned from the 2008 China earthquake were placed in a refugee camp. The tags around their necks denote they are in need of specialized care.

UNICEF's official position on intercountry adoption after a natural disaster, war, etc.

"The case of children separated from their parents and communities during war or natural disasters merits special mention. It cannot be assumed that such children have neither living parents nor relatives. Even if both their parents are dead, the chances of finding living relatives, a community and home to return to after the conflict subsides exist. Thus, such children should not be considered for inter-country adoption, and family tracing should be the priority."



Haiti



"The Haitian Government is very clear on this...We are facilitating all of the adoption applications already submitted. Other than those, no child will be leaving the country for adoption."

- Marie-Laurence Jocelyn Lessgue,
the Communications Minister of Haiti



Convention on the Rights of the Child

- Preamble

"[T]he child, for the full and harmonious development of his or her personality, should grow up in a *family environment*, in an atmosphere of happiness, love, and understanding." (emphasis added)

Convention on the Rights of the Child

- **Article 20 (1)**

A child who is "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."

- **Article 20(2)**

Requires State Parties to provide "alternative care" for orphaned children.

- **Article 20(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."

Convention on the Rights of the Child

- Article 21(b)

"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:"

"(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;*" (emphasis added)

Legal Hierarchy of Alternative Forms of Care

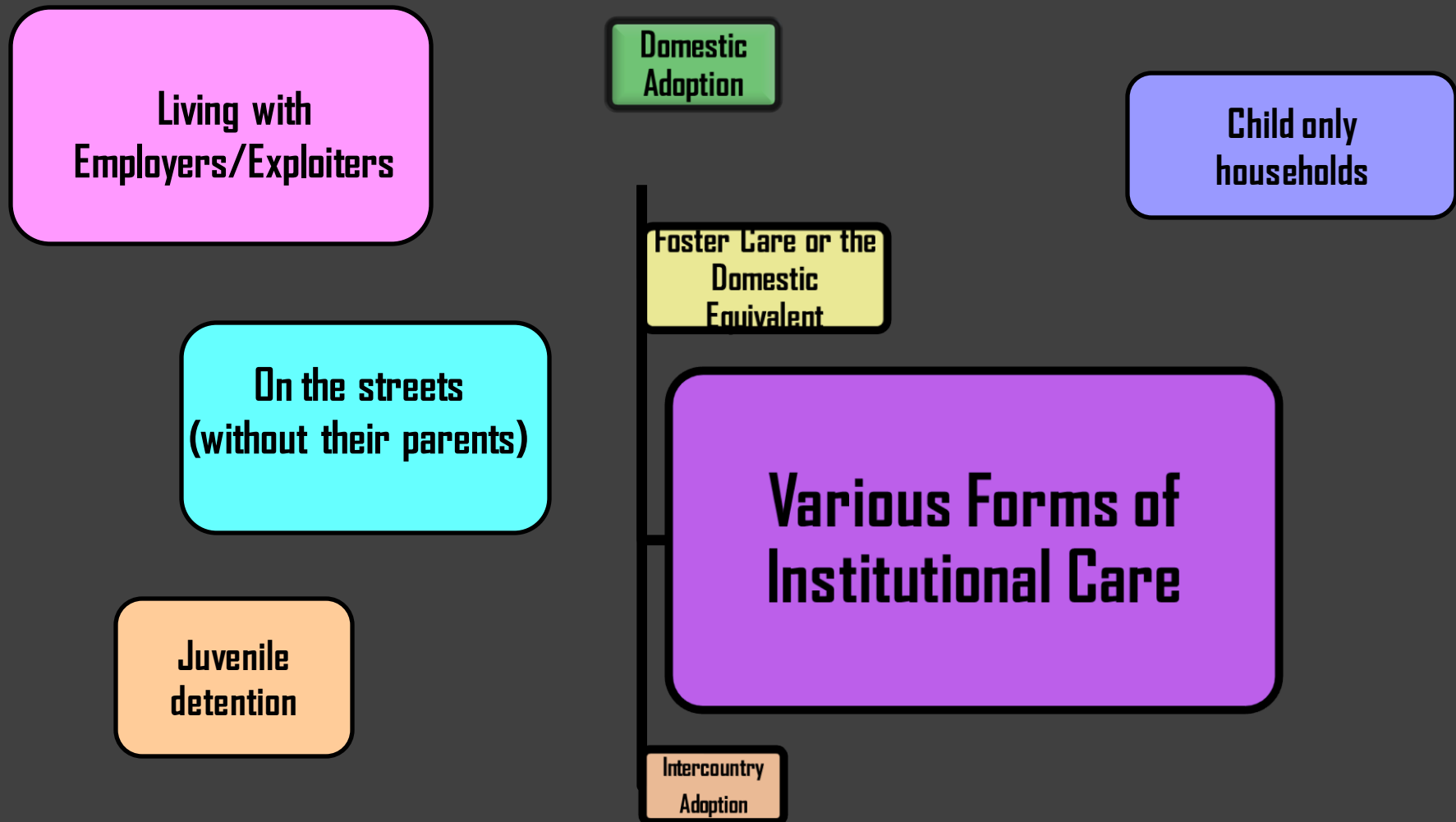
Domestic Adoption

**Foster Care or the
Domestic
Equivalent**

**Various Forms of
Institutional Care**

**Intercountry
Adoption**

The way this legal hierarchy is practically implemented:



Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption

- 81 State Parties
- Each state party must "designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities."
— Article 6
- These Central Authorities are required to communicate and cooperate with one another.
— Article 8
- Each Central Authority is responsible for the accreditation of private adoption agencies.
— Article 9

Hague Convention

- "Accreditation shall only be granted to and maintained by bodies demonstrating their competence to carry out properly the tasks with which they may be entrusted."
— Article 10
- "An accredited body shall -
 - a)* pursue only non-profit objectives according to such conditions and within such limits as may be established by the competent authorities of the State of accreditation;
 - b)* be directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of intercountry adoption; and
 - c)* be subject to supervision by competent authorities of that State as to its composition, operation and financial situation."— Article 11

Hague Convention

The Central Authority is to only approve an intercountry adoption if:

- a) it has been "established that the child is adoptable;
- b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interest;
- c) have ensured that
 - (1) the persons, institutions and authorities whose consent is necessary for adoption, have been counselled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin,
 - (2) such persons, institutions and authorities have given their consent freely, in the required legal form, and expressed or evidenced in writing,
 - (3) the consents have not been induced by payment or compensation of any kind and have not been withdrawn, and
 - (4) the consent of the mother, where required, has been given only after the birth of the child; and
- d) have ensured, having regard to the age and degree of maturity of the child, that
 - (1) he or she has been counselled and duly informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required,
 - (2) consideration has been given to the child's wishes and opinions,
 - (3) the child's consent to the adoption, where such consent is required, has been given freely, in the required legal form, and expressed or evidenced in writing, and
 - (4) such consent has not been induced by payment or compensation of any kind."

— Article 11

Hague Convention

- Prospective adoptive parents must apply to the Central Authority of their home country to be considered eligible for intercountry adoption.
— Article 14
- The Central Authority from the receiving country must then send a report with relevant information about the prospective parents to the Central Authority of the sending country.
— Article 15
- The Central Authority from the sending country must also supply a similar report on the child to the Central Authority of the receiving country.
— Article 16

Allowance for State Variances:

- Waiting Periods
 - i.e. Malawi requires adoptive parents to live in Malawi for 18 months prior to adopting a child
- Medical Requirements
 - i.e. Russia prohibits anyone with a number of common illnesses from adopting.
 - i.e. China requires adoptive parents to have an average body mass index
- Age Requirements
 - i.e. China prohibits anyone over the age of 50 from adopting
- Miscellaneous Requirements
 - i.e. China prohibits single persons from adopting

The real rationale behind these domestic restrictions:

"Adoption by foreigners probably isn't entirely right . . . Any normal state should be able to create conditions for children to grow up in their own country. That's what we are aiming for. Russian children should stay in Russia."

— Sergei Vitelis, an official working in the Education Ministry of
Russia

Recommendations to provide for the best interest of the child:

- Encourage States to sign and ratify the Hague Convention
- Focus on greater enforcement of the Hague Convention's procedural safeguards
- Optional Protocol to the CRC

Proposed Optional Protocol to the CRC

- Inclusion of a definition of "orphan"
- All orphaned children have a right to participate in the practice of intercountry adoption.
- State parties will take necessary steps to recognize this right.
- State parties will take all necessary and appropriate remedial actions to deconstruct any legal systems which create a hierarchical system in which intercountry adoption is placed in a lower status to that of institutional care, foster care, or domestic adoption.
- State parties will remove any legal restrictions that impose barriers on foreigners adopting which of beyond those safeguards provided for in the Hague Convention.

Intercountry Adoption ≠ Trafficking

- Those who traffic children need a steady supply to meet the demand.
- By only utilizing the practice of intercountry adoption as a last resort or, as some critics propose, to stop the practice entirely, is to provide a larger supply of vulnerable children to those traffickers than would otherwise be available.
- Therefore, a decrease in intercountry adoptions in the absence of other measures leaves more children vulnerable and therefore could lead to a potential increase in trafficking of children.