

FROM STALEMATE TO SOLUTIONS: RETHINKING INTERCOUNTRY ADOPTION THROUGH VULNERABILITY THEORY AND TECHNOLOGICAL INNOVATION

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INTRODUCTION

Intercountry adoption has long been shaped by legal reforms, societal debates, and ethical dilemmas. Once viewed as a marginal and contentious issue, it remains firmly embedded in global discussions on law, psychology, and social policy.¹ Rather than occurring in isolation, intercountry adoption is influenced by broader global dynamics, including demographic changes, economic disparities, and evolving family structures. These forces amplify its complexities, particularly in the context of international law and human rights. Adoption across borders is often fraught with procedural hurdles and institutional challenges. These concerns become more pronounced in intercountry adoption, where the movement of children across cultures raises difficult questions of identity, belonging, and heritage. Addressing these challenges requires an ongoing dialogue that balances legal protections with the child's best interests.²

Today, intercountry adoption stands at a crossroads. Traditional perspectives no longer suffice in addressing the new challenges introduced by geopolitical conflicts and economic disparities. While the practice has long provoked both criticism and support, its continued existence necessitates a focus on reform rather than abolition. This paper explores how intercountry adoption can be improved to better serve children while addressing ethical concerns.

¹ See *THE INTERCOUNTRY ADOPTION DEBATE: DIALOGUES ACROSS DISCIPLINES* (Robert L. Ballard et al. eds., 2015) (bringing together contributors from diverse fields such as law, psychology, social work, medicine, anthropology, religion, sociology, history and ethics).

² Elizabeth Bartholet, "International Adoption," in *CHILDREN AND YOUTH IN ADOPTION, ORPHANAGES, AND FOSTER CARE* 63 (Lori Askeland ed., 2006).

Part I traces the evolution of intercountry adoption from post-World War II humanitarian efforts to complex, market-influenced systems. It discusses the transition to adopting from developing countries and the emergence of global commercial surrogacy as an alternative, emphasizing changes in family formation. Part II examines the intersection between international legal frameworks and ethical dilemmas that shape intercountry adoption, focusing on the ambiguity in applying the child's best interest principle and the political, ethical, and welfare dynamics shaping policies, illustrated by high-profile case studies. Part III critically assesses European countries' re-evaluations of intercountry adoption policies in response to past injustices and systemic abuses. It highlights introspective reforms aimed at aligning practices with contemporary ethical standards and international child welfare norms, challenging the U.S. to undertake similar scrutiny.

Part IV addresses the ethical, legal, and human rights debates surrounding intercountry adoption, contrasting arguments against adoption, such as commodification and cultural disintegration, with advocacy for it as a means to fulfill children's rights to family life. Part V examines the Bartholet-Smolin debate as a microcosm of broader tensions in intercountry adoption discourse, contrasting Bartholet's advocacy for fewer restrictions with Smolin's focus on ethical concerns and systemic flaws. This section argues for moving beyond these repetitive debates towards innovative and forward-thinking approaches to address the challenges of intercountry adoption. Part VI advocates for ethical practices, global cooperation, and the use of technology for reform. The discussion extends to the integration of technology in adoption processes, highlighting both its potential and the ethical considerations it entails. Part VII introduces vulnerability theory as a framework for understanding and reforming intercountry adoption, emphasizing policies that address the inherent vulnerabilities of all parties involved. The conclusion advances a vulnerability theory-informed adoption system, promoting ethical practices, global cooperation, and technological innovation.

I. INTERCOUNTRY ADOPTION: HISTORICAL OVERVIEW AND CONTEMPORARY CONTEXT

A. Foundations of Intercountry Adoption

The genesis of modern intercountry adoption traces back to the aftermath of World War II,³ when humanitarian efforts led American families to adopt European orphans⁴ (mostly from Germany and Greece), a practice institutionalized by the Displaced Persons Act of 1948.⁵

The mid-20th century domestic adoption controversies, characterized by black and gray markets and the conflict between social welfare norms and consumer demand, influenced by media portrayal, shaped the development of intercountry adoption frameworks as American families pursued their aspirations to parent by adopting war orphans from overseas. The transition to adopting children from beyond Europe was defined by the Refugee Relief Act of 1953.⁶ This act, unlike its predecessor, did not limit its focus to European orphans but aimed to address the increasing number of displaced and orphaned children worldwide, signaling an evolving legal and organizational infrastructure supporting

³ Some argue that intercountry adoption has roots that predate World War II, with Christian missionaries informally bringing children from abroad. Pearl Buck, a Nobel and Pulitzer Prize-winning author, played a significant role in advocating for transracial and transnational adoption. ELLEN HERMAN, *KINSHIP BY DESIGN: A HISTORY OF ADOPTION IN THE MODERN UNITED STATES* 209-212 (2008); *see also* David Beimers, *"I am the Better Woman for Having My Two Black Children": An Account from Pearl S. Buck*, in 1 *THE PRAEGER HANDBOOK OF ADOPTION* 116-17 (Kathy S. Stolley & Vern L. Bullough eds., 2006).

⁴ *See generally* ARISSA H. OH, *TO SAVE THE CHILDREN OF KOREA: THE COLD WAR ORIGINS OF INTERNATIONAL ADOPTION* (2015) (examining the Cold War's significant influence on the origins of international adoption, focusing on the case of Korea to explore how geopolitical tensions and humanitarian reasons shaped the practice and perception of adopting Korean children into American families); *see also* CATHERINE CENIZA CHOY, *GLOBAL FAMILIES: A HISTORY OF ASIAN INTERNATIONAL ADOPTION IN AMERICA* (2013) (analyzing the history and impact of Asian international adoption in America, exploring how it shaped American family dynamics and the nation's identity).

⁵ Displaced Persons Act of 1948, Pub. L. No. 774, 62 Stat. 1009 (addressing the post-World War II refugee crisis, facilitating the immigration of displaced Europeans to the United States. While the act itself was not specifically about intercountry adoption, its passage and the context in which it was enacted contributed to the environment that allowed for the adoption of European war orphans by American families).

⁶ Refugee Relief Act of 1953, Pub. L. No. 203, 67 Stat. 400.

intercountry adoption.⁷ This legislation not only expanded the geographical reach but also introduced a more structured legal framework, reflecting a more formalized and regulated practice.

Subsequent legislation, particularly the inclusion of orphan provisions in the Immigration and Nationality Act of 1965,⁸ solidified the legal basis for intercountry adoption by removing racial and national barriers to immigration. This development facilitated adoption of children from diverse backgrounds into American families, guided by both humanitarian motives and the realities of intercountry adoption.⁹

B. Korean War and Shift to Developing Nations

The trajectory of intercountry adoption changed significantly in the following decades. The Korean War catalyzed a “second wave” of adoptions,¹⁰ not only increasing adoptions but also transforming motivations behind them. While humanitarian concerns remained central, a new factor emerged: the desire to provide homes to children from countries experiencing political turmoil or economic hardship. The adoption of Korean children by American families reflected a mix of humanitarian impulses and strategic international relations, illustrating the Cold War’s influence on domestic and international policies.¹¹

Additionally, the racial dynamics of adopting non-white children highlighted the evolving American racial thought and the impact of Cold War racial liberalism. Korean adoptees, viewed through the framework of “Cold War civil rights,” became symbols of America’s racial and international aspirations.¹² The motivations behind these adoptions were rooted not only in humanitarian ideals

⁷ RACHEL RAINS WINSLOW, *THE BEST POSSIBLE IMMIGRANTS: INTERNATIONAL ADOPTION AND THE AMERICAN FAMILY* 15-70 (2017) (charting the evolution of foreign child adoption from its nascent, crisis-driven stages in the 1940s to its institutionalization by the 1970s, offering the first comprehensive historical analysis of the key figures, policies, and systems that cemented the United States’ status as an “adoption nation”).

⁸ Immigration and Nationality Act, Pub. L. No. 89-236, 79 Stat. 911 (1965).

⁹ WINSLOW, *supra* note 7, at 98.

¹⁰ Lisa M. Katz, *A Modest Proposal? The Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, 9 EMORY INT’L L. REV. 283, 286 (1995).

¹¹ See OH, *supra* note 4, at 8-13; see also CHOY, *supra* note 4, at 15-16.

¹² See OH, *supra* note 4, at 9-10; see also CHOY, *supra* note 4, at 1-2, 15-16.

but also in the desire to support a national Cold War agenda and the appeal of creating multicultural families. This period also saw the rise of a more consumer-oriented approach to parenthood, driven by narratives of rescue and the perceived right to parenthood through any available means, further complicating the motivations behind intercountry adoption.¹³ The story of Korean adoption demonstrates how international crises, domestic policies, and social attitudes intersect, shaping the lives of thousands of children and American families.

This era marked the beginning of adoptions from newly decolonized and economically disadvantaged nations,¹⁴ particularly in Africa, reflecting wider geopolitical and socio-economic changes. From the late 1960s onwards, intercountry adoption became increasingly responsive to global humanitarian crises, leading to a surge in adoption of children affected by conflicts, natural disasters, and other crises.¹⁵ These evolving ideologies not only justified intercountry adoption but also influenced the narrative around the practice, making it a popular method for family formation across the globe. As intercountry adoption expanded, these ideological

¹³ OH, *supra* note 4, at 9-15.

¹⁴ Kimberly Devon McKee, *The Transnational Adoption Industrial Complex: An Analysis of Nation, Citizenship, and the Korean Diaspora* 31 (2013) (Ph.D. dissertation, The Ohio State University) (available at https://etd.ohiolink.edu/acprod/odb_etd/ws/send_file/send?accession=osu1373460152&disposition=inline [<https://perma.cc/H6AF-WGYL>]) ("The origins of the transnational adoption industrial complex (TAIC) lie in the American military industrial complex's involvement in Korea during and after the Korean War 1950-1953) [sic]. The sexual entanglements of American soldiers and local Korean women resulted in mixed race progeny who faced discrimination in Korea – stigmatized by the notion that their mothers were prostitutes. As a result, many of the first children sent abroad for adoption were mixed-race children or war orphans. American military influence extends further than the direct military intervention, to the social effects war produces within local communities. Since the Cold War, countries in military conflict as a result of U.S. involvement have been likely to become sending countries for transnational adoption.").

¹⁵ See KAREN DUBINSKY, *BABIES WITHOUT BORDERS: ADOPTION AND THE SYMBOLIC CHILD IN A GLOBALIZING WORLD* 57-92 (2010). In the midst of Cold War tensions, Operation Peter Pan, which labeled over 10,000 Cuban minors as "political orphans" and relocated them to U.S. foster care, was prominently supported by narratives from the U.S. Department of State, the Catholic Church, and other entities. *Id.* These narratives emphasized the children's swift assimilation into American cultural and political norms, highlighting this transition as both crucial and seamless. *Id.* This episode not only illustrates the exploitation of child welfare for ideological ends but also the complex dynamics of U.S.-Cuba relations, where children's experiences were foregrounded in the contestation of national identities and political ideologies. *Id.*

structures, initially shaped within the context of Korea-US adoption proved highly adaptable to the distinct cultural, economic, and social environments of various sending and receiving countries. This flexibility enabled the practice to expand beyond Korea to other countries, such as Vietnam, several Central and Latin American countries in the 1970s, India in the 1980s, and Romania, Russia, and China in the 1990s.¹⁶ Although the United States pioneered international adoption, it has since become a widely accepted method of family creation in Canada, Australia, and many European countries, demonstrating its global impact and reach.¹⁷

C. Increased Responsiveness to Global Crises

The following decade, however, showed a significant change in the modality of intercountry adoptions, increasingly resembling a market-driven enterprise facilitated by intermediaries. The growing role of private agencies introduced market logic into adoption, raising ethical concerns about commodification, exploitation, and whether the child's best interests remained central.

As Hübinette notes, the dynamics of intercountry adoption are often influenced by the geopolitical climate, particularly in the aftermath of conflict.¹⁸ When countries are left devastated by war, children often became available for adoption along lines shaped by wartime political alliances. For example, after the Korean War, a substantial number of South Korean children were adopted by families in the United States, reflecting the political alliances of the time. This phenomenon highlights the ways adoption systems became intertwined with global power structures, where the fates of children were linked with broader geopolitical strategies.¹⁹ Many

¹⁶ OH, *supra* note 4, at 204-5.

¹⁷ *Id.*

¹⁸ Tobias Hübinette, *Adopted Koreans and the Development of Identity in the 'Third Space,'* in 28 ADOPTION & FOSTERING 16-19, 23 (2004).

¹⁹ See generally INTERNATIONAL KOREAN ADOPTION: A FIFTY-YEAR HISTORY OF POLICY AND PRACTICE (Kathleen Ja Sook Bergquist et al. eds., 2013); see also MARY ANN DAVIS, CHILDREN FOR FAMILIES OR FAMILIES FOR CHILDREN: THE DEMOGRAPHY OF ADOPTION BEHAVIOR IN THE US (2011); see also Joshua Forkert, Orphans of Vietnam: A History of Intercountry Adoption Policy and Practice in Australia, 1968-1975 (January 2012) (Ph.D. Dissertation, University of Adelaide, 2012) (available at <https://digital.library.adelaide.edu.au/server/api/core/bitstreams/d4cc7776-4004-4b0b->

of the remaining children were adopted into Northern European countries that had also supported South Korea during the war.²⁰ A similar trend emerged following conflicts in Europe and Vietnam,²¹ where the destinations of adoptees were influenced by the political relationships between the countries involved in the war and those receiving the adoptees.

Significant in shaping Australia's approach to intercountry adoption from Vietnam was the transition in immigration policy that no longer explicitly prohibited the entry of non-European, including mixed-race, children for adoption. Notably, the Australian government's response to adoption proposals emphasized support for programs aiding children within Vietnam, reflecting a preference for in-country solutions over adoption abroad. This stance was in line with the South Vietnamese government's regulations, which prioritized the welfare of orphans within the country and required stringent conditions for overseas adoptions.²² The Australian decision to engage in intercountry adoption from Vietnam was not merely an act of international altruism but was influenced by the desire to project a modern, compassionate national image on the global stage. This effort was complicated by the lingering shadows of the "White Australia" policy, which had historically prioritized European immigration and reflected broader societal attitudes towards race and identity.²³

b85d-3bbf1566da71/content [https://perma.cc/J2KR-DWKJ]; see also McKee, *supra* note 14; see also Barbara Stark, *When Genealogy Matters: Intercountry Adoption, International Human Rights, and Global Neoliberalism*, 51 VAND. J. TRANSNAT'L L. 159 (2018).

²⁰ Hübinette, *supra* note 18, at 16-19, 23.

²¹ See Rachel Martin, *Remembering the Doomed First Flight of Operation Babylift*, NPR (Apr. 26, 2015, 8:22 AM), https://www.npr.org/2015/04/26/402208267/remembering-the-doomed-first-flight-of-operation-babylift [https://perma.cc/BC2X-XY3W]. The origins of U.S. adoptions from Vietnam trace back to the conclusion of the Vietnam War. *Id.* During this period, as American forces were pulling out, President Ford initiated an evacuation effort for more than 2,500 Vietnamese children who were orphaned or abandoned. *Id.* This operation, known as Operation Babylift, saw these children being airlifted to the U.S. and placed with adoptive families over the ensuing months. *Id.* The mission garnered widespread media coverage, not only for its humanitarian intent but also due to the tragic crash of the initial flight associated with the operation. *Id.*

²² Forkert, *supra* note 19, at 89-90, 92.

²³ See *id.* at 51-85; Kate Murphy et al., *These Infants are Future Australians?: Making the Nation Through Intercountry Adoption*, 34 J. OF AUSTRALIAN STUD. 141, 141-

Following the Paris Peace Accords, the U.S. faced a unique challenge in the adoption of American-fathered Black-Vietnamese children. While the U.S. promoted international adoption as a humanitarian effort, it also engaged in what Winslow describes as “racial alchemy.”²⁴ These children, stigmatized in Vietnam due to their mixed heritage, were also marginalized in the U.S., where they faced persistent racism.²⁵ The government’s use of international adoption as a solution for “mixed-race” children in Vietnam, while dealing with the Civil Rights Movement’s ongoing impacts at home, reveals the complicated, and often contradictory roles adoption can play in social and political contexts.

D. The Shift Towards Market-Driven Practices and the Emergence of Legal and Ethical Challenges

After the fall of the Iron Curtain, Eastern Europe and especially Romania became a major source of adoptable Caucasian children amid widespread socio-political upheaval and humanitarian distress. Countries like Ukraine, the Republic of Georgia, and Russia, reeling from wars, poverty, and governance failures, have seen their orphanages swell with children left behind. With limited resources to support these children, especially those with health issues or disabilities, foreign adoption has emerged as a practical solution to alleviate state burdens and offer children better life prospects. While this policy appears benevolent, it raises critical ethical and legal questions, spotlighting the need for stronger oversight to prioritize children’s welfare in these geopolitical and humanitarian crises.²⁶

The escalation of Romania’s orphan crisis can be directly traced back to the draconian policies of Nicolae Ceaușescu,²⁷ who,

61 (2010); Denise Cuthbert et al., *“That was Then, but This is Now”: Historical Perspectives on Intercountry Adoption and Domestic Child Adoption in Australian Public Policy*, 23 J. OF HIST. SOCIO. 427, 427-52 (2010).

²⁴ WINSLOW, *supra* note 7, at 145-70.

²⁵ *Id.*

²⁶ Kimberly A. Chadwick, Comment, *The Politics and Economics of Intercountry Adoption in Eastern Europe*, 5 J. INT'L LEGAL STUD. 113, 113 (1999).

²⁷ See Jini L. Roby & Jim Ife, *Human Rights, Politics and Intercountry Adoption: An Examination of Two Sending Countries*, 52 INT'L SOC. WORK 661, 661-68 (2009). Under Nicolae Ceaușescu’s regime (1965-1989), Romania enforced a strict pronatalist policy, mandating women to produce a workforce, leading to severe penalties for

in his quest for a larger workforce to fulfill military and economic ambitions, mandated urban migration and outlawed birth control, effectively leading the population with children their families could not support. Following the regime's collapse, economic hardship left the state unable to adequately support the rising number of institutionalized children, many of whom were institutionalized based on the belief they were better off in state care than with their impoverished families.²⁸

Romania's post-Ceaușescu era exposed the ethical dilemmas and regulatory deficiencies affecting intercountry adoption. The global outcry over the conditions in Romanian orphanages²⁹ and the rush to adopt Romanian children demonstrated the importance for international cooperation and oversight in the intercountry adoption process. The global community was confronted with the dire conditions within Romanian orphanages³⁰ through widespread media exposure following the regime's collapse in 1989.³¹ The subsequent spike in the adoption of Romanian children by foreign nationals, with over 3,000 children adopted internationally in 1990,

underproduction and criminalizing abortion, causing an estimated 9,500 deaths due to illegal procedures. *Id.* The regime's fall in 1989 unveiled the dire conditions of 100,000 children in state orphanages. *Id.*

²⁸ Donovan M. Steltzner, *Intercountry Adoption: Toward a Regime that Recognizes the Best Interests of Adoptive Parents*, 35 CASE W. RSRV. J. INT'L L. 113, 126-28 (2003).

²⁹ Virginia Hughes, *Detachment*, AEON (July 29, 2013), <https://aeon.co/essays/romanian-orphans-a-human-tragedy-a-scientific-opportunity> [https://perma.cc/AQ2V-WR66].

³⁰ Vlad Odobescu, *Half a Million Kids Survived Romania's 'Slaughterhouses of Souls.' Now They Want Justice*, THE WORLD (Dec. 28, 2015), <https://theworld.org/stories/2015-12-28/half-million-kids-survived-romanias-slaughterhouses-souls-now-they-want-justice> [https://perma.cc/U233-UQVD]. Romanian orphans suffered under brutal conditions in state-run institutions during and after Ceaușescu's regime, facing extreme neglect, physical and sexual abuse, starvation, and cold. *Id.*; see also CHARLES A. NELSON ET AL., ROMANIA'S ABANDONED CHILDREN: DEPRIVATION, BRAIN DEVELOPMENT, AND THE STRUGGLE FOR RECOVERY 10-18 (2014) (providing an authoritative account of Romanian orphanages and revealing the profound impact of institutionalization on children's brain development, behavior, and psychological health due to lack of care, interaction, and comfort).

³¹ Yves Denéchère & Béatrice Scutaru, *International Adoption of Romanian Children and Romania's Admission to the European Union (1990-2007)*, 1 E. J. OF EUR. STUD. 135, 148 (2010).

and notably, 1,300 of these adoptions by United States citizens in 1991 alone, exposed the regulatory oversight failure.³²

This period also emphasized the power of media in shaping public perception and policy regarding intercountry adoption. The demand for Caucasian children in Western nations, coupled with the affluence of prospective adoptive parents, fueled a black market for child trafficking in Romania. This illegal trade embarrassed the Romanian government, complicating its aspirations for international recognition, particularly within the European Union.³³ Corruption and exploitation by Romanian officials and intermediaries flourished, exploiting both the biological families and prospective adoptive parents. These revelations pressured for comprehensive legal reforms and the establishment of safeguards to protect the integrity of the adoption process and the welfare of the children involved.³⁴

Similar to Romania's experience post-Ceaușescu, Guatemala emerged as a significant source of children for U.S. adoptions, eventually leading the world in per capita adoptees. At its zenith, an estimated seventeen Guatemalan children, predominantly infants, were adopted internationally each day, with flights carrying these children to their new homes colloquially termed "baby flights". This trend reflected a strong preference for international adoption, with a staggering 98% of adoptions by foreigners, leading to nearly 27,805 children adopted by U.S. citizens by 2000.³⁵ This phenomenon persisted despite other

³² Kathleen Hunt, *The Romanian Baby Bazaar*, N.Y. TIMES (Mar. 24, 1991), <https://www.nytimes.com/1991/03/24/magazine/the-romanian-baby-bazaar.html> [https://perma.cc/P286-8CF4].

³³ Lisa M Yemm, *International Adoption and the Best Interests of the Child: Reality and Reactionism in Romania and Guatemala*, 9 WASH. U. GLOB. STUD. L. REV. 555, 565 (2010).

³⁴ See Rebeca Popescu et al., *Adoption in Romania: Historical Perspectives and Recent Statistics*, 23 ADOPTION Q. 1, 1-22 (2020).

³⁵ Karen Smith Rotabi & Kelley Bunkers, *Intercountry Adoption Reform Based on the Hague Convention on Intercountry Adoption: An Update on Guatemala in 2008*, SOC. WORK AND SOC'Y NEWS MAG. https://www.hf.uni-koeln.de/data/lfeusa/File/SocMag/2008/November2008-Rotabi_Karen_Smith_Bunkers_Kelley_Abada_Addis-Intercountry_Adoption_Reform_Based_on_the_Hague_Convention_on_Intercountry_Adoption.pdf [https://perma.cc/7QWC-9W8R] (last visited Dec. 5, 2024); Karen Smith Rotabi, *From Guatemala to Ethiopia: Shifts in Intercountry Adoption Leaves Ethiopia Vulnerable for Child Sales and Other Unethical Practices*, SOC. WORK & SOC'Y NEWS

countries, like Canada, imposing moratoriums due to adoption irregularities.³⁶ The adoption boom in Guatemala unfolded amid allegations of severe human rights violations, including child trafficking warnings from the U.S. government. Adoption transformed into a profitable industry driven by strong demand in the U.S., alongside Guatemala's inadequate legal framework and fragile state mechanisms, remnants of a repressive government.³⁷ Reports detail cases of child kidnappings and coercion, tales of women deceived into surrendering their offspring, instances of teenage girls compensated to conceive, and nurseries brimming with infants earmarked for sale.³⁸ Practices such as illegal payments to birth mothers and "child laundering" to falsify orphans' identities were reportedly routine, exploiting Guatemala's most marginalized populations.³⁹

E. Global Shifts in Intercountry Adoption

The digital era's expansion has introduced unprecedented opportunities for international adoption, dramatically broadening the scope for prospective adopters to connect with agencies and legal intermediaries worldwide. Data from Spain in the early 2000s

MAG., https://www.hf.uni-koeln.de/data/lfeusa/File/SocMag/2010/June2010-Rotabi_Kara_Smith-From_Guatemala_to_Ethiopia_Shifts_in_intercountry_adoption_leaves_ethopia_vulnerable_for_child_sales_and_other_unethical_practices.pdf [https://perma.cc/E6MB-RHPM] (last visit Dec. 5, 2024).

³⁶ 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, 163-70 (2006).

³⁷ *Id.*; Meave Garigan, *Guatemala's Adoption Industry*, 27 SAIS REV. INT'L AFF. 179, 180 (2007).

³⁸ Garigan, *supra* note 37, at 180; see also Laura Beth Daly, *To Regulate or Not to Regulate: The Need for Compliance with International Norms by Guatemala and Cooperation by the United States in Order to Maintain Intercountry Adoptions*, 45 FAM. CT. REV. 620, 620-37 (2007); Judith L. Gibbons et al., *Foster Parents as a Critical Link and Resource in International Adoptions from Guatemala*, 12 ADOPTION Q. 59, 59-77 (2009).

³⁹ See Carmen C. Mónico, *Implications of Child Abduction for Human Rights and Child Welfare Systems: A Constructivist Inquiry of the Lived Experience of Guatemalan Mothers Publicly Reporting Child Abduction for Intercountry Adoption* (April 25, 2013) (Ph.D. dissertation, Virginia Commonwealth University) (available at <https://scholarscompass.vcu.edu/cgi/viewcontent.cgi?article=4136&context=etd> [https://perma.cc/Z8P5-G5SB]).

show that approximately 70% of international adoptions were executed independently, facilitated by non-governmental entities.⁴⁰ Once primarily viewed as a humanitarian response to the plight of war orphans, international adoption has evolved into a prevalent option for couples and individuals seeking to form or enlarge their families through non-biological means.⁴¹

The data from “*Global Statistics for Intercountry Adoption: Receiving States and States of Origin 2004-2022*”⁴² provides a comprehensive overview of intercountry adoption trends over nearly two decades. The statistics reveal a decline in intercountry adoption overall, particularly from previously dominant source countries like China and Russia but also a reduction in overall intercountry adoptions into countries like the USA, which has historically been the largest recipient.⁴³ For instance, in 2004, the United States, as the largest receiving country,⁴⁴ finalized over 22,000 intercountry adoptions. However, by 2022, this number had plummeted to 1,517 annually.⁴⁵

⁴⁰ DIANA MARRE & LAURA BRIGGS, INTERNATIONAL ADOPTION: GLOBAL INEQUALITIES AND THE CIRCULATION OF CHILDREN 13 (2009).

⁴¹ Richard R. Carlson, *Transnational Adoption of Children*, 23 TULSA L.J. 317, 331 (1988).

⁴² Peter Selman, *Global Statistics for Intercountry Adoption: Receiving States and States of Origin 2004-2022*, HAGUE CONF. ON PRIV. INT'L L. (FEB. 2024), <https://www.hcch.net/en/publications-and-studies/details4/?pid=5891&dtid=32> [https://perma.cc/CKT5-XZD5].

⁴³ *Id.*

⁴⁴ MARRE & BRIGGS, *supra* note 40, at 9 (highlighting the U.S.’s role not only as a receiver but also as a sender of children for adoption abroad, especially noting the trend of African American children being adopted into European countries such as the Netherlands and the U.K.).

⁴⁵ U.S. DEPT’ OF STATE, ANNUAL REPORT ON INTERCOUNTRY ADOPTION (July 2023), <https://adoptioncouncil.org//pdfviewer/department-of-state-fy22-report-on-intercountry-adoptions/> [https://perma.cc/G2KC-74DJ] (revealing a significant downturn in adoption numbers for FY2022, spanning October 1, 2021 to September 30, 2022). The year witnessed 1,517 intercountry adoptions. Ryan Hanlon & Kristen Hamilton, *New Report on International Adoption Highlights Need for Change*, NAT'L COUNCIL FOR ADOPTION (July 13, 2023), <https://adoptioncouncil.org/blog/new-report-on-international-adoption-highlights-need-for-change/> [https://perma.cc/6VU8-3SNL]; see also Veera Korhonen, *Number of Intercountry Adoptions Involving the United States in 2022, by Age*, STATISTA (July 5, 2024), <https://www.statista.com/statistics/255460/intercountry-adoptions-involving-the-us-by-age/> [https://perma.cc/Y69U-SKCZ].

For decades, the phenomenon of non-U.S. citizens adopting American children has unfolded with relatively little fanfare. This outward adoption flow from the U.S. has seen children placed in Western nations like Canada, the Netherlands, Switzerland, and the U.K. over the last decade.⁴⁶ This trend challenges the conventional view of intercountry adoption as a movement from lower-resource nations to wealthier Western countries. These outgoing adoptions, which predominantly involve black and biracial infants, occur within a complex racial and sociolegal context. In these cases, birthparents actively choose foreign families for their children, with placements often happening shortly after birth and involving pre- and post-birth contact with the adoptive family, diverging from the norm in international adoption practices. Despite the significance of these trends, there is a notable lack of empirical research on the experiences and outcomes of outgoing U.S. adoptions, highlighting a gap in our understanding of this unique aspect of international adoption. This absence of study persists even as the practice continues, signaling a need for comprehensive research to fully understand these transnational family formations.⁴⁷

On the other hand, countries like China and Russia, previously major sources of adoptees, saw their numbers drop due to policy changes and international adoption regulations. This decline reflects a broader global re-evaluation of intercountry adoption, shaped by shifting legal frameworks, social norms, technological developments, and geopolitical tensions.⁴⁸

F. Transition to Global Commercial Surrogacy

In family formation, the number of prospective parents moving from intercountry adoption to global commercial surrogacy is unclear. Nonetheless, this transition is evident amidst the

⁴⁶ Dana M. Naughton, *Learning Through Adoption: The Intercountry Adoption Experiences of Canadian and Dutch Adopters of Children from the United States* 2-30 (May 2014) (Ph.D. dissertation, Pennsylvania State University); *see also* MARRE & BRIGGS, *supra* note 40, at 13.

⁴⁷ *Id.* at 2-30.

⁴⁸ *See generally* Peter Selman, *The global decline of intercountry adoption: What lies ahead?*, 11 SOC. POL'Y & SOC'Y 381 (2012) (examining “the latest trends in intercountry adoption worldwide”).

downturn of intercountry adoption.⁴⁹ This suggests an evolving climate of family formation, where individuals and couples are increasingly exploring alternative paths to parenthood in response to the challenges and controversies surrounding intercountry adoption. Concerns surrounding the ethics of adoption and its alignment with social work practice have garnered attention from scholars across various disciplines.⁵⁰

In 2004, a year that saw a peak followed by a sharp drop in intercountry adoptions, family formation trends changed with the growth of commercial surrogacy contracts in India.⁵¹ This development is driven not only by advancements in reproductive technologies but also a broader societal willingness to embrace diverse family-building strategies.⁵² The popularity of global surrogacy can be attributed to several key factors. Firstly, advancements in assisted reproductive technology have made these procedures more accessible and effective, providing a viable pathway to parenthood for many who previously faced insurmountable barriers. Additionally, the globalization of surrogacy services, facilitated by the Internet and international legal frameworks, has made it easier for individuals and couples

⁴⁹ See KAREN SMITH ROTABI AND NICOLE F. BROMFIELD, FROM INTERCOUNTRY ADOPTION TO GLOBAL SURROGACY: A HUMAN RIGHTS HISTORY AND NEW FERTILITY FRONTIERS 121-31 (2017).

⁵⁰ See *id.*; see generally Rhoda Scherman et al., *Global Commercial Surrogacy and International Adoption: Parallels and Differences*, 40 ADOPTION & FOSTERING 20-35 (2016); Kristen E. Cheney, Executive Summary of the International Forum on Intercountry Adoption and Global Surrogacy (Dec. 2014) (Working Paper No. 596, International Institute of Social Studies) (available at <https://repub.eur.nl/pub/77408/wp596.pdf> [<https://perma.cc/7S93-VATG>]).

⁵¹ ROTABI & BROMFIELD, *supra* note 51; see generally DAISY DEOMAMPO, TRANSNATIONAL REPRODUCTION: RACE, KINSHIP, AND COMMERCIAL SURROGACY IN INDIA 2016); Amrita Banerjee, *Race and a Transnational Reproductive Caste System: Indian Transnational Surrogacy*, 29 HYPATIA 114-16 (2014).

⁵² Scherman et al., *supra* note 50, at 21. This shift towards GCS, often viewed as a quicker and potentially less expensive route to genetic parenthood, gained public attention through high-profile cases like “Baby Gammy” in 2014, where a child born with Down Syndrome was allegedly abandoned by the commissioning parents. *Id.* This incident, among others, has highlighted the urgent need for international regulations on commercial surrogacy, echoing concerns historically associated with ICA practices. *Id.* The parallels between ICA and GCS, including the roles of adoptive and commissioning parents, birth mothers and surrogates, and the children involved, underscore the complexities of both practices and the need for comprehensive oversight to protect the rights and well-being of all parties involved. *Id.*

worldwide to engage in surrogacy arrangements beyond their national borders.⁵³ While surrogacy offers new family-building options, it also raises new ethical and legal questions, mirroring those that have long surrounded intercountry adoption.⁵⁴ It emerges alongside evolving family structures, the democratization of reproductive technologies, and an increasing emphasis on genetic ties in the conceptualization of family.⁵⁵

Global surrogacy, often lacking comprehensive regulation, risks replicating a market-driven commodification of children, with surrogate mothers in economically disadvantaged nations becoming the new 'source countries' for child-seeking Westerners. The decline in intercountry adoption and the ascendancy of global commercial surrogacy are closely linked, driven by a demand for children that outpaces supply within legally and ethically constrained frameworks.

II. NAVIGATING THE COMPLEXITIES OF INTERCOUNTRY ADOPTION: LEGAL FRAMEWORKS, ETHICAL DILEMMAS, AND GLOBAL PERSPECTIVES

A. Foundational Legal Instruments and Global Agreements

Intercountry adoption, although a relatively small component of global child protection systems, has drawn significant attention within international legal communities. This focus is evident in the number of conventions and agreements that have been established, particularly within Europe and Latin America, to set forth

⁵³ See generally Erica Davis, *The Rise of Gestational Surrogacy and the Pressing Need for International Regulation*, 21 MINN. J. INT'L L. 120 (2012); see also Kristy Horsey, *The Future of Surrogacy: A Review of Current Global Trends and National Landscapes*, 48 REPROD. BIOMEDICINE ONLINE, May 2024, at 1-16; see also Gloria Torres et al., *A Review of Surrogate Motherhood Regulation in South American Countries: Pointing to a Need for an International Legal Framework*, 19 BMC PREGNANCY & CHILDBIRTH 1-12 (2019).

⁵⁴ Seema Mohapatre, *Adopting an International Convention on Surrogacy - A Lesson from Intercountry Adoption*, 13 LOY. U. CHI. INT'L L. REV. 25, 25 (2016). The realm of international surrogacy is increasingly marred by scandals and instances of stranded and stateless infants, a profound identity crisis within the practice. *Id.*

⁵⁵ See generally ROTABI & BROMFIELD, *supra* note 49; see also Karen Smith Rotabi, Force, Fraud, and Coercion: Bridging from Knowledge of Intercountry Adoption to Global Surrogacy (Dec. 2014) (Working Paper No. 600, International Institute of Social Studies) (accessible at <https://repub.eur.nl/pub/77403> [<https://perma.cc/KL37-N7ED>]).

principles and standards governing this practice.⁵⁶ This global legal framework, while intended to universal child welfare standards, often exposes tensions between national sovereignty and international norms.

The evolution of intercountry adoption witnessed significant transformation as the number of such adoptions increased through the 1960s and 1970s.⁵⁷ A key milestone was the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption enacted on May 1, 1995.⁵⁸ This Convention represents an important step in the codification of children's rights within the context of international adoption but highlighted the challenges of enforcing such rights across diverse legal systems. The Convention was influenced by a series of earlier legal instruments, including the European Convention on the Adoption of Children (1967),⁵⁹ the Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors,⁶⁰ the United Nations Declaration on Social and Legal Principles Relating to the

⁵⁶ *Intercountry Adoption*, UNICEF: INNOCENTI DIGEST (1998), <https://digitallibrary.un.org/record/1491174?ln=en&v=pdf> [https://perma.cc/J9JC-KDJ7].

⁵⁷ See Richard H. Weil, *International Adoptions: The Quiet Migration*, 18 INTERNATIONAL MIGRATION REVIEW 276, 282 (1984); Shani King, *Challenging Monohumanism: An Argument for Changing the Way we Think about Intercountry Adoption*, 30 MICH. J. INT'L L. 413, 420, 423 (2008).

⁵⁸ Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, S. TREATY DOC NO. 105-51, 1870 U.N.T.S. 167, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=69> [https://perma.cc/5W79-PAN4].

⁵⁹ European Convention on the Adoption of Children, Apr. 24, 1967, Eur. T.S. No. 58, <https://rm.coe.int/168006ff60> [https://perma.cc/B9F5-NUKB]. This Convention underwent a significant revision in 2008 to address and modernize outdated provisions in light of new challenges and interpretations of the European Court of Human Rights. European Convention on the Adoption of Children (Revised), Nov. 27, 2008, Council of Eur. Treaty Series No. 202., <https://rm.coe.int/1680084823> [https://perma.cc/93KT-MTTB].

⁶⁰ Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors, May 24, 1984, O.A.S.T.S. No. B-48, <https://www.oas.org/juridico/english/treaties/b-48.html> [https://perma.cc/LQZ9-PM3Y].

Protection and Welfare of Children (1986),⁶¹ and the Convention on the Rights of the Child (1989).⁶²

B. The Convention on the Rights of the Child (“CRC”) and the Optional Protocol

The adoption of the Convention on the Rights of the Child (“CRC”) in 1989 introduced formal recognition of intercountry adoption as a legitimate form of alternative childcare, a first in the context of global agreements.⁶³ In addressing the adoption, CRC provides a foundational yet general framework. Specifically, while recognizing the potential of intercountry adoption as a viable alternative for childcare, Article 21(b) restricts the frequency of international placements.⁶⁴ This provision mandates the

⁶¹ U.N. GAOR, 41st Sess., 95th plen. mtg. at 6, U.N. Doc. A/RES/41/85 (Dec. 3, 1986), <https://digitallibrary.un.org/record/126399?ln=en> [https://perma.cc/7ZK3-MJG8].

⁶² *Convention on the Rights of the Child*, 1577 UNITED NATIONS: TREATY SERIES 3 (1989), <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-11.en.pdf> [https://perma.cc/JU7M-A24F].

⁶³ Mary Eschelbach Hansen & Daniel Pollack, *The Regulation of Intercountry Adoption*, 45 BRANDEIS L.J. 105, 110 (2006). The CRC’s negotiation phase highlighted the contentious nature of adoption, particularly among Islamic delegations due to religious perspectives on adoption. Ann Elizabeth Mayer, *Islamic Reservations to Human Rights Conventions: A Critical Assessment*, 15 RECHT VAN DE ISLAM 25, 37 (1998); *Reservations to the Convention on the Rights of the Child: A Look at the Reservations of Asian State Parties*, INT’L COMM’N OF JURISTS, <https://www.icj.org/wp-content/uploads/2013/10/Asia-Convention-Rights-of-the-Child-non-legal-submission-1994-eng.pdf> [https://perma.cc/S56C-FWHK] (last visited Dec. 6, 2024). For example, upon signature, the Maldives made a reservation to the Convention saying: “1) Since the Islamic Shariah is one of the fundamental sources of Maldivian Law and since Islamic Shariah does not include the system of adoption among the ways and means for the protection and care of children contained in Shariah, the Government of the Republic of Maldives expresses its reservation with respect to all the clauses and provisions relating to adoption in the said Convention on the Rights of the Child. 2) The Government of the Republic of Maldives expresses its reservation to paragraph 1 of article 14 of the said Convention on the Rights of the Child, since the Constitution and the Laws of the Republic of Maldives stipulate that all Maldivians should be Muslims.” *Convention on the Rights of the Child*, *supra* note 62, at 7.

⁶⁴ Article 21 (b) CRC: (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. *See generally* SYLVAIN VITÉ & HERVÉ BOÉCHAT, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: ARTICLE 21: ADOPTION (2008). Gerison Lansdown, *Chapter 7: Article 21-Adoption*, in 25 MONITORING STATE COMPLIANCE WITH THE UN CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF ATTRIBUTES (Ziba Vaghri et al., 2022), <https://link.springer.com/chapter/10.1007/978-3->

exploration of international adoption options only in scenarios where feasible domestic solutions, such as placement within a foster or adoptive family, or any other suitable care within the child's country of origin, are unattainable.⁶⁵

Further, the CRC in Article 21(d) highlights a crucial aspect of ethical intercountry adoptions: the need to avoid any improper financial benefits accruing to the parties involved in the adoption process. The emphasis of the CRC on ethical practices sets a moral compass rather than establishing a rigid legal framework for the conduct of intercountry (and, by extension, domestic) adoptions. It advocates for the authorization of child adoption solely by entities with recognized competence, aiming to safeguard the welfare of the child involved in intercountry adoption by ensuring they receive protections and standards on par with those afforded in domestic adoptions.⁶⁶ This approach encourages best practices and guidelines, urging signatory parties to implement measures that uphold the integrity of the adoption process and prioritize the best interests of the child.⁶⁷

030-84647-3_19 [<https://perma.cc/S42Y-3VVP>]; DAVID SMOLIN, ABDUCTION, SALE AND TRAFFIC IN CHILDREN IN THE CONTEXT OF INTERCOUNTRY ADOPTION (2010), <https://assets.hcch.net/upload/wop/adop2010id01e.pdf> [<https://perma.cc/3VFV-AMLQ>].

⁶⁵ *Convention on the Rights of the Child*, *supra* note 62, at 9.

⁶⁶ See VITÉ & BOÉCHAT, *supra* note 64; Lansdown, *supra* note 64.

⁶⁷ *Convention on the Rights of the Child*, *supra* note 62, at 9. Article 21 reads as follows:

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;

While the CRC's provisions laid the groundwork for ethical intercountry adoption practices, they also expose the absence of a binding, enforceable framework capable of addressing systemic risks and exploitation within the adoption process. Such protections demand coordinated action by international bodies, national governments, and civil society to ensure that the rights and welfare of children are at the forefront of all adoption policies and practices.

The principle of the child's best interests, while universally acknowledged, suffers from persistent ambiguity in its application. International guidelines offer no concrete criteria for determining these best interests, leading to varied interpretations over time. It wasn't until twenty-three years after the 1990 Convention on the Rights of the Child that the Committee on the Rights of the Child issued General Comment No. 14 in 2013,⁶⁸ attempting to clarify the implementation of this principle. However, the lack of interpretive clarity surrounding this principle creates persistent challenges, especially in the context of intercountry adoption. The process often involves stakeholders from diverse cultural backgrounds with different views on what constitutes the child's best interests, further complicated by the complexities of relocating a child not just to a new family but to a new country and culture. Despite efforts to address these issues, there remains a concerning disregard for the principle's application in intercountry adoption.⁶⁹

Some authors argue that the principles outlined in the Convention on the Rights of the Child inherently oppose the establishment of an intercountry adoption framework. According to this viewpoint, prioritizing human rights necessitates the creation of robust domestic child welfare systems. Since the CRC's

(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.

Id.

⁶⁸ Comm. on the Rts. of the Child, Gen. Comment No. 14 on the Right of the Child to have his or her Best Interests Taken as a Primary Consideration (art. 3, para. 1), U.N. Doc. CRC/C/GC/14 (2013), <https://www.refworld.org/legal/general/crc/2013/en/95780> [<https://perma.cc/ZKG8-FGBF>].

⁶⁹ NIGEL CANTWELL, THE BEST INTERESTS OF THE CHILD IN INTERCOUNTRY ADOPTION 58 (2014), <https://www.unicef.nl/files/UNICEF%20REPORT%20-The%20best%20interests%20of%20the%20child%20in%20intercountry%20adoption.pdf> [<https://perma.cc/BH3R-ELCN>].

subsidiarity principle emphasizes domestic solutions, including foster care and various forms of local care, the establishment of an intercountry adoption system would contradict these principles. Advocates of this perspective contend that every effort should be made to ensure that suitable care options are available for every child within their own nation, even in regions with developing or transitioning economies. Instead of focusing on the development of intercountry adoption practices, attention should be directed towards addressing gaps within the domestic child welfare system.⁷⁰

Dillon suggests that United Nations entities dedicated to child welfare, notably UNICEF and the Committee on the Rights of the Child, interpret the CRC in a manner that favors intra-country foster care and “family-like” group homes over conventional institutional care. This interpretative strategy permits these bodies to circumvent criticisms that the CRC may have inadequately addressed the complexities of childcare and protection in its drafting.⁷¹

The debate around the CRC’s subsidiarity principle and its implications for intercountry adoption reveals an unresolved conflict between the desire to protect the children and the practical realities faced by children in need of permanent homes. While the focus on strengthening domestic child welfare systems is crucial, it is also essential to recognize that, in some cases, intercountry adoption may represent the best available option for ensuring a child’s need to a family. The challenge lies in balancing these considerations, ensuring that intercountry adoptions are conducted ethically and transparently, with the child’s best interests at the forefront.

The Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (to the CRC)⁷² attempts to

⁷⁰ See generally David M. Smolin, *Can the Center Hold? The Vulnerabilities of the Official Legal Regimen for Intercountry Adoption*, in THE INTERCOUNTRY ADOPTION DEBATE: DIALOGUES ACROSS DISCIPLINES, *supra* note 1.

⁷¹ Sara Dillon, *The Missing Link: A Social Orphan Protocol to the United Nations Convention on the Rights of the Child*, 35 ADMIN. & REG. L. NEWS 7, 7 (2010).

⁷² G.A. Res. 54/263, U.N. Doc. A/RES/54/263, Optional Protocol to the Convention on the Rights of the Child on the sale of Children, Child Prostitution and Child Pornography (May 25, 2000), <https://www.ohchr.org/en/instruments/>

address some of the gaps by criminalizing actions that improperly induce consent for adoption, acknowledging connections between financial incentives and ethical adoption practices. However, this legal instrument, while a step forward, also exposes the reactive nature of international law to the challenges of intercountry adoption, rather than providing proactive, comprehensive solutions. The Protocol expressly mandates States Parties to criminalize actions that improperly induce consent for the adoption of a child, in violation of applicable international legal instruments on adoption. This focus on penalization signals a move towards safeguarding ethical practices in adoption, specifically targeting exploitation and corruption. However, it is noteworthy that the Optional Protocol does not extend its scope to prescribe specific legal frameworks or detailed procedural guidelines for adoption, reflecting a targeted approach towards combating malpractices in adoption processes rather than establishing comprehensive adoption procedures.⁷³

In light of the Optional Protocol's efforts to combat exploitation and corruption in intercountry adoption, there is a clear necessity for further action to develop a holistic framework that addresses the root causes of these issues. This includes enhancing the capacity of domestic child welfare systems, promoting ethical adoption practices, and ensuring that all stakeholders in the adoption process are held to the highest standards of integrity and transparency.

C. The European Court of Human Rights and Adoption Jurisprudence

Despite the absence of explicit provisions on intercountry adoption in the European Convention on Human Rights, the European Court of Human Rights has developed a substantial body of case law based on Article 8, addressing issues such as the right of the adopted child to know its origins and considerations related

mechanisms/instruments/optional-protocol-convention-rights-child-sale-children-child [https://perma.cc/F4KW-5QHB].

⁷³ UNICEF, HANDBOOK ON THE OPTIONAL PROTOCOL ON THE SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY (2009), <https://www.unicef.org/media/66806/file/Handbook-Optional-Protocol.pdf> [https://perma.cc/3E3W-7L7V].

to the non-discrimination of adoptive parents based on sexual orientation.⁷⁴ The Court has adjudicated several cases related to adoption and its implications for Article 8, establishing significant precedents. For example, it has ruled that non-consensual adoption constitutes a violation of a parent's right to respect for family life, permissible only under extraordinary circumstances, as seen in cases such as *Johansen v. Norway*⁷⁵ and *Görgülü v. Germany*.⁷⁶

Additionally, the Court clarified that the right to respect for family life encompasses procedural safeguards concerning the processes of placement and adoption. This includes the entitlement of birth parents and the child to receive information, engage in the decision-making process, and challenge any resolutions made.⁷⁷ The Court has articulated that there exists no inherent right to adopt a child or entitlement to a child. Instead, the principle of adoption is articulated as "providing a child with a family, not a family with a child."⁷⁸ The European Court of Human Rights' approach to adoption jurisprudence, particularly its emphasis on the child's best interest and procedural safeguards has helped establish enforceable standards that promote ethical intercountry adoption practices. Furthermore, the Court's jurisprudence reaffirms the legal centrality of the child's right to identity and family life, principles that should guide all adoption proceedings. By setting these standards, the Court contributes significantly to shaping a more humane and just framework for intercountry adoption. Given the complexity and sensitivity of international placements, its case law should inform the development of unified international standards governing adoption.⁷⁹

⁷⁴ GERALDINE VAN BUEREN, CHILD RIGHTS IN EUROPE 126 (2007).

⁷⁵ *Johansen v. Norway*, App. No. 17383/90, 23 (June 27, 1996), [https://hudoc.echr.coe.int/eng#%22itemid%22:\[%22001-45701%22\]}](https://hudoc.echr.coe.int/eng#%22itemid%22:[%22001-45701%22]}).
[<https://perma.cc/QC55-GLQN>]

⁷⁶ *Görgülü v. Germany*, App. No. 74969/01 (Feb. 26, 2004), <https://hudoc.echr.coe.int/eng-press?i=003-944064-972418> [<https://perma.cc/4W4F-ZCSP>].

⁷⁷ *X v. Croatia*, App. No. 11223/04 (July 17, 2008), <https://hudoc.echr.coe.int/eng?i=002-1976> [<https://perma.cc/5P8N-YT83>].

⁷⁸ *Pini and Others v. Romania*, App. Nos. 78028/01 & 78030/01, ¶ 156 (Sept. 22, 2004), <https://hudoc.echr.coe.int/eng?i=001-61837> [<https://perma.cc/GPZ9-8SEG>].

⁷⁹ See KERRY O'HALLORAN, 41 THE POLITICS OF ADOPTION: INTERNATIONAL PERSPECTIVES ON LAW, POLICY AND PRACTICE 107-136 (Mortimer Sellers et al. eds., 3d ed. 2015); Erika Pehr Katonáné, *The Right of Children to Adoption in Light of the*

D. The Hague Convention and its Impact

Finally, the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption⁸⁰ emerged as a vital legal instrument, addressing the complexities of intercountry adoption beyond the mere conflict of laws to facilitate structured cooperation between countries of origin and receiving countries. The Convention stresses the child's best interests and fundamental human rights⁸¹ while aiming to minimize potential abuses and ensure the automatic recognition of adoptions across contracting states.⁸²

While the Hague Convention draws upon principles established in the Convention on the Rights of the Child,⁸³ it serves

European Convention on Human Rights, 19 EUR. INTEGRATION STUD. (2023); Elvira Loibl, *The ECHR and private intercountry adoptions in Germany and the Netherlands: Lessons learned from Campanelli and Paradiso v. Italy*, 2021 Fam. & L. 1-19 (2021); EUR. COMM'N: COUNCIL OF EUR. & DIRECTORATE-GEN. FOR JUST., CHALLENGES IN ADOPTION PROCEDURES IN EUROPE: ENSURING THE BEST INTERESTS OF THE CHILD (2011), <https://data.europa.eu/doi/10.2838/31489> [<https://perma.cc/3RFP-AVAP>]; Lydia Bracken, *Adoption in 'New Family Forms': Emerging Case Law from the European Court of Human Rights*, in RESEARCH HANDBOOK ON ADOPTION LAW 306-321 (Nigel Lowe & Claire Fenton-Glynn eds., 2023); Clarie Breen et al., *Family life for children in state care: An analysis of the European Court of Human Rights' reasoning on adoption without consent*, 28 INT'L J. OF CHILDREN'S RTS. 715-747 (2020).

⁸⁰ Peter Hayes, *The Legality and Ethics of Independent Intercountry Adoption Under the Hague Convention*, 25 INT'L J.L. POL'Y & FAM. 288 (2011). Anchoring in the foundational principles of the Convention on the Rights of the Child, The Hague Convention operates within the realm of private international law. *Id.* As a piece of legislation, it was crafted as a mediating solution aiming to bridge the divide between divergent perspectives on intercountry adoption. *Id.*

⁸¹ Cantwell, *supra* note 69, at 12. Like human rights law, private international law seldom employs the term 'best interests,' and its use is primarily associated with matters concerning children. *See id.* An example is the 1993 Hague Convention on Intercountry Adoption, which emphasizes the importance of conducting intercountry adoptions in a manner that prioritizes the child's best interests and respects the child's fundamental rights, as recognized by international law. *Id.*

⁸² Ann Laquer Estin, *Families Across Borders: The Hague Children's Convention and the Case for International Family Law in the United States*, 62 FLA. L. REV. 47, 55 (2010).

⁸³ Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, *supra* note 58, at pmbl. In its preamble, the Hague Convention emphasizes the critical importance of aligning with the Convention on the Rights of the Child, highlighting the mutual objective of safeguarding children's rights and welfare on an international scale. *Id.* By explicitly referencing the CRC, the Hague Convention signals its dedication to ensuring that all actions and decisions concerning intercountry adoption are guided by the fundamental principles and rights established in the CRC, promoting a cohesive and child-centered approach to international adoption practices. *Id.*

as an instrument of international private law with a distinct legal status and scope relative to the CRC.⁸⁴ However, its ratification by the United States in 2008 did not quell the debate on core issues, leading to the issuance of guidelines by the Permanent Bureau of the Hague Conference.⁸⁵ The Convention's preamble reminds states of the importance to take appropriate measures to enable a child to remain in their country of origin. Yet, it acknowledges the benefits of international adoption when such is not feasible, emphasizing that international adoptions must be conducted in the best interests of the child and with respect for their fundamental human rights, while also preventing abduction, sale, or trafficking of children.

The Hague Convention introduces safeguards for all participants in the adoption process, establishes a system of cooperation between authorities in the country of origin and the receiving country, and aims to minimize potential abuses by prescribing clear procedures. Its application is triggered when the adoptee and adopter reside in different countries, provided both the receiving country and the country of origin are signatories to the Convention.⁸⁶ It protects children up to the age of eighteen years

Desiring to establish common provisions to this effect, taking 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, and the United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (General Assembly Resolution 41/85, of 3 December 1986. *Id.*

⁸⁴ Ingi Iusmen, *The EU and International Adoption from Romania*, 27 INT'L J. OF L., POL'Y & FAM. 1, 4 (2013).

⁸⁵ Hayes, *supra* note 80, at 288.

⁸⁶ This specificity ensures that the Convention directly addresses the complexities and challenges associated with intercountry adoption, such as jurisdictional differences, the harmonization of legal standards, and the protection of children's rights across international borders. The limitation to cases where adoptive parents and the child reside in different states is a deliberate design to provide a structured and secure framework for intercountry adoptions, reinforcing the Convention's role as a critical instrument in promoting the best interests of the child on a global scale. *See generally* HAGUE CONF. ON PRIV. INT'L L., 1993 HAGUE CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION: INFORMATION BROCHURE (2024), <https://assets.hcch.net/docs/ccbff557d-d5d2-436d-88d6-90cddbe78262.pdf> [<https://perma.cc/FNX5-H9K>]; *see also* G. Parra-Aranguren, EXPLANATORY REPORT ON THE CONVENTION OF 29 MAY 1993 ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION (2022), <https://assets.hcch.net/docs/78e18c87-fdc7-4d86-b58c-c8fdd5795c1a.pdf> [<https://perma.cc/GTA5-NPQ3>].

who are without parental care, recognizing full adoption as the form of adoption known to the Convention.

The Convention is grounded on several principles, including the best interests of the child, subsidiarity, cooperation between states to prevent abduction, sale, or trafficking of children, automatic recognition of adoption decisions and competent authorities, central authorities, and accredited bodies⁸⁷ to act as competent organs under continuous state supervision.⁸⁸

The best interests of the child⁸⁹ are reflected through the obligation of states to first seek suitable adopters within the child's

⁸⁷ See HAGUE CONF. ON PRIV. INT'L L., ACCREDITATION AND ADOPTION ACCREDITED BODIES: GENERAL PRINCIPLES AND GUIDE TO GOOD PRACTICE, 2nd ed. (2d ed. 2012), <https://www.hcch.net/en/publications-and-studies/details4/?pid=5504> [https://perma.cc/7424-RNLT].

⁸⁸ See generally HAGUE CONF. ON PRIV. INT'L L., THE IMPLEMENTATION AND OPERATION OF THE 1993 HAGUE INTERCOUNTRY ADOPTION CONVENTION: GUIDE TO GOOD PRACTICE (1st ed. 2008), <https://assets.hcch.net/docs/bb168262-1696-4e7f-acf3-fbbd85504af6.pdf> [https://perma.cc/4GS7-ELR3]. The guide elaborates on several general principles fundamental to the Convention's implementation. *See id.* First, it underscores the paramountcy of the child's best interests, aligning with the broader mandates of child protection under international law, notably the CRC. *See id.* Second, the principle of subsidiarity is emphasized by advocating for intercountry adoption as a last resort. *See id.* This reflects a commitment to preserving the child's connections to their cultural, linguistic, and familial heritage, promoting solutions that maintain these ties wherever feasible. *See id.* Third, non-discrimination is highlighted as a pivotal principle, ensuring equal protection and consideration for all children regardless of their circumstances. *See id.* This principle is crucial for fostering inclusivity and equity in the adoption process. *See id.* Fourth, the guide focuses on the establishment of rigorous safeguards to combat the abduction, sale, and trafficking of children. *See id.* It calls for the protection of families, the integrity of consent in the adoption process, and the prevention of financial exploitation, outlining measures to uphold ethical standards and protect the vulnerable. *See id.* Fifth, cooperation between States is identified as essential for the Convention's successful implementation. *See id.* The guide details the roles of Central Authorities and the importance of international collaboration to prevent abuses and ensure the adherence to the Convention's standards. *See id.* Finally, the authorization of competent authorities is discussed, with an emphasis on the need for oversight by accredited bodies and the importance of ensuring that all entities involved in the adoption process are operating within the legal and ethical framework provided by the Convention. *See id.*

⁸⁹ See Lisa Myers, *Preserving the Best Interests of the World's Children: Implementing the Hague Treaty on Intercountry Adoption Through Public-Private Partnerships*, 6 RUTGERS J.L. & PUB. POL'Y 780 (2009); Lara Walker, *Intercountry Adoption and the Best Interests of the Child: The Hague Convention of 1993 and the Importance of Bonding*, 27 CHILD & FAM. L. Q. 355 (2015); Elisabeth J. Ryan, *For the Best Interests of the Children: Why the Hague Convention on Intercountry Adoption Needs to Go Farther, as Evidenced by Implementation in Romania and the United States*, 29

country of origin, compliance with legal conditions, and the confidentiality of information about the child's biological parents.

The subsidiarity principle⁹⁰ emphasizes the obligation of contracting states to enable a child's development within their birth family whenever possible, followed by exhausting all other forms of protection in the country of origin before considering international adoption as an alternative solution. Goodno argues that the language within the Hague Convention holds significance as it establishes the convention's subsidiarity principle, which outlines the prioritization of various options for the care of an orphan. This approach diverges from that of the Convention on the Rights of the Child. The Hague Convention stipulates that "due consideration" must be given to settling the child in the state of origin. Therefore, while the Hague Convention favors placing the child in a permanent home within their own country, it acknowledges that if permanent placement is unattainable domestically, intercountry adoption is preferred over institutional care. This wording also implies a preference for intercountry adoption (permanent placement) over foster care. Goodno points out that while some scholars argue that the subsidiarity principles of the Hague and CRC align, a straightforward interpretation of the treaty language suggests otherwise. The CRC's subsidiarity principle prioritizes in-country foster care (and potentially institutionalization) over intercountry adoption, whereas the Hague's subsidiarity principle places intercountry above in-country temporary care.⁹¹

B.C. INT'L & COMPAR. L. REV. 353 (2006); Sarah-Vaughan Brakman, *Defending Intercountry Adoption: An Ethical Analysis of the Best Interests of Children and Subsidiarity*, in RESEARCH HANDBOOK ON ADOPTION LAW, *supra* note 79, at 365.

⁹⁰ See Sarah-Vaughan Brakman, *The Principle of Subsidiarity in the Hague Convention on Intercountry Adoption: A Philosophical Analysis*, 33 ETHICS & INT'L AFFS. 207 (2019); Chad Turner, *The History of the Subsidiarity Principle in the Hague Convention on Intercountry Adoption*, 16 CHI.-KENT J. INT'L & COMPAR. L. 95 (2016).

⁹¹ Naomi Goodno, *The Hague: An Endless Balancing Act of Preventing Intercountry Adoption Abuses and Finding Permanent Homes for Orphans*, in THE INTERCOUNTRY ADOPTION DEBATE: DIALOGUES ACROSS DISCIPLINES, *supra* note 1, at 215. Hence, while both the Hague Convention and the CRC prioritize the "best interest of the child," they offer slightly different interpretations of this concept. *See id.* The Hague Convention places importance on securing a permanent home for the child, whereas the CRC prioritizes the preservation of cultural identity before permanency. *Id.* According to the CRC, intercountry adoption is considered a measure of last resort. *Id.* Under this perspective, children would ideally remain in their state of origin, albeit in temporary arrangements such as foster care or, potentially, institutional care, before considering

The language used in the Hague Conference's documents clearly supports the principle of subsidiarity, as seen in their own publications stating that the Convention grants origin countries the authority to control both the adoption process and the extent of intercountry adoptions and upholds the essential principle of subsidiarity, mandating that every consideration be given to national solutions for the child's care before contemplating intercountry adoption.⁹² Additionally, the foundational principle of subsidiarity is evident from the drafting history and the outset of the Conclusions of the Special Commission on intercountry adoption in June 1990. The document reaffirms that the Convention should prioritize the best interests of the child, noting that intercountry adoption should only be considered when it is in the child's best interests to be raised by their own parents or by a foster or adoptive family in their own country. Intercountry adoption is thus positioned as a subsidiary solution, intended to protect the welfare of the child.⁹³

The Convention's significance lies chiefly in the automatic recognition⁹⁴ of adoptions and their effects in all contracting states. It allows a state to deny the effects of an adoption and refuse its recognition only if the adoption contradicts its public order, while considering the best interests of the child.⁹⁵ The European Union,

placement outside the country. *Id.* If both treaties are interpreted in conjunction with each other, the Hague Convention's emphasis on achieving permanent care through intercountry adoption could face challenges. *Id.*

⁹² Permanent Bureau of Hague Conf. on Priv. Int'l L., *Hague Conference Update, in INTERNATIONAL FAMILY LAW* (June 2010), <https://www.hcch.net/en/publications-and-studies/details4/?pid=5560> [<https://perma.cc/3ZYP-CQBR>] ("It is a Convention which empowers countries of origin to retain control over the adoption process, as well as the level of intercountry adoption. It also supports the crucial principle of subsidiarity which requires that, before intercountry adoption is contemplated, (in the words chosen by the African experts) 'full and proper consideration has been given to national solutions' for the child's care.").

⁹³ HAGUE CONF. ON PRIV. INT'L L., *PROCEEDINGS OF THE SEVENTEENTH SESSION* 129 (May 29, 1993), <https://www.hcch.net/en/publications-and-studies/details4/?pid=918> [<https://perma.cc/5RWB-NP4R>].

⁹⁴ HAGUE CONF. ON PRIV. INT'L L., *supra* note 87, at 11.

⁹⁵ Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, *supra* note 58 ("The recognition of an adoption may be refused in a Contracting State only if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child.").

by virtue of its unique supranational character and the diverse legal systems of its member states, faces particular challenges⁹⁶ in handling adoptions that contain an international dimension, which fall outside the purview of the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.⁹⁷

⁹⁶ See Céline Chateau, *Adoption: Cross-Border Legal Issues and Gaps in the European Union*, EUR. PARLIAMENT (Dec. 15, 2015), [https://www.europarl.europa.eu/thinktank/en/document/IPOL_BRI\(2015\)536480](https://www.europarl.europa.eu/thinktank/en/document/IPOL_BRI(2015)536480) [https://perma.cc/89H2-EX8Z]. The absence of a unified system within the EU for recognizing domestic adoptions leads to various legal and practical challenges, underscored by numerous cases. *Id.* Inheritance Rights Disputes are exemplified by the European Court of Human Rights (ECtHR) in the Negropontis case, where non-recognition sparked contention over inheritance. *Id.* Citizenship Uncertainty arises when adoptions recognized in one state do not assure the child's citizenship in another, creating legal and administrative challenges. *Id.* Recognition of Same-Sex Couples' Adoptions varies across EU Member States, with some allowing it and others not, affecting parental rights in areas like school registration and medical care. *Id.* This non-recognition further complicates the Automatic Recognition of Parental Responsibility Decisions, protected under the Brussels IIa Regulation but not extended to adoption orders. *Id.* Additionally, Child Protection Measures in Muslim Jurisdictions, such as the 2012 ECtHR case on France's non-recognition of a legal bond under Algerian 'kafala' procedures, highlight the difficulties in recognizing adoption-equivalent child protection measures from jurisdictions with differing legal perspectives on adoption. *Id.*

⁹⁷ See Tatjana Evas, *Cross-Border Recognition of Adoptions: European Added Value Assessment*, EUR. PARLIAMENT (Nov. 2016), https://www.europarl.europa.eu/RegData/etudes/STUD/2016/581384/EPRS_STU%282016%29581384_EN.pdf [https://perma.cc/DT39-KL3X].

The mobility of EU citizens, facilitated by the principle of free movement, significantly enhances the likelihood of familial formations across nationalities within the Union. *Id.* Such cross-border familial ties inevitably lead to adoptions that, while recognized under the national laws of one member state, may not seamlessly align with the legal frameworks of others due to the absence of a uniform EU-wide legal mechanism for the recognition and enforcement of such adoptions. *Id.* The limitations of the 1993 Hague Convention, which specifically addresses intercountry adoptions between states with the intent to safeguard children's best interests through standardizing procedures and protections, do not extend to cover intra-EU adoptions where the child and adoptive parents are habitually resident within the same member state. *Id.* This gap presents a complex legal landscape for EU citizens whose familial structures transcend national borders, as the lack of a harmonized approach to the recognition of adoption orders across member states can result in legal uncertainties and practical barriers. *Id.* These barriers not only affect the fundamental rights of the child and the adoptive parents but also impede the free movement of families within the EU, potentially restricting their ability to reside, work, or access social benefits across member states. *Id.*

In response to the challenges of cross-border adoption recognition within the EU, the European Parliament, leveraging Article 225 of the Treaty on the Functioning of the European Union (TFEU), initiated a legislative move. *Id.* On 23 April 2015, the

One of the Convention's particularly significant elements is its post-adoption protection, as it requires the central authority of the receiving state to take appropriate measures to protect the adoptee if it is deemed that their continued stay with the adoptive family is not in their best interest.⁹⁸ However, during discussions on the development of the Convention, the focus arose on the potential for the new legislation to enhance international adoption by encouraging collaboration between countries involved in sending and receiving children, with the aim of increasing the number of placements and ensuring children are placed at younger ages.⁹⁹ However, those opposed to international adoption successfully argued against the incorporation of language that would ease the adoption process.¹⁰⁰

The United States endorsed the Hague Convention, enacting it domestically through the Intercountry Adoption Act of 2000, but it was not fully operational until 2008. Consequently, from 2008 onwards, in situations where the country of origin has also ratified the Hague Convention, the protocols for intercountry adoption outlined in the Hague Convention exclusively dictate procedures within the U.S. In contrast, if the country of origin has not ratified the Hague Convention, then the domestic laws of both the sending

Conference of Presidents authorized the Committee on Legal Affairs (JURI) to draft a report advocating for an EU-wide regulation. *Id.* This proposed regulation aims to standardize the mutual recognition of domestic adoption orders across EU Member States, drawing inspiration from the successes of the 1993 Hague Convention and the Brussels IIa Regulation. *Id.* This step represents a strategic effort to address jurisdictional, recognition, and enforcement disparities in adoptions, enhancing the legal security and welfare of children and families across the EU. *Id.*

⁹⁸ See Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, *supra* note 58, at art. 9, 21, 24; see also Karen Smith Rotabi et al., *Does the Hague Convention on Intercountry Adoption Adequately Protect Orphaned and Vulnerable Children and Their Families?*, 21 J. CHILD & FAM. STUD. 106-119 (2012); Brakman, *supra* note 89, at 365-366; Susann M. Bisignaro, *Intercountry Adoption Today and the Implications of the 1993 Hague Convention on Tomorrow*, 13 PENN STATE INT'L L. REV. (1994); Sarah Richards, HCIA Implementation and the Best Interests of the Child (Dec. 2014) (International Institute of Social Studies, Working Paper No. 597) (accessible at <https://repub.eur.nl/pub/77407/wp597.pdf> [https://perma.cc/M2UE-CDL5]); Jean NELSON ERICHSEN, *INSIDE THE ADOPTION AGENCY: UNDERSTANDING INTERCOUNTRY ADOPTION IN THE ERA OF THE HAGUE CONVENTION* (2007).

⁹⁹ Elizabeth Bartholet, *The Hague Convention: Pros, Cons and Potential, in THE INTERCOUNTRY ADOPTION DEBATE: DIALOGUES ACROSS DISCIPLINES*, *supra* note 1, at 241.

¹⁰⁰ *Id.* at 239, 241.

and receiving countries (including U.S. immigration law) apply to govern the process.¹⁰¹

An illustrative example of intercountry adoption procedures in the absence of Hague Convention ratification is seen in the 2023 case of *Trower v. Blinken*. Jill and Adam Trower sought to adopt a child from the Democratic Republic of Congo (“DRC”), a country that had not ratified the Hague Convention at the time of the adoption process. Despite the lack of Hague Convention ratification by the DRC, the Trowers followed the domestic laws of both the U.S. and the DRC, including U.S. immigration law, in pursuing the adoption of Baby M.S. However, questions were raised about the validity of the adoption decree issued by the DRC court, leading to a legal dispute with U.S. government officials. The *Trower* case demonstrates the challenges in intercountry adoptions, particularly in situations where the Hague Convention is not ratified by the country of origin.¹⁰²

Despite the progress these conventions represent, there remain notable criticisms and challenges, such as the need for clearer terminology within the Hague Convention and the lack of explicit sanctions for violations of its provisions. These criticisms highlight the ongoing debate over the interpretation of the child’s best interests and the need for additional safeguards, such as DNA testing, to prevent child abduction.¹⁰³

A common misconception about the Hague Convention is that it serves as a solution for all challenges associated with intercountry adoption. In reality, it functions primarily as a mechanism to enhance intergovernmental cooperation and streamline processes among states concerning intercountry adoption. It establishes a framework for collaboration, echoing its title’s emphasis on cooperation. However, the Convention does not aim to supplant or override a country’s domestic legislation, nor does it address every conceivable issue a child might encounter in

¹⁰¹ Goodno, *supra* note 91, at 209.

¹⁰² *Trower v. Blinken*, No. 4:22-cv-00077-JAR, 2023 WL 1100385, at *1-2, *4 (E.D. Mo. Jan. 30, 2023).

¹⁰³ Michael Freeman, *Article 3: The Best Interests of the Child*, in *A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD* 22 (André Alen et al. eds., 2007); see also Erica Briscoe, *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. MATRIMONIAL L. 437, 442-45 (2009).

the intercountry adoption process. Many forms of adoption misconduct occur before the procedural safeguards of the Hague Convention are triggered. For instance, unethical practices such as the falsification of a child's civil status, which effectively renders the child "abandoned" by erasing their familial ties, reveals gaps that the Convention does not directly address. Such actions, occurring outside the Convention's purview, can lead to the undoubted acceptance of a child's eligibility for adoption despite the foundational information being fundamentally flawed. The Convention does not dictate the management or integrity of official documents, nor does it deal with the ramifications of their manipulation. Therefore, even if misconduct remains undetected, the adoption process under the Convention could proceed unimpeded based on misrepresented facts. This demonstrates the importance for vigilance and integrity at all stages of the adoption process, well before the Convention's protocols are engaged.¹⁰⁴

E. Legislative Responses and Policy Shifts

The trajectory of modern adoption laws has not uniformly facilitated the expansion of intercountry adoption. Indeed, several countries of origin have significantly restricted such adoptions, as a result of tension between legal, social, and ethical considerations. A notable case is the post-1954 adoption of Korean children by families in the United States, a phenomenon rooted in the aftermath of military engagement.¹⁰⁵ This wave of adoptions largely involved the children of U.S. military personnel stationed in Korea, who often faced substantial barriers to social integration and acceptance within Korean society due to their mixed heritage.¹⁰⁶

The Republic of Korea has historically been perceived as the principal "exporter" of children for international adoption, a distinction that drew negative attention, particularly during the

¹⁰⁴ Hervé Boéchat & Flavie Fuentes, *The Grey Zones of Intercountry Adoption*, 6 HAGUE CONF. ON PRIV. INT'L L. (June 2010), <https://assets.hcch.net/docs/0ca8b59b-4caa-40bf-99a9-2b5cfc358bb3.pdf> [https://perma.cc/N7AT-CT4T].

¹⁰⁵ King, *supra* note 57, at 420.

¹⁰⁶ *Id.*

1988 Seoul Olympic Games.¹⁰⁷ In response to this scrutiny, the Korean government initiated a strategic plan aimed at curbing the rates of intercountry adoption. Despite these initial efforts yielding limited success, a more ambitious approach was adopted in 2006.¹⁰⁸ The government launched various projects designed to encourage domestic adoption practices. These initiatives offered prospective Korean adopters incentives, including the elimination of adoption-related costs and the provision of more favorable conditions for adoption, particularly targeting older couples and individuals. A notable policy innovation was the introduction of “adoption leave,” similar to maternity leave, providing adoptive parents with dedicated time to bond with their adopted children.¹⁰⁹ These measures reflect an intentional policy push to reframe societal and cultural perceptions toward domestic adoption.¹¹⁰

The occurrence of sporadic but highly publicized scandals in the realm of intercountry adoption has precipitated a reconsideration of this practice on a global scale. Notably, in China, scandals have emerged, highlighting systemic issues driven by various factors, including family planning policies and the one-child policy, raising concerns over children subsequently placed in orphanages and later adopted abroad.¹¹¹ Similarly, in India, a 1999 scandal exposed the egregious practices of orphanage leaders and social workers in the “purchase” of babies from the Lambada tribal group, known for its cultural stigma against certain female children. These children were acquired at nominal costs and sold to

¹⁰⁷ ELEANA J. KIM, ADOPTED TERRITORY: TRANSNATIONAL KOREAN ADOPTEES AND THE POLITICS OF BELONGING 32 (2010).

¹⁰⁸ *Id.* at 1.

¹⁰⁹ *Id.* at 12.

¹¹⁰ *Id.* at 1.

¹¹¹ See KAY ANN JOHNSON, CHINA’S HIDDEN CHILDREN: ABANDONMENT, ADOPTION, AND THE HUMAN COSTS OF THE ONE-CHILD POLICY (2020); Kay Johnson, *Challenging the Discourse of Intercountry Adoption: Perspectives from Rural China*, in INTERCOUNTRY ADOPTION: POLICIES, PRACTICES, AND OUTCOMES 103 (Judith L. Gibbons & Karen Smith Rotabi eds., 1st ed. 2012); Crystel J. Gates, *China’s Newly Enacted Intercountry Adoption Law: Friend or Foe?*, 7 IND. J. GLOB. LEGAL STUD. 1 (1999); Brian H. Stuy, *Open Secret: Cash and Coercion in China’s International Adoption Program*, 44 CUMB. L. REV. 355 (2013); David M. Smolin, *The Missing Girls of China: Population, Policy, Culture, Gender, Abortion, Abandonment, and Adoption in East-Asian Perspective*, 41 CUMB. L. REV. 1 (2010); Smolin, *supra* note 36, at 113.

orphanages at a markup, eventually being placed for intercountry adoption at significantly higher prices.¹¹²

These incidents have led some nations to reconsider or restrict intercountry adoptions. The United Arab Emirates, for example, has outright banned such adoptions,¹¹³ with Romania imposing strict limitations, permitting them only in cases where the adoptive parents are close relatives.¹¹⁴ These measures reflect a growing trend among states to closely scrutinize and, in some cases, severely limit intercountry adoption.¹¹⁵

¹¹² See David M. Smolin, *The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandal*, 35 SETON HALL L. REV. 403, 456-57 (2005). A scandal in India exposed the involvement of orphanage leaders and social workers in buying babies from the Lambada tribal community, which culturally deems the third, sixth, and ninth female children as bearers of bad luck, leading to their sale at minimal prices. *Id.* Legal action was taken against two women, social workers who acted as intermediaries in these transactions, purchasing children for \$15 to \$45 and selling them to orphanages for \$220 to \$440. *Id.* Subsequently, these children were placed for intercountry adoption at prices ranging from \$2,000 to \$3,000. *Id.*

¹¹³ See Andrea Büchler & Eveline Schneider Kayasseh, *Fostering and Adoption in Islamic Law - Under Consideration of the Laws of Morocco, Egypt, and the United Arab Emirates*, 6 ELEC. J. ISLAMIC & MIDDLE E. L. 31, 56 (2018). In the UAE, adoption is restricted to Emirati nationals who are Muslim and reside within the country. *Id.* The law specifies that eligible adopters must be married couples or single women over 30, which excludes single men. *Id.* All applicants must be at least 25 years old and free from infectious diseases, underscoring the UAE's prohibition on foreigner adoptions. *Id.*

¹¹⁴ See 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, 387-90 (2007). In 2004, Romania implemented a total ban on inter-country adoptions. *Id.* While the number of domestic adoptions increased, a significant number of children continued to live in institutional settings. *Id.*

¹¹⁵ See 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, 3 (2010). In China, the 2007 regulations aimed to narrow the pool of eligible adopters by excluding those who were single, overweight, over the age of fifty, or recently divorced. *Id.* This approach suggests a stringent set of criteria that China employs to regulate the process of intercountry adoption, emphasizing the country's evolving stance on the qualifications deemed necessary for prospective adoptive parents from abroad. *Id.*

*F. The Intersection of Politics, Ethics, and Child Welfare:
Romania and Russia*

The discourse on intercountry adoption has been shaped by legislative actions and high-profile cases, reflecting the mix between national interests, international relations, and child welfare. Two notable examples illustrate this issue.

Firstly, Romania's approach to intercountry adoption has undergone substantial changes since the early 1990s, when it became prominent for foreign adoptions.¹¹⁶ The involvement of British politician Baroness Nicholson, a loud critic of intercountry adoption, indicated a turning point. Arguing that such adoptions facilitated child trafficking, prostitution, pedophilia, and slavery and inadvertently involved adoptive parents in criminal activities, Nicholson's advocacy contributed to Romania's decision to severely restrict intercountry adoption practices.¹¹⁷ This stance attracted

¹¹⁶ See Estye Fenton, *The End of International Adoption?: Altruism, Reproductive Markets, and the "Healthy Child"* (April 2016) (Ph.D. dissertation, Northeastern University) (accessible at <https://repository.library.northeastern.edu/files/neu:cj82n556r/fulltext.pdf> [https://perma.cc/WQ7N-CFAR]). In the aftermath of the Cold War, the plight of Romanian orphans captured the American public's attention, epitomized by the harrowing revelations of ABC's 20/20 special "Shame of a Nation." *Id.* at 44-47. This coverage not only shed light on the dire conditions within Romanian orphanages but also served as a canvas for the United States to reinterpret its global stance, framing the adoption of these orphans as a narrative of American moral superiority. *Id.* As international adoption from Romania surged, it underscored a broader cultural and ideological reinvention of America in the post-Cold War landscape. *Id.* This phenomenon, propelled by a "wildfire" of adoption fervor, reveals the complex interplay of humanitarian impulses with geopolitical triumphalism. *Id.* The rapid increase in adoptions, facilitated by a lack of regulation and oversight, was not merely a response to a humanitarian crisis but also a reflection of shifting power dynamics and the dissolution of communist-era social safety nets. *Id.* This period of adoption boom, marked by a significant influx of Romanian children to the U.S., symbolizes a critical juncture in international adoption narratives, intertwining with broader socio-political transformations. *Id.*; see also *Shame of a Nation: The Story of Genocide by Neglect*, MINNESOTA GOVERNOR'S COUNCIL ON DEVELOPMENTAL DISABILITIES: 20/20 (1990), <https://mn.gov/mnddc/parallels2/one/video/2020shameofthenation.html> [https://perma.cc/LM6Y-56P4].

¹¹⁷ See Richard Carlson, *Seeking the Better Interests of Children with a New International Law of Adoption*, 55 N.Y.L. SCH. L. REV. 733, 741 (2010). British politician Baroness Nicholson served as the Special European Parliament Rapporteur for Romania's accession to the European Union. *Id.* Her role was pivotal in scrutinizing and reporting on Romania's readiness and compliance with EU standards, significantly influencing the process of Romania's integration into the EU. *Id.*

attention not only within Romania but also across the European and global communities, prompting widespread discussion and debate on the ethics and implications of intercountry adoption practices.¹¹⁸ As mentioned, in 2004, Romania enacted legislation completely banning intercountry adoption, except in cases of close familial relationships, a move broadly interpreted as a response to European Union pressures. This decision highlighted a paradox within the EU, as all member states, including Romania, had ratified the Hague Convention, which supports intercountry adoption under specific guidelines.¹¹⁹

The European Union's position on Romania's intercountry adoption policies has notably evolved. Initially, as part of its accession conditions, the EU required Romania to ban ICA to reform its child protection system. This move was seen as a commitment to improving child welfare internally before joining the EU. However, post-2007, the EU's position shifted towards advocating for the resumption of intercountry adoption from Romania.¹²⁰ This change, driven by both lobbying efforts and an emerging EU children's rights agenda, suggests connections between external pressures, internal policy evolution, and the interpretation of international child welfare standards. The EU's revised advocacy for intercountry adoption, despite Romania's continued prohibition, highlights the balance between national child welfare policies, international norms, and the legal and ethical considerations surrounding intercountry adoption.¹²¹

The second case of note involves a tragic incident in the United States that reverberated through Russian-American relations. The death of a Russian boy adopted by an American citizen led to the enactment of the Dima Yakovlev Law¹²² in Russia. This legislation

¹¹⁸ *Id.* at 763-64.

¹¹⁹ Yemm, *supra* note 33, at 555.

¹²⁰ Iusmen, *supra* note 84, at 1.

¹²¹ *Id.*

¹²² See Nick Hayes, *Putin's Cruel Politics Behind the Ban on Russian Adoptions*, MINNPOST (Feb. 12, 2013) https://digitalcommons.csbsju.edu/cgi/viewcontent.cgi?article=1027&context=ucct_pubs [https://perma.cc/6454-ZLWR]. The legislation bears the name of Dima Yakovlev, a 21-month-old child who tragically passed away on July 8, 2008, after being left unattended in a parked SUV for nine hours. *Id.* At the time of the incident, Dima had been living in the United States with his adoptive family for three months. *Id.* His adoptive father, who had inadvertently failed to take him to daycare, went to work, leaving Dima secured in

not only banned Americans from adopting Russian children but also imposed restrictions on NGOs receiving U.S. funding.¹²³ Critics, including prominent human rights organizations, argue that the law prioritizes political considerations over the welfare of children, a sentiment echoed by many in the scientific community.¹²⁴

In the wake of instituting a ban on adoptions to the United States, Russia has further tightened its international adoption policies by enacting legislation that restricts same-sex couples and unmarried individuals from countries where same-sex marriage is legal from adopting Russian children.¹²⁵ This legislative

his car seat. *Id.* The oversight resulted in Dima's untimely death, which was later discovered by a colleague of the father. *Id.* In essence, the Dima Yakovlev Law and its enactment are emblematic of Russia's complex interplay between media sensationalism, domestic politics, and geopolitical strategy. *See id.* The sensationalist media coverage acted as a catalyst, enabling the Russian government to advance its objectives under the guise of child protection while simultaneously reinforcing nationalistic and conservative ideologies, countering perceived Western moral encroachments, and consolidating Putin's political authority. *See id.*

¹²³ *See Russia 'Concerned' Over Max Shatto Texas Death Ruling*, BBC NEWS (Mar. 2, 2013), <https://www.bbc.co.uk/news/world-europe-21640246> [https://perma.cc/8WEP-GAZQ]. President Vladimir Putin, with support from the Russian Orthodox Church, signed the law amidst international criticism from major human rights organizations like Amnesty International and Human Rights Watch. *Id.* These organizations argue the law harms children by making them pawns in political disputes, suggesting the law was more a retaliation against the U.S. Magnitsky Act than a protective measure for children. *Id.* The Magnitsky Act imposes sanctions on Russian officials implicated in human rights abuses, including the death of Russian lawyer Sergei Magnitsky under suspicious circumstances. *Id.* Critics, including voices within the scientific community, contend that the Dima Yakovlev Law aims to distract from domestic corruption issues. *Id.*; *see also* Kathy Lally & Tara Bahrampour, *Death of Adopted Russian Child in U.S. Spurs Anger in Moscow*, WASHINGTON POST (Feb. 19, 2013), https://www.washingtonpost.com/world/europe/adopted-russian-toddler-dies-in-texas/2013/02/19/493b3862-7aa0-11e2-9a75-dab0201670da_story.html [https://perma.cc/FYC3-NL5J].

¹²⁴ *See* Sean Roberts, *The Russian Adoption Ban Fits the Putin Agenda*, FIIA COMMENT (2013), https://www.fiiia.fi/wp-content/uploads/2017/01/fiiia_comment_01_2013.pdf [https://perma.cc/D5V7-LW3L] (saying the Russian adoption ban aligns with the Putin administration's political strategy by diverting attention from internal corruption and leveraging anti-American sentiment to undermine critics).

¹²⁵ *See* Christopher Brennan, *Russia Bans Adoptions to Countries Where Gay Marriage Is Legal*, MOSCOW TIMES (Feb. 13, 2014), <https://www.themoscowtimes.com/2014/02/13/russia-bans-adoptions-to-countries-where-gay-marriage-is-legal-a32064> [https://perma.cc/FL33-UVS3] ("An explanatory note accompanying the amendments said that the government had acted to protect

amendment categorically prevents foreign same-sex couples and single applicants from such jurisdictions from proceeding with the adoption of Russian children.¹²⁶ Traditionally, there was no formal ban in place; however, the likelihood of success for international adoption applications by foreigners was considerably diminished if there were any suspicions regarding the sexual orientation of the prospective adopters. This practice was corroborated by Russia-based international adoption agencies. It is important to note that within the Russian legal framework, same-sex marriage is not recognized. The decision to extend the prohibition to include single individuals arises from concerns among Russian lawmakers regarding the potential for single adoptive parents to be homosexual and subsequently enter into same-sex marriages in their respective countries.¹²⁷ This legislative measure has implications for individuals from over a dozen countries worldwide that legally recognize same-sex marriages, reflecting the broader socio-political stance of Russia on this issue. The law's enactment¹²⁸ was perceived as a retaliatory measure against the US Magnitsky Act,¹²⁹ shifting the focus away from adoption to international

adopted children 'from possible unwanted influence such as artificial forcing of non-traditional sexual behavior and the suffering, complexes and stresses that, according to psychologists' studies, are often experienced by kids raised in same-sex families.'¹³⁰

¹²⁶ See *Russia Officially Implements Anti-LGBT International Adoption Ban*, HUM. RTS. CAMPAIGN (Feb. 14, 2014), <https://www.hrc.org/press-releases/russia-officially-implements-anti-lgbt-international-adoption-ban> [https://perma.cc/K73A-5FVF]; Phil Black & Alla Eshchenko, *Russia Enacts Anti-Gay Adoption Ban*, CNN (Feb. 14, 2014), <https://www.cnn.com/2014/02/13/world/europe/russia-same-sex-marriage-adoption-ban/index.html> [https://perma.cc/YXF4-6H9Q].

¹²⁷ Eliana Dockterman, *Russia Expands Adoption Ban: Targets Single People of Any Orientation in Countries Where Gay Marriage is Legal*, TIME (Feb. 13, 2014), <https://world.time.com/2014/02/13/russia-bans-adoption-by-singles-in-gay-marriage-legal-countries/> [https://perma.cc/3DB4-EDVC]; see also Sarah Gatti, *After Artyom: How Efforts to Reform U.S.-Russia Adoption Failed, and What Russia Must Do Now to Ensure the Welfare of Her Orphans*, 46 CASE W. RES. J. INT'L L. 589 (2014).

¹²⁸ The law effectively bans U.S. citizens from adopting Russian children, prohibits adoption service providers from aiding such processes, and mandates the termination of the U.S.-Russia Adoption Agreement. See *Adoption Information: Russia*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/adoption/country-information/adoption-information-russia> [https://perma.cc/RYF5-S7R8] (last updated Apr. 1, 2024).

¹²⁹ The Magnitsky Act is legislation inspired by the tragic case of Sergei Magnitsky, a Russian tax attorney who exposed significant tax fraud in Russia. See Christina Champenois, *Does the Russian Adoption Ban Violate International Law*, 11 BYU INT'L L. & MGMT. REV. 29, 37 (2015). Following his revelations, Magnitsky was unlawfully

political disputes.¹³⁰ Following the Russian law that prohibits adoptions to the United States, Italy remains the only country that successfully meets Russia's two essential criteria for international adoptions.¹³¹ These criteria include having an active bilateral agreement with Russia and enforcing a ban on same-sex marriages. While bilateral agreements were initially signed with the USA, France, and Italy, the agreements with the USA and France have been suspended. The suspension with the USA follows specific articulated reasons, and with France, it is due to the country's legalization of marriage for same-sex partners.¹³² In recent years, Israel, facing restrictions from many countries on adoption, has entered into an agreement with Russia that imposes a significant restriction on the LGBT community in Israel, effectively preventing them from adopting Russian children.¹³³ Although the agreement itself does not explicitly state this limitation, it specifies that adoptions must comply with the legal frameworks of both nations. Given Russia's prohibition against adoption by same-sex couples and individuals from countries recognizing gay marriage, this stipulation implicitly bars LGBTQ parents in Israel from adopting Russian children.¹³⁴

arrested, detained under inhumane conditions, and denied essential medical care by Russian authorities, leading to his death. *Id.* Independent investigations, including one by the Human Rights Council, uncovered numerous irregularities in Magnitsky's case. *Id.* These included his investigation by the very officials he accused of fraud and the deliberate delay of medical assistance, culminating in his death. *Id.* Even Russia's Presidential Human Rights Council acknowledged that Magnitsky suffered severe abuse and was denied medical treatment, with findings suggesting his mistreatment amounted to a violation of his right to life. *Id.*; see also *The US Global Magnitsky Act*, HUM. RTS. WATCH (Sept. 13, 2017, 10:40 AM), <https://www.hrw.org/news/2017/09/13/us-global-magnitsky-act> [https://perma.cc/7GBF-MCPD].

¹³⁰ Roberts, *supra* note 124.

¹³¹ See *Italians are Only Foreigners with Right to Adopt Russian Children - Official*, RUSSIA TODAY (Nov. 29, 2013), <https://www.rt.com/russia/italy-russian-children-adoption-477/> [https://perma.cc/FU63-9TK5].

¹³² See *Only Italy Can Currently Adopt Russian Orphans, Astakhov Says*, MOSCOW TIMES (Nov. 29, 2013), <https://www.themoscowtimes.com/archive/only-italy-can-currently-adopt-russian-orphans-astakhov-says> [https://perma.cc/NVJ7-ZFAM].

¹³³ Lee Yaron, *Israel Signs Pact to Bar Gay Couples From Adopting Russian Babies*, HAARETZ (Jan. 22, 2020), <https://www.haaretz.com/israel-news/2020-01-22/ty-article/.premium/israel-signs-pact-to-bar-gay-couples-from-adopting-russian-babies/0000017f-e061-d568-ad7f-f36b79410000> [https://perma.cc/7PBB-95PA].

¹³⁴ *Israel, Russia Agree on Same-Sex Couple Adoption Restrictions: Report*, I24NEWS (Oct. 14, 2018, 5:40 AM), <https://www.i24news.tv/en/news/israel/186314-181014-israel>

Recently, following the military invasion of Ukraine, President Putin directed the creation of a list of “unfriendly nations.”¹³⁵ This move set the stage for further retaliatory measures, including a legislative proposal by Russian lawmakers aimed at prohibiting adoptions of Russian children by citizens from these marked countries.¹³⁶

The 2023 Report from the Russian Ministry of Foreign Affairs sharply criticizes the United States’ intercountry adoption practices, claiming systemic failures in respecting children’s fundamental rights and alleging widespread violations of minors’ interests. This timing, a decade after Russia imposed its own ban on U.S. citizens adopting Russian children, is not incidental but rather indicative of Russia’s continued use of adoption policy as a lever in its geopolitical strategy. The report’s emphasis on alleged “gross violations” of rights among Russian adoptees in the U.S. and illegal adoptions by same-sex couples is laced with political undertones, reflecting Russia’s stance on same-sex relationships and its use of these cases to critique Western values. Furthermore, the report’s portrayal of intercountry adoption as “opaque, corrupt,

russia-agree-on-same-sex-couple-adoption-ban-report [https://perma.cc/J862-4H8L]. Because of the restrictions on adopting children from numerous other countries, Russian adoptions have represented half of all adoptions by Israelis since 2007. *Id.*

¹³⁵ *Russia Adds Croatia, Denmark, Greece, Slovakia, Slovenia to List Of ‘Unfriendly Nations’*, RADIO FREE EUR. (July 22, 2022). <https://www.rferl.org/a/russia-unfriendly-nations-croatia-denmark-greece-slovakia-slovenia/31955184.html> [https://perma.cc/2UYT-VUTY]; Isabel van Brugen, *Russia Releases Lengthy List of ‘Unfriendly’ Countries*, NEWSWEEK (Mar. 7, 2022, 10:55 AM), <https://www.newsweek.com/russia-list-unfriendly-countries-1685468> [https://perma.cc/RZ9P-9869].

¹³⁶ See *Russian Lawmakers Outline Bill Banning Adoption Of Russian Children By Citizens Of ‘Unfriendly Countries’*, RADIO FREE EUR. (Aug. 1, 2022) <https://www.rferl.org/a/russia-bill-ban-adoption-russian-children-unfriendly-countries/31969097.html> [https://perma.cc/B2MM-7QZA]. The list includes the United States, Canada, Britain, Ukraine, Australia, Singapore, Japan, New Zealand, Taiwan, Micronesia, Montenegro, Albania, Switzerland, Andorra, South Korea, Lichtenstein, Monaco, Norway, San Marino, the Czech Republic, North Macedonia, Croatia, Denmark, Greece, Slovakia, and Slovenia. *Id.*; see *Report of the Russian Foreign Ministry Commissioner for Human Rights, Democracy and the Rule of Law on Violations of Children’s Rights in Intercountry Adoption in the United States*, Russian Ministry of Foreign Affs. (July 12, 2023), https://mid.ru/en/foreign_policy/humanitarian_cooperation/1896478/ [hereinafter *Report on Russian Foreign Ministry Commissioner for Human Rights*] [https://perma.cc/V2EG-GRPN].

and resource-intensive” and influenced by “neo-colonial political agendas” seems to project Russia’s geopolitical grievances onto a humanitarian issue.¹³⁷ The suggestion that the U.S.’s interest in Ukrainian children post-conflict is driven by adoption markets rather than humanitarian concerns introduces a cynical view of international adoption efforts and appears more interested in maligning the U.S. than addressing the complexities of child welfare in conflict zones.¹³⁸ Scholars analyze that the release of the report by the Kremlin is a calculated maneuver, aligning with ongoing investigations into Russian war crimes, to serve dual political ends: firstly, to erode the perceived integrity of the United States in protecting the human rights of its own populace, and secondly, to craft an image of Russian benevolence through the adoption of Ukrainian orphans amidst conflict.¹³⁹ Moreover, the report shifts culpability for the fate of missing Ukrainian orphans onto Western nations, especially the United States, while minimizing or omitting Russia’s accountability as established by various international entities. Russia’s attempt to cast itself as a protector of children through the adoption of Ukrainian orphans, while simultaneously engaging in actions that have led to their displacement, highlights a disturbing exploitation of children for political propaganda.¹⁴⁰

¹³⁷ *Report on Russian Foreign Ministry Commissioner for Human Rights*, *supra* note 136.

¹³⁸ *See id.*; *see also Report on Russian Foreign Ministry Commissioner for Human Rights*, *supra* note 136 (“Following the introduction of a ban on the adoption of Russian children by U.S. citizens as of January 1, 2013, the focus of such activities has shifted to Ukraine and other post-Soviet states, which are seen as new ‘markets’ for the adoption of white Caucasian children. Washington’s sham concern about the situation with children in the zone of the special military operation is caused primarily by the fact that the U.S. authorities had regarded Ukraine, including Donbass, as a source for international adoptions (particularly of children of Slavic origin.”).

¹³⁹ Thea Dunlevie, *Geopolitics in the Babyhouse: How the Kremlin Uses Adopted Orphans to Advance Its Foreign Policy Agendas*, GEO. SEC. STUD. REV. (Oct. 26, 2023), <https://georgetownsecuritystudiesreview.org/2023/10/26/geopolitics-in-the-babyhouse-how-the-kremlin-uses-adopted-orphans-to-advance-its-foreign-policy-agendas/> [<https://perma.cc/RH3W-69LF>].

¹⁴⁰ *Id.*; Emma Bubola, *Using Adoptions, Russia Turns Ukrainian Children Into Spoils of War*, N.Y. TIMES (Oct. 22, 2022). <https://www.nytimes.com/2022/10/22/world/europe/ukraine-children-russia-adoptions.html> [<https://perma.cc/6KNZ-CYRP>].

III. REEVALUATIONS OF INTERCOUNTRY ADOPTION POLICIES OF EUROPEAN COUNTRIES

In recent years European nations have confronted the complex legacies of intercountry adoption. Driven by a growing body of evidence uncovering systemic abuses and ethical dilemmas, countries like the Netherlands, Sweden, and others have initiated thorough reviews of their intercountry adoption policies. This chapter aims to dissect these reevaluations within the broader context of international legal frameworks and societal values.

A. Netherlands: Leading Change

The debate within Dutch society following the CIIA report and the subsequent academic discussions, reflects an ongoing tension between acknowledging historical injustices and ensuring appropriate care for children currently in need and future generations. In 2021, the Ministry for Legal Protection suspended intercountry adoption procedures in the Netherlands following the Joustra committee's report.¹⁴¹ The report criticized the Dutch government's passive role in handling malpractice and abuse in the system from 1967–1998,¹⁴² highlighting that the government's insufficient monitoring and failure to act on abuses stemmed from an outdated belief in intercountry adoption as inherently beneficial, despite the occurrence of document forgery, child trafficking, fraud, corruption, and unethical coercion of parents.¹⁴³

¹⁴¹ GOV'T OF NETH., CONSIDERATION, ANALYSIS, CONCLUSIONS, RECOMMENDATIONS AND SUMMARY (2021), <https://www.government.nl/topics/adoption/documents/reports/2021/02/08/summary-consideration-analysis-conclusions-recommendations> [https://perma.cc/D2S4-UVF4].

¹⁴² See Claire Moses, *Netherlands Halts Adoptions From Abroad After Exposing Past Abuses*, N.Y. TIMES (Feb. 9, 2021), <https://www.nytimes.com/2021/02/09/world/europe/netherlands-international-adoptions.html> [https://perma.cc/7VNB-ETKP]. See generally, Loibl, E., & Smolin, D. (Eds.) (2024). *Facing the Past: Policies and Good Practices for Responses to Illegal Intercountry Adoptions*. Eleven Publishing. https://cris.maastrichtuniversity.nl/ws/portalfiles/portal/232904139/9789047301882_web.pdf [https://perma.cc/L7JG-E5SG].

¹⁴³ *The Netherlands: Closed Intercountry Adoptions Between the Netherlands and the United States*, U.S. DEPT' OF STATE, BUREAU OF CONSULAR AFFS., <https://travel.state.gov/content/travel/en/News/Intercountry-Adoption-News/the-netherlands-closed-intercountry-adoptions-between-the-nethe.html> [https://perma.cc/EBM8-LDRC] (last updated Apr. 11, 2023). The U.S. has expressed

Following the publication of the CIIA report on 8 February 2021,¹⁴⁴ experts like Balk, Frerks, and de Graaf advocated for a moratorium on intercountry adoption due to the historical extent of abuses, a position that stirred debate within Dutch society and the academic community.¹⁴⁵ In their analysis, the authors argue for the necessity of a moratorium on intercountry adoption, grounding their conclusion in a detailed historical analysis of adoption practices over the past 70 years.¹⁴⁶ This approach emphasized the pattern of abuses and aimed to inform policy revisions to prevent future occurrences.¹⁴⁷ Their findings suggested that these abuses were not isolated incidents but indicative of deeper systemic flaws within the adoption process.¹⁴⁸

However, a response to their analysis raised critical points concerning their methodology and the broader implications of their recommendations. These critics highlighted the absence of

concerns following the Netherlands' decision to phase out intercountry adoptions with eight countries, including the United States. *Id.* This cessation means no new adoptions will occur between the US and the Netherlands, though efforts will be made to complete existing adoption processes. *Id.*

¹⁴⁴ See generally GOV'T OF NETH., *supra* note 141. The report on intercountry adoption in the Netherlands uncovers systemic abuses from 1967 to 1998, highlighting the government and intermediaries' failure to protect adoptees and birth parents, favoring adoptive parents' interests. *Id.* at 15. It reveals that despite awareness of these issues as early as the late 1960s, the Dutch government neglected to intervene or effectively address the reported abuses, which included illegal activities and unethical acts across five countries: Bangladesh, Brazil, Colombia, Indonesia, and Sri Lanka. *Id.* Dutch intermediaries, aware of the abuses, varied in their involvement, with documentation often insufficient or destroyed. *Id.* at 15-18. The prevailing positive view of intercountry adoption hindered timely action against abuses, perpetuated by public and political opinion that saw adoption as a laudable solution for children in need. *Id.* at 18. The report concludes with significant emotional impacts on all parties involved and recommends government acknowledgment of failures, suspension of intercountry adoption, and the establishment of a National Centre of Expertise to support adoptees, aiming to address the consequences of past abuses and prevent future occurrences. *Id.* at 19-22.

¹⁴⁵ Yannick Balk et al., *Investigating Historical Abuses: An Applied History Perspective on Intercountry Adoption in the Netherlands, 1950s–Present*, 5 J. APPLIED HIST. 19, 46 (2023). Researchers recommended to the Dutch government: 1) Acknowledge past failures in handling adoption abuses, a step initiated by the Minister for Legal Protection's public apology; 2) Implement a moratorium on intercountry adoption, leading to its temporary suspension; 3) Create a National Centre of Expertise for identity and adoption-related support, still in development. *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

consideration of empirical studies on the effects of de-/institutionalization on children, pointing out that such oversight could lead to policy recommendations that might inadvertently neglect the needs of children growing up in institutional care.¹⁴⁹ Van IJzendoorn and Bakermans-Kranenburg argued that while the historical analysis of adoption abuses is crucial, it should not overshadow the pressing need for family-based care arrangements for children without parental care.¹⁵⁰ The response also criticized the use of inaccessible archival material and unclear triangulation methods which authors believed hindered the ability for replication and verification of findings.¹⁵¹ More importantly, the critics lamented the lack of an overall estimate of the frequency of adoption abuses, a metric they viewed as essential for informing balanced and evidence-based policy decisions.¹⁵² At the core of their critique was the argument that historical accountability must be weighed against the current needs of children in institutional settings.¹⁵³

After initially suspending international adoptions in February 2021 due to concerns over child theft and purchase from birth parents, the Dutch government announced it will resume adoptions from selected countries including the Philippines, Hungary, Lesotho, Taiwan, Thailand, and South Africa, signaling an end to the uncertainty.¹⁵⁴ However, adoptions from China, the United States, Haiti, Slovakia, the Czech Republic, Peru, Colombia, and Burkina Faso were discontinued amid ongoing scrutiny over adoption practices and discoveries of illegal adoptions and forged documents by adoptees investigating their origins.¹⁵⁵ In May 2024,

¹⁴⁹ Marinus H. van IJzendoorn & Marian J. Bakermans-Kranenburg, *Intercountry Adoption is a Child Protection Measure: Some Comments on “Investigating Historical Abuses” by Balk, Frerks and De Graaf* (2022), 5 J. APPLIED HIST. 1, 2-3 (2022).

¹⁵⁰ *Id.* at 9-10.

¹⁵¹ *Id.* at 4-6.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Foreign Adoptions can soon Resume from 6 Countries, but not U.S., China or Colombia*, NL Times (Nov. 2, 2022, 1:40 PM), <https://nltimes.nl/2022/11/02/foreign-adoptions-can-soon-resume-6-countries-us-china-colombia> [https://perma.cc/ARV3-55HJ].

¹⁵⁵ *Netherlands to Resume International Adoptions from Selected Countries*, REUTERS (Nov. 2, 2022, 9:14 AM), <https://www.reuters.com/world/europe/netherlands-resume-international-adoptions-selected-countries-2022-11-02/> [https://perma.cc/5QPN-6UBL].

the Netherlands announced a full and permanent ban on intercountry adoptions, citing the persistence of systemic abuses that reforms could not rectify, ending all international adoption procedures in the country.¹⁵⁶

B. Sweden

Following the Netherlands' policy shift on intercountry adoptions, the European community has taken note, prompting Sweden to reassess its own policies. The Swedish Family Law and Parental Support Authority, inspired by the Dutch example, has initiated an in-depth inquiry into Sweden's intercountry adoptions.¹⁵⁷ This move reflects a growing awareness and concern over the potential for systemic abuses within the system of intercountry adoption, a system that Sweden, home to the highest number of adopted children per capita globally, is engaged with.¹⁵⁸

Adoptees in Sweden, numbering around 60,000, have raised voices of concern.¹⁵⁹ Investigations initiated by adoptees into their origins have frequently uncovered missing, incorrect, or even illegal information within their adoption files. This has intensified

¹⁵⁶ *No New Inter-Country Adoptions Effective Immediately*, GOV'T OF NETHERLANDS (May 21, 2024, 6:06 PM), <https://www.government.nl/latest/news/2024/05/21/no-new-inter-country-adoptions-effective-immediately> [https://perma.cc/A83V-J5NL]; *see also* *Netherlands Will No Longer Allow International Adoptions*, US NEWS & WORLD REP. (May 21, 2024, 1:16 PM), <https://www.usnews.com/news/world/articles/2024-05-21/netherlands-will-no-longer-allow-international-adoptions> [https://perma.cc/N7XR-TCAQ]; Viënnna van der Beek, *Netherlands Announces Ban on Adoption from Foreign Countries*, JURIST NEWS (May 22, 2024, 10:23 AM), <https://www.jurist.org/news/2024/05/netherlands-announces-ban-on-adoption-from-foreign-countries/> [https://perma.cc/G58N-LSLM].

¹⁵⁷ Susanné Seong-eun Bergsten, *Sweden to Investigate Illegal Intercountry Adoptions*, HUM. RTS. WATCH (Feb. 22, 2021, 12:58 PM), <https://www.hrw.org/news/2021/02/22/sweden-investigate-illegal-intercountry-adoptions> [https://perma.cc/7N7M-RUM9].

¹⁵⁸ Ingrid Bosseldal, *Traces in the History of Swedish Transnational Adoption—A Diffractive Mapping through the Voices of Adoptees and Their Parents*, 8GENEALOGY 67 (2024), <https://www.mdpi.com/2313-5778/8/2/67> [https://perma.cc/67YK-6L5L]; *see also* Richey Wyver, "More Beautiful Than Something We Could Create Ourselves": Exploring Swedish International Transracial Adoption Desire (Mar. 2021) (Ph.D. dissertation, University of Auckland) (available at https://www.researchgate.net/publication/349945178_More_Beautiful_Than_Something_We_Could_Create_Ourselves_Exploring_Swedish_International_Transracial_Adoption_Desire [https://perma.cc/8SNP-BN4V]).

¹⁵⁹ Bergsten, *supra* note 157.

demand for greater transparency, accountability, and an ethical reexamination of intercountry adoption practices.¹⁶⁰

The Swedish government is at a critical juncture, weighing the recommendations of a January 2021 report by the Agency for Public Management, which acknowledges issues of corruption in source countries but refrains from advocating for comprehensive reforms.¹⁶¹ In 2023, Anna Singer, a Swedish legal expert and law professor at Uppsala University, investigated Sweden's international adoption practices, focusing on the thousands of South Korean children adopted during the 1970s and '80s.¹⁶²

Sweden's recent decision to halt adoptions from South Korea is an important change, informed by allegations of falsified documents concerning the origins of children.¹⁶³ The implications of such changes are profound, not only for the countries directly involved but also for the broader international community. The Swedish response to the Dutch inquiry's findings, alongside its own controversies surrounding adoption practices, indicates an increasing commitment to ethical standards and the protection of children's rights within the intercountry adoption system.¹⁶⁴

C. Norway and Denmark

Norway and Denmark, following the examples of the Netherlands and Sweden, have taken steps towards prohibiting international adoptions.¹⁶⁵ To address these issues, they have set

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Kim Tong-Hyung, *Swedish Investigator Says S. Korea Key to Her Adoption Probe*, AP (Mar. 21, 2023, 8:22 PM), <https://apnews.com/article/korea-sweden-adoptions-false-origins-4015ccb5d48794c576e97313c72ecb1e> [https://perma.cc/4F7D-XXUS]. The investigation aims to discern whether Swedish authorities had knowledge of these falsifications and whether there were adequate safeguards to prevent wrongful displacements. *Id.* The investigation also reflects on the motivations behind international adoptions, suggesting a shift from finding families for children to finding children for Western families. *Id.*

¹⁶³ *Id.*

¹⁶⁴ Jan M. Olsen, *Sweden Halts Adoptions from South Korea After Claims of Falsified Papers on Origins of Children*, AP (Nov. 29, 2023, 4:47 PM) <https://apnews.com/article/sweden-south-korea-adoptions-0db5d3940d66c7721745f3281e453d5e> [https://perma.cc/F8MK-FMCZ].

¹⁶⁵ Joe-Lize Kruijsse-Brugge, *At Least Three Countries Restrict Children's Adoption from Abroad*, CNE NEWS (June 11, 2024), <https://cne.news/article/4304-at-least-three-countries-restrict-childrens-adoption-from-abroad> [https://perma.cc/UK3X-JNNK].

up commissions and conducted investigations to examine and reevaluate the adoption procedures.¹⁶⁶ Denmark's exclusive agency for facilitating international adoptions has initiated the process of shutting down its operations.¹⁶⁷ This move follows concerns expressed by a governmental body regarding the use of fraudulent documents and practices that conceal the true origins of children from foreign countries.¹⁶⁸

Simultaneously, Norway has taken a cautious stance on intercountry adoptions.¹⁶⁹ The country's leading regulatory authority has suggested a temporary halt of all overseas adoptions for a duration of two years.¹⁷⁰ This pause is intended to allow time

¹⁶⁶ *The Opposition Asks the Government for a Thorough Investigation into International Adoptions*, COPENHAGEN POST (Oct. 30, 2024), <https://cphpost.dk/2024-10-30/news/round-up/the-opposition-asks-the-government-for-a-thorough-investigation-into-international-adoptions/> [https://perma.cc/7KR2-7P84].

¹⁶⁷ Michael Barrett, *Denmark Ends Adoptions from Abroad as Government Sanctions Bureau*, THE LOCAL (Jan. 16, 2024), <https://www.thelocal.dk/20240116/denmark-ends-adoptions-from-abroad-as-government-sanctions-bureau> [https://perma.cc/STA6-L9Y8].

¹⁶⁸ Jan M. Olsen, *Danish Report Underscores 'Systematic Illegal Behavior' in Adoptions of Children from South Korea*, AP (Jan. 25, 2024, 7:20 PM) <https://apnews.com/article/denmark-south-korea-adoptions-49eb9356a365b6fbe272a8c239941a15> [https://perma.cc/W5UV-SJX]. The agency, Danish International Adoption (DIA), had been involved in arranging adoptions from multiple countries including the Philippines, India, South Africa, Thailand, Taiwan, and the Czech Republic. *Id.* Notably, its activities in South Africa were suspended due to non-compliance with legal standards. See also Rebecca Farquhar, *Denmark Report Reveals 'Systematic Illegal Behavior' in Past Adoptions of South Korean Children*, JURIST NEWS (Jan. 28, 2024, 11:25 AM) <https://www.jurist.org/news/2024/01/denmark-report-reveals-systematic-illegal-behavior-in-in-past-adoptions-of-south-korean-children/> [https://perma.cc/567L-LNZU] (further detailing Denmark report revealing 'systematic illegal behavior' in past adoptions of South Korean children); see also Denmark Halts All Adoptions from South Africa, RITZAU NEWS (Oct. 25, 2024), <https://danishnews.ritzau.com/article/993d2551-4609-436d-89b3-ee6dd43254ba1undefined> [https://perma.cc/H9NX-VQQ2]; Vhahangwele Nemakonde, Netherlands and Denmark Announce Ban on Adoptions from South Africa, THE CITIZEN (Aug. 2, 2024, 1:57 PM), <https://www.citizen.co.za/news/netherlands-denmark-ban-adoptions-south-africa/> [https://perma.cc/L8B3-2CL4].

¹⁶⁹ Bufdir Maintains Recommendation of Temporary Suspension of Inter-Country Adoptions, THE NORWEGIAN DIRECTORAGE FOR CHILD., YOUTH, AND FAM. AFFS., <https://www.bufdir.no/en/bufdir-maintains-recommendation-of-temporary-suspension-of-inter-country-adoptions/> [https://perma.cc/RU25-44PK] (last visited Dec. 12, 2024); *Norway Tightens Controls Over, but Won't Ban International Adoptions*, AP (June 23, 2024, 2:50 AM), <https://www.voanews.com/a/norway-tightens-controls-over-adoptions-from-abroad-but-won-t-ban-it-/7664560.html> [https://perma.cc/9H7D-97WL].

¹⁷⁰ Bufdir Recommends Temporary Suspension of Inter-Country Adoptions, THE NORWEGIAN DIRECTORAGE FOR CHILD., YOUTH, AND FAM. AFFS.,

for an investigation into several cases that are suspected to be illegal, signaling a growing concern over the integrity of the international adoption process.¹⁷¹ Previously, in November 2023, the directorate halted adoptions from Madagascar, citing inadequate security measures to guarantee compliance with international adoption standards.¹⁷²

D. Belgium, Switzerland and France

Other European countries are following. In a significant move, the Belgian parliament has recently passed a resolution addressing the grave issue of illegal adoptions within the country.¹⁷³ This resolution not only recognizes the existence of such illicit practices but also officially designates those affected as victims, initiating a formal administrative inquiry into the matter. The resolution's focus is to investigate instances of illegal adoption in Belgium dating back to the mid-20th century, particularly concerning

<https://www.bufdir.no/en/suspension-adoption/> [https://perma.cc/8B3B-TSZE] (last visited Dec. 12, 2024).

¹⁷¹ Ali Watkins, *In Norway, a Proposed Ban on Foreign Adoptions Rattles All Sides of a Heated Debate*, N.Y. TIMES (Jan. 17, 2024) <https://www.nytimes.com/2024/01/17/world/europe/foreign-adoptions-ban-norway-denmark.html> [https://perma.cc/Z7XG-S2MM]. Norway's top policy body recommended halting all foreign adoptions after a series of shocking revelations. *Id.* These included instances of stolen children, falsified paperwork, and profit-driven adoption schemes. *Id.* The scandal emerged in 2021 when investigative journalists reported on illegal adoptions from countries like South Korea and Ecuador. *Id.* Prompted by these reports, Norwegian authorities established a commission to investigate the allegations, with its work ongoing since 2023. *Id.* The recommendation to suspend foreign adoptions awaits approval from Norway's Ministry of Children and Families. *Id.*

¹⁷² *Norway Considers Halting Overseas Adoptions as Denmark Agency Winds Down*, VOICE OF AM. (Jan. 16, 2024, 5:45 PM), <https://www.voanews.com/a/norway-considering-halting-overseas-adoptions-as-denmark-agency-winds-down/7442817.html> [https://perma.cc/72JM-N3JW]. The Norwegian Directorate for Children, Youth, and Family Affairs has voiced concerns about the real risk of illegalities within the adoption system, advocating for adoptions to be secure, sound, and primarily in the best interest of the children involved. *See also Is Norway About to Halt All Overseas Adoptions?*, EURONEWS WITH AP (Jan. 17, 2024, 3:46 PM) <https://www.euronews.com/2024/01/17/is-norway-about-to-halt-all-overseas-adoptions> [https://perma.cc/8RWS-74SX].

¹⁷³ *Belgium Officially Recognises Illegal Adoptions*, THE BRUSSELS TIMES WITH BELGA (May 8, 2024), <https://www.brusselstimes.com/1038620/belgium-officially-recognises-illegal-adoptions> [https://perma.cc/7XSQ-G2VS].

children from Guatemala, Chile, Sri Lanka, and India.¹⁷⁴ To this end, a panel of independent experts is tasked with conducting the inquiry, underlining the importance of neutrality and expertise in addressing such a sensitive issue.¹⁷⁵ In December 2023, Flanders, the northern region of Belgium, announced a temporary cessation of intercountry adoptions following concerns over malpractices in adoptions from countries like Ethiopia, Gambia, Haiti, and Morocco.¹⁷⁶

In May 2022, Switzerland launched a pioneering initiative aimed at assisting individuals adopted from Sri Lanka during the 1970s, 1980s, and 1990s in tracing their origins.¹⁷⁷ The necessity for this project came from revelations of misconduct by Swiss federal and cantonal authorities in the 1980s, which overlooked clear indications of illegal adoptions from Sri Lanka.¹⁷⁸ A report published in December 2020 underlined the authorities' failure to address abuses adequately, prompting the Swiss Federal Council to acknowledge past failures¹⁷⁹ and to express a commitment to supporting adoptees more effectively in their search for their birth families.¹⁸⁰

¹⁷⁴ *Belgian Parliament Adopts Resolution on Illegal Adoptions*, THE BRUSSELS TIMES WITH BELGA (Sept. 11, 2023), <https://www.brusselstimes.com/683908/belgian-parliament-adopts-resolution-on-illegal-adoptions> [https://perma.cc/2HPA-TDNT].

¹⁷⁵ *Id.*

¹⁷⁶ Maïthé Chini, *Flanders Halts Adoptions from Abroad*, BRUSSELS TIMES (Dec. 16, 2023) <https://www.brusselstimes.com/841330/eliminating-malpractices-flanders-halts-adoptions-from-abroad> [https://perma.cc/QG72-N24A]. The suspension duration remains undefined, pending the establishment of a new adoption service and the resolution of existing concerns. *Id.*

¹⁷⁷ *Protocol: Search of origins process in Sri Lanka*, FED. OFF. OF JUST., SWITZERLAND (June 5, 2020), <https://www.bj.admin.ch/dam/bj/en/data/gesellschaft/adoption/illegale-adoptionen/zusammenarbeitsprotokoll-herkunftssuche-e.pdf.download.pdf/zusammenarbeitsprotokoll-herkunftssuche-e.pdf> [https://perma.cc/6LXR-5BAU].

¹⁷⁸ *Swiss Extend Support for Sri Lankan Adoptees Wishing to Trace Roots*, SWISSINFO.CH (Apr. 26, 2024, 10:55 AM), <https://www.swissinfo.ch/eng/swiss-politics/further-support-for-sri-lankan-adoptees-wishing-to-trace-roots/76453337> [https://perma.cc/ED6F-NKD9].

¹⁷⁹ *Switzerland Regrets Past Sri Lankan Adoption Practices*, SWISSINFO.CH (Dec. 14, 2020, 1:38 PM), <https://www.swissinfo.ch/eng/politics/switzerland-regrets-past-sri-lankan-adoption-practices/46222964> [https://perma.cc/R5MB-WEVY].

¹⁸⁰ Press Release, *Adoptions from Sri Lanka: Pilot Project to Support Adoptees*, FED. OFF. OF JUST., SWITZERLAND (May 16, 2022), <https://www.bj.admin.ch/bj/en/home/aktuell/mm.msg-id-88825.html> [https://perma.cc/PX6U-7AKJ].

In a subsequent action, The Zurich University of Applied Sciences conducted the investigative reports, revealing widespread illegal practices, including child trafficking and falsification of documents, affecting potentially thousands of children.¹⁸¹ In December 2023, Switzerland has publicly acknowledged and expressed regret for past irregularities in international adoptions following a comprehensive report analyzing adoption practices from ten countries.¹⁸² This acknowledgment highlights the Swiss authorities' failure to act despite clear signs of misconduct in adoptions from Sri Lanka between 1973 and 1997, as well as similar issues from Bangladesh, Brazil, Chile, Guatemala, India, Colombia, Korea, Lebanon, Peru, and Romania during the 1970s to 1990s.¹⁸³ Finally, on December 22, 2023, the Swiss Federal Office of Justice announced the suspension of adoptions between Switzerland and the United States, meaning no new adoption cases will be approved between these two countries.¹⁸⁴

In France, the 2023 report, "Historical Study on the Illicit Practices of International Adoption in France" authored by historians Fabio Macedo and Yves Denéchère, has revealed

¹⁸¹ Sabine Bitter et al., *Summary: Adoptions of Children from Sri Lanka in Switzerland, 1973-1997: The Practices of Private Adoption Agencies and the Authorities*, ZURICH UNIV. OF APPLIED SKIS. (ZHAW) (JAN. 2020), <https://digitalcollection.zhaw.ch/bitstreams/663932de-4c18-4d10-8194-d6599b23ae92/download> [https://perma.cc/B5E2-UYQG].

¹⁸² Monika Pfaffinger, Expert Group "International Adoption": Interim Report for the Attention of the Federal Office of Justice, FED. OFF. OF JUST., SWITZERLAND (Mar. 28, 2023), <https://www.bj.admin.ch/dam/bj/de/data/gesellschaft/adoption/illegale-adoptionen/zwischenber-expertengruppe-internationale-adoption.pdf.download.pdf/zwischenber-expertengruppe-internationale-adoption-d.pdf> [https://perma.cc/35H5-KXUR].

¹⁸³ Press Release, *International Adoption Law: Federal Council Sees Need for Action*, FED. COUNCIL (Dec. 8, 2023) <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-99228.html#:~:text=The%20Federal%20Council%20acknowledges%20the,of%20adoptions%20to%20this%20day> [https://perma.cc/65QK-CTVP]; see also *Adoptions from Sri Lanka: The Federal Council Regrets the Negligence of the Authorities*, FED COUNCIL (Dec. 14, 2020), <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-81577.html> [https://perma.cc/TCN8-MUYR].

¹⁸⁴ *Switzerland: Decision to Close Intercountry Adoptions from the United States*, U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFS., https://travel.state.gov/content/travel/en/News/Intercountry-Adoption-News/switzerland_decision_to_close_intercountry_adoptions_from_the_united_states.html [https://perma.cc/TV5Q-ASFV] (last updated Feb. 14, 2024).

extensive mishandling in international adoptions involving France over the past 30 years.¹⁸⁵ This independent research, sanctioned by the French Foreign Affairs Ministry in December 2021, examines 9,600 pages of predominantly classified diplomatic archives, uncovering a disturbing pattern of illicit adoptions from more than 20 countries since 1979.¹⁸⁶ The findings highlight practices such as child trafficking and irregular adoptions, financial incentives offered to biological parents corruption, document fraud.¹⁸⁷ Particularly shocking are the reports of abductions, the creation of false orphans, and forced abandonment of newborns by young mothers in Madagascar, aimed at fulfilling the demand from French adoptive parents.¹⁸⁸

E. When Will the United States Follow?

As European countries reassess their intercountry adoption policies, their efforts should be closely observed, potentially establishing new standards for ethical adoption practices. The European reevaluation raises a question for the United States: when will similar reflective and reformative measures be initiated?

The lessons learned from these European case studies offer critical insights into the ethical complexities of intercountry

¹⁸⁵ Yves Denéchère & Fábio Macedo, *Historical Study of Illicit Practices in International Adoption in France*, UNIVERSITÉ D'ANGERS - TEMOS 12 (2023). This comprehensive report sheds light on a “real marketplace” for children facilitated by fraudulent practices within international adoptions to France. *Id.* One striking example is the AOO Comexseo in Vietnam, accused by the French consulate of engaging in direct bribery with biological parents in 1994. *Id.* at 59. Despite early warnings, it maintained its accreditation until 2009. Vietnam, which briefly suspended international adoptions in 1999 due to abuse and illicit practices, quickly resumed these activities, becoming a primary source of adoptive children for French families, with over 12,100 Vietnamese children adopted since 1979.

¹⁸⁶ *Government Launches Inspection Mission on Illegal Practices in International Adoption*, MINISTRY FOR EUR. & FOREIGN AFFS. (Nov. 8, 2022), <https://www.diplomatie.gouv.fr/en/french-foreign-policy/human-rights/news/article/government-launches-inspection-mission-on-illegal-practices-in-international> [https://perma.cc/2RHB-DJU9].

¹⁸⁷ Morgane Le Cam, *Report Points to 30 Years of International Adoption Mishandling in France*, LE MONDE (Feb. 10, 2023, 7:00 PM), https://www.lemonde.fr/en/international/article/2023/02/10/report-points-to-30-years-of-international-adoption-mishandling-in-france_6015214_4.html [https://perma.cc/88Y8-TYYU].

¹⁸⁸ *Id.*

adoption, challenging other nations, including the United States, to reconsider their positions and practices. As the international community moves forward, it must collectively embrace the principles of transparency, accountability, and, most importantly, the unwavering protection of children in all adoption practices.

IV. A CRITICAL ANALYSIS OF INTERCOUNTRY ADOPTION: PROS AND CONS

The discourse on intercountry adoption remains mired in a contentious debate that has scarcely evolved over the past three decades. This controversy, rooted in ethical, legal, and human rights considerations, continues to polarize global opinions, reflecting a critical failure to adapt to new developments in child welfare. Central points of contention such as commodification of children, the effects on sending countries, and the ethical concerns of cultural integration remain persistent. These debates, while important, increasingly resonate within academic and policy spheres without leading to substantial changes. It is important that we move our focus towards innovative solutions and contemporary challenges, moving beyond the repetitive and often outdated debates that have long dominated the field. This chapter seeks to dissect the entrenched positions that have characterized the intercountry adoption debate advocating for a renewed discourse that is reflective of current realities.

A. The Case Against Intercountry Adoption

Opponents of intercountry adoption argue it leads to a child's disconnection from their identity, exploiting those in less economically developed situations and turning children into commodities to satisfy the desires of wealthier Western individuals looking to start families without appreciating or addressing the unique needs and individualities of each child. The United States, accounting for a significant portion of international adoptions, has been criticized for instances of scandal, corruption, and abuses that have negatively exemplified the practice.¹⁸⁹ From this perspective,

¹⁸⁹ David M. Smolin, *The Corrupting Influence of the United States on a Vulnerable Intercountry Adoption System: A Guide for Stakeholders, Hague and Non-Hague Nations, NGOs, and Concerned Parties*, 15 J. L. & FAM. STUD. 81, 81-3 (2013); see also

those who give up their children are seen as suppliers driven by financial incapacity, entrusting their offspring to foreign adopters in an effort to alleviate their own burdens of care. Meanwhile, the adoptive parents are likened to consumers in a market, selecting children as they might any other product.¹⁹⁰

Ergas critically addresses the dynamics within international adoption, noting a troubling demand-supply imbalance for infants that she terms as “child trade.”¹⁹¹ This characterization highlights the power imbalances among the adoption triad, adoptive parents, birth parents, and adoptees, and the organizations and governments involved. By referring to adoptive children as “iron ore,” Ergas challenges the role of adoptive parents, questioning the ethical implications of treating adoption as a market transaction.¹⁹²

Critics also argue that intercountry adoption negatively impacts the sending countries, suggesting it reflects poorly on national morale by implying a government’s inadequacy in caring for its own children. This perception of shame has led some nations to reconsider or reduce their participation in international adoption programs, which in turn affects the number of children placed in institutional care.¹⁹³ Furthermore, human rights activists contend that intercountry adoption violates the child’s right to be raised within their cultural, ethnic, linguistic, and religious traditions, and the community’s collective right to impart these values, suggesting that such adoptions disrupt the transmission of cultural heritage.¹⁹⁴

The literature on the cultural belonging of internationally adopted children reveals a strong contrast between European and

David M. Smolin, *The Corrupting Influence of the United States on a Vulnerable Intercountry Adoption System: A Guide for Stakeholders, Hague and Non-Hague Nations, NGOs, and Concerned Parties*, 2013 UTAH L. REVIEW 1065, 1065-7 (2013).

¹⁹⁰ John Triseliotis, *Intercountry Adoption: Global Trade or Global Gift?*, 24 ADOPTION & FOSTERING 45-54 (2000).

¹⁹¹ Yasmine Ergas, *Are Children Today’s Iron Ore? Russia’s Adoption Ban and International Diplomacy*, HUFFINGTON POST (Jan. 8, 2013, 3:04 PM), https://www.huffingtonpost.com/yasmine-ergas/russian-adoption-ban_b_2433606.html [<https://perma.cc/6JNA-BNYJ>].

¹⁹² *Id.*

¹⁹³ Katz, *supra* note 10, at 283.

¹⁹⁴ Elisabeth M. Ward, *Utilizing Intercountry Adoption to Combat Human Rights Abuses of Children*, 17 MICH. ST. U. COLL. L. J. INT’L L. 729, 746 (2008).

American perspectives. European scholars,¹⁹⁵ particularly in France, emphasize the child's integration into the adoptive family's culture, arguing against fostering connections with the birth culture to avoid highlighting differences that might impede family unity. They advocate for the child's assimilation into the adoptive family's intergenerational history as crucial for successful adoption and development. Conversely, English-language literature underscores the importance of maintaining ties with the child's country of birth and its culture. This approach¹⁹⁶ mirrors immigrant studies, suggesting that cultural identity, including beliefs, customs, and traditions, is vital for the child's well-being.¹⁹⁷

Some scholars raised questions regarding the appropriateness and implications of adopting children across racial¹⁹⁸ and national

¹⁹⁵ Aurélie Harf et al., *Cultural Identity and Internationally Adopted Children: Qualitative Approach to Parental Representations*, 10 PLOS ONE (Mar. 16 2015) <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0119635> [<https://perma.cc/QX5U-5PE9>]; *see generally* SIGNE HOWELL, THE KINNING OF FOREIGNERS: TRANSNATIONAL ADOPTION IN A GLOBAL PERSPECTIVE (2006) (referring to "Norwegianisation" as the deliberate cultural integration and familial assimilation of transnationally adopted children into Norwegian society through practices aimed at fostering a shared Norwegian identity and kinship in the process of "kinning").

¹⁹⁶ Professor of social anthropology at the University of Oslo, Signe Howell, explores the perceptions of adoptees in Norway regarding the notion of roots, revealing a nuanced understanding of cultural identity and kinship among this group. HOWELL, *supra* note 195, at 133. Howell's research uncovers that the adoptees she interviewed predominantly view culture as a construct shaped by experiences rather than an inherent biological attribute. *Id.* Contrary to the widespread assumption held by many Norwegians, these adoptees do not place significant emphasis on the importance of knowing their country of origin or biological parents. *Id.* Howell articulates this sentiment by asserting that for these adoptees, the concepts of kinship and relatedness transcend mere biological connections. *Id.* She notes that transnational adoptees often feel a sense of belonging and comfort within their social environments, challenging the prevailing notion of biological relatedness valued by the majority in Norway. *Id.* Howell's findings contribute to a deeper understanding of how adoptees perceive their own identities and relationships, suggesting a broader definition of family and belonging that goes beyond genetic ties. *Id.*

¹⁹⁷ *See generally* Harf et al., *supra* note 195; *see* Kristy A. Thomas & Richard C. Tessler, *Bicultural Socialization Among Adoptive Families: Where There is a Will, There is a Way*, 28 J. FAM. ISSUES 1189 (2007); M. Elizabeth Vonk, *Cultural Competence for Transracial Adoptive Parents*, 46 SOC. WORK 246 (2001); Richard M. Lee et al., *Cultural Socialization in Families with Internationally Adopted Children*, 20 J. FAM. PSYCH. 571 (2006).

¹⁹⁸ Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51 (1990). Perry's approach is underpinned by the recognition of race's profound influence on societal experiences and the child's development, arguing

divides.¹⁹⁹ According to Hawley Fogg-Davis, potential adoptive parents show a preference hierarchy, with strong demand for healthy white infants, followed when white infants are scarce- by a greater inclination towards children of Colombian, Korean, and American Indian descent over African American children.²⁰⁰

On the other hand, comprehensive analysis addressing potential identity challenges faced by adoptees due to ethnic, racial, or national differences (while acknowledging these challenges) argues that their significance outweigh these concerns.²⁰¹ A segment of the academic community attributes this change in perception of societal attitudes toward racial and ethnic diversity, driven by a liberal philosophy prioritizing the integration of individuals of diverse racial backgrounds over discriminatory practices based on color. This shift significantly contributed to the favorable view of transracial adoption.²⁰²

for a balanced consideration of the child's welfare, stability, and identity in the context of racial dynamics and the complexities of adoption. *See also* Tobias Hübner, *Post-Racial Utopianism, White Color-Blindness and "the Elephant in the Room": Racial Issues for Transnational Adoptees of Color*, in *INTERCOUNTRY ADOPTION: POLICIES, PRACTICES, AND OUTCOMES*, *supra* note 111, at 221-29 (exploring the oversight of race and non-white identities among transnational adoptees, highlighting the marginalization of these issues within adoption research and advocating for a more comprehensive approach that addresses the complexities of transracial, transcultural, and transnational adoptions, while also criticizing the tendency to pathologize and medicalize adoptees).

¹⁹⁹ See SANDRA PATTON, *BIRTHMARKS: TRANSRACIAL ADOPTION IN CONTEMPORARY AMERICA* (2000); Ravinder Barn, *'Doing the Right Thing': Transracial Adoption in the USA*, 36 ETHNIC & RACIAL STUD. 1273 (2013); HAWLEY FOGG-DAVIS, *THE ETHICS OF TRANSRACIAL ADOPTION* (2002); MARK C. JERNG, *CLAIMING OTHERS: TRANSRACIAL ADOPTION AND NATIONAL BELONGING* (2010); Andrew Morrison, *Transracial Adoption: The Pros and Cons and the Parents' Perspective*, 20 HARV. BLACKLETTER L. J. 167 (2004); Pamela Anne Quiroz, *From Race Matching to Transracial Adoption: Race and the Changing Discourse of US Adoption*, 5 CRITICAL DISCOURSE STUD. 249 (2008); David Ray Papke, *Transracial Adoption in the United States: The Reflection and Reinforcement of Racial Hierarchy*, 15 J.L. & FAM. STUD. 57 (2013); David Ray Papke, *Transracial Adoption in the United States: The Reflection and Reinforcement of Racial Hierarchy*, 2013 UTAH L. REV. 1041 (2013); Elizabeth Bartholet, *Race Separatism in the Family: More on the Transracial Adoption Debate*, 2 DUKE J. GENDER L. & POL'Y 99 (1995); Hiromi Ishizawa et al., *Constructing Interracial Families Through Intercountry Adoption*, 87 SOC. SCI. Q. 1207 (2006).

²⁰⁰ FOGG-DAVIS, *supra* note 199, at 12.

²⁰¹ REBECCA J. COMPTON, *ADOPTION BEYOND BORDERS: HOW INTERNATIONAL ADOPTION BENEFITS CHILDREN* (2016).

²⁰² Ana Teresa Ortiz & Laura Briggs, *The Culture of Poverty, Crack Babies, and Welfare Cheats: The Making of the "Healthy White Baby Crisis"*, 21 SOC. TEXT 39 (2003); *see also* IVOR GABER & JANE ALDRIDGE, *IN THE BEST INTERESTS OF THE CHILD: CULTURE*,

However, some critics contend that the intercountry adoption operates as an imperialistic exertion by receiving countries,²⁰³ draining the countries of origin of their 'best resources' and casting doubt on their capability to care for children without parental support. This practice, critics argue, often fulfills the childbearing desires of citizens in wealthier nations while reinforcing perceptions of inadequacy and inferiority in the sending countries. According to this view, intercountry adoption does not address the root causes of children without homes but instead only treats the symptoms of underlying social and economic issues.²⁰⁴

Hübinette, for instance, uses Korea's experience to highlight this viewpoint, suggesting that the ongoing international adoption from Korea symbolizes the nation's dependency and subordinate role in the global order, evoking colonial dynamics and perpetuating racial inequities.²⁰⁵ The author also notes that many countries that are prominent sources of children for international adoption are either within the United States' sphere of influence or have been directly impacted by U.S. military actions, including Korea, Vietnam, Thailand, and the Philippines in Asia, as well as Colombia, Chile, and Guatemala in Latin America.²⁰⁶ This observation supports the argument that intercountry adoption reflects broader geopolitical power dynamics, where the movement of children from poorer to wealthier nations mirrors global patterns of influence and control reminiscent of colonial relationships.

Opponents of intercountry adoption also argue that it often proves to be counterproductive, prompting countries of origin to enact significant reforms under international pressure. Such reforms, intended to address the criticisms of intercountry adoption practices, typically result in fewer children available for adoption by foreign nationals.²⁰⁷

IDENTITY AND TRANSRACIAL ADOPTION (1994); Toby Alice Volkman and Cindi Katz, *Transnational Adoption*, 21 SOC. TEXT 74 (2003).

²⁰³ INTERCOUNTRY ADOPTION: A MULTINATIONAL PERSPECTIVE 2 (Howard Altstein & Rita J. Simon eds., 1991).

²⁰⁴ Jini L. Roby, *Understanding Sending Country's Traditions and Policies in International Adoptions: Avoiding Legal and Cultural Pitfalls*, 6 J.L. & FAM. STUD. 303 (2004).

²⁰⁵ Hübinette, *supra* note 18, at 16-24.

²⁰⁶ *Id.*

²⁰⁷ Marx, *supra* note 114, at 377-78.

Critics also suggest that the portrayal of adoption as a uniformly positive outcome for all involved is overly simplistic. Challenges faced by adoptive families, adoptees, and birth families, including inadequate support systems, identity struggles, insufficient records of origin, disconnection from birth culture, experiences of racism, and feelings of guilt or lack of belonging, are substantive issues that complicate the post-adoption experience. Additionally, the background of children deemed adoptable often contradicts the traditional notion of “orphanhood,” with studies showing that many children in residential care have at least one living parent.²⁰⁸

B. The Case for Intercountry Adoption

On the flip side, supporters for intercountry adoption place human rights at the center of the discussion, arguing that it fundamentally serves the child’s right to a nurturing family environment, offering a pathway to a healthier and more fulfilling life.²⁰⁹ Proponents identify a concerning silence from human rights activists on the issues surrounding intercountry adoption, attributing this quietness to the influence of powerful organizations like UNICEF and the UN Committee on the Rights of the Child, which are perceived to oppose the practice. Despite UNICEF’s assertion of neutrality, supporters of intercountry adoption suggest that the organization’s stance, along with others, significantly impacts the discourse and actions surrounding this form of adoption.²¹⁰

²⁰⁸ The notion of “orphanhood” often misrepresents the situation of children considered for adoption, as many have one living parent. Johanna Oreskovic & Trish Maskew, *Red Thread or Slender Reed: Deconstructing Prof. Bartholet’s Mythology of International Adoption*, 14 BUFF. HUM. RTS. L. REV. 71, 78-9 (2008).

²⁰⁹ Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issues*, 13 BUFF. HUM. RTS. L. REV. 151, 151-2 (2007).

²¹⁰ *Intercountry Adoption*, UNICEF (June 26, 2015), <https://www.unicef.org/media/intercountry-adoption> [https://perma.cc/Z6K9-WAQQ] (“UNICEF supports intercountry adoption, when pursued in conformity with the standards and principles of the 1993 Hague Convention on Protection of Children and Co-operation in Respect of intercountry Adoptions - currently ratified by 95 countries. This convention is an important development for children, birth families and prospective foreign adopters.”).

UNICEF indeed holds an odd position on intercountry adoption.²¹¹ On one hand, the organization recognizes the detrimental impacts of institutional care on children, highlighting ongoing efforts towards the prevention of institutionalization and the implementation of deinstitutionalization initiatives for those already in such environments.²¹² Despite this acknowledgment, the UNICEF ranks intercountry adoption relatively low in the hierarchy of preferred solutions for children lacking familial care.²¹³ UNICEF's position on intercountry adoption holds considerable significance primarily due to its authoritative standing and mandate from the United Nations.

Advocates also highlight the disproportionate focus of international media on negative and abusive instances of intercountry adoption, arguing it fuels a bias against the practice entirely.²¹⁴ This selective reporting, they argue, hides the reality that intercountry adoption can and does remove children from life-threatening situations, providing them with the safety, security, and love of permanent families.²¹⁵ They also dispute portrayals of adoptive parents as disinterested in nurturing, asserting instead that many are motivated by a profound commitment to children in need.²¹⁶

Advocates critique the dominant framework that often prioritizes parental and heritage rights over a child's fundamental right to family environment. They point out the contradiction in policies that emphasize keeping children within their birth

²¹¹ Fenton, *supra* note 116, at 30. Advocates highlight a notable paradox in UNICEF's policies, as the organization funds orphanages worldwide while concurrently critiquing international adoption. *Id.*

²¹² UNICEF: INNOCENTI DIGEST, *supra* note 56.

²¹³ Dillon, *supra* note 71.

²¹⁴ Elizabeth Bartholet, *International Adoption: Propriety, Prospects and Pragmatics*, 13 J. AM. ACAD. MATRIMONIAL L. 181, 195 (1996); see also Cynthia Morton and Summer Shelton, *The Framing of Adoption: A Content Analysis of Print News Coverage 2014-2016*, 3 J. PUB. INT. COMM'NS. (2019); Erin Siegal McIntyre, *Saviors, Scandal, and Representation: Dominant Media Narratives Around Human Trafficking in International Adoption*, 4 J. HUM. TRAFFICKING 92 (2018); Maureen Maxwell and Lauren Cook, *The Portrayal of the Adopted Child in British Newspapers and Magazines*, 9 VULNERABLE CHILD. & YOUTH STUD. 318 (2014); Susan L. Kline et al., *Covering Adoption: General Depictions in Broadcast News*, 55 FAM. RELS. 487 (2006).

²¹⁵ Bartholet, *supra* note 214, at 195.

²¹⁶ *Id.*

countries at the expense of their well-being, noting the devastating impact institutionalization can have on children's development.²¹⁷ They challenge the opposition to international adoption, often based on outdated notions of racial and national purity, by highlighting the transformative potential of adoption for child welfare. Advocates call for a reevaluation of the principle of subsidiarity, advocating for a prioritization of adoptive families in child placement decisions and criticizing policies that delay or deny children the chance for adoption based on a misguided effort to keep them in their countries of origin.²¹⁸ Their work stresses the importance of viewing children as individuals with rights independent of their birth parents or countries, advocating for policies that truly serve the best interests of the child.²¹⁹

Supporters of intercountry adoption consistently raise critical issues, such as the significant number of children residing in institutions long-term, the reasons behind their placement, the prevalence of children living on the streets, and those engaged in hazardous and dangerous labor.²²⁰ These points emphasize the urgency for intercountry adoption as a viable solution for children in dire circumstances.²²¹

Advocates for intercountry adoption challenge the notion that children are seen as belonging (property) to their country of origin or their biological parents, arguing that such a perspective is fundamentally flawed and overlooks the best interests of the child.²²² Proponents argue that the concern over intercountry adoption depleting significant resources from the child's country of origin is unfounded, labeling it a myth that highlights these countries' incapacity for transformative reforms. They contend that

²¹⁷ Elizabeth Bartholet, *Advocating for the Child's Human Right to Family*, 109 ADOPTION ADVOCATE 1 (2017).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ Elizabeth Bartholet, *International Adoption: The Child's Story*, 24 GA. ST. U.L. REV. 333 (2007).

²²¹ Sara Dillon, *Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption*. 21 B.U. INT'L. L.J. 179 (2003).

²²² Bartholet, *supra* note 214.

these nations are least equipped to manage the overwhelming numbers of children in need of care.²²³

Proponents emphasize that the real issue is misery and poverty affecting countless children, many of whom succumb daily to malnutrition and disease. They succinctly encapsulate their argument in the powerful assertion: adoption both literally and metaphorically saves lives.²²⁴ The advocacy for intercountry adoption is built on several pillars, including the child's right not to be institutionalized, the potential for adults to adopt children of different nationalities, providing orphans with parents, alleviating global social issues, and promoting international tolerance and diversity.²²⁵

Other supporters claim that intercountry adoption can help countries with fragile social infrastructures, particularly those unable to provide adequate child care services amid socio-political or economic challenges.²²⁶ In many sending nations, the capacity to offer comprehensive care for unparented children is limited, often resulting in reliance on institutionalization as the primary form of child welfare.²²⁷ Thus, these institutions can fall short of meeting the essential developmental needs of children, providing environments that may hinder rather than foster growth due to a lack of resources and professional expertise. On the other hand, western countries, with their advanced and well-equipped child welfare systems, are positioned to offer immediate and transformative assistance through intercountry adoption. Moreover, some Western nations are actively working to enhance the child welfare infrastructure of sending countries.²²⁸ By allocating resources to improve local services, they aim to empower these countries to better address their child welfare challenges in

²²³ Elizabeth Bartholet, *What's Wrong with Adoption Law*, 4 INT'L. J. CHILD. RTS. 263 (1996).

²²⁴ Bridget M. Hubing, *International Child Adoptions: Who Should Decide What is in the Best Interests of the Family*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 655, 664 (2001).

²²⁵ Jena Martin, *The Good, the Bad & the Ugly A New Way of Looking at the Intercountry Adoption Debate*, 13 U.C. DAVIS J. INT'L. L. & POL'Y 173, 181 (2007).

²²⁶ Wechsler, *supra* note 115; Bartholet, *supra* note 214; O'HALLORAN, *supra* note 79, at 276.

²²⁷ Wechsler, *supra* note 115; Bartholet, *supra* note 214; O'HALLORAN, *supra* note 79, at 276.

²²⁸ See generally O'HALLORAN, *supra* note 79.

the future, ultimately fostering a system where children can thrive within their own communities.²²⁹

One of the key arguments for the importance of intercountry adoption is the substantial body of research indicating that children who spend extended periods in institutional environments may experience adverse effects on their intellectual and socio-emotional development.²³⁰ The link between the gravity of developmental issues in orphanage-residing children and the caliber of their social milieu is inversely proportional.²³¹

²²⁹ *Id.* at 160.

²³⁰ See Sharon Landesman, *Institutionalization Revisited: Expanding Views on Early and Cumulative Life Experiences*, in HANDBOOK OF DEVELOPMENTAL PSYCHOPATHOLOGY 455-462 (Michael Lewis & Suzanne M. Miller eds., 1st ed. 1990) (emphasizing the importance of understanding the psychological consequences of institutionalization and underscoring the need for individualized care, stable human connections, and a comprehensive understanding of person-environment interactions to promote the healthy development of children); *see also* Sharon Landesman Ramey & Gene P. Sackett, *The Early Caregiving Environment: Expanding Views on Nonparental Care and Cumulative Life Experiences*, in HANDBOOK OF DEVELOPMENTAL PSYCHOPATHOLOGY, 365-380 (Arnold J. Sameroff et al. eds., 2d ed. 2000). Ten years later, another study by Sharon Landesman Ramey reinforced the critical need for early, individualized care and stable human connections for children's healthy development. Jill Hodges & Barbara Tizard, *Social and Family Relationships of Ex-Institutional Adolescents*, 30 J. CHILD. PSYCH. & PSYCHIATRY 77 (1989) (demonstrating that adoption can significantly mitigate the negative impacts of early institutional care on children's social and emotional development).

²³¹ See SHANNAH THARP-TAYLOR, THE EFFECTS OF EARLY SOCIAL DEPRIVATION ON CHILDREN REARED IN FOREIGN ORPHANAGES (2003), <https://files.eric.ed.gov/fulltext/ED475594.pdf> [https://perma.cc/6H38-EPBZ] (emphasizing that social deprivation, encompassing both social and emotional neglect, significantly impacts the development of cognitive and interpersonal skills in children raised in environments lacking adequate social interaction); *see also* Marinus H. van IJzendoorn et al., *Children in Institutional Care: Delayed Development and Resilience*, 76 MONOGRAPHS OF SOC'Y FOR RES. IN CHILD DEV. 8 (2011) (showing that, despite advancements and interventions aimed at improving conditions within institutional settings, the inherent nature of such care often falls short of providing the nurturing and developmentally supportive environment crucial for a child's growth. The study stresses the role of adoption as a preferred alternative that can provide the stable, nurturing environment necessary for healthy development). Katie A. McLaughlin et al., *Widespread Reductions in Cortical Thickness Following Severe Early-Life Deprivation: A Neurodevelopmental Pathway to Attention-Deficit/Hyperactivity Disorder*, 76 BIOLOGICAL PSYCHIATRY 629 (2014). The Bucharest Early Intervention Project studied the effects of institutionalization on children in Romania. *Id.* It found that early neglect in institutions led to thinner cortical tissue in brain areas linked to attention and impulse control, suggesting a connection to ADHD symptoms. *Id.* Despite meeting physical needs, the lack of emotional and social stimulation in institutions adversely affected brain development. *Id.* The study underscores the importance of early care

Dr. Rebecca Compton, in her work drawing in psychology, social work, neuroscience, and anthropology, underscores the importance for early placement of unparented children into adoptive homes.²³² This analysis demonstrates the significant role that a nurturing and stable family environment plays in the developmental leaps seen in adopted children.²³³ Highlighting the improvements in both physical and cognitive development post-adoption, Compton emphasizes a research-backed “earlier is better” approach and endorses intercountry adoption not just as an alternative, but often as the superior option for ensuring the holistic development and well-being of unparented children across the globe.²³⁴

The ERA study similarly demonstrated the potential for recovery and development in children who experienced early deprivation when adopted into supportive families, highlighting the role of environmental factors and the importance of minimizing institutional care to enhance cognitive outcomes.²³⁵

environments, including high-quality foster care, for healthy development, emphasizing the public health significance of nurturing care for abandoned or orphaned children. *Id.*

²³² COMPTON, *supra* note 201.

²³³ *Id.*

²³⁴ *Id.*; see also Barbara Tizard, *Intercountry Adoption: A Review of the Evidence*, 32 J. CHILD PSYCH. & PSYCHIATRY 743 (1991) (examining a range of studies conducted in Europe and the USA, concluding that overseas adoption has, indeed, been successful.)

²³⁵ Michael Rutter, et al., *Recovery and Deficit Following Profound Early Deprivation*, INTERCOUNTRY ADOPTION. DEVELOPMENTS, TRENDS AND PERSPECTIVES (Peter Selman ed., 2000). The findings of the Social, Genetic, and Developmental Psychiatry Research Centre of the Institute of Psychiatry, King’s College, London led by Michael Rutter revealed a remarkable capacity for recovery among children who experienced severe early deprivation once placed in stable and caring adoptive homes. *Id.* By age four, most of these children had achieved dramatic catch-up in physical growth and cognitive development, underscoring the transformative power of a supportive family environment. *Id.* The study also examined the role of environmental factors in child development, finding that the duration of institutional care significantly influenced cognitive outcomes. *Id.* Children adopted before six months of age showed substantially better cognitive development than those who remained in institutional care longer. *Id.* This highlights the critical importance of minimizing the time children spend in institutional settings to mitigate the long-term effects of deprivation. *Id.* The study’s findings advocate for the effectiveness of intercountry adoption as a means to provide children from deprived backgrounds with the opportunity for a better life, challenging the notion of “irreversible deficits” and emphasizing the resilience of children when given the chance to thrive in a loving home. See also Frank C. Verhulst, *Internationally Adopted Children: The Dutch Longitudinal Adoption Study*, 4 ADOPTION Q. 27 (2000). The Dutch experience study contrasts with earlier highlighting that a significant

V. THE BARTHOLET-SMOLIN DEBATE: A MICROCOSM OF BROADER CHALLENGES

Over the past three decades or more, the debate on intercountry adoption has been dominated by two prominent figures: Elizabeth Bartholet and David Smolin, both US law professors with opposing views.

Elizabeth Bartholet, an emeritus professor of law at Harvard Law School and a strong advocate for intercountry adoption, posits that the global regulatory framework governing these adoptions has become excessively restrictive.²³⁶ She critiques what she sees as a paradox within the international law, which, while intended to protect, also limits their access to stable permanent families.²³⁷ Bartholet's work advocates for loosening intercountry adoption restrictions to help millions of children worldwide in orphanages or unstable living situations, deprived of the fundamental right to family life.²³⁸ Bartholet challenges the current system constrained

number of intercountry adopted children in a Dutch survey showed maladjustment in adolescence, likely due to the extreme deprivation experienced prior to adoption. *Id.* It suggests early adversities increased vulnerability to adolescence's developmental stresses, potentially exacerbated by the ethnic differences between adopted children and their white adoptive families. *Id.* The key difference attributed to this variation is the extreme deprivation experienced by the children in the Dutch study prior to adoption, unlike the mostly white, intra-racially adopted children in earlier studies. *Id.* However, transracial adoption itself was not linked to maladjustment, indicating other factors, such as concerns over biological origins and identity, might play a crucial role. *Id.* Despite these challenges, the majority of adopted adolescents function well, supporting transracial intercountry adoption as a viable option for providing stable homes to children facing adversities. *Id.*; Wendy Tieman et al., *Psychiatric Disorders in Young Adult Intercountry Adoptees: An Epidemiological Study*, 162 AM. J. PSYCHIATRY 592 (2005); Wendy Tieman et al., *Social Functioning of Young Adult Intercountry Adoptees Compared to Nonadoptees*, 41 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY (2005); Marielle C. Dekker et al., *Mental Health Problems of Dutch Young Adult Domestic Adoptees Compared to Non-Adopted Peers and International Adoptees*, 60 INT'L SOC. WORK 1201 (2017); Monica Dalen, *Cognitive Competence, Academic Achievement, and Educational Attainment Among Intercountry Adoptees: Research Outcomes from the Nordic Countries*, in INTERCOUNTRY ADOPTION. POLICIES, PRACTICES, AND OUTCOMES, *supra* note 111, at 199.

²³⁶ Elizabeth Bartholet, *The Hague Convention: Pros, Cons and Potential*, HARVARD LIBR. OFF. FOR SCHOLARLY COMM'CN, <http://nrs.harvard.edu/urn-3:HUL.InstRepos:10777663> [https://perma.cc/B7GM-T8VV] (last visited May 2, 2025).

²³⁷ Elizabeth Bartholet, *International Adoption: The Human Rights Position*, 1 GLOB. POL'Y 91 (2010).

²³⁸ See *id.*; see also Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, 51 ARIZ. L. REV. 871 (2009);

by the Hague Adoption Convention's stringent procedures and promotes that intercountry adoption offers a viable solution, advocating for policies that prioritize the best interests of the child, which, in her view, align with facilitating adoptions.²³⁹ Bartholet's support for Congressional support of the CHIFF legislation is a direct challenge to current policies, seeking to make adoption more child-centered in both domestic and international contexts.²⁴⁰

In contrast, David Smolin, a professor of law at Cumberland School of Law, brings a critical perspective to the forefront of this debate. His concerns center on systemic failures that exploit the very weaknesses they purport to address. Smolin's work sheds light on troubling practices in the adoption industry, such as child trafficking, manipulating orphan status, and the exploitation of marginalized families. He advocates for a system that preserves child's connections to their birth culture and, when possible, their biological families.²⁴¹ Through his scholarly and advocacy efforts, Smolin advocates for comprehensive reforms of intercountry adoption practices.²⁴²

ELIZABETH BARTHOLET, *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* (2000); Elizabeth Bartholet, *International Adoption: Current Status and Future Prospects*, 3 *FUTURE OF CHILD.* 89 (1993); Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issues*, 13 *BUFF. HUM. RTS. L. REV* 151 (2007); Elizabeth Bartholet, *supra* note 209; Elizabeth Bartholet, *supra* note 214.

²³⁹ Bartholet, *supra* note 236.

²⁴⁰ *Law Professors Urge Congress to Support International Adoption*, HARVARD L. TODAY (Feb. 10, 2014), <https://hls.harvard.edu/today/harvard-law-professors-urge-congress-to-support-international-adoption/> [<https://perma.cc/94ZC-CZAG>] (Bartholet's advocacy, supported by 34 professors from Harvard Law School and 24 Boston College Law School professors, called for Congressional support of the CHIFF legislation, aimed at prioritizing the child's right to a nurturing family by facilitating both domestic and international adoptions).

²⁴¹ David M. Smolin, *Intercountry adoption as child trafficking*, 39 *VAL. UNIV. L. REV.* 281 (2004).

²⁴² *Id.*; Smolin, *supra* note 36, at 113; David M. Smolin, *Child Laundering and the Hague Convention on Intercountry Adoption: The Future and Past of Intercountry Adoption*, 48 *U. LOUISVILLE L. REV.* 441 (2010); David M. Smolin, *Intercountry Adoption and Poverty: A Human Right Analysis*, 36 *CAP. U.L. REV.* 413 (2007) [hereinafter *Intercountry Adoption and Poverty*]; David M. Smolin, *Child Laundering as Exploitation: Applying Anti-Trafficking Norms to Intercountry Adoption under the Coming Hague Regime*, 32 *VT. L. REV.* 1 (2007); David Smolin, *The Legal Mandate for Ending the Modern Era of Intercountry Adoption*, in *RESEARCH HANDBOOK ON ADOPTION LAW*, *supra* note 79, at 384; David M. Smolin, *The Case for Moratoria on Intercountry Adoption*, 30 *S. CAL. INTERDISC. L.J.* 501 (2021) [hereinafter *The Case for Moratoria*].

The Bartholet-Smolin debate captures a critical moment in the conversation about intercountry adoption, serving as a microcosm of the broader challenges facing those who seek to balance between the need for homes for children and the imperative to protect those children and their families from exploitation and harm. By examining the positions of Bartholet and Smolin, we can better understand the climate of international adoption and the need for policies that are both compassionate and just, ensuring that the best interests of the child are central of all adoption practices.

A. Elizabeth Bartholet: The Advocacy for Intercountry Adoption

Bartholet's position, rooted in her personal experiences and extensive research, strongly criticizes the declining trend in international adoptions and the increasing restrictions imposed by countries.²⁴³ She contend that the right of children to grow up in a family is a fundamental human right, overriding the sovereignty claims of states.²⁴⁴

Bartholet argues that international adoption often represents the best, and sometimes the only, opportunity for many unparented children to grow up in a nurturing family environment.²⁴⁵ She challenges the positions of organizations and countries against international adoption, labeling concerns of preserving national heritage or preventing potential abuses as secondary to the immediate need for children to have families.²⁴⁶

While recognizing the Hague Convention on Intercountry Adoption's role in promoting ethical practices, Bartholet critiques its implementation as too often obstructive, advocating for a shift in policies to prioritize the best interests of children over restrictive adoption practices.²⁴⁷ She accuses leading human rights organizations, such as UNICEF and Save the Children, of contributing to a human rights crisis by opposing international adoption.²⁴⁸ Bartholet further suggests that the United States'

²⁴³ Bartholet, *supra* note 236, at 91.

²⁴⁴ *Id.* at 94-96.

²⁴⁵ *Id.* at 92-96.

²⁴⁶ *Id.*

²⁴⁷ *Id.*; Bartholet, *supra* note 214.

²⁴⁸ Bartholet, *supra* note 236.

leverage its financial contributions to UNICEF to encourage a policy shift in favor of international adoption.²⁴⁹ Although she acknowledges the existence of adoption abuses, Bartholet argues that these do not justify the widespread restrictions of international adoptions.²⁵⁰ Instead, she calls for reforms to address and prevent abuses without limiting children the opportunity for family care.²⁵¹

Bartholet's commitment to children's rights and welfare is commendable. However, Bartholet positions intercountry adoption as a near-universal solution to the global orphan crisis, a perspective that may inadvertently oversimplify the complex nature of child welfare across diverse geopolitical and cultural landscapes. Her critique of the Hague Convention tends to overlook the essential role this international agreement plays in safeguarding against child trafficking and ensuring ethical adoption practices. By advocating for a loosening of adoption restrictions, Bartholet risks potentially weakening these critical protections, which could lead to the erosion of necessary safeguards.

B. David Smolin: The Case Against Intercountry Adoption

David Smolin, leveraging his personal experience and scholarly research, focuses on the ethical, legal, and procedural shortcomings in intercountry adoption practices. He argues that these practices often prioritize the demands of receiving countries over the best interests of the children, leading to unnecessary separations from their biological families.²⁵² Smolin's analysis explores the practice of child laundering, where children are unethically obtained, through deception, coercion, or financial incentives, and placed for adoption, violating international norms.²⁵³

Smolin criticizes the pervasive lack of accountability and remedies for past wrongful adoptions and describes illicit intercountry adoption as the "perfect crime," where systemic

²⁴⁹ Elizabeth Bartholet, *The International Adoption Cliff: Do Child Human Rights Matter?*, in THE INTERCOUNTRY ADOPTION DEBATE: DIALOGUES ACROSS DISCIPLINES, *supra* note 1, at 193.

²⁵⁰ Bartholet, *supra* note 236.

²⁵¹ *Id.*

²⁵² *The Case for Moratoria*, *supra* note 242.

²⁵³ Smolin, *supra* note 36, at 113.

barriers effectively prevent accountability and redress for victims.²⁵⁴ Smolin advocates for a moratorium on intercountry adoption as a necessary step towards addressing and rectifying the deep-seated issues within the system.²⁵⁵

Smolin proposes an 'Aid Rule' as a solution to the corruption afflicting intercountry adoption.²⁵⁶ This rule mandates "family preservation assistance" for birth parents living in dire poverty before their children become eligible for adoption.²⁵⁷ Aimed at addressing the root cause of many adoptions, economic desperation forcing parents to relinquish their children, this financial assistance proposes reorienting funds towards maintaining biological family units, thereby reducing the number of children 'sold' into adoption.²⁵⁸

While Smolin's critique highlights serious issues within the adoption system, his solutions, particularly the broad application of a moratorium and the 'Aid Rule,' prompt questions regarding their practicality and possible unintended consequences. Smolin's focus on systemic exploitation raises ethical questions, yet the broad generalization of the adoption industry may obscure distinctions between exploitative and ethical adoption practices, overlooking the positive impacts of intercountry adoption when conducted responsibly.

C. Clash of Perspectives: Bartholet vs. Smolin on the Ethics of Intercountry Adoption

Analyzing the intense debate between Bartholet and Smolin on intercountry adoption reveals a clash of ideologies, methodologies, and proposed solutions to the challenges faced by unparented children globally. Their debate, encapsulated in the

²⁵⁴ *The Case for Moratoria*, *supra* note 242, at 515.

²⁵⁵ *Id.* ("Reforming intercountry adoption without addressing the harms of the past is not really practical. Such an approach creates a never-ending cycle of impunity. No matter how many reforms there are, if there are no consequences or remedies for past illicit practices, this impunity will tend to fuel new abuses. So long as the impression continues that 'the end justifies the means,' that the good of adoption is far greater than the harm even in cases of children wrongfully separated from their families, the abuses will continue.").

²⁵⁶ *Intercountry Adoption and Poverty*, *supra* note 242, at 415, 417.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 438-39 (proposing that adoptive parents provide this aid).

chapter titled “The Debate” from *Intercountry Adoption: Policies, Practices, and Outcomes*, juxtaposes two deeply held convictions about the ethics, implications, and best practices of intercountry adoption.²⁵⁹

Bartholet’s position defends intercountry adoption as a critical pathway to securing loving, permanent homes for unparented children.²⁶⁰ She critiques what she perceives as a kind of false romanticism in Smolin’s emphasis on the value of cultural heritage and adherence to the subsidiarity principle, arguing that these priorities can act as barriers to achieving timely family placements for children.²⁶¹ Bartholet contends that while concerns over potential adoption abuses are valid, should not overshadow the need to secure loving homes for children languishing in institutional care.²⁶² She criticizes those who, like Smolin, emphasize the risks of intercountry adoption, of allowing ideological biases to obstruct practical solutions for the urgent needs of unparented children.²⁶³

Smolin, on the other hand, counters Bartholet’s pro-adoption stance with a series of concerns about the systemic issues that have historically compromised the integrity of the adoption process. He criticizes Bartholet’s of overlooking the systemic problems in intercountry adoption practices such as corruption, trafficking, and commodification of children.²⁶⁴ Smolin accuses Bartholet of being part of an overly optimistic camp that minimizes the significant losses and potential harms associated with removing children from their countries of origin.²⁶⁵ Smolin argues that Bartholet’s push for reducing barriers to adoption overlooks the profound trauma and identity disruptions experienced by children removed from their original familial and cultural contexts.²⁶⁶ He implies that Bartholet’s stance is indicative of a broader issue within the pro-adoption community, which he sees as too willing to overlook or

²⁵⁹ Elizabeth Bartholet & David Smolin, *The Debate*, INTERCOUNTRY ADOPTION: POLICIES, PRACTICES, AND OUTCOMES, *supra* note 111, at 233.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

downplay the ethical complexities and potential for exploitation in the name of increasing adoption rates.²⁶⁷

D. Beyond the Stalemate: A Call for Innovative Solutions in Intercountry Adoption

The debate between Bartholet and Smolin captures a broader discourse on the ethics of intercountry adoption. Their discussions reflect a critical impasse highlighting the demand for innovative, adaptable, child-centric solutions.

In my view, the ongoing discourse on intercountry adoption has reached a point of stagnation, bogged down by repetitive arguments and minimal progress, despite the implementation of the Hague Convention. The Convention remains impartial on the matter of adoption rates, focusing primarily on establishing protocols to prevent corruption and abuses within the process.²⁶⁸ While passionate, the polarized pro and contra stances risk stifling progress, obscuring opportunities for solutions that could address the needs of unparented children more directly. There is an unavoidable requirement to pursue adaptable solutions that can respond to the diverse needs of children across various cultural and legal settings. For example, emerging technology and new pre- and post-adoption frameworks hold potential for significant improvements, with innovations focused on child welfare, ethical integrity, and holistic support for all parties involved.

Moreover, the global nature of intercountry adoption necessitates deeper international collaboration and shared ethical standards. Beyond the Hague Convention, other international bodies and coalitions could foster consensus on best practices, ethical guidelines, and support systems. This global approach would help standardize protections, ensuring that adoptions are conducted ethically and sustainably. Innovations should include strong safeguards against abuse, with frameworks incorporating rigorous ethical oversight, comprehensive screening, and long-term post-adoption support. To break the stalemate, a more inclusive dialogue involving adoptees, birth families, adoptive families,

²⁶⁷ *Id.*

²⁶⁸ Dillon, *supra* note 71. More than 15 years ago, Dillon made a similar argument. *Id.*

scholars, and policymakers is essential. The adoption community should also emphasize empirical research and cross-disciplinary insights to shape effective policy and practice. By embracing this holistic, forward-looking approach, the field of intercountry adoption can move beyond stagnation toward meaningful progress, ultimately centering on the best interests of the children it serves.

VI. FROM STALEMATE TO SOLUTIONS: ADVANCING INTERCOUNTRY ADOPTION

The discourse on intercountry adoption has long been entrenched in a binary framework, divided between proponents and opponents of the practice. This dichotomy, while rooted in legitimate concerns on both sides, has often obscured complexities in the adoption process. This article suggests that the conversation must progress beyond the polarized “for or against” framework and instead center on practical, child-focused solutions to address today’s challenges.

A. The Imperative for Ethical Practices and Global Cooperation

In the context of new challenges, ranging from geopolitical shifts, economic disparities, to humanitarian crises, intercountry adoption presents both opportunities and pitfalls. The real question is no longer whether intercountry adoption should occur but how it can be managed responsibly to ensure children’s well-being. Moving away from entrenched debates toward a practical, solution-oriented view can help build ethical systems that meet current needs.

B. Addressing Systemic Challenges and Innovations

In Europe, recent actions reflect a reckoning with past abuses in adoption, such as falsified records and trafficking. These efforts reveal a larger dilemma: balancing the need to address historical wrongs with the commitment to providing stable futures for children. Critically, these developments occur against a backdrop where many implicated countries were either not signatories of the

Hague Convention²⁶⁹ or joined only after the completion of contentious adoptions. This temporal gap highlights the need for full respect for the Hague regime. Lasting change demands reforms that correct the system's failings and build ethical foundations, with international cooperation focused squarely on children's best interests.

C. The Role of Leading Nations in Shaping Ethical Adoption Practices

I concur that revisiting past policies and investigating instances of corruption in intercountry adoption is crucial to ensure ethical and effective practices. Where investigations reveal systemic issues or ethical breaches, substantial corrective actions, including moratoria, should be considered.²⁷⁰ The recent actions taken by several European countries, which have temporarily suspended intercountry adoptions in response to concerns over malpractice and corruption, demonstrate the necessity of such interventions.

As the predominant destination for children adopted internationally,²⁷¹ the United States holds a disproportionate influence over the global environment of intercountry adoption. This places an undeniable responsibility on the U.S. to lead by example in scrutinizing and rectifying the systemic abuses. Unlike recent European efforts, the United States has yet to demonstrate a similarly rigorous approach. Neglecting to address these issues compromises the integrity of the adoption system and fails children seeking safe, permanent families.

²⁶⁹ For example: Bangladesh, Ethiopia, Gambia, Lebanon, Morocco. *See generally* Hague Conf. on Private International Law, *Status Table 33: Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, HAGUE CONF. ON PRIV. INT'L L., <https://www.hcch.net/en/instruments/conventions/status-table/?cid=69> [https://perma.cc/D8W7-YUM6] (last updated Mar. 14, 2024).

²⁷⁰ SMOLIN, *supra* note 64.

²⁷¹ Selman, *supra* note 42.

D. Revisiting International Structures for Adoption Oversight

Some scholars support establishing an international agency on intercountry adoption and an international family court.²⁷² I argue that while the proposals for establishing an International Agency on Intercountry Adoption and an International Family Court are undoubtedly intriguing, a realistic perspective is essential. The creation of such bodies would require an unprecedented level of cooperation and consensus among nations, each with distinct legal systems, cultural norms, and reservations about relinquishing authority to an international entity. Achieving this level of collaboration would necessitate navigating sovereignty issues and national pride. Establishing an international court with binding authority poses significant challenges. Countries may exhibit reluctance to cede jurisdiction over family law matters, deeply embedded in unique cultural, social, and legal traditions. The effectiveness of an International Family Court would heavily rely on the enforceability of its rulings. Without a robust enforcement mechanism, the court's decisions could be disregarded or circumvented, undermining its intended purpose. This reality underscores the importance of leveraging existing platforms like the HCCH, which already play a role in international legal cooperation.

E. Maximizing the HCCH's Potential in Intercountry Adoption

Despite its central role, the Hague Conference on Private International Law (HCCH) has potential for a deeper engagement with the complexities of intercountry adoption and international family law. My analysis of the HCCH's annual reports and publications from its Permanent Bureau reveals a noticeable gap in the organization's focus on intercountry adoption compared to its progress in other areas of international law.

The Hague Conference's annual reports are generally brief and general, often lacking substantive insights into the specifics of the organization's work. While these reports acknowledge various activities within private international law and its conventions, they tend to provide only a superficial overview, neglecting to address

²⁷² Wechsler, *supra* note 115.

crucial issues.²⁷³ This review analyzed the available publications in the field of intercountry adoption from the Permanent Bureau of the HCCH, revealing some valuable actions. Despite the ongoing updates and publications in other domains, the HCCH's International Family Law Briefings have not seen a continuation past the year 2014.²⁷⁴

The HCCH is uniquely positioned to provide technical assistance and promote global cooperation in intercountry adoption. For example, in response to Cambodia's accession to the 1993 Hague Convention on Intercountry Adoption and subsequent international concerns regarding adoption practices, the HCCH provided Cambodia with technical assistance,²⁷⁵ as well as Guatemala and other countries.²⁷⁶

²⁷³ See generally 2022 ANNUAL REPORT, HAGUE CONF. ON PRIV. INT'L L.(2022), <https://assets.hcch.net/docs/f75bab65-9330-44db-a570-6b2c2954d7ff.pdf> [<https://perma.cc/P4HG-MYGG>]; 2021 ANNUAL REPORT, HAGUE CONF. ON PRIV. INT'L L. (2021), <https://assets.hcch.net/docs/af309929-be6c-4a38-ae7b-ddf5ec3ddb94.pdf> [<https://perma.cc/64PG-6C8Y>]; 2020 ANNUAL REPORT, HAGUE CONF. ON PRIV. INT'L L. (2020), <https://assets.hcch.net/docs/be1e5b62-3e96-4cb2-a104-044181a2a6f5.pdf>; See generally 2019 ANNUAL REPORT, HAGUE CONF. ON PRIV. INT'L L. (2019), <https://assets.hcch.net/docs/abdaec6b-4044-4a50-a90b-e5c7f9e43f45.pdf> [<https://perma.cc/UV5B-MQ6C>]; See generally 2018 ANNUAL REPORT, HAGUE CONF. ON PRIV. INT'L L. (2018), <https://assets.hcch.net/docs/237a753d-5c87-4763-86de-5f724185ed9a.pdf> [<https://perma.cc/V6WW-7KDG>].

²⁷⁴ See HCCH *International Family Law Briefings*, HAGUE CONF. ON PRIV. INT'L L., <https://www.hcch.net/en/publications-and-studies/publications2/hcch-ifl-briefings> [<https://perma.cc/2CPH-3QEM>] (last visited Dec. 13, 2024).

²⁷⁵ HAGUE CONFERENCE UPDATE, HAGUE CONF. ON PRIV. INT'L L. 61-63 (Mar. 2009), <https://www.hcch.net/en/publications-and-studies/details4/?pid=5556> [<https://perma.cc/2HK6-293Q>]. This collaboration focused on enhancing Cambodia's legal framework for adoptions, establishing a central authority, and addressing issues such as child trafficking and the authenticity of children's origins. *Id.*

²⁷⁶ See HAGUE CONFERENCE UPDATE, HAGUE CONF. ON PRIV. INT'L L. 238-39 (Nov. 2011), <https://www.hcch.net/en/publications-and-studies/details4/?pid=5566> [<https://perma.cc/JTU7-RC3V>] (stating the Intercountry Adoption Technical Assistance Programme (ICATAP) helped countries like Guatemala, Cambodia, and Haiti align their adoption laws and practices with the standards of the Hague Convention on Intercountry Adoption); see HAGUE CONFERENCE UPDATE, HAGUE CONF. ON PRIV. INT'L L. 230-35 (June 2012), <https://www.hcch.net/en/publications-and-studies/details4/?pid=5567> [<https://perma.cc/DQN5-6UWE>] (stating the Intercountry Adoption Technical Assistance Programme (ICATAP) continued to facilitate the implementation and application of the 1993 Convention by providing technical assistance to specific countries, including Cambodia, Haiti, Mexico, and Nepal); see HAGUE CONFERENCE UPDATE, HAGUE CONF. ON PRIV. INT'L L. 84-88 (Mar. 2013), <https://www.hcch.net/en/publications-and-studies/details4/?pid=5862> [<https://perma.cc/6G5J-MXG5>] (providing more on the

Beyond individual country assistance, the Conference promotes global cooperation and capacity building²⁷⁷ particularly in Africa.²⁷⁸ Some fifteen years ago, the Conference, initially focusing on systems like iChild and INCASTAT for child abduction, showed openness to adapting these technologies for broader applications, including intercountry adoption, to enhance efficiency and protect children.²⁷⁹ A more focused and sustained effort by the HCCH to address the challenges of intercountry adoption could significantly enhance its effectiveness. This includes not only facilitating technical assistance and capacity building but also spearheading initiatives that promote ethical adoption practices globally.

Meeting of an Expert Group on the financial aspects of intercountry adoption and the Working Group to develop a common approach to preventing and addressing illicit practices in intercountry adoption cases); *see* HAGUE CONFERENCE UPDATE, HAGUE CONF. ON PRIV. INT'L L. 125 (June 2014), <https://www.hcch.net/en/publications-and-studies/details4/?pid=6189> [<https://perma.cc/PZ9B-KQW6>]; *see* HAGUE CONFERENCE UPDATE, HAGUE CONF. ON PRIV. INT'L L. 194-197 (Sept. 2014), <https://www.hcch.net/en/publications-and-studies/details4/?pid=6190> [<https://perma.cc/P8AF-KB4U>] (regarding a training mission in Guinea to provide technical assistance on the implementation of the 1993 Hague Convention on Intercountry Adoption).

²⁷⁷ HAGUE CONFERENCE UPDATE, HAGUE CONF. ON PRIV. INT'L L. 199 (Sept. 2009), <https://www.hcch.net/en/publications-and-studies/details4/?pid=5558> [<https://perma.cc/62PR-WPNY>]. Through its support to Guatemala the Conference supported the creation of a new Adoption Central Authority and legal reforms have shifted the adoption process from a privately driven, often unethical system to one that emphasizes the welfare of the child and the principle of subsidiarity. *Id.* Cambodia has seen similar progress with the Conference's help in legal and procedural reforms to align with international standards. *Id.* Initiatives like the Francophone Seminar on the Hague Intercountry Adoption Convention and the Judicial Training Seminar for Ukrainian Judges demonstrate its dedication to improving the understanding, implementation, and cooperation among Contracting States in intercountry adoption processes. *Id.*

²⁷⁸ HAGUE CONFERENCE UPDATE, HAGUE CONF. ON PRIV. INT'L L. 209 (June 2010), <https://www.hcch.net/en/publications-and-studies/details4/?pid=5560> [<https://perma.cc/9DUH-3LFC>]. The Conference has engaged in capacity-building and technical assistance for African countries, recognizing the emerging pressures on these nations concerning intercountry adoptions. *Id.* "The situation in Ethiopia where many hundreds of children are the subject of inadequately regulated intercountry adoptions rings a warning bell for the rest of the Continent." *Id.* at 210.

²⁷⁹ HAGUE CONFERENCE UPDATE, HAGUE CONF. ON PRIV. INT'L L. 186 (Sept. 2008), <https://www.hcch.net/en/publications-and-studies/details4/?pid=5554> [<https://perma.cc/UEB4-TDQY>].

*F. Global Fund and Additional Protocol for
Ethical Adoption Practices*

Some authors have argued that the current framework governing intercountry adoption, particularly under the Hague Convention, requires significant enhancements. They propose establishing a global fund, led by United Nations institutions, to strengthen and standardize national adoption systems. This fund would alleviate financial and technical barriers that prevent some countries from fully adopting the Hague Convention's standards, aiming to promote a more consistent and ethical approach to intercountry adoption worldwide.²⁸⁰

While ambitious, the idea of a global fund to support the Hague Convention implementation is within reach. Recognizing the unique challenges that resource-limited countries face in upholding the Convention, the Permanent Bureau has taken steps to provide tailored technical support through the Intercountry Adoption Technical Assistance Programme (ICATAP). This support is essential for countries planning to ratify or accede to the Convention, as well as those encountering difficulties in its implementation. ICATAP, contingent upon funding availability, is administered directly by the Permanent Bureau in collaboration with international consultants, experts, and organizations.²⁸¹ I argue for a more concrete role that goes beyond mere financial and technical assistance. This envisioned fund should serve as a cornerstone for a comprehensive support system, empowering countries to fully implement and adhere to the Convention's standards. A more robust role entails offering customized solutions that address the unique challenges faced by different countries, facilitating a more effective implementation of the Convention. This

²⁸⁰ Central to achieving these reforms is the establishment of a vigorous system of oversight and enforcement. This entails the creation of a new global agency, enjoying broad credibility, tasked with monitoring intercountry adoption processes to prevent exploitation, corruption, and profiteering. This agency, envisaged as operating with a lean and specialized team, would ensure compliance with the Hague Convention's standards, thereby safeguarding the integrity of intercountry adoptions. Dillon, *supra* note 71, at 179.

²⁸¹ *Information Brochure: The 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, HAGUE CONF. ON PRIV. INT'L L. (2012) <https://assets.hcch.net/upload/brochure33en.pdf> [<https://perma.cc/GB7V-MFQ2>].

could be achieved through the development of guidelines, toolkits, and platforms for knowledge sharing among Contracting States.

By fostering a collaborative environment, the fund would help harmonize intercountry adoption practices, ensuring they are ethical. A critical aspect of the fund's role involves monitoring and evaluation to assess the effectiveness of adoption practices and the implementation of the Convention. This would include regular assessments of countries' adoption systems, providing feedback, and recommending improvements. Such oversight would ensure accountability and continuous improvement in intercountry adoption processes. The fund should also engage in advocacy and awareness-raising activities to promote the importance of ethical intercountry adoptions and the protection of children's rights. Finally, the fund's role should extend to supporting research and innovation in the field of intercountry adoption.

Additionally, enhancing the Hague Conference's effectiveness requires a comprehensive strategy, including increased funding, broader convention ratification, and cooperation with non-member states. Primarily, boosting the Conference's funding and resources is essential. With sufficient financial support, the Conference could expand its training programs, conduct critical research, and engage in extensive outreach efforts, all of which are fundamental to the effective implementation and enforcement of its conventions. Additionally, building stronger partnerships with non-member states, particularly those from which many adoptive children originate, is crucial to achieving a more comprehensive global adoption framework.

Public awareness and education are also key components of this ecosystem. By promoting knowledge of ethical intercountry adoption practices among prospective adoptive parents, professionals, and the public, the Conference can advance its mission and help prevent practices harmful to child welfare. Finally, the value of ongoing research and data collection is paramount. Regular monitoring of intercountry adoption trends, challenges, and outcomes enables the Hague Conference to inform policy development and adjust conventions as needed. Together, these measures provide a strong foundation to support the Conference's mission, ensuring that children's rights and welfare remain central in intercountry adoption practices worldwide.

Some scholars propose a protocol to the 1993 Hague Convention aimed at clarifying discrepancies between the Hague Convention and the Convention on the Rights of the Child, affirming the Hague's precedence where inconsistencies arise. It also suggests procedural amendments, including setting time limits for temporary care to avoid prolonged institutionalization and detailing the accreditation process for adoption agencies to ensure uniform quality standards.²⁸²

While I agree that a protocol addressing these operational details could significantly improve the Hague Convention's effectiveness, I contend that its impact would be enhanced by explicitly including technology-based solutions. Integrating technology into intercountry adoption processes promises to streamline procedures, improve transparency, and strengthen communication among all parties involved. These advancements could fundamentally transform the management of intercountry adoption, making it more efficient and accessible.²⁸³

However, it is essential to recognize that the formulation and ratification of international protocols are typically protracted, often lagging behind the rapid pace of technological innovation. Consequently, while advocating for a protocol that is forward-looking and technology-ready, there is equal value in pursuing technological improvements independently of the protocol's timeline. By proactively adopting digital solutions now, we can begin to address some of the current system's shortcomings without waiting for legislative processes to conclude.

²⁸² Goodno, *supra* note 91, at 207-239. Additionally, the protocol advocates for a more flexible approach to compliance for countries struggling with implementation due to financial or structural challenges, suggesting phased compliance mechanisms and temporary suspensions of full Hague requirements in specific situations, such as post-catastrophe recovery or for new member states working towards compliance. *Id.*

²⁸³ For example, the adaptation of iChild and INCSTAT for intercountry adoption could revolutionize how cases are managed, tracked, and analyzed, offering the potential for greater efficiency, transparency, and child protection. The Hague Conference has posited that the technological systems and innovations could be adapted to enhance the implementation and efficacy of several key Conventions, including the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption 1993. HAGUE CONFERENCE UPDATE, HAGUE CONF. ON PRIV. INT'L L. 186 (Sept. 2008), <https://www.hcch.net/en/publications-and-studies/details4/?pid=5554> [https://perma.cc/KD6W-6V4X].

This dual approach, envisioning a protocol that is adaptable to technology while concurrently implementing digital solutions, offers a balanced strategy. It ensures that immediate progress can be made in improving the intercountry adoption system, providing timely benefits to children and families and setting a proactive example of how international legal frameworks can evolve to meet modern demands.

G. Fostering Innovation and Technology Integration in Adoption Practices

Incorporating technology into the operational framework of the Hague Convention presents a critical opportunity to enhance both the efficiency and integrity of intercountry adoptions. Technological solutions can streamline management, communication, and collaboration among Central Authorities, accredited bodies, and other stakeholders, directly supporting the Convention's objectives. Digital platforms could significantly improve the exchange of essential information, secure adoption records, and ensure compliance, especially with key articles. Furthermore, technology can strengthen cooperation, enable comprehensive online training and support, and improve monitoring and reporting practices, thereby promoting transparency and accuracy.

Specifically, integration of technology could transform information exchange and documentation practices, aligning with Articles 8,²⁸⁴ 9,²⁸⁵ and 23²⁸⁶ to facilitate smoother and more compliant processes. Moreover, leveraging technology for training, support, monitoring, and preventing improper financial gains under Article 32²⁸⁷ could substantially mitigate risks and foster ethical practices.²⁸⁸

²⁸⁴ See Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, *supra* note 58, at art. 8.

²⁸⁵ See *id.* at art. 9.

²⁸⁶ See *id.* at art. 23.

²⁸⁷ See *id.* at art. 32.

²⁸⁸ Implementing systems to track, audit, and report fees and expenses can help prevent improper financial gains, aligning with Article 32's directive against deriving undue profit from adoption activities.

Recent studies have illustrated the transformative impact of technology and social media on post-adoption experiences, revealing both challenges and opportunities in how adoptees connect with their biological families.²⁸⁹ These studies have explored the impact of technology and social media on post-adoption scenarios.²⁹⁰

However, our proposal emphasizes technology's role in systemic reform, focusing on transparency, efficiency, and ethical practices to address the foundational challenges of intercountry adoption. We focus on leveraging technology not merely as a factor in post-adoption relationships but as an element in reforming the intercountry adoption system itself.

H. Navigating Technological Advancements: Challenges and Ethical Considerations

Integrating technology into intercountry adoption frameworks represents a meaningful shift aimed at addressing systemic inefficiencies and strengthening process integrity. However, ensuring this integration genuinely benefits children's welfare requires careful scrutiny.

For instance, digital documentation and tracking systems provide robust tools to combat fraud and corruption by creating transparent adoption records. Yet, their implementation demands

²⁸⁹ Anne Marie Shier, *Negotiating Reunion in Intercountry Adoption Using Social Media and Technology*, 51 BRITISH J. SOC. WORK 408 (2020) (exploring how intercountry adoptees utilize social media and technology to facilitate reunions with their birth families in Ireland, highlighting the significant role of digital platforms in reshaping search and reunion practices within the realm of intercountry adoption.)

²⁹⁰ Stacey Steinberg et. al., *Adopting Social Media in Family and Adoption Law*, 2023 UTAH L. REV. 447 (2023) (discussing the legal implications and challenges of social media use in domestic family and adoption scenarios within the United States); AMY WHITESEL & JEANNE A. HOWARD, UNTANGLING THE WEB II: A RESEARCH-BASED ROADMAP FOR REFORM (2013), <https://njarch.org/wpress/wp-content/uploads/2015/11/UntanglingtheWeb21.pdf> [https://perma.cc/E7C2-7V8S] (exploring how the internet influences various facets of adoption, including reunions); see also Ann M. Haralambie, *Use of Social Media in Post-Adoption Search and Reunion*, 41 CAP. U.L. REV. 177 (2013) (exploring the impact of social media on the search and reunion processes within the context of U.S. national adoption, addressing the challenges of navigating sealed records and privacy concerns.); Valerie O'Brien, *Social Networking, Adoption and Search and Reunion*, IRISH SOC. WORKER (UCD Sch. of Applied Soc. Sci., Working Paper No. 31, 2013) (discussing the impact of social networking on adoption practices in Ireland, particularly in the areas of search and reunion).

rigorous data protection protocols to balance transparency with privacy rights. Likewise, online platforms for oversight and accountability should be developed under strict ethical standards, protecting children and families from intrusive surveillance and potential data breaches.

AI-driven matching systems, while improving efficiency, must respect the complex nature of family matching, ensuring technology supports rather than overshadows comprehensive welfare assessments so that a child's best interests are always prioritized. Similarly, the proposal for a global child welfare database and predictive analytics underscores the potential for technology to advance international cooperation and protection. However, ethical standards are essential to prevent the commodification of children's profiles and to mitigate data misuse risks, positioning technology as a safeguard for ethical adoption rather than a tool for exploitation. The discussion on technology's role in intercountry adoption highlights the need for an ethical approach, with privacy and ethics concerns prioritized to protect children and their families. Addressing the digital divide is also critical; technological advancements should be inclusive, particularly for under-resourced countries, with designs that make technology both accessible and user-friendly.

In conclusion, while technology has the potential to transform intercountry adoption where current legal frameworks may fall short, its application requires a thoughtful, ethics-focused strategy. Collaborative efforts across governments, technology firms, NGOs, and the adoption community are crucial in developing solutions that are innovative, child-centered, and protective of children's rights. Integrating technology into intercountry adoption is more than a technical advancement; it is an ethical imperative toward a transparent, fair, and effective adoption system.

VII. REFRAMING INTERCOUNTRY ADOPTION THROUGH VULNERABILITY THEORY

Integrating vulnerability theory into intercountry adoption discourse shifts focus to a more humane and justice-oriented approach for understanding this complex global phenomenon.²⁹¹ Vulnerability theory challenges the prevalent neoliberal ethos that prioritizes autonomy, independence, and self-sufficiency, reframing this by centering our inherent dependence on the social and material conditions necessary for building resilience.²⁹²

Vulnerability theory's emphasis on the role of the state in addressing vulnerability provides an alternative approach to intercountry adoption.²⁹³ Applying this theory to intercountry adoption redirects attention from only individual rights to a broader look at the societal, institutional, economic, and political structures that shape the vulnerabilities experienced by everyone involved, children, birth families, and adoptive families.²⁹⁴ The application of vulnerability theory to intercountry adoption demonstrates the interrelationship between the positions of the involved parties, highlighting the systemic context of the vulnerabilities faced by all parties involved and challenging the need to transcend transactional models of intercountry adoption in favor of ethical engagements.²⁹⁵ Moreover, the emphasis on state

²⁹¹ Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J. L. & FEMINISM 1 (2008).

²⁹² Martha Albertson Fineman, *Vulnerability and Social Justice*, 53 VAL. UNIV. L. REV. 341, 342 (2019) ("Recognition of fundamental, universal, and perpetual human vulnerability reveals the fallacies inherent in the ideals of autonomy, independence, and individual responsibility that have supplanted an appreciation of the social."); *see also* Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251 (2010) [hereinafter *Responsive State*].

²⁹³ Martha Albertson Fineman, *Reasoning from the Body: Universal Vulnerability and Social Justice*, in *A JURISPRUDENCE OF THE BODY* 17-34 (Chris Dietz et. al. eds., 2020).

²⁹⁴ Martha Albertson Fineman, *Universality, Vulnerability, and Collective Responsibility*, 16 LES ATELIERS DE L'ÉTHIQUE/THE ETHICS FORUM 103, 105 (2021) ("Human vulnerability is universal and constant, inherent in the human condition.").

²⁹⁵ Helene Brodin, *Still a Responsive State? Marketization and Inequalities in Swedish Aged Care*, in *PRIVATIZATION, VULNERABILITY, AND SOCIAL RESPONSIBILITY: A COMPARATIVE PERSPECTIVE* 209-229 (Martha Albertson Fineman et al. eds., 2016) (arguing that marketization in Swedish aged care has led to increased inequalities and a focus on profit over care quality, demonstrating the risks of reducing state involvement in favor of market principles).

responsibility in vulnerability theory offers a critique of the current regulatory frameworks governing intercountry adoption. The theory argues for a responsive role of the state, not merely as a regulator but as a guarantor of the well-being of all involved in adoption.²⁹⁶

A. Systemic Failures and the Need for Reform

A focus on human vulnerability urges a rethinking of the core assumptions within intercountry adoption frameworks. Traditional approaches often fail to address the ways in which systemic issues reduce resilience. As discussed in previous sections, intercountry adoption faces serious systemic challenges, including inconsistent regulations across countries, deep ethical concerns, and widespread fraud and corruption, such as document falsification and bribery, which reveals failures due to abuse and misuse of the system.²⁹⁷

On the other hand, there is a failure to adequately respond to the demands placed on all parties involved. This is evidenced by inadequate pre- and post-adoption support, insufficient oversight of adoption agencies, and a pervasive lack of transparency. These problems reflect systemic shortcomings in addressing the needs of children, birth families, and adoptive families within the adoption process.²⁹⁸

The urgency for reforming current intercountry adoption practices has become increasingly clear by recent re-evaluations across Europe. For instance, the Netherlands has suspended intercountry adoptions, recognizing systemic flaws including document forgery, child trafficking, and unethical coercion of parents. This move reflects a broader trend, as seen in Sweden and Denmark, where similar issues have prompted rigorous inquiries and policy shifts aimed at addressing the ethical dilemmas and corruption in the intercountry adoption process.²⁹⁹ These developments align with a growing recognition that past policies

²⁹⁶ Fineman, *supra* note 293, at 33 (“Law is both inherently a social endeavor and a primary instrument of accomplishing social justice.”).

²⁹⁷ *Responsive State*, *supra* note 292, at 273 (“Societal institutions. . . have a powerful interest in disclaiming the appearance of any vulnerability.”).

²⁹⁸ *Id.* at 256.

²⁹⁹ Fineman, *supra* note 294, at 105 (“Law is the mechanism by which we construct and through which we maintain our social institutions and relationships.”).

have often failed, necessitating a reformed approach that provides comprehensive support for all involved parties.³⁰⁰

B. Vulnerability and Intercountry Adoption

Adopting a vulnerability approach to intercountry adoption brings forward a critical insight: the vulnerabilities experienced by birth families, adoptive families, and children cannot be viewed in isolation.³⁰¹ This interconnected web calls for policies and practices that are responsive,³⁰² and that form part of a routine systemic response that prioritizes the well-being of all parties involved.

Birth families often face economic precariousness, social stigma and isolation. It is important to recognize that these challenges are not solely related to the adoption process but are broader societal issues. Problems such as economic hardship, property distribution, and resource allocation are systemic issues that affect birth families independently of the adoption context. Additionally, there is a deficiency of support structures such as the lack of accessible alternatives like financial aid, counselling, and temporary foster care solutions. Addressing these broader societal issues requires a comprehensive approach that extends beyond the adoption system, tackling fundamental problems of economic inequality and social support.

Adoptive families face significant emotional and psychological strains throughout the adoption process, revealing the inefficiencies and insensitivities within adoption systems that are intended to support them. Particularly in transnational adoptions, adoptive families navigate complex cultural integration issues that current practices often overlook. The lack of substantial post-adoption support resources leaves adoptive families without necessary guidance to address the myriad of emotional, behavioral, and health-related challenges that may arise. This deficiency

³⁰⁰ Martha Albertson Fineman, *Vulnerability and Inevitable Inequality*, 4 OSLO L. REV. 133, 134 (2017) (“[T]he state must be responsive to the realities of human vulnerability and its corollary, social dependency, as well as to situations reflecting inherent or necessary inequality . . .”).

³⁰¹ Fineman, *supra* note 294, at 107 (“The injuries should not be the occasion for separating the injured from others, but for recognizing the general, shared fragility of human wellbeing.”).

³⁰² *Responsive State*, *supra* note 292.

reveals a neglectful disregard for the ongoing needs of adoptive families, undermining the stability and health of familial units.³⁰³

Adopted children face acute struggles with belonging, challenges that are magnified in transnational contexts. These issues are symptomatic of deeper, systemic failures to address the needs of adopted children, reflecting a troubling oversight by policymakers. Many adopted children have histories of trauma, whether pre-adoption or during the adoption process itself. The enduring psychological impacts of such experiences are severe yet remain systematically under addressed.³⁰⁴

Adoption agencies, meanwhile, frequently contend with a labyrinth of international laws and regulations that are not only complex but also are inconsistently applied across jurisdictions. This regulatory maze poses operational challenges, reflecting the broader lack of coherence in international adoption governance. Agencies also often face ethical dilemmas, particularly in balancing the urgency to place children with suitable families against the imperative to ensure that these placements are made ethically and not driven by profit motives. Moreover, errors in handling adoptions can inflict severe reputational damage on agencies, impacting their operational efficacy. These risks highlight the precarious nature of adoption work and show the demand for stringent standards and accountability mechanisms to prevent and address such failures effectively.

Additionally, it is essential to address the state's vulnerabilities in relation to the adoption process. These vulnerabilities include resource constraints, where limited funding and staffing can hinder the state's ability to effectively oversee and support adoption processes. Policy limitations also pose significant challenges, as outdated or insufficient policies may fail to address the complexities and evolving needs of intercountry adoption. Systemic reform is needed to enhance the state's capacity to manage the intricacies of intercountry adoption. This includes

³⁰³ Fineman, *supra* note 292 (stating that state's responsibility extends beyond initial regulatory oversight to the creation and maintenance of just social institutions that support all individuals, including adoptive families).

³⁰⁴ *Id.* at 21 ("Vulnerability, therefore, is not a characteristic of only some individuals or groups, nor does it differ in quality or degree from one individual or group to another. We are all always vulnerable—there is no position of invulnerability.").

developing robust regulatory frameworks, improving inter-agency and international collaboration, and ensuring continuous training and support for state officials involved in the adoption process. By acknowledging and addressing these vulnerabilities, the state can create a more resilient and responsive adoption system that better serves all parties involved.³⁰⁵

This analysis highlights the challenges involved in intercountry adoption and demands robust, ethically grounded reforms. One significant reform could be for the state to assume primary responsibility in the adoption process rather than deferring to private institutions. By centralizing the adoption process, the state can ensure that all aspects of the adoption process adhere to high ethical standards and provide comprehensive support to all parties involved. This approach could mitigate issues such as inconsistent regulatory standards, ethical concerns, and the prioritization of profit over the well-being of children and families. A state-led adoption system would emphasize accountability, transparency, and a commitment to addressing the vulnerabilities of all parties involved, enhancing the integrity and care in the intercountry adoption process.

This is not an unreasonable suggestion; some countries around the world already have state-led adoption systems or systems where agencies operate under close state supervision. For instance, in France, the Ministry of Foreign Affairs oversees all international adoptions, ensuring strict adherence to ethical standards.³⁰⁶ Similarly, in Serbia, the Ministry of Family Affairs, supported by centers for social work and other relevant public institutions, oversee the entire adoption process. This ministry ensures compliance with both national and international laws, maintaining high ethical standards. Unlike some countries (e.g., US) where private agencies play a significant role, Serbia has a state-led intercountry adoption system where governmental institutions

³⁰⁵ Jennifer Hickey, *Ensuring Contraceptive Equity*, 17 NW. J.L. & SOC. POL'Y 61 (2022) (arguing that the state must address its own vulnerabilities and those of institutions it relies upon to ensure equitable outcomes).

³⁰⁶ INTERCOUNTRY ADOPTION IN FRANCE, MINISTÈRE DES AFFAIRES ÉTRANGÈRES ET EUROPÉENNES, https://www.diplomatice.gouv.fr/IMG/pdf/Adoption_FinaleAng_BD.pdf [<https://perma.cc/TFK9-ZUX9>] (last visited Dec. 14, 2024).

manage the adoption process from start to finish.³⁰⁷ Similarly to Serbia, China and South Korea also exemplify state-led intercountry adoption systems.³⁰⁸

Norway and Sweden also have centralized adoption systems. In Norway, the Directorate for Children, Youth, and Family Affairs (Bufdir)³⁰⁹ handles all intercountry adoptions, ensuring consistent application of national standards. In Sweden, the Family Law and Parental Support Authority (MFoF) oversees intercountry adoptions and supports adoptive families through comprehensive post-adoption services.³¹⁰

This approach is in line with the vulnerability theory's concept of a responsive state. Vulnerability theory advocates for a state that actively addresses the inherent dependencies and needs of its citizens by creating resilient structures.

The primary difference between the United States and countries such as France, Serbia, Norway, Sweden, China, and South Korea lies in the degree of centralization and the role of the state in the oversight and regulation of the adoption process. The U.S. has a dual system of federal and state regulation. The Department of State's Office of Children's Issues serves as the central authority under the Hague Convention, providing federal oversight. However, individual states have their own adoption laws and regulations, which can vary significantly.³¹¹

³⁰⁷ *PORODIČNI ZAKON: Na koji način stranci mogu usvojiti dete iz Srbije?*, PARAGRAFLEX (Aug. 13, 2019), <https://www.paragraf.rs/dnevne-vesti/140819/140819-vest13.html> [https://perma.cc/3W56-47LA].

³⁰⁸ Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, *supra* note 58; *The Korean Government is Committed to Reforming the Adoption System*, MINISTRY OF HEALTH & WELFARE (May 10, 2024, 6:21 PM), https://www.mohw.go.kr/board.es?mid=a20401000000&bid=0032&list_no=1481399&act=view [https://perma.cc/HHP9-RVWH].

³⁰⁹ *The Norwegian Directorate for Children, Youth and Family Affairs (Bufdir)*, GOVERNMENT.NO, <https://www.regjeringen.no/en/dep/bfd/organisation/Offices-and-agencies-associated-with-the-Ministry-of-Children-and-Equality/Norwegian-Directorate-for-Children-Youth/id418035/> [https://perma.cc/F4JM-6BAQ] (last visited Oct. 1, 2024).

³¹⁰ *Family Law and Parental Support Authority*, SWEDISH AGENCY FOR FAM. L. AND PARENTAL SUPPORT, <https://mfaf.se/sidhuvudets-innehallssidor/choose-language/english.html> [https://perma.cc/2YGX-WMWV] (last visited Oct. 1, 2024).

³¹¹ *Important Adoption Laws*, NAT'L COUNCIL FOR ADOPTION, <https://adoptioncouncil.org/resources-and-training/important-adoption-laws/> [https://perma.cc/KX82-STWB] (last visited Oct. 1, 2024).

In the U.S., accredited private agencies handle much of the adoption process, from home studies and matching to post-adoption services. These agencies operate with federal accreditation but are subject to varying state regulations. The interplay between federal oversight, state laws, and private agency practices can lead to inconsistencies in the adoption process.³¹² In contrast, countries like France, Serbia, Norway, and Sweden have a more centralized approach to intercountry adoption, with a single national authority overseeing and regulating the entire process.

Adopting a similar approach in the US could significantly improve the integrity and effectiveness of the intercountry adoption process. By integrating these practices, the US could foster a more transparent, accountable, and supportive adoption system that aligns with the principles of vulnerability theory. Such reforms would help address the vulnerabilities of all parties involved, creating a more resilient and responsive adoption system that better serves children, birth families, and adoptive families alike. A comprehensive reform strategy must also consider state vulnerabilities and address them through increased funding, better policy frameworks, and enhanced collaboration with international bodies to create a more cohesive and effective adoption system.

C. Transitioning to a Proactive and Responsive State Involvement

Vulnerability theory compels a transformation in the state's role from a passive regulator to an active guarantor of ethical and responsive adoption practices. In the US, the state's current engagement in intercountry adoption often mirrors the restrained and passive approach. Traditionally, the state has often deferred deeper responsibilities to prospective parents and, indirectly, to children themselves, forcing them to navigate the complexities of intercountry adoption systems without sufficient support. This approach, primarily focused on addressing misconduct by adoption agencies, leaves systemic issues unaddressed and does not provide

³¹² Trish Maskew, *Failure of Promise: The U.S. Regulations on Intercountry Adoption under the Hague Convention*, 60 ADMIN. L. REV. 487 (2008).

comprehensive support and protection for all parties involved, a necessity in such a critical area of social and family policy.³¹³

For the state to be responsive, we propose the following actions:

***Development and Implementation of
Comprehensive Support Systems***

- Establish and maintain robust institutional support systems that not only meet legal and procedural requirements but also address the emotional, psychological, and cultural needs of all parties involved in adoption.
- Create and fund continuous training programs for adoptive parents that cover cultural competency, trauma-informed caregiving, and adaptive parenting strategies.
- Establish legal aid services specifically geared towards assisting all parties with the legalities of adoption ensuring that legal support is accessible and equipped to handle intercountry nuances.
- Expand educational and training programs that address not only the initial stages of adoption but also long-term challenges and facilitate the creation of peer support groups where adoptive parents, and potentially adoptees, can share experiences and strategies.
- Invest in public education campaigns to raise awareness about the intercountry adoption process and standards.

Enhancing Regulatory Frameworks

- Develop regulations that prioritize the well-being of all parties involved over the efficiencies of the adoption process or the commercial interests of agencies.

³¹³ Fineman, *supra* note 300, at 149 (“The responsive state must be one that recognises relationships or positions of inevitable inequality, as well as universal vulnerability and dependency acting as an instrument of social justice in both its law making and enforcement functions.”).

- Implement stringent oversight mechanisms that regularly assess the operations of adoption agencies, ensuring adherence to ethical standards and responsiveness to the evolving needs of parties involved.
- Particularly in the context of the U.S. where private adoption agencies are predominant, the state must enforce enhanced regulatory measures that include:
 - Robust oversight and licensing for private agencies, assessing their operational integrity and compliance with ethical practices.
 - Continuous monitoring in implementing a system of regular, unannounced audits to ensure agencies adhere to ethical guidelines continuously.
 - Transparency and accountability to mandate that agencies provide detailed annual reports on their operations, adoption numbers, and countries involved to enhance transparency and enable better oversight by regulators and the public.
 - Ethical Training and Standards: Mandate comprehensive ethical training for all agency staff and develop and enforce a standardized code of ethics specific to intercountry adoption that all private agencies must adhere to.
 - Support Services for All Parties: Require agencies to provide or connect a pre- and post-adoption support services and other services such as counselling services.

D. Towards a Truly Responsive Adoption System

A responsive state that truly embodies the principles of vulnerability theory in intercountry adoption does so by gradually implementing comprehensive support systems and policies that prioritize long-term well-being and developmentally focused support. As outlined, a responsive state begins by conducting

thorough evaluations of existing adoption policies to assess their effectiveness beyond just procedural adequacy. By pinpointing deficiencies, the state can target areas for significant policy innovation and restructuring.³¹⁴

With a clear understanding of the existing policy gaps, the state moves to design responsive measures that are not confined to the administrative aspects of adoption but extend to comprehensive support systems. These systems are conceived to provide continuous and adaptable support, starting from the adoption process and extending throughout the life of the adoptive relationship.

The state then implements these comprehensive support systems, ensuring they address the multifaceted aspects of adoption. This involves setting up robust institutional frameworks that can provide ongoing support. Finally, the state advocates for a systemic shift in how adoption is perceived, as a continuous process that requires ongoing engagement and support. Policies are restructured to reflect this view, promoting practices that foster long-term relationships and ensuring that the legal and social frameworks support this continuous interaction.

By following these steps, a responsive state gradually transforms its approach to intercountry adoption. Each step builds on the last, moving from assessment to implementation, and culminating in a cultural shift towards ongoing support and engagement. This approach not only protects the immediate interests of all parties involved but also fosters a supportive environment and system that is not static but is continually responsive to the needs and challenges that emerge over time. By integrating vulnerability theory into our efforts to reform intercountry adoption practices, we pave the way for an adoption system that is not only compliant with legal norms but also deeply aligned with the ethical imperatives of care, fairness, compassion, solidarity, and responsibility.

³¹⁴ *Id.* (asserting that true social justice is achieved through state responsibility and the creation of resilient social structures that support all individuals).

CONCLUSION: TOWARDS A FUTURE-PROOFED, VULNERABILITY
INFORMED ADOPTION SYSTEM

Intercountry adoption debates have long been trapped in binary arguments. Rather than asking whether it should exist, the real question is how to regulate it responsibly to serve children's best interests.

Intercountry adoption is inherently complex, requiring clear ethical practices, global cooperation, and accountability for past abuses. When used carefully, technology can strengthen oversight and transparency in adoption systems. Widespread abuses across Europe have exposed deep flaws in international adoption systems, making reform not just necessary, but long overdue.

The integration of vulnerability theory into intercountry adoption offers a constructive perspective that addresses the inherent vulnerabilities of all parties involved. It also insists on a state that is not just a regulator but a long-term support system that supports birth families, adoptive families, and children throughout the adoption journey. This approach rejects polarized narratives and instead focuses on ethical, workable reforms that respond to today's global adoption realities.