INTERCOUNTRY ADOPTION IS A TYPE OF INTERNATIONAL MIGRATION:

SAFEGUARDING THE RIGHTS OF CHILDREN IN CROSS-BORDER MIGRATION REQUIRES ADDRESSING ABUSES IN INTERCOUNTRY ADOPTION

submission of

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In the humanitarian work on international migration, one of the areas that is often overlooked is intercountry adoption. Moreover, when it is addressed, it is usually not from a children’s rights perspective. It is therefore important that this Day of General Discussion fully integrates intercountry adoption into the discussions and outcome recommendations.

International adoption is a subcategory of international migration

Discussions of international migration often overlook intercountry adoption.

When we consider intercountry adoption as a specific area of concern, it is clear that it is a part of international migration: Children who are moved across national borders for the purposes of adoption are children who are migrating internationally. By definition, intercountry adoption is a subcategory of international migration. This is seen in the definition of the International Organization for Migration:

international migration is a “process of moving ... across an international border.”1 This definition coincides with the dictionary, or ordinary, meaning of migration: “to move from one country or region and settle in another.”2

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Moreover, scholars in migration studies are treating intercountry adoption as a subcategory of international migration. (See examples in the footnote.)³

While the definition-approach is important, the pragmatic-approach is also important. When we focus on preventing abuses of children’s rights in international migration situations, we can see that it is essential to address intercountry adoption as a distinct priority area of intervention.

In particular, there are several kinds of social situations that drive international migration. Among the most important are: violence (war, internal conflict, criminal gangs, etc.), economic hardship (e.g., “regular” and “irregular” migration, displacement from development projects), and natural disasters.⁴ All of these situations also serve as catalysts for intercountry adoption. Each one of them makes children vulnerable to intercountry adoption, which in turn makes children vulnerable to abuses in the processes of intercountry adoption. From the pragmatic perspective of protecting the well-being and rights of children in these situations of international migration, efforts must be focused on preventing abuses in intercountry adoption.⁵


³ Underscoring has been added in these examples to show that the authors view international adoption as a type of international migration. “Another type of transnational migration is that of children for adoption … a significant type of migration, both because of its increasing volume over time and because the factors involved clearly illustrate how particular cultural and political factors can retard or accelerate the international movement of people.”; in R.H. Weil, “International Adoptions: The Quiet Migration” (International Migration Review, Vol. 18(2), pp. 276-293); “From the 1950s to the present, the migration of children for adoption to First World nations became an established practice.” “Since World War II, the migration of children for adoption has become an established migratory trend.”; in K. Lovelock, “Intercountry Adoption as a Migratory Practice: A Comparative Analysis of Intercountry Adoption and Immigration Policy and Practice in the United States, Canada and New Zealand in the Post W.W. II Period” (International Migration Review, Vol. 34(3) pp. 907-949); “ICAs function as a ‘quiet migration’ of children ... Similar to other migratory flows, intercountry adoptions (ICAs) of orphans to the U.S. have generally conformed to trends ...”; in M. A. Davis, “Intercountry Adoption Flows from Africa to the U.S.: A Fifth Wave of Intercountry Adoptions” (International Migration Review, Vol. 45(4). pp. 784-811); P. Selman, “Intercountry Adoption in the New Millennium: The ‘Quiet Migration’ Revisited” (Population Research and Policy Review 21:205-225.); R. Gehrmann, “Migrants between worlds: inclusion, identity and Australian intercountry adoption” (Migrant Security 2010: Citizenship and Social Inclusion in a Transnational Era, Public Research Center. http://eprints.usq.edu.au/19379/).


⁵ The UNHCR serves as a good example of how intercountry adoption is integrated within the broader field of international migration. To fulfill its mandate to protect refugees, who, by definition, are international migrants, UNHCR protects refugee children (and their parents and extended family) from abuses of intercountry adoption. E.g., “UNHCR Policy on Adoption of Refugee Children” (August 1995); Executive Committee of the High Commissioner’s Programme, “Family Protection Issues” (paras. 24-26, “Adoption of Separated Children”), EC/49/SC/CRP.14 (1999); Guidelines on Protection and Care of Refugee Children (1994), pp. 130-133; UNHCR Guidelines for Determining the Best Interests of the Child (2008).
And finally, when we take a child-centered approach, we see that the situation of the child is identical in international migration and in international adoption: the decisions are made by adults, not the children. The objective of the Convention on the Rights of the Child (CRC) is to ensure that these decisions are based on the best interests of the children.6

Two overarching problems

There are two overarching problems when addressing intercountry adoption as a part of international migration.

Safeguarding the best interests of the child

The first problem is the failure of the state to comply with the “best interests of the child” provisions in the Convention on the Rights of the Child. The CRC requires the “best interests” (or well-being, welfare) of children to be addressed in two dimensions:

(i) When state authorities are making decisions about the adoption of a particular boy or girl, that child’s best interests must be the “paramount” (controlling) consideration, overriding the interests of the prospective adoptive parents. (CRC, Art. 21.)

(ii) When a state sets up and administers a system to manage intercountry adoption, it must make the best interests of the children affected (that is, children considered collectively) “a primary consideration”; this duty pertains to all of its laws, policies, and programs. (CRC, Art. 3(1).)

The second, collective dimension is where the greatest weakness lies. Often times, the laws and institutions of states are not sufficiently developed to ensure that the best interests of the adoptee children are a primary consideration in the management of intercountry adoptions.

The Committee on the Rights of the Child made a similar integration of intercountry adoption in Gen. Com. No. 6 (2005), Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, para. 91 (“Intercountry Adoption”).

To appreciate how easy it is to overlook children as persons who have an individual identity, and therefore individual needs and rights, consider this definition of “migrant”:

The term migrant is usually understood to cover all cases where the decision to migrate is taken freely by the individual concerned for reasons of “personal convenience” and without intervention of an external compelling factor. This term therefore applies to persons, and family members, moving to another country or region to better their material or social conditions and improve the prospect for themselves or their family. IOM, Glossary (emphasis added).

The situation is the same in international migration in general and intercountry adoption in particular: the child does not make his or her own decision. The child is treated as a dependent, and the parents’ decision (or that of a guardian or other authority) is therefore an “external compelling factor.” Moreover, in intercountry adoption the decision is too often for the convenience of the prospective adoptive parents and the intermediaries in the transaction. As carefully written as the Glossary is, children are “invisible” as individual human beings, and holders of rights.

Compare to: “[I]t can be stated that in one sense this process [i.e., intercountry adoption] is a type of forced migration, since orphans may have no control over whether or where they will be moved.”; in R.H. Weil, “International Adoptions: The Quiet Migration” (International Migration Review, Vol. 18(2), pg. 277).
Failure of international law and institutions to manage intercountry adoptions

The second difficulty is that intercountry adoption transcends the responsibilities of individual states, but there is no international regime to manage this migration, or to ensure that intercountry adoption is fully integrated into existing measures.

For instance, the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption is a framework treaty to promote international cooperation, and the development of laws and policies at the state level. However, the Convention has gaps. These include: (i) The Hague Convention provides a framework for the creation of laws and policies, but not the detailed laws themselves: each State Party enacts its own laws; (ii) The Convention is not universally ratified (a major sending country, the Republic of Korea (South Korea), is not a party, for example); (iii) There is no international regulatory body to ensure international adoption standards are complied with; (iv) The Convention was neither written as, nor is being applied as, a part of the field of international migration; and (v) There is tension between the purposes of the Convention: it is intended to promote the interests of adults who want to adopt from abroad, and of the adult-controlled entities engaged in intercountry adoption, while, at the same time the Convention is intended as a framework to help protect children from abuses in those adoptions.

This is where the Day of General Discussion is important. The outcome recommendations must include measures that specifically address the protection of children who are migrating across borders by way of intercountry adoption.

In developing the recommendations, several matters need to be considered.

The large numbers of children who are migrating for the purposes of adoption

In 2004, for instance, 45,298 children are estimated to have been sent out of their country for adoption. In the ten-year period of 2000-2010, there were 410,000 children who migrated internationally through the means of intercountry adoption. In the African region, from 2003 to 2010, there was a three-fold increase in intercountry adoptions.

As for individual states, the Republic of Korea has the longest continuously operating international adoption program: the official figure over the course of the program is 164,894 children. (The actual total is reported to be much greater.) In 2010 alone, South Korea sent 1,013 of its youngest citizens overseas to be adopted. In the same year, China, as the current top-sending country, transferred 5,471 of its children overseas for adoption, while Russia, the major sending country in Eastern Europe, sent 3,387 children abroad for adoption. And to cite one example from the Latin American region, 1,798 children migrated from Colombia through adoption.

7 P. Selman, “Global Trends in Intercountry Adoption: 2001-2010.” (Adoption Advocate. No. 44.)
“Loud” humanitarian crises as catalysts of international migration/adoption

During wars, internal conflicts, and natural disasters, children have been transferred from their communities, often at a high human cost. Well-known situations of children migrating internationally are the Spanish Civil War, the genocide in Rwanda, and the recent Haitian earthquake. Sometimes children are directly adopted from these situations, and sometimes they are removed as “unaccompanied minors,” who are subsequently adopted. Whether the adoptions are direct or indirect in these “loud” crises, they have caused countless violations of children’s rights. (As well as violating the rights of their parents and extended families, and the interests of their ethnic communities.) For these reasons, the Inter-agency Guiding Principles on Unaccompanied and Separated Children warns against removing a child at the height of or shortly after a disaster or conflict.

“Silent” humanitarian crises as catalysts of international migration/adoption

There are also on-going, structural problems that are catalysts for international migration through adoption. Four “silent” humanitarian problems stand out:

Poverty, especially in the context of the breakdown of family and community supports

Poverty is a common driving force of international migration, and international adoption is one of the ways in which the migration occurs. Poverty is especially a catalyst when the parents don’t have the traditional social supports, or state-provided safety-nets. Many abuses of children’s (and parents’) rights have been reported from Cambodia, Ethiopia, Guatemala, India, Nepal, and Vietnam, for instance.

But the abuses are not caused by poverty. Rather, the parents’ economic distress is exploited by “intermediaries” who obtain the children for adoption by fraud and other abusive practices. These abusive practices amount to trafficking when the child is transferred across borders for the purposes of adoption.

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**Children born to unmarried parents**

Intercountry adoption is also used to address social problems. In the Republic of Korea, babies from unmarried mothers account for 90% of those adopted abroad.\(^{16}\) Again, a combination of factors precipitates the crisis that leads to a decision to transfer the child to another country through adoption: severe social stigmatization of children born to unmarried parents, the mother’s inability to support the baby, and the withdrawal of family and community support from the unmarried mother.

**Children with disabilities**

While having a disability can make it difficult for a child to be accepted by prospective adopting parents, the opposite is also true. The demand for babies in the international “adoption market”\(^ {17} \) is so great that States make it easier for foreigners to adopt babies who have impairments; sometimes the authorities even falsify or exaggerate the disability as a technique to facilitate the transfer abroad.\(^ {18} \)

**Other socially rejected children**

International migration/adoption is also used to remove children from the country when traditional attitudes devalue a child for having certain characteristics. For instance, the large-scale exportation of children from Korea after the North-South conflict of the 1950s began as a “solution” to the thousands of children who were abandoned because they were of “mixed race.”\(^ {19} \) And in China, the one-child policy and preference for a son led to girls being abandoned; this transfer abroad through adoption being a “solution” to the overcrowding of social welfare institutions.\(^ {20} \)

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\(^ {16} \) S.H. Choe, “Group Resists Korean Stigma for Unwed Mothers” (The New York Times, Oct. 7, 2009); http://www.nytimes.com/2009/10/08/world/asia/08mothers.html (reporting a figure obtained from the Ministry of Health, Welfare and Family Affairs.) The CRC Concluding Observations expressed concern that the overwhelming majority of adopted children have been placed for adoption by unmarried adolescent mothers; CRC/C/KOR/3-4, para. 49 (c).


\(^ {18} \) *UNICEF Guidance Note on Intercountry Adoption in the CEE/CIS Region*, UNICEF Regional Office for CEE/CIS (2009) (reporting that some Eastern European adoption agencies exaggerate the seriousness of a child’s impairments to qualify the youngster for intercountry adoption, or doctors provide false medical information to enable the child to be placed on a “special needs” register for adoption overseas); on pp. 14 and 21; J.J. Trenka, “Structural Violence, Social Death, and International Adoption” (Conducive Chronicle, 19 March 2010) (showing how the South Korean government manipulates the term *handicapped* to facilitate ICA). Retrieved 12 Sept. 2012 from: http://cchronicle.com/2010/03/structural-violence-social-death-and-intl-adoption-part-1-of-4/


Common denominators

Despite the differences in these catalysts to international migration of children through intercountry adoption, there are important similarities: (i) The lack of support services for the children and parents, from the state, civil society, and international assistors. (ii) Negative attitudes towards the particular categories of children who are transferred abroad. (iii) The frequency with which intermediaries use fraud, coercion, and other abusive practices to obtain the children for intercountry adoption. (iv) And the absence of safeguards, at both the state and international levels, even when a state has ratified the Hague Convention.

Recommendations

This Day of General Discussion can help promote reform in intercountry adoption by, first of all, recognizing that transferring a child across borders for the purpose of adoption is a subcategory of international migration. And second, by recognizing that serious abuses in the adoption process are a form of trafficking in children.21

In particular, the Committee on the Rights of the Child is urged to include the following recommendations in the outcome document for the Day of General Discussion:

1. Intercountry adoption needs to be fully integrated into all activities pertaining to the rights of children in international migration situations.
   - The well-being of the children involved needs to be addressed holistically, including (i) prevention of unnecessary adoptions, (ii) prevention of abuses of intercountry adoption committed by intermediaries and others, (iii) support services to ensure that each adoption guarantees the best interests of the child, (iv) mechanisms that allow for the possibility of eventual reunion with the birth mother and father, and (v) measures to correct abuses and errors.
   - The regulation of intercountry adoption needs to be grounded on protecting the human rights of the children in the processes, and addressed on the local, state, regional, and international levels.22

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21 The abuses can occur at any point in the migratory movement: when intermediaries obtain physical or legal custody of the children; when the children are made eligible for intercountry adoption under the state’s laws; when they are transferred abroad; when they enter the receiving state; and when the adoption is legally finalized.

22 Many CRC rights are relevant to protecting children from abuses in ICA, such as: Art. 5 (parents’ rights to guide and direct their children’s exercise of rights); Art. 7 (child’s right to “be registered immediately after birth,” which is a basic safeguard against trafficking and other ICA abuses); Art. 7 (child’s “right to know and be cared for by his or her parents”); Art. 8 (child’s right “to preserve his or her identity, including nationality, name and family relations ...”); Art. 9(1) (state’s duty to “ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine ... that such separation is necessary for the best interests of the child”); Art. 11(1) (state’s duty to “take measures to combat the illicit transfer and non-return of children abroad”); Art. 16(1) (“No child shall be subjected to arbitrary or unlawful interference with his or her privacy [or]
• The rights of every child who is being adopted in intercountry processes must be protected by DNA registering, in order to preserve the possibilities of eventual tracing for birth family reunion, and to safeguard against trafficking and irregularities.  

2. All States that are engaged in intercountry adoption and haven’t ratified the Hague Convention should do so promptly, without reservations.

3. The international community should establish an independent, expert body to evaluate the implementation of the Hague Convention by State Parties. There should be a moratorium on adoptions from or to States that fall below international standards. States that do not meet international standards should be considered to be engaged in the trafficking of children.

4. Serious abuses in the process of an intercountry adoption should be treated as “trafficking of children,” and dealt with, under state and international law, as criminal offenses.

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family, ....”); Art. 18(1) (“the principle that both parents have common responsibilities for the upbringing and development of the child,” as it relates, for instance, to preventing the marginalization of fathers in the life and the rights of the child in cases of adoption); Art. 20(1) (“A child temporarily or permanently deprived of his or her family environment ... shall be entitled to special protection and assistance provided by the State,” as relevant when, for instance, economic and social pressures cause young unmarried mothers to entrust their newborn babies to care providers, who in turn become ICA intermediaries); Art. 21 (best interests rule in adoptions, and ICA only as a measure of last resort); Art. 26 (right to social safety-net assistance, as relevant to mothers and fathers relinquishing their children due to economic pressures); Art. 27 (right to adequate standard of living, as relevant when economic distress induces parents to give up their children for adoption); Art. 30 (rights of children from ethnic and linguistic minorities to enjoy their culture and language in community with members of those groups, as it relates to the needs of adoptee children growing up in their adoptive country); Art. 31 (the right to engage in play, recreation, culture, and the arts, as it relates to the cultural adjustment needs of adoptee children in their new homeland); and Arts. 34, 35 & 36 (rights to be protected from all forms of exploitation, including sexual exploitation and trafficking).

23 Mandatory DNA registering has already occurred on a limited basis in Guatemala as a safeguard for abuses in ICA. E.g., M. A. Davis, “Intercountry Adoption Flows from Africa to the U.S.: A Fifth Wave of Intercountry Adoptions” (International Migration Review, Vol. 45(4) (“The rapid increase in ICAs from Guatemala led to baby selling scandals. ... Complaints led to a temporary moratorium on ICAs by the Guatemalan government and the requirement of DNA testing to insure that the biological parents were the relinquishers.”), pp. 784 & 786. In August 2007, the U.S. State Department began requiring a second DNA test for all children adopted from Guatemala due to concern that “all parties involved were not being protected.” E.g., S. M. Llana, “Why adopting in Guatemala is getting harder” (Christian Science Monitor, Sept. 12, 2007). Retrieved 17 Sept. 2012 from: http://www.csmonitor.com/2007/0912/p01s03-woam.html