

RESIDENTIAL REQUIREMENTS IN THE INTERCOUNTRY
ADOPTION PROCESS: PROTECTIONIST MEASURE OR
INSURMOUNTABLE BARRIER?

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I. INTRODUCTION

The Green family, an average American couple living in Michigan, opened their home to a total of fourteen children, all of whom were adopted domestically and internationally over a nine-year period. Through the adoption process, the couple witnessed the cruelties of the system, experiencing forgery of documents, bribery, corruption, and even the deaths of two of their adopted babies due to terminal illnesses. Yet, it was not these horrifying experiences that deterred the family from their desire to continue adopting; rather, it was the residential requirement of the Tanzanian adoption system.

In Tanzania, a couple must live within the country for three years before they are allowed to adopt.¹ This residential requirement by the Tanzanian government prohibits qualified parents, such as the Greens, from adopting children who are in dire need of a safe environment where they can receive the healthcare and education they desperately need. The two children the Greens were particularly drawn to were four-year-old boys, one with Down syndrome and the other with Albinism.² The Greens visited Tanzania and met the boys.³ However, this did not satisfy the stringent residency requirement. This inability to adopt due to the country's residential requirement was especially consequential for the young boy with Albinism because in Tanzania, "Witch doctors . . . seek the body parts of albino children to use for potions believed to bring good luck."⁴ Even the boy's birth mother realized the need for him to be removed from Tanzania, driving for hours to meet with the Greens and "thank[ing] the Michigan couple for pursuing the adoption of her son and providing a loving and safe environment."⁵ The residential requirement in the adoption process of Tanzania and several other countries has deterred qualified and determined parents from adopting these boys and countless other children in similar situations.⁶

The residential provisions in the adoption processes of Tanzania, Uganda, and Botswana have become a means of shutting down the international adoption process. This end is a tragic one because it keeps children who are in dire need of a stable and healthy home environment from gaining access to capable and willing parents. As these countries are not members of the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption (the Convention), they have the opportunity to create their own formulas for the adoption process. Ideally, these countries would create systems that

¹ Jill Nelson, *Overseas Orphans*, WORLD MAG. (Oct. 30, 2015), https://world.wng.org/2015/10/overseas_orphans.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

best connect children with any and all qualified parents. Unfortunately, this freedom to create their own system has resulted in the creation of residential requirements and respected customs. These residential requirements and customs have substantial consequences for both adopting parents and the children they are trying to adopt. The consequences of these rule also inevitably violate several articles of the United Nations Convention on the Rights of the Child (the CRC), which all three countries have adopted.⁷

Part II of this Note provides a case study of the various residential provisions and customs in the adoption processes of these three countries. The adoption processes of these three countries have either stringent residential requirements or more lenient but highly followed customs.⁸ This Note argues that these residential provisions create an unworkable barrier for adoptive parents to overcome and are in violation of the CRC.

Further, Part II explains the significance of the residential barrier, emphasizing the likelihood that adopting parents will seek to adopt children from Convention countries rather than countries with difficult residential requirements. The analysis explains that even parents who look to non-Convention countries are unlikely to choose from countries with insurmountable barriers. Therefore, such provisions reduce the chance that children of these countries will be adopted through the intercountry adoption process.

Part III gives background on the Convention and explains the difference between being a Convention country and a non-Convention Country. The Convention has been ratified by ninety-eight countries and is the first real effort at streamlining the intercountry adoption process. In order to provide security and protection for the rights of both the child and the adopting parents, the Convention implements requirements and restrictions on both countries involved in an intercountry adoption.⁹ However, for those countries that have not ratified the Convention, the intercountry adoption process is left to their discretion. Tanzania, Uganda, and Botswana have yet to ratify the Convention. Therefore, they have the opportunity to develop their own adoption systems, resulting in the implementation of residential requirements or customs as part of their adoption processes. These residential requirements and customs require adopting parents to maintain residency in the child's country for a significant amount of time before completion of the adoption process.

⁷ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 44 [hereinafter CRC].

⁸ Joseph M. Isanga, *Surging Intercountry Adoptions in Africa: Paltry Domestication of International Standards*, 27 *BYU J. Pub. L.* 229, 308-32 (2012) (discussing how Uganda's courts have relaxed their interpretation of the residential requirement in several cases and have instead looked at the residential requirement as a factor in adoption proceedings).

⁹ *Id.* at 259-60.

The Convention also provides safeguards and protections for both the child and the adopting parents.¹⁰ Convention countries are required to establish a Central Authority in their country to streamline the process and must implement the requirements of the Convention.¹¹ Convention countries differ from non-Convention countries because non-Convention countries have to classify children as orphans under a rigid definition before they are allowed to enter the children into the adoption process.¹² In addition, non-Convention countries are given leniency in the restrictions and requirements they can implement, and they are not required to maintain the same level of transparency as Convention countries.

Part IV discusses how the consequences stemming from the residential provisions violate various rights guaranteed by the CRC. This section gives a brief history of the CRC and dissects various provisions of the CRC to demonstrate how these residential provisions are being used to violate Articles 3, 6, 12, 24, 28, and 29.¹³ This discussion is pursued with the understanding, set out in Part V, that these countries created these provisions based on what they deemed to be in the best interest of their children, with the understanding that a child has a right to nationality as given by the CRC and with the understanding that the CRC views intercountry adoption as a last resort.¹⁴ With these understandings in mind, it is essential to balance the concerns and opinions of these countries with the need for these children to have the rights they were promised fulfilled.

In addition, emphasis is placed on the reality that a child's right to health and education likely trumps their right to nationality, especially in a time when HIV and AIDS are so prevalent in Africa. These serious epidemics need to be countered with adequate medical resources and education because "HIV/AIDS impacts . . . the lives of all children that it affects [and] all their rights - civil, political, economic, social and cultural."¹⁵ Yet, due to the poverty and limited resources of these countries, HIV and AIDS, as well as

¹⁰ *Understanding the Hague Convention*, U.S. DEP'T OF ST. (Mar. 23, 2017), <https://travel.state.gov/content/travel/en/Intercountry-Adoption/Adoption-Process/understanding-the-hague-convention.html>.

¹¹ *Id.*

¹² Dep't of Homeland Security, *Orphan Process*, U.S. CITIZENSHIP AND IMMIGR. SERVICES, <https://www.uscis.gov/adoption/immigration-through-adoption/orphan-process> (last updated July 15, 2015).

¹³ CRC, *supra* note 7 (Article 3: The Best Interest of the Child; Article 6: The Right to Life, Survival, and Development; Article 12: The Right of the Child to be Heard; Article 24: The Right to Health; Articles 28 and 29: The Right to Education).

¹⁴ Benyam D. Mezmer, *Intercountry Adoption as a Measure of Last Resort in Africa: Advancing the Right of a Child Rather than a Right to a Child*, 6 INT'L J. L. HUM. RTS. 83 (2009).

¹⁵ ASBJØRN EIDE & WENCHE BARTH EIDE, ARTICLE 24. THE RIGHT TO HEALTH 23 (André Alen et al. eds., 2006).

malaria, diarrheal diseases, and nutritional deficits, cannot be overcome.¹⁶ Likewise, the level of education these children are receiving is lacking, with many of the children in these countries having limited or no education at all. The inadequacies of the education system stem from unmotivated and under-equipped educators and a lack of familial finances needed to pay for schooling.

Part V discusses the intercountry adoption process through the lens of the CRC, showing that several of the provisions in the CRC limit a child's ability to be adopted.¹⁷ Although the CRC does limit intercountry adoption by giving the child the right to be raised by his or her family, the right to his or her nationality, and the right to intercountry adoption as a last resort, the notion of intercountry adoption has not been completely eliminated. In fact, intercountry adoption may be the key to providing the other rights the CRC gives children, which are described in Part IV. Therefore, it is crucial these countries strike a balance to uphold all the rights the CRC gives children.

Part VI concludes with recommendations, urging these three countries to remove the residential provisions from their intercountry adoption processes. It further explains how adopting the Convention would allow them to comply with the CRC. These countries not only need to remove the residential provisions currently causing violations of their ratification of the CRC, but they also need to ratify the Convention to provide essential rights to their children and to streamline their adoption processes. Focus is placed on how ratification of the Convention meets the concerns of these countries while also fulfilling the rights their children were promised by the countries' ratification of the CRC.

II. THE RESIDENTIAL PROVISIONS: AN INSIDE LOOK AT THREE AFRICAN COUNTRIES' ADOPTION PROCESSES

Tanzania, Uganda, and Botswana all have residential provisions that play a significant role in their adoption processes. These residential provisions are either rigid requirements adopting parents must satisfy in order to adopt from that country or more leniently applied customs. While more leniency is given

¹⁶ *Global Health Uganda*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/globalhealth/countries/uganda/> (last updated July 12, 2018); *Global Health Tanzania*, CTRS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/globalhealth/countries/tanzania/> (last updated July 17, 2018); *Global Health Botswana*, CTRS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/globalhealth/countries/botswana/> (last updated May 12, 2018); *Uganda*, WORLD FOOD PROGRAMME, <http://www1.wfp.org/countries/uganda> (last visited Dec. 11, 2018); *Tanzania*, WORLD FOOD PROGRAMME, <http://www1.wfp.org/countries/tanzania> (last visited Dec. 11, 2018).

¹⁷ CRC, *supra* note 7 (Article 7: The right to Birth registration, Name and Nationality, and the Right to know and be cared for by parents; Article 8: The right to preservation of identity; Article 9: the right not to be separated from his or her parents; Article 20: Child deprived of their Family Environment; Article 21: Adoption).

in applying customs, they are still largely utilized and implemented within the adoption process.

A. Tanzania

Tanzania is one of the African countries with a rigid residential requirement in its adoption process. Its residential requirement mandates that adopting parents who are not from Tanzania must retain residency within Tanzania for three consecutive years before they are eligible to adopt.¹⁸ The only exceptions allowed are when “the applicant is a Tanzanian citizen or the High Court of Tanzania determines an adoption by non-Tanzanians to be ‘in the best interests of the child’.”¹⁹ Under Tanzanian law, the Tanzanian Department of Social Welfare considers an individual a resident “if that person holds a Resident Permit (Class A, B, or C), a Dependent’s Pass, or an Exemption Permit, and lives in Tanzania.”²⁰

B. Botswana

The residential requirement used in Botswana is different from Tanzania’s because it does not require the adopting parents to demonstrate permanent residency.²¹ Instead, the Department of Social Work within the Ministry of Local Government reviews “work and residency documents before placing a prospective adoptive parent’s name on the adoption ‘wait list’.”²² After being placed on the wait list, the adopting parents are matched with an eligible child.²³ Next, adopting parents are “expected to foster the prospective child for a period of six months in Botswana before they may conclude a full and final adoption.”²⁴ However, residency must continue even after the finalization of the adoption because the child is required to remain in Botswana for twelve months after being adopted.²⁵

¹⁸ *Intercountry Adoption: Tanzania*, U.S. DEP’T OF ST., <https://travel.state.gov/content/adoptionabroad/en/country-information/learn-about-a-country/tanzania.html> (last updated Feb. 9, 2018).

¹⁹ *Id.* See also, The Law of the Child Act (2009), Article 74 § 2.

²⁰ U.S. DEP’T OF STATE, *Tanzania*, *supra* note 18.

²¹ *Intercountry Adoption: Botswana*, U.S. DEP’T OF ST., <https://travel.state.gov/content/adoptionabroad/en/country-information/learn-about-a-country/botswana.html> (last updated Nov. 7, 2016).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

C. Uganda

Although Uganda still has restrictive residential requirements, there have been clear indications of progress in the reduction of these requirements. Prior to an amendment to the Children's Act (Uganda's Act outlining the rights of their children), the residency requirement was three years, and many Ugandan justices held the requirement was a bright-line standard.²⁶ However, as time progressed, the courts showed some leniency in their interpretation of the residential requirement.²⁷ Many began to take a liberal approach in evaluating the "residency" language of the Children's Act.²⁸ Today, this more lenient approach has been codified in the amendments to the Children's Act and now requires adopting parents to retain residency for only one year rather than three.²⁹ The amendments not only greatly reduced the residency requirement for adopting parents, but they also allow courts to waive this requirement "in exceptional circumstances."³⁰ Although the residency requirement has been significantly shortened, it is still the law and is still a relevant factor when a non-Ugandan individual considers adopting a child from Uganda. For this reason, it is still a barrier for the majority of parents who want to adopt from Uganda, especially if they do not have the resources to live in Uganda for any period of time.

²⁶ The opinion states:

The petitioners do not satisfy the requirements under this sub-section as they are not resident in Uganda. The wording of this section is mandatory; no discretion is left to the court. Generally the law relating to adoption of children is very strict, and it is regrettable that this law has not been looked at since 1964 and some of the provisions are not up-to-date with the changes, which have taken place in our society. However, until the law is amended, my hands are tied. In the result, I cannot grant an adoption

In re Harry John Shilling (An Infant) (Adoption Cause No. 15 of 1991) (1991) UGHC 6; *see also* Joseph M. Isanga, *supra* note 8, at 284 (exploring the case law in Uganda and the different interpretations Ugandan judges have taken on the residency requirement); *The Children Act*, 1997, available at: <https://ulii.org/ug/legislation/consolidated-act/59>.

²⁷ Joseph M. Isanga, *supra* note 8, at 284-86.

²⁸ *Id.* (providing case law to demonstrate the various ways in which judges in Uganda liberally interpreted the residency requirement in the adopting parents' favor).

²⁹ *Intercountry Adoption: Uganda*, U.S. DEP'T OF ST., <https://travel.state.gov/content/adoptionabroad/en/country-information/learn-about-a-country/uganda.html> (last updated Dec. 27, 2016).

³⁰ *The Children (Amendment) Act*, 2016, 20 May 2016, available at: <https://ulii.org/system/files/legislation/act/2015/2016/Children%20%28Amendment%29%20Act%202016.pdf>.

D. Minor Provision or Insurmountable Barrier?

It is reasonable for one to assume that parents who want to adopt internationally will favor a process that ensures the best safeguards for themselves and their new child. Many parents considering international adoption are likely to favor the safeguards provided by the Convention and, therefore, favor adopting from a Convention country. Even if parents are willing to forgo the safeguards provided by the Convention, they are unlikely to choose to adopt from a country with onerous residential barriers.

The residential requirement is not just a minor hurdle, like filling out a form or even hiring an agency equipped to handle international adoptions. Rather, the residential requirement or custom is an insurmountable barrier that requires adopting parents to pick up their former lives and residences and establish a new life in a foreign country.

This process of relocation has many moving parts. First, a family must decide how it is going to handle its affairs in the United States. Decisions such as selling one's home or quitting one's job have to be made. Second, the family must make travel arrangements to the foreign country. Financial resources are required to sustain such traveling expenses. A one-way ticket for one passenger from the United States to any of these three countries is between one thousand and five thousand dollars.³¹ Third, the family must establish itself in the new country. Although the cost of living is often much less in these countries than in the United States, the adopting parents still have to find a safe residence, obtain work, and adapt to the cultural differences. In some countries, all of this must be done in tandem with fostering a new child, who will also be adjusting to a new and unfamiliar life. This requirement is not just a simple adjustment to the parents' lifestyle but rather a complete alteration that will naturally disqualify otherwise capable parents who genuinely want to care for a child in need.

III. THE INNER WORKINGS OF THE HAGUE ADOPTION CONVENTION: THE DIFFERENCES IN THE ADOPTION PROCESSES OF CONVENTION COUNTRIES VERSUS NON-CONVENTION COUNTRIES

A. History of the Convention

The Convention was the first attempt to streamline the intercountry adoption process in a manner that considers the child's fundamental rights, limits the economic gain from the sale and trafficking of children, and provides a "family environment, in an atmosphere of happiness, love and

³¹ See PRICELINE, <https://www.priceline.com/> (last visited Dec. 10, 2018). See also, KAYAK, <https://www.kayak.com/> (last visited Dec. 10, 2018).

understanding.”³² The Convention concluded in 1993 in The Hague, Netherlands, and the resulting treaty has been ratified by ninety-nine countries as of 2018.³³ Convention countries have certain requirements they must meet to fulfill their obligations under the Convention, whereas non-Convention countries have a slightly different process that does not provide the same protections of “greater security, predictability and transparency for all parties to the adoption, including the prospective adoptive parents.”³⁴

B. Scope of the Hague Adoption Convention and the Adoption Processes of Convention countries

In order to understand the Convention, it is crucial to evaluate the text itself. The first chapter of the Convention provides the “scope of the Convention.”³⁵ This chapter defines the purposes of the Convention, to whom the Convention applies, and the relationships the Convention governs.³⁶ The second chapter provides the requirements that the child’s State of origin and the receiving State must meet.³⁷ These two chapters are crucial because they are a large part of what differentiates Convention countries and non-Convention countries.³⁸ From these chapters, it is clear the drafters intended to incorporate

³² Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, S. Treaty Doc. No. 105-5 [hereinafter Hague Adoption Convention].

³³ U.S. DEP’T OF STATE, *Understanding the Hague Convention*, *supra* note 10. *See also*, *Status Table: Hague Conference on Private International Law, 33: Convention of 29 May 1993 on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, HCCH <https://www.hcch.net/en/instruments/Conventions/status-table/?cid=69> (last updated June 28, 2018).

³⁴ *Outline: Hague Intercountry Adoption Convention*, HAGUE CONF. ON PRIV. INT’L L. 1 (Jan. 2013), <https://assets.hcch.net/docs/e5960426-2d1b-4fe3-9384-f8849d51663d.pdf> [hereinafter HCCH Outline].

³⁵ Hague Adoption Convention, *supra* note 32.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

An adoption . . . shall take place . . . if the competent authorities of the State of origin – (a) have established that the child is adoptable; (b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child’s best interests; (c) have ensured that (1) the persons, institutions and authorities whose consent is necessary for adoption, have been counselled . . . and duly informed of the effects of their consent . . . (2) such persons, institutions and authorities have given their consent freely; in the required legal form, and expressed or evidenced in writing, (3) the consents have not been induced by payment or compensation of any kind and have not been withdrawn, and (4) the consent of the mother . . . has been given only after the birth of the child; and (d) have ensured,

the principles of the CRC into the Convention and ensure that the child's State of origin, the child, and the adoptive receiving entities are protected.³⁹

The third chapter adds to these requirements by requiring that Convention countries establish Central Authorities in their countries, including a framework for what constitutes an accredited body.⁴⁰ Central Authorities are meant to serve as hubs for all adoption inquiries and carry out all responsibilities associated with the adoption process.⁴¹ Central Authorities within different Convention countries are required to work together to convey information on their specific caseloads, implement the requirements of the Convention, keep data on their experience with the intercountry adoption process, and provide guidance to adopting parents on their country's adoption procedures.⁴²

Articles 10 through 13 lay out the guidelines for Authority accreditation, most importantly stating that, in order to be accredited, bodies must have qualified workers who are familiar with intercountry adoption, be supervised by a higher state power, and carry out their functions appropriately.⁴³ Only entities that are accredited or "approved on a Federal level" can carry out intercountry Convention adoption procedures.⁴⁴ These accreditation requirements act as a

having regard to the age and degree of maturity of the child, that (1) he or she has been counselled and duly informed of the effects of the adoption and of his or her consent to the adoption . . . (2) consideration has been given to the child's wishes and opinions, (3) the child's consent to the adoption . . . has been given freely, in the required legal form, and expressed or evidenced in writing, and (4) such consent has not been induced by payment or compensation of any kind . . . An adoption . . . shall take place only if the competent authorities of the receiving State – (a) have determined that the prospective adoptive parents are eligible and suited to adopt; (b) have ensured that the prospective adoptive parents have been counselled . . . and (c) have determined that the child is or will be authorised to enter and reside permanently in that State.

Id. at art. 4-5.

³⁹ *Adoption Section*, HCCH, <https://www.hcch.net/en/instruments/Conventions/specialised-sections/intercountry-adoption> (last visited Dec. 11, 2018). *See also*, HCCH Outline, *supra* note 34, at 1 (explaining how the Hague Adoption Convention "gives effect to Article 21 of the *United Nations Convention on the Rights of the Child* by adding substantive safeguards and procedures to the broad principles and norms laid down in the Convention on the Rights of the Child.") (emphasis in original).

⁴⁰ Hague Adoption Convention, *supra* note 32, at ch. III.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at arts. 10-13. *See also*, HCCH Outline, *supra* note 34, at 2 (explaining how accredited bodies can serve in some capacity as Central Authorities but that the Convention has required the agencies to act in accordance with the provisions of the Convention in order to protect children in the adoption process).

⁴⁴ U.S. DEP'T OF STATE, *Understanding the Hague Convention*, *supra* note 10 (explaining the accreditation safeguard and the use of the Council on Accreditation as the evaluating entity).

safeguard for adopting parents and ensure that the agencies the adopting parents contact have been vetted and are complying with the Convention.⁴⁵

Next, Chapter Four provides the procedural requirements of the intercountry adoption process. In general, the chapter outlines the process as a back-and-forth negotiation between the Central Authority in the State of origin and the receiving State.⁴⁶ An adopting parent must first apply to the Central Authority in his or her country of residence; after finding the parents eligible, the Central Authority evaluates and produces a report concerning the qualifications of the adopting parents.⁴⁷ This report is given to the child's country of origin, which then prepares a report regarding the child who has been deemed eligible for adoption.⁴⁸ The response by the child's country of origin should include "its report on the child, proof that the necessary consents have been obtained and the reasons for its determination on the placement"⁴⁹ The remaining Articles in this chapter outline the procedure for uniting the child with his or her adoptive families, returning information if the child is not adopted, and remedying a situation in which the child was adopted in a manner that was later found to not be in the child's best interest.⁵⁰ Chapter Five explains how the adoptions are recognized and the legal effects the adoptions have.⁵¹ Chapters Six and Seven conclude the Convention, providing general provisions and clauses to cover miscellaneous requirements and factors.⁵²

C. *Adoption Process for Non-Convention countries*

The U.S. Department of State Bureau of Consular Affairs broke the intercountry adoption process for non-Convention states down into six primary steps: choosing a licensed adoption service provider, applying for eligibility to adopt, being referred for a child, adopting the child, applying for the child to be found eligible for immigration to the United

⁴⁵ *Id.*

⁴⁶ Hague Adoption Convention, *supra* note 32, at ch. IV.

⁴⁷ *Id.* at art. 14.

⁴⁸ *Id.* at art. 15.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

The recognition of an adoption includes recognition of (a) the legal parent-child relationship between the child and his or her adoptive parents; (b) parental responsibility of the adoptive parents for the child; (c) the termination of a pre-existing legal relationship between the child and his or her mother and father, if the adoption has this effect in the Contracting State where it was made.

Id.

⁵² *Id.*

States, and obtaining an immigrant visa for the child.⁵³ First, adopting parents must try to find either an agency or a lawyer within the United States who can help them through the process.⁵⁴ These adoption service providers must be licensed or able to complete a valid home study and any “adoption service provider must be licensed by the U.S. state in which they operate.”⁵⁵

Next, the United States Citizenship and Immigration Services (USCIS) must certify that the adopting parents are eligible to adopt.⁵⁶ Without this determination by USCIS, adopting parents will not be permitted to bring a child into the United States.⁵⁷ In order to determine the eligibility of the prospective parents, USCIS will evaluate the I-600A Application for Advance Processing of Orphan Petition; the home study; proof of the adoptive parents’ U.S. citizenship; proof of marriage, if applicable; and proof of dissolution of any of the prospective parents’ prior marriages.⁵⁸ The USCIS also collects a filing charge of \$720 per application.⁵⁹

The third step is referring the adoptive parents to a child. This occurs when the parents are matched with a child who has been deemed available for adoption under the requirements set by the child’s country of origin.⁶⁰ The child must also be classified as an orphan under U.S. immigration law, which defines an orphan as one “who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption.”⁶¹

An adopting parent also needs to fill out an I-600 Petition to Classify as an Immediate Relative form. This form is used “to determine the child’s eligibility for classification as an orphan under U.S. immigration law.”⁶² If the child is not defined as an orphan because a parent is still alive, the child must be “legally and irrevocably released for adoption in a manner provided for under local law.”⁶³ Upon these determinations, the adopting parents can

⁵³ *Intercountry Adoption: Non-Hague Adoption Process*, U.S. DEP’T OF ST., <https://travel.state.gov/content/travel/en/Intercountry-Adoption/Adoption-Process/how-to-adopt/non-hague-adoption-process.html> (last visited Dec. 21, 2018).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ 8 U.S.C. §1101(b)(1)(F) (2012).

⁶² *Who Can Be Adopted*, U.S. DEP’T OF ST., <https://travel.state.gov/content/adoption abroad/en/adoption-process/how-to-adopt/who-can-be-adopted.html> (last updated Sept. 19, 2018).

⁶³ U.S. DEP’T OF STATE, *Non-Hague Adoption Process*, *supra* note 53.

legally adopt the child, either in the foreign court or through a simple adoption.⁶⁴ After legally adopting, the fifth and sixth steps are to verify the child's eligibility to immigrate to the United States and to obtain an Immigrant Visa for the child.⁶⁵

D. The True Differences in the Adoption Processes of Convention countries Versus Non-Convention countries

With this in mind, the question becomes how different the processes in Convention countries are compared to the processes in non-Convention countries. The processes of non-Convention countries on their face look synonymous to the processes of Convention countries because at the core of both is the evaluation of the adopting parents' ability to be competent parents and the child's eligibility for adoption.⁶⁶ However, an in-depth comparison reveals that Convention states provide adopting parents and children significantly more protections.

First, for Convention countries, adoption service providers must be both licensed in the state in which they operate and "accredited or approved by one of the Department of State's designated Accrediting Entities."⁶⁷ This is in contrast to non-Convention countries, which only require adoption service providers to meet the former of these two requirements.⁶⁸ This is a significant difference because "[t]he State Department requires accredited adoption agencies to follow mandated guidelines, trainings, and follow certain protocols that may not be the same as state guidelines alone."⁶⁹ Therefore, by having both levels of accreditation for adoption service providers in Convention countries, the amount of variation from state to state is limited.⁷⁰ This helps create a more standard system of guidelines for accreditation in the adoption process.

Additionally, Convention countries require the agency to disclose all fees it charges for adoption services and identify all of its policies.⁷¹ In contrast, adoption agencies in non-Convention countries are permitted to provide this information but are not required to do so.⁷² This difference is problematic because it allows the agencies in non-Convention countries to provide fewer

⁶⁴ *Id.*

⁶⁵ *Id.* (explaining the intricacies of eligibility and the process associated with getting a visa).

⁶⁶ *NCFCA on Topic: Hague v. Non-Hague Country Adoptions*, NAT'L COUNCIL FOR ADOPTION, <http://www.adoptioncouncil.org/files/large/7a933009abbcca1> (last visited Dec. 11, 2018).

⁶⁷ *Id.* at 1.

⁶⁸ *Id.*

⁶⁹ *Id.* at 2.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

protections to adopting parents. Adopting parents in these countries may fall victim to extremely high adoption fees that are only disclosed later in the process or may be forced to overcome an insurmountable barrier due to policies of which they were unaware.⁷³ This can have a severe impact on the child as well if the parents can no longer continue the adoption process due to these unexpected high fees or unknown policies.

A third difference is the level of evaluation required for a successful home study of the adopting parents' home. In Convention countries, the home study has to meet the requirements at both the U.S. state and federal levels and must be completed by an accredited professional.⁷⁴ Non-Convention countries are only required to comply with the state and USCIS requirements.⁷⁵ While the more thorough requirements implemented in Convention countries may limit some parents from being qualified as adoptive parents based on factors such as "misdemeanors [and] mental or physical health,"⁷⁶ they do provide a safeguard against allowing people to adopt who are not capable of properly caring for a child.

Additionally, in Convention countries, adopting parents must receive ten hours of parenting education.⁷⁷ The classes may be completed online and can be either an overview of the adoption process or can be tailored to the specific region from which the adopting parents are adopting.⁷⁸ These classes review a range of topics, including becoming a family through multicultural adoption, health and development of orphaned children, life inside the orphanage, and promoting healthy attachments.⁷⁹ However, in non-Convention countries parental education is only required if the state enforces it.⁸⁰ In the event the state does not require it, an adoption agency may implement voluntary training.⁸¹ The educational requirement of Convention countries "prepare[s] prospective parents for mental and physical difficulties, cultural differences, health concerns, family adjustment, and more in regards to the adoptive child."⁸² Therefore, it is clear this educational experience puts the child in a more capable and prepared family setting and allows the parents the opportunity to become acquainted with parenting an adopted child before they have to put it into practice. The educational component on cultural differences is crucial to the

⁷³ *Id.* at 2.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 2.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Adopting from Africa Countries: Complete Course Package*, HAGUE TRAINING ONLINE COURSES, <http://www.haguetrainingonline.org/courseshow.php?packageid=3> (last visited Dec. 11, 2018).

⁸⁰ NATIONAL COUNCIL FOR ADOPTION, *supra* note 66, at 3.

⁸¹ *Id.*

⁸² *Id.*

transitioning phase because it helps adopting parents recognize the changes the child is experiencing and helps them prepare an atmosphere that will be welcoming to their new child.

The medical records of a child are another major concern for adopting parents. In Convention countries, medical records are prepared in the child's country of origin and are turned over to the parents at least two weeks before the parents accept the child's referral.⁸³ In contrast, non-Convention countries do not require medical records to be provided, and if they are provided, they are not required to be in English.⁸⁴ Although the records required by Convention Conventions can often be limited in scope, giving only the basics of the child's health status, they at least give adopting parents some general information.⁸⁵ In addition, when more serious conditions are monitored and recorded, adopting parents can consider whether they are willing and able to continue with the adoption, begin securing medical assistance for the child, and prepare for the child's needs.⁸⁶ However, when adopting parents are not provided these records or are provided records in a foreign language, the child's access to proper medical care is delayed and his development can be greatly hindered.

Lastly, in Convention countries, adoption records must be preserved in the country of origin for seventy-five years.⁸⁷ This is not required in non-Convention countries.⁸⁸ This preservation of records is relevant to the "adoptive child in case he or she wishes to return to their land of origin and retrace the adoption process."⁸⁹ Having the ability to "retrace the adoption process" they went through allows adopted children to discover their roots and gives them the opportunity to learn more about their culture and heritage.

IV. VIOLATIONS OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

The CRC received the twenty ratifications necessary to enter into effect on September 2, 1990.⁹⁰ It was ratified at a time when children's rights were being infringed upon at an increasingly high rate. At this time, nationwide:

100 million abandoned children were driven to resort to hard labor, petty crime, prostitution, or begging in order to survive;

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 4.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ CRC, *supra* note 7.

50 million children worked under unsafe or unhealthy conditions; 120 million children 6-11 years of age were not in school; 3.5 million children died annually from preventable or curable diseases; 155 million children under five years of age lived in absolute poverty; and millions, including many in wealthier countries, were maltreated or neglected, sexually exploited, or victims of drug abuse.⁹¹

With these staggering statistics, it became abundantly clear something needed to be done to improve the standard of living and the rights of children. In order to meet this desperate need, “the Convention on the Rights of the Child was designed to fulfill the functions characteristic of international human rights covenants with the added distinction of having these functions directed toward a specific sector of the nations’ citizenry that had not, until this time, been targeted”⁹² This nations’ citizenry was children.

Tanzania, Uganda, and Botswana have all ratified the global effort of the CRC. However, the consequences stemming from the residential provisions of their intercountry adoption processes place these countries in tension with that ratification. The residential provisions of their intercountry adoption processes have caused these countries to violate several CRC provisions, including Articles 3, 6, 12, 24, 28 and 29.

A. *Article 3: Best Interest of the Child*

Article 3 of the CRC mandates the best interests of the child be taken into consideration when making decisions on the child’s behalf.⁹³ This provision is referred to throughout the rights listed within the Convention and is extremely relevant when referring to adoption and the separation of children from their biological parents.⁹⁴

⁹¹ A. GLENN MOWER, JR., *THE CONVENTION ON THE RIGHTS OF THE CHILD: INTERNATIONAL LAW SUPPORT FOR CHILDREN* vii (1997).

⁹² *Id.* at viii.

⁹³ CRC, *supra* note 7, at art. 3 (“1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”).

⁹⁴ JOHNATHAN TODRES, ET. AL, *THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION* 121 (2006) (Articles 9, 18, 20, and 40 all use the “best interest of the child” language. This is relevant particularly in Article 20, which “provides that children should not be removed from the bosom of the family unless it would be in a child’s best interests to do so.”).

B. Article 6: Right to Life, Survival, and Development

Article 6 of the CRC is the child's right to life, survival and development. In the first provision of Article 6, the word "inherent" is used to show the significance of this right.⁹⁵ This right is a linchpin to the Convention because of the vital role it plays in giving substance to other rights. For instance, "a number of corollary rights follow from the right to survival and development and are essential for its enjoyment."⁹⁶ Therefore, the right to health as laid out in Article 24, the right to education as laid out in Articles 28 and 29, and the child's right to his or her nationality laid out in other articles enforce Article 6's provisions on survival and development.⁹⁷

C. Article 12: The Right to Be Heard

A child's right to be heard, as detailed in Article 12, does not guarantee that his or her opinions will be the determining factor and by no means gives the child the final decision-making role.⁹⁸ However, this Article does give children who can articulate their ideas in a meaningful manner an opportunity to be heard. Similar to Articles 3 and 6, Article 12 "establish[es] not only a right itself, but should also be considered in the interpretation and implementation of all other rights."⁹⁹

D. Article 24: The Right to Health

Article 24 gives the child the right to health. This Article is written in broad terms due to the extremely diverse conditions and atmospheres present among

⁹⁵ CRC, *supra* note 7, at art. 6 ("1. States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child.").

⁹⁶ MOWER, JR., *supra* note 91, at 31.

⁹⁷ *Id.*

⁹⁸ Article 12 reads:

1. State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age of maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

CRC, *supra* note 7, at art. 12; *See also* TODRES, ET. AL, *supra* note 92.

⁹⁹ UN Committee on the Rights of the Child (CRC), *General comment No. 12 (2009): The Right of the Child to Be Heard*, 20 July 2009, CRC/C/GC/12, available at: <http://www.refworld.org/docid/4ae562c52.html> [accessed 2 November 2017].

the Convention's signatories.¹⁰⁰ This Article is best understood by analyzing the separate provisions of the first section. Therefore, when evaluating whether a country meets the "highest attainable standard," it is crucial to consider the child's biological preconditions, his or her living conditions, the habits he or she develops through his or her upbringing, and the society in which he or she lives.¹⁰¹ The child's biological preconditions and his or her living environment are greatly influenced by the resources his or her parents had available leading up to the child's birth and throughout the child's upbringing. It is important to recognize how "[p]overty naturally has a strong impact on living conditions, including housing, nutrition, hygiene, or access to clean water."¹⁰² In addition, if a child is brought up in an environment with substandard living conditions, he or she begins to develop poor hygiene habits, which children carry with them for the remainder of their lives.¹⁰³

The parental contribution aside, the state itself plays a significant role in the health status of a child. Everything from nonexistent regulations on pollution emissions of factories to the "political persecution, imprisonment or torture of the parents, guardians or of the child itself can affect the future health of the child."¹⁰⁴ In order to reach the standard set out under this Article for health care, it will take a combination of education for parents on the best health practices for their children before and after birth, sufficient resources to help parents implement these educational techniques within the home, and "policies in the areas of sanitation, water supply, [and] environmental protection."¹⁰⁵

The second provision of Article 24 explains how State parties are supposed to acknowledge the right that children have "to facilities for the treatment of illness and rehabilitation of health."¹⁰⁶ This provision is crucial because it explicitly requires states that are parties to the Convention to ensure they have adequate medical facilities, which can provide first-aid assistance as well as

¹⁰⁰ Article 24 states:

1. State Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. State Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.
2. State Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures....

CRC, *supra* note 7, at art. 24; *see also*, ASBJØRN EIDE & WENCHE BARTH EIDE, ARTICLE 24. THE RIGHT TO HEALTH 9 (André Alen et al. eds., 2006).

¹⁰¹ EIDE & EIDE, *supra* note 100, at 9-11.

¹⁰² *Id.* at 9.

¹⁰³ *Id.* at 9-10 ("The adoption by the child itself of unhealthy or risky lifestyles, pertaining to smoking, drugs, sexual [behavior] and inappropriate diets particularly during adolescence, may play an important role with respect to the child's health.")

¹⁰⁴ *Id.* at 10.

¹⁰⁵ *Id.* at 11.

¹⁰⁶ CRC, *supra* note 7, at art. 24.

more extensive health care options.¹⁰⁷ In addition, these facilities are required to be accessible, being “within the physical reach of all sections of the population, and available without any discrimination.”¹⁰⁸

The third provision is the state’s assurance that “no child is deprived of his or her right of access to such health care service.”¹⁰⁹ Packed within this provision are three main concepts. First, this provision requires the states to provide medical care, products, and facilities that are financially accessible to all children.¹¹⁰ Limited financial resources should not hinder a child’s access to medical services.¹¹¹ Second, the medical establishments created by the state should be in a location accessible to all children, not in remote areas with limited accessibility.¹¹² Third, a child’s access to medical resources of any kind should not be limited due to discrimination based on the child or guardian’s, “race, [color], sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”¹¹³

Lastly, it is important to take note of a member’s obligation to implement these health requirements under Article 24(2). Article 24(2) states, “States Parties shall pursue full implementation of this right and . . . shall take appropriate measures.”¹¹⁴ In order to achieve full implementation of this right, the state must take “all appropriate legislative, administrative and other measures” possible and should use the resources available over time to further these initiatives.¹¹⁵

E. Articles 28 & 29: The Right to Education

Both Articles 28 and 29 focus on a child’s right to an education. Article 28 requires state parties to “make primary education compulsory and available free to all.”¹¹⁶ In addition to this requirement, state parties are encouraged to provide various forms of secondary education, making it available to all children.¹¹⁷ Higher education should also be made accessible based on the country’s capacity.¹¹⁸ Lastly, state parties are required to create systems that “encourage regular attendance at schools,” reduce the dropout rates within them,

¹⁰⁷ EIDE & EIDE, *supra* note 100, at 11.

¹⁰⁸ *Id.*

¹⁰⁹ CRC, *supra* note 7, art. 24.

¹¹⁰ EIDE & EIDE, *supra* note 100, at 11-12.

¹¹¹ *Id.*

¹¹² *Id.* at 12.

¹¹³ *Id.* at 13.

¹¹⁴ CRC, *supra* note 7, at art. 24.

¹¹⁵ EIDE & EIDE, *supra* note 100, at 15.

¹¹⁶ CRC, *supra* note 7, at art. 28.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

and ensure that “school discipline is administered in a manner consistent with the child’s human dignity and in conformity with the present Convention.”¹¹⁹

Article 29 furthers the right to education by directing party members on what an education should include. For example, Article 29 entices states to focus on developing educational systems that develop “the child’s personality, talents and mental and physical abilities to their fullest potential.”¹²⁰ In addition, this Article focuses on how important it is for children to develop a sense of their heritage and culture, respect for their elders, knowledge of various languages, the national values of their country, and life skills for their success.¹²¹

F. CRC Violations Due to the Consequences Stemming from the Residential Provisions

Each of the Articles previously mentioned equips children with the rights needed to be crucial members of society and with mechanisms to protect themselves in ways they could not previously. Violations of these rights by their countries put these children at a disadvantage during the most pivotal time of their lives; therefore, it is imperative members to the CRC maintain compliance. However, in some instances, countries are not adequately equipped with the resources or the aid needed to ensure these rights are carried out for every child. As a result, many children within these countries are not given the rights they were promised. International adoption can be a remedy.

However, if the residential provisions of these three countries are deterring parents from adopting children from these countries, then these countries are further depriving their children access to rights that other countries, such as the United States, are able to provide. Therefore, by having these provisions as a part of their intercountry adoption processes, these countries are eliminating adoptive parents who can and would provide better resources to these children.

This is not to say that the United States, or other developed countries, are a better fit for every child from these three countries. Rather, the argument is that for children from these countries, who are either without a home or who are not living at the standard set out by the CRC, intercountry adoption may be the best avenue to regain access to the rights promised to them by their respective countries.

There needs to be a balance between ensuring the rights promised are fulfilled while also considering the ways the CRC intentionally limits intercountry adoption. The question becomes which rights are more important: health,

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

education, a voice, survival, and development; or nationality and being raised by one's biological parents. These latter rights are laid out below.

V. INTERNATIONAL ADOPTION THROUGH THE LENS OF THE CRC

The previous section explained several rights children have under the CRC and the standards CRC members must implement to comply with their ratification. When member countries are not in compliance with the CRC due to a violation of one of these previously discussed articles, they are inevitably stripping a child of a right they promised the child. This leads to the question of whether these children's rights would be better protected if they were adopted by families in countries where their rights could be adequately provided for, whether due to better resources or less government corruption.

However, putting aside the importance of these previously described rights and the abhorrence of their violation, it is imperative to question whether international adoption is actually the best solution or whether international adoption itself is a violation of the CRC. Therefore, an evaluation of international adoption, through the lens of several CRC rights, aids in solidifying the boundaries in which international adoptions occur without violating the rights provided for in the CRC.

A. *Article 7: The Right to Birth Registration, Name and Nationality, and the Right to Know and Be Cared for by Parents*

Article 7 of the CRC is the right to birth registration, name, nationality, and the right to know and be cared for by parents.¹²² The text reads: "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents . . ." ¹²³ The latter part of this right, the right to know and be cared for by parents, has a significant impact on the intercountry adoption process. This provision gives children the right to know who their biological parents are and the right to have a relationship with them if possible.¹²⁴ An issue tends to arise with this provision in the adoption context because "it is common, when a child is adopted, not to disclose the names of the biological parent(s)."¹²⁵

A member state has the burden of ensuring children are taken care of by their biological parents, to the extent possible. However, this can be quite

¹²² CRC, *supra* note 7, at art. 7.

¹²³ *Id.*

¹²⁴ INETA ZIEMELE, ARTICLE 7 THE RIGHT TO BIRTH REGISTRATION, NAME AND NATIONALITY, AND THE RIGHT TO KNOW AND BE CARED FOR BY PARENTS 26 (André Alen et al. eds., 2007).

¹²⁵ *Id.*

taxing on the resources of a state, especially when biological parents are not in the position to care for their children.¹²⁶ In these situations, the state under the CRC has “to develop such forms of alternative care that allows for the development of children and respect of their rights.”¹²⁷ Whether through orphanages or the adoption process, member states have the obligation to ensure children within their state are being cared for and are developing in a fashion that “respect(s) the interest of the child above all to be cared by its parents.”¹²⁸

B. Article 8: Right to the Preservation of Identity

Article 8 provides the right to the preservation of identity.¹²⁹ After reviewing the drafting history this right is “not about the deprivation of a name and/or nationality and/or family relations via domestic or inter-country adoption”¹³⁰ Rather, it is about the “obligation of States parties to prevent disappearances of children.”¹³¹

C. Article 9: Right to Not be Separated from His or Her Parents

Article 9 gives a child the right to not be separated from his or her parents. This Article establishes that children should not be removed from their family “against their will.”¹³² However, Article 9 grants an exception when “competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.”¹³³

D. Article 20: Rights of Children Deprived of Their Family Environment

Article 20 refers to children who are deprived of their family environment. This Article requires member states to protect and provide alternate care for children who are without their family.¹³⁴ Paragraph three of this article states,

¹²⁶ *Id.* at 27.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ CRC, *supra* note 7, at art. 8 (1. State Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference . . .).

¹³⁰ JAAP DOEK, ARTICLE 8. THE RIGHT TO PRESERVATION OF IDENTITY AND ARTICLE 9. THE RIGHT NOT TO BE SEPARATED FROM HIS OR HER PARENTS 8 (André Alen et al. eds., 2006).

¹³¹ *Id.*

¹³² *Id.* at 21, 23; *see also* CRC, *supra* note 7, at art. 9.

¹³³ CRC, *supra* note 7, at art. 9.

¹³⁴ CRC, *supra* note 7, at art. 20.

“When considering solutions, due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.”¹³⁵ This section of the Article emphasizes the CRC’s intent to ensure the child remains in his or her country of origin if possible and the need to exhaust all in-country options. In addition, although the text of this paragraph “does not dictate what measures should be taken specifically to ensure that a child’s identity is preserved, the text [does] suggest that states parties should attempt to place children in foster care or adoptive families that share the child’s ethnic, religious, or linguistic background whenever possible.”¹³⁶

E. Article 21: Child’s Right to Adoption

Article 21 pertains to adoption and sets specific parameters for the intercountry adoption process.¹³⁷ This Article requires member states to view intercountry adoption as a last resort. By regarding intercountry adoption as a last resort, Article 21 reiterates the importance of keeping a family together, as previously noted in Article 9.¹³⁸

The tension between the different rights given to children under the CRC, especially in the intercountry adoption context, quickly becomes apparent. On one hand, the child’s right to education and healthcare and the child’s right to be heard are significant; on the other hand, the child’s right to be raised by his or her family and to know his or her birth parents is of equal importance. The CRC has yet to express an opinion regarding the comparative importance of these rights. Therefore, the rights promised to the children of these countries must be balanced to ensure they are adequately and equally provided.

¹³⁵ 1. State Parties shall 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, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child’s place of residence. CRC, *supra* note 7, at art. 20.

¹³⁶ TODRES, ET. AL., *supra* note 94, at 210.

¹³⁷ CRC, *supra* note 7, at art. 21. (“(b) Recognize that intercountry 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”).

¹³⁸ Mezmur, *supra* note 14.

VI. ANALYSIS: THE RATIFICATION OF THE HAGUE ADOPTION
CONVENTION AS A MEANS FOR COMPLIANCE WITH THE UNITED
NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

Uganda, Tanzania, and Botswana need to ratify the Convention to remedy the tension that currently exists between their residential requirements and customs and the rights promised to their children through their ratification of the CRC. Central to this argument are three key concepts.

First, all three countries have ratified the CRC, taking on the responsibility of ensuring their children are given the rights outlined by the CRC. Second, these countries have residential provisions that are part of their intercountry adoption processes. These countries created these provisions believing they were in the best interests of their children and with the idea that adoption is used as a last resort. Third, this argument focuses on children who have inadequate living conditions or are completely deprived of their family and all other resources for in-country placement have been exhausted. This argument does not advance the notion that adopting parents from countries such as the United States should have the ability to access and adopt any child from another country.

With these three underlying concepts in mind, it is clear the residential provisions in the intercountry adoption processes of these three countries have created insurmountable barriers, preventing their children from accessing an environment that can provide all the rights promised to them by the CRC. In addition, these countries have yet to ratify the Convention. If ratified, the Convention would aid in streamlining their intercountry adoption processes and honoring the rights promised in the CRC.

A. The Residential Provisions in the Intercountry Adoption Process of Non-Convention countries: A Clearly Insurmountable Barrier for Most

As explained in Section IV, the residential provisions used in Uganda, Tanzania, and Botswana have created barriers for adopting parents. These adopting parents are qualified and have the means to provide a home that is not being provided for in-country. Many parents are not willing to adopt from countries that do not provide the safeguards given through the Convention adoption process. Therefore, adopting parents looking to adopt from these countries first must relinquish the rights that would be afforded to them through the Convention adoption process and then uproot their lives in their country of origin to satisfy the residency requirements and customs.

B. The Six Articles: Rights Given and Taken Away

Section IV explained six articles of the CRC that are violated as a consequence of the residential provisions these countries use in their intercountry adoption processes. The rights explained include the following: the advancement of the best interests of the child (Article 3); the right to life, survival and development (Article 6); the right to be heard (Article 12); the right to health (Article 24); and the right to education (Articles 28 and 29). The consequences stemming from the residential provisions violate these rights because they prevent parents from adopting children from these countries even though they have the desire and ability to provide a child with the rights guaranteed under the CRC. Adopting parents who are qualified to advance these rights and provide a stable home are deterred from adopting due to these requirements and instead frequently choose to adopt from other countries with more manageable requirements and better safeguards.

i. The Violation of Article 3

A consequence of the residency requirement is that the countries are in violation of Article 3 of the CRC, which requires the child's country of origin to make decisions based on what is in the child's best interest. It is crucial at this point to return to the third concept discussed above: this Note's argument is advanced for children who are without adequate living conditions, who have been completely deprived of their family, and for whom all in-country resources have been exhausted. With this in mind, Article 3 is violated by the consequences of the residential provisions because the provisions are taking away an opportunity for these children to have better lives—lives that cannot be provided for them within their country. Therefore, the child's best interest is not being advanced and instead is being overshadowed by a requirement that is completely unnecessary.

ii. The Violation of Article 6

Next, the residential provisions are violating Article 6 because they deprive the children of adopting parents who have the resources to provide them their rights to life, survival, and development. These three rights are very broad, and it is easy to assume that as long as a child has the bare essentials, this right is being met. However, children deprived of their families and those living in unsatisfactory conditions are in fact at severe risk of not having these rights fulfilled. It is said:

[P]arenting goes far beyond the requirements for meeting the basic survival needs of the child, and parents have a significant

influence on how children turn out, including their personality, emotional development, and behavioral habits It is important for the overall development of children that parents be present enough to support them, and this support fosters confidence and growth in many areas.¹³⁹

Therefore, when a child has been completely deprived of parental guidance or is living under conditions that are inadequate and all other options within the country have been exhausted, the child should be given access to adopting parents who can provide him or her with not only the resources necessary but also the parental guidance crucial to development.

iii. The Violation of Article 12

The residential provisions also violate Article 12 because the children's voices are being silenced. These provisions are deterring adoptions within these countries and are inevitably stripping the children of their right to voice their opinion on all available parental options. The deterred adopting parents could have been best suited to adopt the child, yet the child is deprived of the opportunity to voice an opinion.

Additionally, in countries with strict residential requirements, such as Tanzania, the child's right to be heard is severely limited in situations where the adopting parents make the decision to uproot their former lives but inevitably fail to satisfy the time requirement. In these scenarios, the parents have moved across the world, fostered the child they plan to adopt, and created connections with that child. However, they are prohibited from adopting the child because of a failure to meet the exact time requirement imposed by the country. Here, the child may be of age and of sound mind to articulate the bond he or she has formed with these adopting parents and may wish to communicate his or her wishes. However, children are silenced because the adopting parents have failed to meet the harsh and firm deadline set out by the requirement.

iv. The Violation of Article 24

Section IV discussed Article 24, the child's right to health. This right is imperative to the child's wellbeing both physically and mentally and is supported by other rights such as the right to life, survival, and development in Article 6. However, this right is burdened by the consequences of residential provisions. By deterring parents from coming to these countries, the

¹³⁹ Bethel Moges & Kristi Weber, *Parental Influence on the Emotional Development of Children*, *DEVELOPMENTAL PSYCHOL. AT VAND.* (May 7, 2014), <https://my.vanderbilt.edu/developmentalpsychologyblog/2014/05/parental-influence-on-the-emotional-development-of-children/>.

residential provisions deprive children of the opportunity to go to countries with the resources available to provide adequate medical care.

Access to adequate medical care is crucial in an era when Africa is riddled with HIV and AIDS. In Tanzania, 1.5 million people were living with HIV in 2017, and there were 32,000 AIDS-related deaths that year.¹⁴⁰ Although progress is being made, “tens of thousands of people become infected with HIV every year.”¹⁴¹ The prevalence of these diseases in Botswana is lower, with 380,000 people living with HIV and 4,100 AIDS-related deaths in 2017.¹⁴² Botswana is still one of the leading countries “affected by HIV in the world,” even with its substantial efforts toward minimizing the effects.¹⁴³ The efforts in Botswana are being “compromised by a low testing rate and low levels of HIV knowledge”¹⁴⁴ Lastly, Uganda has a high prevalence of HIV and AIDS, with 1.3 million people having HIV and 26,000 AIDS-related deaths in 2017.¹⁴⁵ It is reported that “while there have been increased efforts to scale up treatment initiatives in Uganda there are still many people living with it who do not have access to the medications they need.”¹⁴⁶

These statistics fall in stark contrast to those of the United States, where there were 1.1 million people living with HIV at the end of 2015.¹⁴⁷ Although these numbers on their face do not appear to vary widely, the difference becomes apparent when viewed alongside the populations of these countries during 2015 through 2017. The populations were 321 million, 57.31 million, 2.29 million, and 42.86 million in the United States, Tanzania, Botswana, and Uganda, respectively.¹⁴⁸

From these numbers, it is clear that HIV and AIDS have had a significant impact on these countries. Although relief efforts have been implemented in all three countries, there is clearly still a significant prevalence. HIV and AIDS can be transmitted to children at birth, posing serious consequences to their upbringing and their ways of life. In addition, even if the child is not diagnosed

¹⁴⁰ *HIV and AIDs in Tanzania*, AVERT, <https://www.avert.org/professionals/hiv-around-world/sub-saharan-africa/tanzania> (last updated Dec. 10, 2018).

¹⁴¹ *Id.*

¹⁴² *HIV and AIDs in Botswana*, AVERT, <https://www.avert.org/professionals/hiv-around-world/sub-saharan-africa/botswana> (last updated Dec. 10, 2018).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *HIV and AIDs in Uganda*, AVERT, <https://www.avert.org/professionals/hiv-around-world/sub-saharan-africa/uganda> (last updated Dec. 10, 2018).

¹⁴⁶ *Id.*

¹⁴⁷ *Basic Statistics: How Many People Have HIV in the United States?*, CTNS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/hiv/basics/statistics.html> (last updated Nov. 19, 2018).

¹⁴⁸ *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2015*, UNITED STATES CENSUS BUREAU, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (last visited on January 23, 2019); *Population, total*, THE WORLD BANK, <https://data.worldbank.org/indicator/sp.pop.totl> (last visited on January 23, 2019).

with either ailment at birth, there can still be a serious threat to the child's upbringing if either parent is diagnosed with or dies from the disease. Therefore, it is crucial these residential barriers be completely removed in order to encourage more adopting parents to adopt from these countries and give these children the essential medical care needed.

v. *The Violation of Articles 28 and 29*

Articles 28 and 29, outlining the child's right to education, are also violated by the residential provisions. A child's education is crucial to the successful development of both mental and social skills. Adequate education stimulates children mentally, but the educational atmosphere also allows children to develop by introducing them to a new environment. This new environment forces the child to learn to work with others and furthers the social skills the child has only begun to cultivate in the family setting. The new educational setting is important for children because "school is the first avenue of [socializing] for a child. Up till then, parents and immediate family members are the only people the child has human interactions with. And familiarity is a breeding ground for stagnancy."¹⁴⁹ Therefore, the child's right to education is crucial, and if the child is not being provided it in his country, he should have the opportunity to be exposed to an environment that can provide it. This opportunity is available to these children through intercountry adoption, but the residential provisions are closing the door.

The CRC requires these countries to provide the best education possible with the resources available.¹⁵⁰ However, in evaluating the education systems within these three countries, questions arise as to whether adequate resources are being put toward providing the best education possible.

In 1997, the President of the Republic of Uganda adopted Universal Primary Education (UPE). One of its main objectives is to provide the facilities and resources to enable every child to enter and remain in school until the primary cycle of education is complete; make education equitable in order to eliminate disparities and inequalities; ensure that education is affordable by

¹⁴⁹ Deepika Sharma, *The Importance of School Education in Child Development*, EDUC. WORLD, <https://www.educationworld.in/the-importance-of-school-education-in-child-development/> (last visited Dec. 10, 2018).

¹⁵⁰ Article 4 states:

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

CRC, *supra* note 7, at art. 4.

the majority of Ugandans; and reduce poverty by equipping every individual with basic skills.¹⁵¹

After the implementation of UPE, “gross enrollment in primary school increased from 3.1 million in 1996 to 7.6 million in 2003.”¹⁵² This huge undertaking required the country to increase the “public expenditures devoted to primary education.”¹⁵³

Although the Ugandan government has made great efforts to fully implement UPE, there are still significant issues with the program. In 2003, the pupil-to-teacher ratio was 54:1 in the government primary schools, and the pupil-to-classroom ratio was 94:1.¹⁵⁴ These ratios should raise concern, as students in their primary grade years need personal and individualized attention to develop the skills and learn the concepts being taught to them. These children are not getting individualized attention in classrooms with so many other students surrounding them.

In addition, although the teachers in public schools are often the “best-trained teachers, . . . they are less motivated to work. Teachers are among the lowest paid public servants in Uganda.”¹⁵⁵ This has negative effects on the children’s educational development, as many were reported to be at lower reading levels than found acceptable for their grade level.¹⁵⁶ This discrepancy in the children’s reading abilities has “created a huge knowledge gap between children of the ‘haves’, studying in private schools, and the ‘have-nots’, in government schools.”¹⁵⁷

After the implementation of the UPE, Uganda has continued to struggle with keeping children enrolled in their seven years of primary school. Initially, there was a huge influx in the number of students enrolled in primary school. However, success dwindled as a large portion of the students began to drop out. This high dropout rate is due in large part to the expenses parents must pay to keep their children in school. Although UPE greatly reduced the enrollment payments, parents “still have to buy scholastic materials including pens, exercise books, clothing and even bricks for classroom construction”¹⁵⁸ “For poorer parents, especially in rural Uganda, who live on about

¹⁵¹ Lawrence Bategeka & Nathan Okurut, *Universal Primary Education: Uganda*, OVERSEAS DEV. INST. (Feb. 2006) <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4072.pdf>.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Alon Mwesigwa, *Uganda’s Success in Universal Primary Education Falling Apart*, THE GUARDIAN (Apr. 23, 2015), <https://www.theguardian.com/global-development/2015/apr/23/uganda-success-universal-primary-education-falling-apart-upe>.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

\$1 a day, the cost is beyond reach.”¹⁵⁹ Due to this inability to pay the required school costs, children are often forced to drop out. Girls in primary school are at a heightened risk of dropping out, with an “estimated 30% . . . leav[ing] school when they start their periods, often because of a lack of sanitary pads.”¹⁶⁰

The children in Tanzania face many of the same issues as the children in Uganda. Primary school in Tanzania has been free since 2002, but parents still must pay for the students’ uniforms, exam materials, and school supplies.¹⁶¹ This is problematic, as many parents cannot afford even these minimal fees.¹⁶² Another major issue in the Tanzanian school system is that students must pass an end-of-primary-school exam to advance to secondary school.¹⁶³ This is a significant issue because “only three out of five Tanzanian adolescents, or 52 percent of the eligible school population, are enrolled in lower-secondary education and fewer complete secondary education.”¹⁶⁴ This standard exam cannot be retaken, barring children who fail from pursuing higher education.¹⁶⁵ One report indicated that “since 2012, more than 1.6 million adolescents have been barred from secondary education due to their exam results.”¹⁶⁶

In addition, the quality of teaching and the resources available to the students are minimal. Often, students are left with teachers who are not specialized in the subjects they are teaching. Students, therefore, must “find alternative ways to learn these subjects or pay for private tuition, or fail exams as a result.”¹⁶⁷

In Botswana, the problem is twofold. First, there are substantial problems with children’s access to education. This problem can only be addressed by “reaching children that are [the] hardest to reach – those in remote areas, those born to communities that are averse to education for reasons of culture, religion or livelihood systems; and those born in abject poverty.”¹⁶⁸ Second, it is difficult to get parents involved in encouraging their children to go to and stay

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Tanzania: Ten Challenges Ahead*, THE SCH. OF ST. JUDE (June 9, 2014), <http://www.schoolofstjude.org/st-judes-in-action/tanzania-the-challenge-ahead>.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ “*I Had a Dream to Finish School*”: *Barriers to Secondary Education in Tanzania*, HUM. RTS. WATCH (Feb. 14, 2017), <https://www.hrw.org/report/2017/02/14/i-had-dream-finish-school/barriers-secondary-education-tanzania#>.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ World Health Organization: Reg’l Office for Africa, *Issues and Challenges – Other MDGs*, AFRICAN HEALTH OBSERVATORY, http://www.who.int/profiles_information/index.php/Botswana:Issues_and_challenges_-_Other_MDGs (last visited Dec. 11, 2018).

in school.¹⁶⁹ A 2014 study gives data supporting these major concerns.¹⁷⁰ The report indicates that in Botswana, 11% of children that are of official primary school age are not in school.¹⁷¹ Out of this subsection, 17% of boys compared to 10% of girls were not enrolled.¹⁷² These percentages only increase when evaluating student enrollment in secondary school.¹⁷³ Of those eligible, 18% of female students and 15% of male students are not enrolled in secondary school.¹⁷⁴

Even with the efforts made by these countries to enhance their educational systems, it is clear these children are either receiving inferior education or no education at all. With many of the students not receiving even primary education, children are at a huge disadvantage in their mental and social development. In addition, it severely limits their ability to find work and succeed when they reach the age of majority. Even the students who receive an education are often educated by teachers who are underqualified, and they must compete for their teachers' attention in overcrowded classrooms. Therefore, although all three of these countries have made efforts to increase enrollment and provide adequate education, many children are not receiving the education they were promised by their country's ratification of the CRC.

Intercountry adoption provides these children with the opportunity to access better education. Adopting parents who are from developed countries can provide these children with education by qualified teachers who can provide individualized instruction.¹⁷⁵ Therefore, the residential provisions are restricting the children's access and right to adequate education.

Although all six of the rights discussed are being violated by these residential provisions, it is crucial to balance these violations with the CRC's desire to make intercountry adoption a last resort; the rights given to a child deprived of his or her family environment (Article 20); the child's right to be known and cared for by his or her parents (Article 7); and the child's right to not be separated from his or her parents (Article 9). By removing these residential provisions from their intercountry adoption processes, this balance can be obtained. Removing these provisions will allow more children to find stable homes with the resources needed to provide them with proper education, adequate health care, and an acceptable standard of living. The removal of

¹⁶⁹ *Id.*

¹⁷⁰ *Botswana*, EDUC. POL'Y AND DATA CTR. (2014), https://www.epdc.org/sites/default/files/documents/EPDC%20NEP_Botswana_0.pdf.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Fast Facts*, NAT'L CTR. FOR EDUC. STATS., <https://nces.ed.gov/fastfacts/display.asp?id=28> (last visited Dec. 11, 2018) (explaining how "the average class size in 2011-12 was 21.2 pupils for public elementary schools and 26.8 pupils for public secondary schools").

these provisions will still conform with the second set of rights, because adoption will be limited to children who do not have adequate living conditions, who are completely deprived of their family, and who are in dire need. Additional protection is provided, as all other resources for placement in the country of origin will still be explored and exhausted before intercountry adoption is allowed.

VII. CONCLUSION

The residential provisions in the intercountry adoption processes of Uganda, Botswana, and Tanzania should be removed, and the countries should ratify and implement the safeguards given by the Convention. First, the residential provisions, whether requirements or customs, are preventing adopting parents from gaining access to children in these countries. As a result, the rights these children were promised by their country's ratification of the CRC have been violated by their country's use of these residential provisions. By removing these provisions, these countries will be one step closer to rectifying their violations of the CRC. In addition, intercountry adoption would allow the children of these countries to access resources they never could in their home country. Gaining access to medical resources and a higher level of education is crucial to the future and development of these children, and they are being deprived of that access due to these residential provisions. Therefore, the residential provisions of these three countries need to be removed in order to realign these countries with their ratification of the CRC and to give these children the rights they were promised.

Second, these countries need to work towards ratifying and implementing the Convention in order to streamline their intercountry adoption processes and provide more safeguards to both the adoptive parents and the children. By ratifying the Convention, these countries will attract more adopting parents. This ratification, coupled with the removal of the residential provisions, will help promote adoption from these countries and will give the children from these countries greater access to the resources they need to have their rights under the CRC fulfilled.

In addition, by ratifying the Convention, these countries will also be working to rectify their violations of the rights mentioned. The Convention provides safeguards for the adoption process, including parental education, extensive home studies, preservation of medical records, and fee agreements. These safeguards protect the adopting parents, but more importantly, they protect the children being adopted. These safeguards help ensure that the decision of adoption is in the best interest of the child (Article 3), that the child has the ability to retrace his or her adoption process to determine his or her nationality (Article 7), and that the child is being put in a home that is prepared to provide for his or her needs as well as the change in circumstances (Article 7).

It is also important to recognize that the regulations and principles of the Convention coincide with those stated in the CRC. There are several clear indications that the drafters of the Hague Adoption Convention intended for the two documents to work in tandem. A prime example is Chapter II, Article 4(b) of the Convention, which states:

An adoption . . . shall take place . . . if the competent authorities of the State of origin- (a) have established that the child is adoptable; (b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests.¹⁷⁶

This requirement is important, because it shows the alignment between the ideals of the Convention and the CRC, which these countries have already ratified. The Convention's desire to search for a viable home for the child in his or her State of origin supports the CRC's view of adoption as a last resort and its desire to keep children with their families, if possible.

In addition, the Convention countries are required to provide the child's existing medical records to the adopting parents two weeks before they accept the child's referral. This safeguard helps ensure the child's right to health, provided by Article 24, is fulfilled. Even if the information provided in these records is limited in scope, the basics of a child's medical history can go a long way in ensuring he or she gets the necessary care in the most efficient manner. This is especially imperative in an era when HIV and AIDS are at their height.

In conclusion, these countries need to both remove the residential provisions on which they currently rely in their intercountry adoption processes and work to ratify and implement the Convention. In doing so, these countries will be able to rectify their violations of the CRC, giving their children access to all the rights they were promised.

¹⁷⁶ Hague Adoption Convention, *supra* note 32.