

CROSS-COUNTRY ADOPTION: A CALL TO ACTION†

*Anthony D'Amato**

We have all met successfully adopted children. Mary Ann Glendon's daughter, Sarah, is a perfect example. She is a graduate of Boston College with an MSW in social work and is devoting her professional life to abused and neglected children. After college she worked for a year in the Jesuit Volunteer Corps, and then was employed by the Massachusetts Department of Social Services. She moved to the private sector, joining Mentor, Inc. where she was recently appointed supervisor. She oversees the activities of a team of social workers who monitor foster home placements under contract with the state.

Professor Glendon and her husband, Edward Lev, adopted Sarah in 1972. They had read about the displaced Vietnamese orphans and, like many other Americans, tried to adopt one of them. But the orphans that had been released by Vietnam were all taken, and the publicity led the Vietnam government to curtail the release of any more orphans. The Vietnamese politicians, following a familiar pattern, were criticized by their own citizens for not taking care of the nation's orphans, and so, rather than releasing them to foreigners, opted to place them in "foster factories." Many governments, before and since then, seem to start out with the benevolent motive of placing refugee children in foreign families who want to adopt them, only to be criticized in the local media for "exporting human capital" and failing to take care of their own. The net result, invariably, is psychological

† Copyright © 1998 Anthony D'Amato

* Leighton Professor of Law, Northwestern University. This article is the full version of a talk I gave at Notre Dame Law School on October 17, 1997. I would like to thank Dean David Link and the Notre Dame audience for their good questions. I would also like to thank Cynthia Price Cohen—tireless advocate of children's rights—and Professor Dolores Donovan for their earlier collaboration with me on the issue of intercountry adoption (which did not result in a publication). And a special thanks to Professor Mary Ann Glendon for allowing me to talk about her private family matters in the opening paragraphs of this article.

trauma for the children as they are placed in underfinanced foster factories.

Edward Lev and Mary Ann Glendon were told that Korean children were available, and so “we decided,” Professor Glendon says, “in a matter of two minutes that we might as well take a Korean child. We were young, and in those days reached a profound decision in just a couple of minutes.” What age child would they like? The Glendons had a daughter of five and an infant girl, so again, without much deliberation, said they would like a girl in between those two ages. A Korean girl of two and a half years was available, but it took nine months for all the paperwork and transfers to be made, so Sarah was over three years old when she arrived in the United States.

Sarah had been found on a train in Korea when she was an infant. She was placed in an orphanage for a year, then sent to a foster “home” that had eighteen other children, and was adopted out of the foster home.

When Sarah arrived in Massachusetts, she cried for three days without stopping. For a child of just over three years, she had experienced the trauma of being abandoned on a train, taken to a strange orphanage, then taken from the orphanage and placed in a foster home, then taken and sent halfway across the world to strangers of a different ethnicity in a totally different environment.

Remarkably, the fact that Sarah cried for three days was a good indication of her mental health. Sarah’s foster home in Korea, though crowded, was apparently run in a humane fashion. Sarah had obviously formed a bond with the other children and with the female caretaker at the foster home; she cried when she was abruptly disengaged from them. Yet at her age new bonds can be formed. The important thing is that a new bond *can* be formed. Other children who have been raised under horrible conditions in “foster factories” often become incapable, by the age of two or three, of ever bonding with others. The psychological phrase for this condition is “reactive attachment disorder”—a child with this disorder has an impenetrable resistance to bonding. In the foster home these children have learned interaction styles that are appropriate in the institution but maladaptive outside it.

On the television show *20/20*, in October 1990, Ted Koppel described conditions in one of Romania’s fifty state-run institutions for unwanted children: “Children here are filthy and unattended. They lie in their own waste, covered with flies. Young girls, their heads shaven, were kept in a giant cage like animals: wild-eyed, screaming,

half-naked.”¹ The *New York Times* made a similar report on the home in Plataresti, Romania.² One room contained twenty-five children who wallowed in urine-sodden diapers and bedding, two to a crib, without a toy. There was one attendant for every twenty children, but the attendants were untrained. Because light bulbs were not available on the market, the light bulbs were all stolen out of the nursery, so that every night the children had to manage in the dark. The *Washington Post* reported on Romanian “warehouses for children”: “[F]ood is sometimes served by throwing it on the floor. Staffers hardly know their charges’ names, much less their medical problems.”³ A visiting French medical team reported that the mortality rate among the children is very high: “[T]hey die of hunger, of very dirty environments, of nobody touching them and of never getting out of their beds.”⁴

Many of these children die; others stay in the foster factory until they are old enough to venture out on their own (perhaps as “street children”), and some are adopted. But nearly all are affected with reactive attachment disorder, a condition that impairs their ability to get along smoothly in society and to relate warmly to friends. They may have no ability at all to understand the concept of romantic love or to experience it in their own lives. The deepest aspects of appreciation for human culture may be permanently inaccessible to them.

If you visit some countries in Latin America you will become immediately aware of the street children. These are the ones who somehow managed to survive the warehouses for children, and now roam the streets in packs. In Bogota, Colombia, there is an estimated 200,000 unwanted and abandoned street children. In Latin America as a whole, over forty million street children are estimated to be living on the streets. The situation may even be worse—though statistics are not available—in some countries in Africa and Southeast Asia.

Even so, the children who survive the foster factories are in a sense the lucky ones. Many more children die from lack of food and care. Worldwide, in every second of the day twelve children die. Although intercountry adoptions are possible (Sarah Lev’s case was one of them), the annual total of intercountry adoptions in the United States saves less than 0.004% (four-thousandths of one per cent) of the number of children that die.

1 20/20 (ABC television broadcast, October, 1990).

2 Chuck Sudetic, *Plataresti Journal—The Castoff Children: Who’s to Give Them Love?*, N.Y. TIMES, Jan. 11, 1991, at 28.

3 Mary Battiata, *A Ceausescu Legacy: Warehouses for Children*, WASH. POST, June 7, 1990, at A1.

4 Michael Dobbs, *Dictator’s Dream Took Harsh Toll*, WASH. POST, Jan. 5, 1990, at A1.

A great many of the street children could have been adopted within the first year or two of their birth; a great many of the children who die throughout the world today could be adopted. The demand to adopt children, mostly in the developed countries, is huge. In the United States, adoption agencies are able to place children in only one out of twenty families wanting to adopt them. Many poor people who want children don't even apply to the adoption agencies, because the fees average about \$13,000. In this area, Catholic Charities is doing a great job helping poor people adopt children, but for the most part only with respect to in-country adoption and not cross-country adoption. The demand to adopt children is increasing because of the dramatic increase in infertility among families in developed countries. There are approximately two million childless families in the United States today wishing to adopt a child; only a very small fraction will get their wish. And if we look at families who have one or more children, but would also like to adopt a child, we increase the number by several million more families in the United States alone.

In short, we have a tremendous surplus of unwanted children all over the world and an equally great unsatisfied demand for those children. If the world were fair and rational, every one of these children would immediately be placed in adoptive families.

But as moral agents, we cannot sit back and bemoan the unfairness and irrationality in the world. We have a moral obligation, whenever it is possible to do so, to make the world just a little less unfair and just a little less irrational. Let me suggest two courses of action.

The first has to do with the way that we, as lawyers, look at the problem of intercountry adoption. We, and the public generally, tend to view adoptions from the point of view of the adopting family. The adopting family wants a child; they are willing to go to some trouble and expense to get one; they complain when bureaucratic obstacles get in the way, but they accept those obstacles as "given" and try their best to get around them.

We are looking at the problem backwards. It's not a matter of the adoptive family's right to get a child, but rather it's a matter of the human right of a child to have a family. The matter was well expressed by Mercedes Rosario de Martinez, founder of Colombia's Foundation for the Adoption of Abandoned Children, who said, "We don't give a child to a family; we give a family to a child."

The Convention on the Rights of the Child⁵ does not in so many words proclaim the right of every child to be brought up in a family, but taken as a whole it may be read to support that proposition. Arti-

5 Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448.

cle 6 states that "every child has an inherent right to life," and places the obligation upon states to "ensure to the maximum extent possible the survival and development of the child."⁶ The development of the child is referred to in the Preamble to the Convention: "[T]he child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love, and understanding."⁷

If we read this Convention, as I do, as standing for the proposition that every child has a right to a family, we are not asking governments to do the impossible. We are not saying that any government that fails to place every unwanted child in a family is violating international law. Rather, the proposition is one of those "positive" human rights, like the right to life, food, clothing, shelter, and the right to work, that are best construed in today's world as requiring governments *not to stand in the way* of private initiatives that secure those rights. For example, if you send a food package to a foreign country where there is widespread starvation, any government official who intercepts that package and sells it for his or her personal profit (a situation which unfortunately happens more than occasionally) *would* be violating the human right to food of the starving people. Thus, although a government itself may not be required by present-day international law to provide every child with a family, it should not block or impede adoption initiatives in the private sector. In particular, a government should not block intercountry adoption.

Unfortunately, when the Convention on the Rights of the Child addresses the issue of adoption, its language leaves something to be desired. Here are the relevant articles, with my comments in footnotes:

Article 20.⁸

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.⁹

2. States' Parties shall in accordance with their national laws ensure alternative care for such a child.¹⁰

6 *Id.* at 1460.

7 *Id.* at 1457.

8 *Id.* at 1464.

9 Why "special protection"? Why suggest that the state has to go out of its way to help such a child? Why not put it in terms of a state's legal obligation to the child?

10 Why such deference to national laws? What if the national laws are inadequate?

3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.¹¹

Article 21.¹²

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counseling as may be necessary;

(b) Recognize that inter-country adoption may be considered as an alternative means of the 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;¹³

(c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;¹⁴

(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

11 Why are these just suggestions for a state's "consideration"? And why accord such prominence to the child's cultural background? Such deference would invite bureaucrats, who will be looking at this treaty as their marching orders, to put cultural factors ahead of immediate adoption by a family that wants the child. And by the time they identify, sort out, and analyze all these imponderable cultural factors, the child may be too old for a family to want to go ahead with the adoption.

12 Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448, 1464.

13 Note the premise of this remarkable provision: we have a child who cannot in any suitable manner be cared for, and cannot be placed in a foster or an adoptive family. What, then, is the conclusion? What do we do for such a child? We simply "recognize" that intercountry adoption "may be considered as an alternative means"! *Not* send the child abroad immediately, but simply think about doing so.

14 But if national adoption is *not available*, then why compare an intercountry adoption that is available to the standards of adoption in the child's own country? Of course, there must be some regard for safeguards and standards. But putting it in terms of equivalence may result in impeding the intercountry adoption process.

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavor, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

Although the Convention on the Rights of the Child is the most widely ratified convention of all time—as well as the most rapidly ratified¹⁵—the above-quoted articles attest to the political squeamishness attendant upon intercountry adoption. The very idea of having governments handle intercountry adoption doesn't work, despite the facilitative Hague Convention of 1993 on intercountry adoption.¹⁶ What happened in the case of Romania is instructive. At first, many Americans, seeing the program on *20/20* and reading about it in the newspapers, immediately said, "I'll adopt one of those poor children." A number of Americans traveled to Romania, paid various bribes to various officials, and came home with a child. And then the Romanian government began to tighten up, to make it harder for the children to be put up for adoption. In this respect, it followed the pattern of Korea some years earlier. Many Americans adopted Korean children in the 1960s and early 1970s, and then Korea clamped down on the practice. Romania and Korea are typical examples of developing countries' experience with intercountry adoption. For a while they open the doors to let unwanted children be adopted abroad, and then they slam the doors shut. They seem to prefer leaving their unwanted children to die in the warehouses.

The blame lies squarely with the media. Although a free press is an integral part of democratic governance, intercountry adoption is one case in which the media makes it virtually impossible for governments to send children abroad for adoption. The pattern is discouragingly similar in every country like Romania. As soon as the media learns that local children are being sent abroad for adoption, headlines appear that the government is "exporting our precious human capital." Rumors of bribery and corruption become media stories;

15 As of today, only two countries have not ratified the Convention. The ratifying countries include the Vatican, Togoland, Western Samoa and the Marshall Islands, Algeria and Andorra, Botswana and Burkina, Zaire, Zambia, and Zimbabwe. Can you guess the two countries that have not ratified the Rights of the Child Convention? One is Somalia. Somalia is the only country in the world without a government, and without a government Somalia cannot ratify anything. The other country is the United States of America.

16 Hague Conference on Private International Law: Final Act of the Seventeenth Session, Including the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134.

government officials are accused of lining their own pockets by selling helpless infants and children to "greedy, wealthy foreigners." Articles appear that the religion and cultural identity of these children will be wiped out by their transplantation into a totally different country with materialistic values. The children may be mistreated and abused by the adopting parents. The opposition party criticizes the government's child-care policy: they claim that by sending the children abroad the government is admitting its own failure to cope with the country's most precious resources.

Note the inherent inconsistency in the media's position. If the government reacts by spending more money checking the credentials and standards of the prospective adoptive parents, it must pass these additional expenses on to the adoptive parents. The result is that the price of adoption goes up, and the media then cites the high fees as "blood money" to line the pockets of the government officials.

In every instance, the government predictably responds by closing down, completely or almost completely, the practice of intercountry adoption. Does the media then follow up by looking into conditions in the warehouses and crowded foster homes? No; their concern for the interests of the children lasted only insofar as it sold newspapers and television advertisements. Once intercountry adoption is shut down, the media looks elsewhere for new stories. Unwanted children dying in warehouses is not "news."

Intercountry adoption is still possible today, but it costs about \$20,000 per adoption.¹⁷ The money goes into the hands of intermediaries, lawyers, facilitators, bureaucrats, notaries, nondescript officials of all kinds, and usually a payment to the natural mother. In addition there are extensive travel costs and time-consuming bureaucratic obstacles.¹⁸ A large part of the problem is the notion that adopting parents are adopting a particular child. This leads to a waiting period—a time for administrative procedures for the recognition of foreign adoption orders for that specific child. The waiting time depends on the requirements of the country of origin, the type of legal order given to the parents when the child leaves the country of origin, the recognition or nonrecognition of these orders by the receiving country, and the requirements of the receiving country. Types of legal orders include guardianship or custody orders, and orders that grant legal adoption in the country of origin depending on

17 This compares with an average cost of about \$13,000 for domestic adoptions.

18 See ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING* (1993), and the excerpt from her book on intercountry adoption in *INTERNATIONAL LAW ANTHOLOGY* 329 (Anthony D'Amato ed., 1994).

whether certain conditions have been met in the receiving country. Necessary documents include proof of the official residence of the child, its citizenship, future social security rights, provision for its education, inheritance rights, and choice of name; costly court proceedings can be involved at any stage.

But the worst problem is baby-snatching. As the price of adoptable children goes up, so does the temptation of theft. A sidewalk thief can steal a purse and be lucky if it contains fifty dollars; if instead he steals an infant from its mother's arms or from a baby carriage, and runs with it to a waiting car, he can sell it to a dishonest adoption agency for at least a thousand dollars. In poor countries, this kind of evil economic incentive can lead to tragedy for natural parents and popular pressure for shutting down intercountry adoptions.

What can people of good will do about placing unwanted children in families that want to adopt them? An action proposal would have to contain these two fundamental elements:

1. Neither the sending nor the receiving state should have to do anything. (It is important to keep governments *out* of intercountry adoption, for reasons I have already stated.)

2. The total cost of adoption should be zero or close to zero. (This would take away the economic incentive for baby-snatching, remove the opportunity for bribery and corruption, and eliminate media charges that human capital is being sold to foreigners.)

My proposal is for an Intercountry Adoption Agency to be set up in Vatican City, funded by private donations. Unwanted children would be taken to a Temporary Hospital run by the Intercountry Adoption Agency, where they would be medically examined and treated if necessary, and then be turned over to the new adoptive parents. Any available information on their parentage, including health status if known, particularly heritable conditions, should be provided to the child. If nothing is known about the parentage, the child should at least be provided with a description of his or her ethnic heritage, including language, customs, and religion so that he or she will never feel anonymous and may interest himself or herself in his heritage later if he or she desires.

Let me briefly expand on these suggestions.

The Vatican City is an ideal neutral territory, because the Holy See is not a "state" in the traditional sense but in fact it has diplomatic standing in the community of states. The Holy See sends and receives ambassadors and issues its own passports. It also signs and ratifies multilateral conventions, and was one of the earliest ratifiers of the Convention on the Rights of the Child.

Unwanted children would be taken from any country in the world to the Vatican by any priest, nun, minister, rabbi, or other religious official who has proper identification. All world airlines could be persuaded to allow any such person who is taking a child to the Vatican to travel for free.¹⁹

A temporary hospital should be constructed on Vatican grounds, funded by private donations. The hospital would be staffed by volunteers. Doctors and nurses all over the world would be encouraged to donate one month's time to serving at the hospital, in return for which they receive nothing more than a Certificate of Good Service. Other hospital employees might donate part of their time or be compensated by endowment funds. I have no doubt that simply by *announcing* this program, people and charitable organizations and foundations all over the world will eagerly send in substantial contributions.

The Intercountry Adoption Agency should have a staff (volunteers and regular workers) which does all the paperwork, but especially concentrates on two tasks. The first is to receive letters (e-mail, telephone, fax all included) from prospective adopters and engage in correspondence with them to determine (through questionnaires) their capacity to take on and care for a child. Once an adoptive family satisfactorily completes the questionnaire, it should be placed on a waiting list. The family may want certain characteristics of the adoptee (age, ethnicity, religion, whatever), and these conditions would be satisfied. The complexity of these factors requires good computing equipment (again, I think any manufacturer would be glad to donate computers to this cause).

Prospective adopters should be dealt with on a first-come-first-served basis with the following important qualification. A country (State A) which gives up a child for intercountry adoption should receive a "credit" for that child which will entitle any other family within State A that may want to adopt a child to priority on the list at the Vatican. This "credit" will help defuse any claim that State A is engaged in a net export of its human capital. Instead, the government of State A may explain to its citizens that, for the time being, we may be sending unwanted children abroad (due to a temporary famine, a civil war, temporary overcrowding, and so on) but in the future, if circumstances warrant, we will be at the top of the list, on a child-per-child basis, to obtain children from abroad for any of our citizens who

¹⁹ Airlines would be fairly easy to persuade. Imagine an airline turning down such a request—the negative publicity would be overwhelming.

want to adopt them. There is no necessary net export of human capital; rather, we get a credit "in the bank" for every child we give up.

The second major function for the staff at the Intercountry Adoption Agency might be called the "annual report" function. All adoptive parents who take a child with them away from the Vatican must, as a precondition, sign a pledge to write an annual report on the welfare of the child, including the current address of the family. Then a staff member (perhaps student volunteers) will write back a "thank you" letter repeating the highlights of the annual report and expressing the hope that—if there are any observable deficiencies in the treatment of the child—the situation will be improved as soon as practicable.

There should not be any sanctions. The only requirement of the adoptive parents is to send in the annual report. Yet this report can have huge beneficial effects. It will demonstrate to the parents that the Intercountry Adoption Agency really cares about the child and is continually interested in the child's welfare. It will encourage the parents to redouble their efforts on behalf of the child, because no one wants to send in an annual report that is false or falls below a generally acceptable standard. Indeed, my model for this procedure is the successful annual reports filed at the United Nations by trusteeship countries and administering countries of dependent and semi-dependent territories in the period 1945–1970. As one who has read a substantial number of these reports, I can attest to the significant role they played in getting the administering country to improve its standard of care—very few countries wanted to be in a position of having to say, with the next year's report, that things had gotten worse in the interim since the last report. For a non-punitive procedure, the system of annual reports must be counted as one of the most effective tools in hastening the move from colonialism to independence. I think the analogy is strong with respect to adoption. The adoptive parents are custodians of the child's welfare, and their job is to prepare the child for eventual independence as an adult.

Of course, this is only a sketch, a "prospectus." Many changes and improvements will happen if people of good will take on the responsibility of setting up this kind of procedure for intercountry adoption. There are very few things I can think of in this difficult world that would make a bigger difference to the quality of life, not just for the unwanted children and the new families that they will adopt, but for everyone connected in any way to the procedure, and indeed for humankind in general in seeing how an international system can step in and do an essential job that nation-states have been self-disabled from doing. The bottom line is the preciousness of human life.

