From the SelectedWorks of David M. Smolin

January 2010

Child Laundering and the Hague Convention on Intercountry Adoption: The Future and Past of Intercountry Adoption

Contact Author

Start Your Own SelectedWorks

Notify Me of New Work

Available at: http://works.bepress.com/david_smolin/8

CHILD LAUNDERING AND THE HAGUE CONVENTION ON INTERCOUNTRY ADOPTION: THE FUTURE AND PAST OF INTERCOUNTRY ADOPTION

David M. Smolin[*]

I. INTRODUCTION

After long delay, the United States finally ratified the 1993 Hague Convention on Intercountry Adoption[1] on December 12, 2007, with an effective date of April 1, 2008.[2] Implementation of the Convention begins at a time of controversy and concern in relationship to intercountry adoption, marked by declining numbers and publicized adoption scandals.

Intercountry adoptions into the United States tripled from 1990 to 2003, moving from 7,093 to 21,654 annual adoptions.[3] The next year, 2004, saw intercountry adoptions peaking at 22,990.[4] Over the last five years, intercountry adoptions have declined, as follows:

2004: 22,990 (peak year)

2005: 22,734

2006: 20,680

2007: 19,609

---

[*] Harwell G. Davis Professor of Constitutional Law, Cumberland Law School, Samford University. I want to thank Desiree Smolin, as we have worked together in analyzing and seeking reform of the current intercountry adoption system. I also want to thank Shannon Hardin and Rachel Winford for their research assistance.

[1] Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134, 1138–39 [hereinafter Hague Convention].

[2] Hague Conference on Private Int'l Law, Status Table 33: Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, *available at* http://www.hcch.net/index_en.php?act=conventions.status&cid=69 (last visited Mar. 2, 2010) [hereinafter Status Table].

[3] *See* U. S. DEP'T OF STATE, IMMIGRANT VISAS ISSUED TO ORPHANS COMING TO THE U.S., TOP COUNTRIES OF ORIGIN (2008) (on file with author) [hereinafter TOP COUNTRIES OF ORIGIN]; U.S. DEP'T OF STATE, TOTAL ADOPTIONS TO THE UNITED STATES, http://adoption.state.gov/news/total_chart.html (last visited July 10, 2010) [hereinafter ADOPTIONS TO THE UNITED STATES]; Tobias Hubinette, International Adoptions to the United States 1946–2004, http://www.tobiashubinette.se/american_adoptions.pdf (last visited Mar. 5, 2010) [hereinafter Hubinette]. Intercountry adoption statistics for the United States generally use fiscal, rather than calendar, years (Oct. 1–Sept. 30); sometimes there are slight discrepancies between different government documents.

[4] ADOPTIONS TO THE UNITED STATES, *supra* note 3; TOP COUNTRIES OF ORIGIN, *supra* note 3.

2008: 17,475

2009: 12,753[5]

Projections suggest that intercountry adoptions to the United States could fall below 10,000 in 2010, and below 8,000 by 2012.[6] Thus, we may be in the midst of a statistical decline that will largely reverse the annual increases created from 1990 to 2003, bringing the intercountry adoption rates down almost to pre-increase levels.

The significance of this decline is highly contested. Professor Elizabeth Bartholet, a prominent adoption advocate, characterizes these numbers as a dramatic decline which deprives children of loving homes.[7] Professor Bartholet blames human rights organizations—prominently including UNICEF—and the United States Department of State for creating pressures that have "led to the cessation of international adoption in half" of the significant sending countries.[8] She further complains that "critics of international adoption" believe that children belong in their countries of origin, and thus are either opposed outright to intercountry adoption or perceive it as a last-choice option that should only rarely be employed.[9] She further blames critics for focusing on "abuses such as baby-buying," which she perceives as largely irrelevant to the larger workings of the intercountry adoption system.[10] According to Professor Bartholet, there is "no hard evidence" of such systemic abuse; further, where such abuses occur, the "right response" is successful prosecution of individual instances of such abuse.[11]

---

[5] ADOPTIONS TO THE UNITED STATES, *supra* note 3; TOP COUNTRIES OF ORIGIN, *supra* note 3; *See* David Crary, *Foreign Adoptions By Americans Drop Sharply*, USA TODAY, Nov. 17, 2008, *available at* http://www.usatoday.com/news/nation/2008-11-17-3481490130_x.htm (including slightly different statistics).

[6] Tom DiFilipo, Joint Council on Int'l Children's Servs., Presentation at the American Academy of Adoption Attorneys Annual Conference, Moving Past the Present: The Future of Intercountry Adoption (May 1, 2009), *available at* http://www.adoptionattorneys.org/2009Conference/Handouts/PowerPoint/DiFilipoMoving%20Past%20the%20Present.pdf; Joint Council on Int'l Children's Servs., *Experts Respond to* The Baby Business, BRANDEIS UNIV., http://www.brandeis.edu/investigate/gender/adoption/expertsrespond_JCICS.html (last visited July 17, 2010).

[7] Elizabeth Bartholet, *International Adoption: The Human Rights Position*, 1 GLOBAL POL'Y 91, 93 (2010), *available at* http://www3.interscience.wiley.com/cgi-bin/fulltext/123264133/PDFSTART [hereinafter Bartholet, *The Human Rights Position*]; Elizabeth Bartholet, Editorial, *Slamming the Door on Adoption*, WASH. POST, Nov. 4, 2007, at B07, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/11/02/AR2007110201782.html [hereinafter Bartholet, Editorial].

[8] Bartholet, Editorial, *supra* note 7.

[9] *Id.*

[10] *Id.*

[11] *Id.*

Professor Bartholet's work is representative of intercountry adoption advocates who increasingly express what could be described as a "siege" mentality.[12] Their writings reflect concern with a widening circle of entities and persons allegedly opposed to intercountry adoption, including UNICEF, children's and human-rights advocates, the United States government, the Chinese government, and nationalist forces in various sending countries.[13] Adoption advocates also blame the media for reporting negative and sensationalistic intercountry adoption stories.[14] By contrast, intercountry adoption advocates rarely blame the individuals involved in abusive adoption practices for declines in intercountry adoption, even when such persons receive criminal convictions or their wrongs are notorious.[15] Focus on such abusive practices is seen largely as a tactic used by those intrinsically opposed to adoption or generally as an inappropriate focus. Thus, intercountry adoption advocates often seem to be the last ones to condemn the abuses committed in the name of intercountry adoption, in part because they are reluctant to acknowledge the reality and significance of such abusive practices, in part because they fear that attention to such abusive practices will lead to restrictions on intercountry adoptions.

This author's writings have focused particularly on baby-buying, child-stealing, and similar abuses within the intercountry adoption system, under the rubric of "child laundering."[16] Child laundering involves obtaining children illicitly through force, fraud, or financial inducement; providing

---

[12] *See* Bartholet, *The Human Rights Position*, *supra* note 7, at 92.

[13] *See, e.g.*, *id.* (critical of UNICEF and other human rights organizations); *see also* Elizabeth Bartholet, *International Adoption: The Child's Story*, 24 GA. ST. U. L. REV. 333, 340 (2007) [hereinafter Bartholet, *The Child's Story*] (complaining that "many who claim they speak for children, including powerful organizations like UNICEF, and many NGOs that purport to represent children's rights, take a negative view of international adoption"); Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issues*, 13 BUFF. HUM. RTS. L. REV. 151 (2007) [hereinafter Bartholet, *Thoughts on Human Rights*] (critical of human rights activists, UNICEF, and U.N. Committee on the Rights of the Child).

[14] *See, e.g.*, Bartholet, *The Child's Story*, *supra* note 13, at 353–55; Bartholet, *Thoughts on Human Rights*, *supra* note 13, at 160; Sara Dillon, *The Missing Link: A Social Orphan Protocol to the United Nations Convention on the Rights of the Child*, 1 HUM. RTS. & GLOBALIZATION L. REV. 39 (2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1136879.

[15] *See generally* sources cited *supra* notes 7–14. While these sources advocate punishment of those involved in child laundering, they concentrate on UNICEF, child rights organizations, the media, and governments as the primary actors harming intercountry adoption.

[16] *See, e.g.*, David M. Smolin, *Child Laundering As Exploitation: Applying Anti-Trafficking Norms to Intercountry Adoption Under the Coming Hague Regime*, 32 VT. L. REV. 1 (2007) [hereinafter Smolin, *Child Laundering as Exploitation*]; David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping, and Stealing Children*, 52 WAYNE L. REV. 113 (2006) [hereinafter Smolin, *Child Laundering*]. Many of the author's adoption-related writings are available at http://works.bepress.com/david_smolin/.

false paperwork which identifies such illicitly obtained children as legally abandoned or relinquished "orphans"; and offering or placing these so-called "orphans" for adoption.[17] The motivation for child laundering is usually financial, although for some there is a significant ideological component based on an overriding desire to save children.[18]

Despite Professor Bartholet's complaint of a lack of evidence, a variety of sources—governments, non-governmental organizations (NGOs), press, activists, and scholars—have provided what amounts to substantial documentation indicating systemic, rather than occasional, abuses within many sending countries.[19] Further, the existence of child laundering is symptomatic of poor practice standards in many aspects of intercountry adoption. These poor practice standards harm children and families

---

[17] Smolin, *Child Laundering*, *supra* note 16.

[18] *See id.*; *see also* David M. Smolin, *The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals*, 35 SETON HALL L. REV. 403, 450–93 (2005) [hereinafter Smolin, *Two Faces*]; Kim Clark & Nancy Shute, *The Adoption Maze*, U.S. NEWS & WORLD REP., Mar. 12, 2001.

[19] *See, e.g.*, Comm'n on Human Rights, 56th Sess., *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography*, ¶¶ 10–87, U.N. Doc. E/CN.4/2000/73/Add.2 (Jan. 27, 2000); Esben Leifsen, *Child Trafficking and Formalisation: The Case of International Adoption from Ecuador*, 22 CHILD. & SOC'Y 212 (2008); Trish Maskew, *Child Trafficking and Intercountry Adoption: The Cambodian Experience*, 35 CUMB. L. REV. 619 (2005); Richard Cross, What Really Happened in Cambodia, Lecture at Samford Univesity, Cumberland Law School, Rushton Distinguished Lecture Series, Reforming Intercountry Adoption: Present Realities and Future Prospects (Apr. 15, 2005), *available at* http://www.cumberland.samford.edu/faculty/david-m-smolin; Embassy of the United States, Adopted Children Immigrant Visa, Summary of Irregularities in Adoptions in Vietnam (Apr. 25, 2008), http://vietnam.usembassy.gov/irreg_adoptions042508.html (last visited Mar. 2, 2010); U.S. Immigration and Customs Enforcement, Backgrounder: Operation Broken Hearts (Nov. 19, 2004), *available at* http://www.brandeis.edu/investigate/gender/adoption/docs/galindo_backgr.pdf; Desiree Smolin & Usha Smerdon, FLEAS BITING, http://fleasbiting.blogspot.com (last visited Mar. 2, 2010) (collecting numerous press and other reports concerning abusive intercountry adoption practices in a variety of countries); The Schuster Inst. for Investigative Journalism, *Corruption in International Adoptions*, BRANDEIS UNIV., http://www.brandeis.edu/investigate/gender/adoption/index.html (last visited July 17, 2010) (The Schuster Institute for Investigative Journalism at the Brandeis University web site contains extensive documentation of abusive intercountry adoption practices.); *Investigating the Grey Zones of Intercountry Adoption*, INT'L SOC. SERV. http://www.iss-ssi.org/2009/assets/files/La%20Haye_draft-ppt%20v2.pdf (last visited Sept. 24, 2010) (presented at Special Commission of June 2010 on the practical operation of the Hague Convention [on Intercountry Adoption]); Int'l Soc. Serv., *Adoption From Vietnam, Findings and Recommendations of an Assessment*, INT'L SOC. SERV., http://www.iss-ssi.org/2009/assets/files/news/vietnam%20report_ENG.pdf (last visited July 17, 2010); Patricia J. Meier & Xiaole Zhang, *Sold Into Adoption: The Hunan Baby Trafficking Scandal Exposes Vulnerabilities in Chinese Adoptions to the United States*, 39 CUMB. L. REV. 87, 90–91 (2009); Barbara Demick, *Chinese Babies Stolen By Officials for Foreign Adoption*, L.A. TIMES, Sept. 20, 2009, at 1, *available at* http://www.latimes.com/news/nationworld/world/la-fg-china-adopt20-2009sep20,0,491086.story; *Fly Away Children* (ABC Australia television broadcast Sept. 15, 2009), *available at* http://www.abc.net.au/foreign/content/2009/s2686908.htm; *Fly Away Home* (ABC Australia television broadcast Feb. 3, 2010), *available at* http://www.abc.net.au/foreign/content/2010/s2834100.htm; *Intercountry Adoption Technical Assistance Programme: Report of Mission to Nepal 23–27 November 2009*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, http://www.hcch.net/upload/wop/nepal_rpt09.pdf (last visited July 17, 2010). *See generally*, *Selected Works of David M. Smolin*, BERKELEY ELECTRONIC PRESS SELECTEDWORKS, http://works.bepress.com/david_smolin/ (last visited July 17, 2010) (containing many of the author's adoption-related articles documenting abusive practices).

profoundly, even when they do not involve child laundering or child trafficking.[20]

This Article argues that poor practice standards and the harms they produce, prominently including child laundering, are the greatest danger to the future of intercountry adoption. Thus, so-called adoption "advocates" who minimize the significance of such child laundering scandals are themselves inadvertently facilitating the long-term decline of intercountry adoption. Such minimization of child laundering scandals undermines necessary efforts to reform intercountry adoption and to raise practice standards. When the predominate voices of adoption advocates, adoption agencies, adoptive parents, and prospective adoptive parents repeatedly respond to adoption scandals with skepticism about their seriousness and a singular focus on facilitating adoptions, it can achieve a short-term result of keeping adoption systems open. In the long term, however, such attitudes defer, delay, and avoid the elevation of practice standards, and frustrate enforcement and reform efforts, allowing both poor practice standards and abusive adoption practices to become constantly festering wounds that undermine the adoption system.

Intercountry adoption advocates are correct that there are some who oppose intercountry adoption, based on concerns with neo-colonialism, power imbalances, and the child's loss of her original culture, nationality, language, and identity.[21] Focus on such ideological opposition to intercountry adoption, however, has caused the intercountry adoption community to blame others for the ills for which the intercountry adoption community is to blame. The current decline in intercountry adoption, and the recurrent shutdowns or slowdowns of intercountry adoption in many sending countries, are not caused primarily by pre-existing ideological opposition to moving orphans outside of their countries of origin. The primary problem is not ideological disagreement about intercountry adoption, but rather regulatory failure leading to recurrent child laundering scandals and other destructive practices. Recurrent child laundering scandals reveal intercountry adoption systems driven by a combination of profit-seeking and rich-nation demand for children. Sustaining the

---

[20] *International Adoptions: Problems and Solutions: Hearing Before the H. Comm. on Int'l Relations*, 107th Cong. 47–49 (2002), *available at* http://www.adoptioninstitute.org/policy/hagueregs.html#background (testimony of Cindy Freidmutter, Executive Director, Evan B. Donaldson Adoption Institute). On the harms of poor practice standards beyond child laundering, see David Smolin, *Experts Respond to "The Baby Business,"* BRANDEIS UNIV., http://www.brandeis.edu/investigate/gender/adoption/expertsrespond_Smolin.html (last visited July 31, 2010).

[21] *See* Bartholet, Editorial, *supra* note 7; Bartholet, *The Child's Story*, *supra* note 13, at 357–68; Bartholet, *The Human Rights Position*, *supra* note 7, at 94–96.

legitimacy of intercountry adoption under conditions of recurrent child laundering scandals is vain, as the claim to operate for the good of orphaned children is fatally undermined in systems whose "orphans" are frequently purchased or stolen children. Thus, preventing child laundering and related abuses needs to move to the center of the intercountry adoption agenda, rather than remaining a largely peripheral concern.

One central question is whether implementation of the Hague Convention will provide the needed regulatory reform. Views of the Convention vary. Some adoption advocates fear that implementation of the Hague Convention will slow or prevent intercountry adoptions without providing real gains in adoption ethics, and hence object to the Convention.[22] Some perceive the Convention as legitimating intercountry adoption.[23] Some complain that the Convention does not mandate intercountry adoptions or provide children the right to an adoptive home,[24] while others perceive the regulatory regime as inadequate to prevent abusive practices.[25]

The following Parts of this Article examine various topics to illuminate the linked past and future of intercountry adoption. Part II examines the role of child trafficking/child laundering concerns in the creation and final language of the Hague Convention. Part III analyzes the demographics of the tripling of intercountry adoptions to the United States from 1990 to 2004, and the more recent declines in adoption. Part IV focuses on the Indian adoption system as a means of demonstrating that, absent effective implementation, the mere ratification of the Convention is not sufficient to prevent child laundering. Part V (the Conclusion) builds upon prior sections to provide recommendations as to how the Convention should be effectively implemented in order to prevent child laundering.

---

[22] *See* Lynette Clemetson, *Adoptions from Guatemala Face an Uncertain Future*, N. Y. TIMES, May 16, 2007, *available at* http://www.nytimes.com/2007/05/16/us/16adopt.html.

[23] *See id.*; *see also* Dillon, *supra* note 14, at 47–48.

[24] *See* Dillon, *supra* note 14, at 47–48.

[25] *See* Arun Dohle, *Inside Story of An Adoption Scandal*, 39 CUMB. L. REV. 131 (2008), *available at* http://www.brandeis.edu/investigate/gender/adoption/docs/adoption_Dohle_cumb_final.pdf.

II. CHILD TRAFFICKING, CHILD SELLING, AND CHILD LAUNDERING IN THE CREATION AND FINAL LANGUAGE OF THE HAGUE CONVENTION ON INTERCOUNTRY ADOPTION

Evaluating the place of child trafficking concerns in the Hague Convention involves a two-step process: (1) evaluating the language of the Hague Convention, and (2) reviewing the materials related to the creation of the Hague Convention. Since the final language of the Convention is the best evidence of the Convention's purposes and concerns, this Article first analyzes the Convention. Materials related to the preparation of the Convention are later explored to determine how concerns with child trafficking shaped the work of preparation. The official preparatory materials provided by the Hague Conference on Private International Law are particularly helpful evidence regarding the Convention's creation, although other materials also are relevant.

A. Final Language

The preamble to the Hague Convention sets out some of the concerns and principles underlying the Convention. These include the following:

> (1) Children "should grow up in a family environment . . . ."[26]
>
> (2) Nations "should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin."[27]
>
> (3) "[I]ntercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin."[28]
>
> (4) State parties recognize "the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children."[29]

---

[26] Hague Convention, *supra* note 1, pmbl.

[27] *Id.*

[28] *Id.*

[29] *Id.*

It is important to recognize that the Hague Convention did not, by its own terms, implement all of these concerns. First, the Convention does not in any way *mandate* that ratifying nations place children in intercountry adoption when no family environment is available for the child within the country of origin.[30] Thus, although the Convention states the principle that children should "grow up in a family environment,"[31] the Convention does not create a right of an institutionalized child to intercountry adoption in the absence of a domestic adoptive placement.[32] The Convention seeks to facilitate intercountry adoptions by safeguarding them from abusive practices, and by securing recognition in Contracting States of such adoptions.[33] Yet, it does not go so far as to require that Contracting States send their children out of the country for an adoptive placement in any particular circumstance.[34]

Similarly, although the preamble recognizes that the first priority of nations should be "appropriate measures to enable the child to remain in the care of his or her family of origin," the Convention itself does not explicitly require such efforts to be made as a condition precedent to intercountry adoption.[35] Thus, the Convention's operational terms never mention family preservation efforts. The Convention does require that birth parents consenting to an adoption be "counselled as may be necessary and duly informed of the effects of the consent...."[36] In addition, consent cannot be "induced by payment or compensation of any kind…."[37] While such standards are necessary to prevent consent from being induced by fraud or misunderstanding, and to prevent baby buying, they fall well short of requiring any kind of active efforts to preserve the family. The Convention's omission of an explicit requirement of family preservation efforts contrasts with the law governing the foster care system within the United States. United States law generally requires reasonable efforts to maintain children with their families before removal, and reasonable efforts

---

[30] *See* HAGUE CONFERENCE ON PRIVATE INT'L LAW, THE IMPLEMENTATION AND OPERATION OF THE 1993 HAGUE INTERCOUNTRY ADOPTION CONVENTION: GUIDE TO GOOD PRACTICE, GUIDE NO.1 100, 102 (2008) [hereinafter HAGUE, GOOD PRACTICE GUIDE]; Dillon, *supra* note 14, at 47–48.

[31] Hague Convention, *supra* note 1, pmbl.

[32] *See* Dillon, *supra* note 14, at 47–48, 79.

[33] Hague Convention, *supra* note 1, art. 1.

[34] *See* HAGUE, GOOD PRACTICE GUIDE, *supra* note 30, at 100, 102.

[35] Hague Convention, *supra* note 1, pmbl.

[36] *Id.* art. 4(c)(1).

[37] *Id.* art. 4(c)(3).

to re-unite the foster children with their families prior to termination of parental rights and adoption.[38] This author has argued elsewhere that international law does not recognize intercountry adoption as an appropriate intervention for extreme poverty and requires that at least modest financial assistance be offered as an alternative to intercountry adoption.[39] It is notable, however, that the operational terms of the Hague Convention omit any specific requirement for family preservation efforts, financial or otherwise, as a condition precedent of intercountry adoption.

Thus, while the preamble to the Convention states the principles that children "grow up in a family environment," and that "appropriate measures" be taken to "enable the child to remain" with his or her original family, those principles are not repeated in the objects (goals or purpose) section of the Convention.[40] Some might argue that these principles be read into the statement, in the objects section, "to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law."[41] Thus, some argue that intercountry adoption is required to effectuate the best interests and rights of institutionalized children.[42] The difficulty with this argument, in terms of the Convention, is that this clause addresses "safeguards."[43] The emphasis is not upon intercountry adoptions as a means to facilitate the best interests and rights of children, but rather to ensure that those intercountry adoptions that do occur have adequate safeguards, such that the intercountry adoptions themselves do not violate the best interests and rights of the child. Given this context of "safeguards," it is very difficult to read into the general language about best interests or children's rights any requirement that nations allow their children to be placed internationally for adoption. The Guide to Good Practice, finalized in 2008 by the Hague Conference on Private International Law, confirms this interpretation, by stating "the

---

[38] Adoption and Safe Families Act (AFSA), 42 U.S.C. § 671(a)(15) (2008). Under ASFA, reasonable efforts to re-unite are not required under certain aggravated circumstances, such as torture or sexual abuse. *Id.* § 671(a)(15)(D).

[39] *See generally* David Smolin, *Intercountry Adoption and Poverty: A Human Rights Analysis*, 36 CAP. U. L. REV. 413 (2007) [hereinafter Smolin, *Intercountry Adoption and Poverty*].

[40] Hague Convention, *supra* note 1, pmbl. & art. 1.

[41] *Id.* art. 1(a).

[42] *See, e.g.*, Dillon, *supra* note 14, at 44.

[43] Hague Convention, *supra* note 1, art. 1(a).

general principle that the Convention does not oblige States to engage in intercountry adoption."[44]

Some might argue that providing family-preservation assistance to birth families is a necessary "safeguard" to ensure that intercountry adoptions are in the best interests of children and to protect children's rights. As a matter of child welfare, it is usually in the best interests of children to remain with their original families, and it violates a number of rights in the Convention on the Rights of the Child for children to lose their original families.[45] Thus, a requirement that parents considering relinquishment primarily due to extreme poverty be offered modest aid to assist them to keep their child, would apparently be a safeguard necessary to protect the best interests and rights of children. Children should not needlessly lose their families, and it is rational to make reasonable family preservation efforts prior to accepting a relinquishment.[46] If that is an "object" of the Convention, however, it is notable that the Convention does not explicitly include it in either the objects or operational sections. This contrasts, for example, with the preamble's principle that domestic adoption be preferred over intercountry adoption, which finds expression in the operational portions of the Treaty.[47] Thus, it appears that the Hague Convention recognizes some principles that the Convention itself fails to adopt as either goals or operational rules. The Hague Convention, while preeminent, is not designed to be a comprehensive implementation of all the fundamental principles governing intercountry adoption.

If the Hague Convention does not comprehensively address all aspects of intercountry adoption, which aspects of intercountry adoption does it address? The answer can be found by finding those principles that are stated in the preamble, specified in the objects section, and addressed in the operational portions of the treaty.[48] The most obvious candidate is language in the preamble and objects sections addressing "the abduction, the sale of, or traffic in children."[49] The objects section makes clear that a primary purpose of the Convention is to create an intercountry adoption system with safeguards against those specific abusive practices: the practices

---

[44] HAGUE, GOOD PRACTICE GUIDE, *supra* note 30, at 102.

[45] *See* Convention on the Rights of the Child, arts. 7, 8, 9, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

[46] *See generally* Smolin, *Intercountry Adoption and Poverty*, *supra* note 39.

[47] *See* Hague Convention, *supra* note 1, pmbl. & art. 4(b).

[48] *See id.* pmbl. & art. 1, 14–22.

[49] *See id.* pmbl. & art. 1(b).

which I have characterized as "child laundering."[50] The safeguards established by the Convention are the creation of both a system of cooperation between sending and receiving nations, and a set of specified roles and obligations for the State and non-State actors functioning within the intercountry adoption system.[51]

Even within this goal of combating child traffic in the intercountry adoption system, the Hague Convention is not designed to be comprehensive. Thus, the work of preparation indicates that the Convention is not designed to address criminal law responses to these practices. At most, the Convention facilitates the reporting of criminal offenses to appropriate authorities.[52] The Convention is based on the assumption that other means, supplemental to the Convention, will address appropriate criminal law responses to such illicit practices. The Optional Protocol to the Convention on the Rights of the Child (Sale of Child), created about seven years after the Hague Convention on Intercountry Adoption, responds to this need by specifically requiring contracting parties to address, in their criminal or penal law, certain forms of buying children for purposes of adoption.[53]

Even within the civil or regulatory realm, the Hague Convention is designed to prevent "only indirectly[] 'the abduction, the sale of, or traffic in children' . . . because it is expected that the observance of the Convention's rules will bring about the avoidance of such abuses."[54] Proposals to term the Convention "an instrument against illicit and irregular activities in this field" were rejected, in favor of the ultimate title: "Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption."[55] Thus, while preventing the abuses of child trafficking within the intercountry adoption system was a central impetus and object of the Convention, the Convention attempted to do so indirectly by establishing safeguards to protect children in the context of intercountry adoption.

---

[50] *See* Smolin, *Child Laundering*, *supra* note 16.

[51] *See generally* Hague Convention, *supra* note 1.

[52] *See* G. Parra-Aranguren, *Explanatory Report*, 1993 Hague Intercountry Adoption Convention, Hague Conference on Private International Law, ¶ 54 (1994), *available at* http://www.hcch.net/index_en.php?act=publications.details&pid=2279&dtid=3 [hereinafter *Explanatory Report*] (quoting Letter from the Secretary General of Interpol, Preliminary Doc. No. 5 of April 1993, Proceedings of the Seventeenth Session (1993), Tome II) [hereinafter Interpol Letter].

[53] G.A. Res. 263, Annex II art. 3, U.N. Doc. A/Res/54/263 (Mar. 16, 2001) [hereinafter Optional Protocols: Sale of Children].

[54] *Explanatory Report*, *supra* note 52, ¶ 52 (quoting Hague Convention, *supra* note 1, pmbl.).

[55] *Id.* ¶ 53.

Those safeguards were to be implemented through an orderly system of international cooperation.[56]

Upon closer examination, the Hague Convention, rather than representing a comprehensive approach to intercountry adoption, is primarily an anti-trafficking treaty, and a very incomplete anti-trafficking treaty at that. Its primary impetus and purpose is to prevent abusive adoption practices by specifically targeting the abduction, buying, and trafficking of children. Its response to this set of evils is to provide for a set of safeguards and international cooperation.[57] In a sense, the Convention is ambitious, for it aims to take the "chaotic, contradictory and unsatisfactory" practice of intercountry adoption which existed prior to the Convention, and replace it with an intercountry adoption system with regularized sets of procedures, and accredited and defined sets of actors.[58] On the other hand, the Convention's agenda is modest, as the Convention leaves unaddressed significant principles of child welfare and child rights at stake in intercountry adoption, while providing only partial coverage even to issues such as abusive child laundering practices, which it does seek to address.

B. Child Laundering and the Work of Preparation

1. The J.H.A. van Loon Report

One of the most significant documents in the preparatory materials for the Hague Convention is the 1990 Report on Intercountry Adoption prepared by J.H.A. (Hans) van Loon,[59] who would later become the Secretary General of the Hague Conference on Private International Law.[60] On the occasion of the United States deposit of ratification on December

---

[56] *Id.* ¶ 59.

[57] *Id.* ¶ 52.

[58] J.H.A. van Loon, *Report on Intercountry Adoption, Preliminary Document No. 1 of April 1990*, *in* Preliminary Work, Proceedings of the Seventh Session 101 (May 10–29, 1993) [hereinafter Van Loon Report].

[59] *See id.*; *see also* Peter H. Pfund, *Intercountry Adoption: The 1993 Hague Convention: Its Purpose, Implementation, and Promise*, 28 FAM. L. Q. 53, 54 (1994) (listing the "very comprehensive report on intercountry adoption prepared by Hans van Loon of the Permanent Bureau" as one of the significant preparatory documents in the creation of the Convention).

[60] Hans van Loon, Statement on the Occasion of the Deposit of the Instrument of Ratification of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, by the United States of America at the Hague Convention on Private International Law (Dec. 12, 2007) [hereinafter Hans van Loon Ratification Statement]. Hans van Loon was First Secretary at the Permanent Bureau at the time that the Hague Convention on Intercountry Adoption was created. *See, e.g.*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, PROCEEDINGS OF THE SEVENTEENTH SESSION, TOME II ADOPTION—CO-OPERATION 450 (1993).

12, 2007, some seventeen years after his report, Secretary General Hans van Loon commented:

> [A]t about the time work on the new Convention started, inter-country adoption itself was at risk, with an increasing number of children's countries of origin closing borders or otherwise rendering adoption impossible. The Convention has created a global framework that provides stability by giving countries the control they need to trust their partners.[61]

Hans van Loon's comments are interesting, given the current propensity of some adoption advocates to blame the Hague Convention for reducing the number of intercountry adoptions.[62] From Mr. van Loon's perspective, intercountry adoption had been under threat before the Convention, and its viability was saved by the Convention.[63]

What had placed adoption at risk? What had made nations mistrust intercountry adoption and inclined to close their borders? The 1990 Report, carefully read, suggests that the pre-Hague intercountry adoption system had been particularly subject to the risks of child laundering.[64] Certainly the Report contains an excellent description of child laundering, although it does not use that term. The following are particularly notable regarding the Report's analysis of child laundering:

(1) Section E of the Report is titled "Abuses of Intercountry Adoption: International Child Trafficking."[65] There are no other sections specifically on the topic of "Abuses." Hence, the Report characterizes child trafficking as the primary abuse of intercountry adoption.

(2) The Report discusses "practices of international child trafficking either for purposes of adoption abroad, or under the cloak of adoption, for other—usually illegal—purposes."[66] Hence, the Report characterizes abducting, buying, or selling children for intercountry adoption as a form of child trafficking, even where the intention and result was that children would be adopted into families.

---

[61] Hans van Loon Ratification Statement, *supra* note 60.

[62] *See, e.g.*, Clemetson, *supra* note 22.

[63] *See* Hans van Loon Ratification Statement, *supra* note 60; Van Loon Report, *supra* note 58, at 51–55.

[64] *See* Van Loon Report, *supra* note 58, at 51–55.

[65] *Id.* at 51.

[66] *Id.*

(3) The Report describes the same three methods for illicitly obtaining children as have been described in more recent child laundering scandals. Thus, the Report states: "The three principal methods are the sale of children, consent obtained through fraud or duress and child abduction. Combinations are possible . . . ."[67]

(4) The Report discusses the "extensive networks" involved in the "[o]rganization of the trafficking": "In some countries lawyers and notaries, social workers (even in some cases those appointed by the courts), hospitals, doctors, children's institutes, sometimes turned into complete 'baby farms,' and others work together to obtain children and make profit out of the despair of parents, in particular women, in difficult situations, sometimes by deceiving them."[68]

(5) Although the Report does not use the term "child laundering" for these forms of misconduct, it uses similar terminology and clearly describes the phenomenon. Thus, the Report refers to "those who bribe the competent authorities and 'wash' the 'commodity.'"[69] The Report also reports on various means of "[c]oncealing of civil status" of the child, such as creation of falsified birth certificates and abandonment declarations.[70] "In order for the trafficking to be successful," van Loon noted, "it is essential that the child leave the country of origin in a legal or seemingly legal way."[71] Hence, the Report clearly describes the concept of "child laundering": obtaining children illicitly, falsifying their status into properly relinquished or abandoned "orphans," and then processing them through the intercountry adoption system.[72]

(6) The Report rejects rumors of a "traffic in children's organs," due to a lack of evidence, but notes that the investigation which found such rumors to be "without justification" also "attest to the existence of a large-scale traffic in children under the cloak of adoption" in two Central American countries.[73] Hence, the evidence of child laundering at the time of van Loon's 1990 Report was substantial.

---

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.* at 53.

[71] *Id.*

[72] *See id.* at 51–55.

[73] *Id.* at 53.

(7) The Report focused on the centrality of money and profits to the problem of abusive child laundering practices: "Child-trafficking means profit making by intermediaries at the expense literally of the biological parents and the adopters (to the extent that they acted in good faith), and in a broader sense also of the child."[74] Hence, Mr. van Loon labeled the corrupt intermediaries as "profiteers."[75] The Report admitted, however, that "drawing the line" between trafficking and "legal and regular intermediary services is in practice not always easy."[76] Mr. van Loon noted that some, during preparation of the Convention on the Rights of the Child, had resisted the concept that there could be legitimate financial gain from adoption. However, the ultimate language of the CRC, in forbidding "improper financial gain," had implicitly permitted proper financial gain. Mr. van Loon did not provide specific guidance as to how this critical line between child trafficking and permissible financial gain could be drawn.[77]

(8) Hans van Loon's strategy for combating child trafficking in intercountry adoption seemed to be a new convention on intercountry adoption, which would provide greater regulation, international coordination, and restrictions on "the freedom of agencies to act as intermediaries in intercountry adoption."[78]

The Report described three objectives of a new Convention. The first objective concerned the principal of subsidiarity, which would "ensure that no child is adopted abroad unless it has been established that the original family cannot take care of him or her and that no other viable alternative in the country of origin is available."[79] The second objective was to "define criteria and improve practice and procedures" for intercountry adoption.[80] The third objective was to "help eliminate abuses of intercountry adoption, in particular, abduction and/or sale of children."[81]

Hans van Loon's sketch of the operational provisions of a new Convention confirms the centrality of the anti-trafficking goal to the structure of the Convention. Mr. van Loon believed that "combating

---

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *See id.*

[78] *Id.* at 55.

[79] *Id.* at 93–95; *see also id.* at 55–57.

[80] *Id.* at 93–95.

[81] *Id.*

international child trafficking" required "above all, strict control over the activities of intermediaries, which should meet the criteria defined for them."[82] Similarly, "straightforward and well-structured procedures for intercountry adoption" would help prevent child trafficking.[83] Hans van Loon thus wanted to replace pre-Convention intercountry adoption practice, which he described as "chaotic, contradictory and unsatisfactory,"[84] and which often relied on profiteering intermediaries of dubious motivations,[85] with a highly ordered and regulated intercountry adoption system in which each significant actor was either the government, or a non-profit entity accredited by the Government.[86]

Hans van Loon's mechanism for achieving the required regulation, inter-governmental coordination, and ordered intercountry adoption system was a regime of "Central Authorities" modeled after prior Hague Conventions, especially the "Hague Child Abduction Convention."[87] Mr. van Loon thus delineated a system whereby the Central Authorities were responsible either for carrying out all of the critical steps related to adoptions, or licensing all actors involved.[88] Van Loon was particularly concerned with discouraging or preventing "independent adoptions" because of "their inherent risks of failure" due to "insufficient preparation and . . . susceptibility to child trafficking."[89]

Mr. van Loon's broad vision for the Convention, in terms of the objectives of the Convention and its method of achieving those objectives, are represented in the final version of the Convention. Mr. van Loon's proposal of a system of Central Authorities, providing for an ordered, regulated, and internationally coordinated intercountry adoption system, is well-reflected in the Convention's final language.

However, not all of Mr. van Loon's goals were realized in the final language of the Convention. In particular, the United States successfully insisted that the final version of the Convention permit the participation of for-profit individuals and agencies in the intercountry adoption system.

---

[82] *Id.* at 95.

[83] *Id.*

[84] *Id.* at 101.

[85] *Id.* at 53, 95.

[86] *Id.* at 93–101.

[87] *Id.* at 95.

[88] *See id.* at 95–99.

[89] *Id.* at 97.

Indeed, the goals of the United States during the negotiations appeared somewhat distinct from that of Mr. van Loon. Thus, while Peter Pfund, the head delegate for the United States, acknowledged that the Hague Convention was created in the shadow of reports about child trafficking in the intercountry adoption system,[90] these anti-trafficking concerns apparently were far less central to Mr. Pfund and the United States than they had been to Hans van Loon and other nations. Indeed, it seems likely that the United States was focused, as a receiving nation, on maintaining access to children for intercountry adoption, and on protecting the role of private agencies and individuals as independent participants in intercountry adoption.[91] The ultimate compromise was to create a system of Central Authorities that left room for for-profit persons and organizations, which nonetheless would have to meet some minimum standards pertaining specifically to intercountry adoption, and hence would be licensed. Thus, the question of the respective role of government and private actors in intercountry adoption was largely left to national choice, with the treaty permitting systems like the United States that relied upon non-profit and for-profit individuals and agencies to carry out many of the critical tasks related to adoption, albeit subject to Central Authority regulation and oversight.[92] Similarly, the Hague Convention also permitted countries to implement the agreement through a government monopoly over all critical services and functions related to adoption, or to limit private agency involvement only to non-profit institutions.[93]

2. Preparatory Materials Beyond the Hans van Loon Report

The creation of the Hague Convention on Intercountry Adoption was a large-scale and lengthy enterprise. The Permanent Bureau of the Hague Conference on Private International Law contributed "countless hours of preparatory work" in the five year effort, from 1988 to 1993, that created the Convention.[94] After dissemination of the Hans van Loon Report in April 1990, "there were three two-week preparatory sessions of a special commission of the Hague Conference. . . . followed by the three-week

---

[90] *See* Pfund, *supra* note 59, at 56.

[91] *See id.* at 59–63.

[92] *See* Hague Convention, *supra* note 1, at art. 6–13, 22; Pfund, *supra* note 59, at 59–63; Ethica, Comments on the Final Regulations Implementing the Hague Adoption Convention 6 (Mar. 2006), *available at* http://ethicanet.org/HagueRegComments.pdf.

[93] *See* Hague Convention, *supra* note 1, at art. 6–13, 22; Pfund, *supra* note 59, at 59–63.

[94] *See* Pfund, *supra* note 59, at 54.

Seventeenth Session . . . of the Hague Conference . . . ."[95] Sixty-six nations (approximately half of which were sending countries), and eighteen organizations (mostly NGOs) participated in the Seventeenth Session, which unanimously approved the final language of the Convention on May 29, 1993.[96]

For the Hague Conference, the Convention has roots in the failure of the 1965 Hague Adoption Convention to generate a significant number of ratifications.[97] More fundamentally, the Convention was shaped by the Convention on the Rights of the Child (CRC), which concluded in November 1989, just as the Hague Conference was beginning its work on a new adoption convention.[98] Article 21, the primary adoption article of the CRC, called on State Parties to promote that article's objectives by "concluding bilateral or multilateral arrangements or agreements."[99] Hence, the Hague Conference understood itself to be responding to the call of the CRC for a new multilateral adoption convention.[100] In addition, the Hague Convention's stated objective to "prevent the abduction, the sale of, or traffic in children" is a response to the call of the CRC to "take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form."[101] Thus, the Hague Convention applies this general call to prevent child trafficking to the specific field of intercountry adoption, which by the late 1980s and early 1990s was already known as a field subject to the abusive practices of abducting, selling, and trafficking of children.

The preparatory materials beyond the van Loon Report confirm both the central role of anti-trafficking concerns in the creation of the Convention, and also the indirect and partial response of the Convention to those concerns. The following are two examples relating to the early stages of preparation:

---

[95] *Id.*

[96] *Id.* at 54–55.

[97] *See* Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions (Nov. 15, 1965), *available at* http://www.hcch.net/index_en.php?act=conventions.pdf&cid=75.

[98] *See* THE PERMANENT BUREAU OF THE HAGUE CONFERENCE, CONCLUSIONS OF THE SPECIAL COMMISSION OF JUNE 1990 ON INTERCOUNTRY ADOPTION, PRELIMINARY DOCUMENT NO. 3 OF AUGUST 1990 129 (1990) [hereinafter SPECIAL COMMISSION CONCLUSIONS] ("The starting point for the Convention should be the United Nations Convention on the Rights of the Child . . . which calls for the conclusion of multilateral agreements to promote the standards set by its Article 21.").

[99] CRC, *supra* note 45, art. 21(e); *see also* SPECIAL COMMISSION CONCLUSIONS, *supra* note 98, at 129.

[100] *See* SPECIAL COMMISSION CONCLUSIONS, *supra* note 98.

[101] CRC, *supra* note 45, art. 35.

(1) In November 1989, prior to the completion of the van Loon Report, the Permanent Bureau of the Hague Conference created a Memorandum "concerning the preparation of a new Convention . . . ."[102] The Permanent Bureau noted:

> [A] need for a system of supervision in order to ensure that these standards are observed (what can be done to prevent intercountry adoptions from occurring which are not in the interest of the child; how can children be protected from being adopted through fraud, duress or for monetary reward; should measures of control be imposed upon agencies active in the field of intercountry adoption, both in the countries where the children are born and in those to which they will travel[.])[103]

(2) A decision was made at the outset (in 1988) that "any new work by the [Hague] Conference on adoption without the participation of those countries of origin which were not at present Members of the Conference, would be of little use."[104] Therefore, in 1988 contacts were made to ascertain the willingness of non-member nations to participate with the Conference in the creation of a new Convention, with encouraging results.[105] Ten Latin American countries, including both Member and non-Member countries, thus participated in the first session of the Special Commission.[106] The Secretary General of the Hague Conference "suggested that 'given the considerable importance which the Latin American countries have in the field of intercountry adoption, there would be a great advantage in facilitating'" their participation by allowing them to speak in Spanish, and have their remarks translated into the "official working languages of French and English."[107] This proposal was accepted upon a vote of the Member Nations of the Hague Conference.[108] The Latin American countries subsequently demonstrated their "great interest" by

---

[102] *See Explanatory Report*, *supra* note 52, at ¶ 7(b), n.9 (citing Memorandum from the Permanent Bureau Concerning the Preparation of a New Convention on International Co-operation and Protection of Children in Respect of Intercountry Adoption, 1–2 (Nov. 1989)).

[103] *See id.* (quoting Memorandum from the Permanent Bureau Concerning the Preparation of a New Convention on International Co-operation and Protection of Children in Respect of Intercountry Adoption, 1–2 (Nov. 1989)).

[104] *See* Preliminary Draft Convention adopted by the Special Commission and Report by G. Parra-Aranguren, Prel. Doc. No. 7 of September 1992 for the attention of the Seventeenth Session, 177 [hereinafter Report of the Special Commission].

[105] *See id.* at 179.

[106] *See id.* at 181 n.21.

[107] *Id.* at 181.

[108] *Id.* at 183.

holding a seminar in Quito, Ecuador, in April 1991 "to examine the problems related to intercountry adoption in the perspective of the convention to be drawn up in the Hague Conference and four working groups were created . . . ."[109] Of the four working groups, two concerned child trafficking, including one titled "child-trafficking in Latin America," and a second titled "possible forms of international co-operation relating to adoptions and trafficking of children."[110]

These two examples indicate that both the Permanent Bureau of the Hague Conference and the participating Latin American sending countries were at the outset of the preparatory process quite concerned with child trafficking as a primary abuse of intercountry adoption.

At the same time, the preparatory materials also confirm that the Convention, while designed to respond to these child-trafficking concerns, approached this concern only partially and indirectly.[111] Thus, the Explanatory Report which comprised a part of the preparatory materials states:

> Despite the last part of the fourth paragraph of the Preamble ["to prevent the abduction, the sale of, or traffic in children"], it is always to bear in mind that the fundamental objects of the Convention are the establishment of certain safeguards to protect the child in case of intercountry adoption, and of a system of co-operation among the Contracting States to guarantee the observation of those safeguards. Therefore, the Convention does not prevent directly, but only indirectly, "the abduction, the sale of, or traffic in children", as is repeated in sub-paragraph b of Article 1, because it is expected that the observance of the Convention's rules will bring about the avoidance of such abuses.[112]

This comment, which is that of the one individual, G. Parra-Aranguren, who authored the Report, rather than that of the various Special Commissions and Sessions who created the Convention, is interesting for its apparent conflict with the final language of the Convention.[113] Parra-Aranguren appears to state that the "fundamental objects" of the Convention are safeguards and international cooperation, and not the prevention of abduction, sale, or traffic in children, despite the inclusion of

---

[109] *Id.*

[110] *Id.*

[111] *See infra* notes 112–17.

[112] *Explanatory Report*, *supra* note 52, ¶ 52 (quoting Hague Convention, *supra* note 1, pmbl.).

[113] *See id.*

the latter clearly within both the preamble and the objects clause of the Convention.[114] Parra-Aranguren lacks the authority, as the author of a Report, to contradict the actual language of the Convention. However, Parra-Aranguren attempts to express a theme that runs through all of the preparatory materials, including the van Loon Report: the Convention is designed to address child trafficking and related wrongs in intercountry adoption only partially and indirectly.[115] Thus, while it is clear that child trafficking in intercountry adoption was a primary impetus for the Convention, and that the Convention was designed to respond to these abusive practices, the Convention approaches these wrongs only indirectly. The Convention's theory is that an ordered system of safeguards and international cooperation will prevent these wrongs. While Parra-Aranguren is wrong to try to remove the prevention of trafficking from the fundamental objects of the Convention, he is correct that the Convention's primary strategy is the creation of safeguards and international cooperation and that the Convention is not intended to be a comprehensive response to trafficking in the intercountry adoption system.

Thus, Parra-Aranguren notes the Special Commission's rejection of a proposal to expressly term the Convention "an instrument against illicit and irregular activities in this field."[116] Parra-Aranguren also correctly notes the Hague Conference correspondence with Interpol concerning the Convention, which demonstrates that the Convention was not designed to address criminal law responses to child trafficking in adoption, but rather was intended to provide safeguards against such abuses while also facilitating the reporting of such offenses to the proper authorities.[117] The Convention is not even a comprehensive response to the "abduction, sale of, or traffic in children," let alone a comprehensive response to all abusive practices in the intercountry adoption field.

III. THE HAGUE CONVENTION AND THE CHANGING DEMOGRAPHICS OF ADOPTION

The prior Part of this Article establishes that the purpose of the Hague Convention was to reform pre-Hague intercountry adoption practice, which was viewed as "chaotic," "incoherent," and particularly vulnerable to child

---

[114] *See* Hague Convention, *supra* note 1, pmbl. & art. 1(b).

[115] *See Explanatory Report*, *supra* note 52, ¶ 52.

[116] *Id.* ¶ 53.

[117] *See id.* ¶ 54; *see also* Interpol Letter, *supra* note 52.

trafficking.[118] Reform was to be accomplished by the creation of an ordered intercountry adoption system, characterized by safeguards and international cooperation, to the end of preventing "the abduction, the sale of, or traffic in children."[119] The primary mechanism for this reform was a system of Central Authorities, who would provide the necessary supervision and accountability for all significant functions, persons, and organizations involved in intercountry adoption, under minimum standards delineated in the Convention. The system of Central Authorities was also intended to facilitate the necessary international cooperation.

This Part of the Article explores possible connections between the Hague Convention and the changing demographics of intercountry adoption. The first section explores the dramatic rise in intercountry adoptions to the United States during the first decade of the Convention's creation. The second section considers the decline in intercountry adoptions from 2005 to 2009, including the prospects for significant further declines, once again exploring any possible relationships to the Convention. Finally, the last section presents the controversy concerning the demographics of Latin American adoptions and the Hague Convention.

A. The Hague Convention and the Rise in Intercountry Adoptions to the United States

The initial decade after the creation of the Hague Convention saw intercountry adoptions to the United States nearly triple in number, from 7,377 adoptions in 1993 (the year the Treaty was finalized) to 21,654 adoptions in 2003.[120] The next year, 2004, saw intercountry adoptions reach a peak of 22,990.[121] It appears that overall trends for intercountry adoption worldwide paralleled this trend, with worldwide intercountry adoptions also rising substantially during this period and also peaking in 2004.[122] Of course the predominate place of the United States as a receiving country, often constituting more than half of all intercountry

---

[118] Van Loon Report, *supra* note 58, at 129.

[119] *See* Hague Convention, *supra* note 1, pmbl. & art. 1(b).

[120] TOP COUNTRIES OF ORIGIN, *supra* note 3; ADOPTIONS TO THE UNITED STATES, *supra* note 3; Hubinette, *supra* note 3.

[121] ADOPTIONS TO THE UNITED STATES, *supra* note 3; TOP COUNTRIES OF ORIGIN, *supra* note 3.

[122] *See* Peter Selman, The Movement of Children for Transnational Adoption: "The Rise and Fall of Intercountry Adoption," Selected Tables from Presentation at The Globalization of Motherhood Symposium (Oct. 14–16, 2008) [hereinafter Selman, Movement] (on file with the author); Peter Selman, *The Rise and Fall of Intercountry Adoption in the 21st Century*, 52 INT'L SOC. WORK 575, 575 (2009) [hereinafter Selman, *21st Century*]; *see also* Austl. Intercountry Adoption Network, *Intercountry Adoption Statistics*, AICAN, http://www.aican.org/statistics.php?region=0&type=receiving [hereinafter *Statistics*].

adoptions, is one reason why worldwide trends parallel those for the United States.[123]

The most obvious question that can be asked is whether this rise in intercountry adoptions is related to the Convention. Did the Hague Convention in its first decade succeed in its objective of creating a well-ordered system, free from abusive child laundering and child trafficking practices, despite the failure of the United States, as the leading receiving country, to ratify and implement the Convention during this time period? Is that why adoptions to the United States nearly tripled in the first decade?

Obviously, if that is the case, it was not due to the Convention's influence upon the United States, which did not ratify the Convention until December 12, 2007, effective April 1, 2008.[124] While the United States went through a substantial and lengthy effort to prepare for Hague implementation, the older, pre-Hague system remained largely unchanged and in effect until 2008. Thus, the rise in intercountry adoptions to the United States occurred with the United States employing its pre-Hague approach to intercountry adoptions.

More fundamentally, the Hague Convention's influence on sending nations cannot explain the rise in intercountry adoptions to the United States from 1993 through 2004. Statistically, the rise in intercountry adoptions during this period was produced by only three sending nations: China, Russia, and Guatemala.[125] These three nations comprised 60% to 70% of all adoptions from 2002 to 2004,[126] 53% of all adoptions in 2001,[127]

---

[123] Peter Selman, *Intercountry Adoption in the New Millennium: The "Quiet Migration" Revisited*, 21 POPULATION RES. & POL'Y REV. 205, 211 (2002) [hereinafter Selman, *Quiet Migration*]; *Statistics*, *supra* note 122.

[124] Status Table, *supra* note 2.

[125] *See* ADOPTIONS TO THE UNITED STATES, *supra* note 3; TOP COUNTRIES OF ORIGIN, *supra* note 3.

[126] *Compare* U.S. DEP'T OF STATE, CHINA: COUNTRY INFORMATION, http://adoption.state.gov/country/china.html (last visited Mar. 14, 2010) [hereinafter CHINA: COUNTRY INFORMATION] (citing 4,677 adoptions in 2002, 6,857 adoptions in 2003, and 7,038 adoptions in 2004), *and* U.S. DEP'T OF STATE, GUATEMALA: COUNTRY INFORMATION, http://adoption.state.gov/country/guatemala.html (last visited Mar. 14, 2010) [hereinafter GUATEMALA: COUNTRY INFORMATION] (citing 2,419 adoptions in 2002, 2,328 adoptions in 2003, and 3,264 adoptions in 2004), *and* U.S. DEP'T OF STATE, RUSSIA: COUNTRY INFORMATION, http://adoption.state.gov/country/russia.html (last visited Mar. 14, 2010) [hereinafter RUSSIA: COUNTRY INFORMATION] (citing 2,685 adoptions in 2002, 5,221 adoptions in 2003, and 5,862 adoptions in 2004), *with* ADOPTIONS TO THE UNITED STATES, *supra* note 3 (citing 21,378 total U.S. adoptions in 2002, 21,654 total U.S. adoptions in 2003, and 22,990 total U.S. adoptions in 2004).

[127] In 2001, U.S. citizens adopted 4705 Chinese children. *See* CHINA: COUNTRY INFORMATION, *supra* note 126. They adopted 1610 Guatemalan children. *See* GUATEMALA: COUNTRY INFORMATION, *supra* note 126. And they adopted 4292 Russian children. *See* RUSSIA: COUNTRY INFORMATION, *supra* note 126. This combined total (10,607) represents 53% of the 19,647 children U.S. citizens adopted from around the world in 2001. *See* ADOPTIONS TO THE UNITED STATES, *supra* note 3.

and 57% to 64% of all adoptions from 1997 to 2000.[128] Each of these nations saw extremely large growth in raw numbers from 1993 to 2004: China grew from 330 to 7,038 adoptions,[129] Russia grew from 746 to 5,862 adoptions,[130] and Guatemala grew from 512 to 3,264 adoptions during those years.[131] By contrast, South Korea, a significant sending country for a half century, played no role in the rise of intercountry adoptions from 1993 to 2004, because it experienced no increase in adoptions to the United States during the relevant period.[132] Thus, South Korea steadily sent between 1,500 to 2,000 children each year to the United States from 1993 to 2004, with 1,775 sent in 1993 and 1,713 sent in 2004.[133] South Korea, incidentally, also has never ratified the Hague Convention.[134] Thus, the rise in intercountry adoptions from 1993 to 2004 was built upon the narrow foundation of China, Russia, and Guatemala.

The rise of these three sending nations cannot be attributed to the Hague Convention. China, the most important of the three nations, signed the Convention on November 30, 2000, but did not ratify until September 16, 2005, effective January 1, 2006.[135] Thus, the rise in Chinese adoptions pre-dated ratification of the Convention, and the first year in which the Treaty was effective in China was the first year of numerical decline in

---

[128] *See International Adoption Facts*, THE EVAN B. DONALDSON ADOPTION INSTITUTE, http://www.adoptioninstitute.org/FactOverview/international.html (last viewed Mar. 14, 2010) [hereinafter DONALDSON, *Adoption Facts*] (citing 3,597 Chinese adoptions, 788 Guatemalan adoptions, and 3,816 Russian adoptions, compared with 13,621 total adoptions by U.S. citizens in 1997; 4,206 Chinese adoptions, 911 Guatemalan adoptions, and 4,491 Russian adoptions, compared with 15,583 total adoptions by U.S. citizens in 1998; 4,101 Chinese adoptions, 1,002 Guatemalan adoptions, and 4,348 Russian adoptions, compared with 16,369 total adoptions by U.S. citizens in 1999; and 5,053 Chinese adoptions, 1,511 Guatemalan adoptions, and 4,269 Russian adoptions, compared with 18,477 total adoptions by U.S. citizens in 2000); *cf.* TOP COUNTRIES OF ORIGIN, *supra* note 3 (giving similar but slightly different statistics).

[129] *Compare* DONALDSON, *Adoption Facts*, *supra* note 128 (citing 362 adoptions in 1993), *with* CHINA: COUNTRY INFORMATION, *supra* note 126 (citing 7,038 adoptions in 2004); *cf.* TOP COUNTRIES OF ORIGIN, *supra* note 3.

[130] *Compare* DONALDSON, *Adoption Facts*, *supra* note 128 (citing 746 adoptions in 1993), *with* RUSSIA: COUNTRY INFORMATION, *supra* note 126 (citing 5,862 adoptions in 2004); *see also* TOP COUNTRIES OF ORIGIN, *supra* note 3.

[131] *Compare* DONALDSON, *Adoption Facts*, *supra* note 128 (citing 512 adoptions in 1993), *with* GUATEMALA: COUNTRY INFORMATION, *supra* note 126 (citing 3,264 adoptions in 2004). *See also* TOP COUNTRIES OF ORIGIN, *supra* note 3.

[132] *See* DONALDSON, *Adoption Facts*, *supra* note 128; TOP COUNTRIES OF ORIGIN, *supra* note 3.

[133] *Compare* DONALDSON, *Adoption Facts*, *supra* note 128 (citing 1,775 adoptions in 1993), *with* U.S. DEP'T OF STATE, SOUTH KOREA: COUNTRY INFORMATION, http://adoption.state.gov/country/south korea.html (last visited Mar. 14, 2010) [hereinafter SOUTH KOREA: COUNTRY INFORMATION] (citing 1,713 adoptions in 2004). *See also* TOP COUNTRIES OF ORIGIN, *supra* note 3 (listing 1,716 adoptions in 2004).

[134] Status Table, *supra* note 2.

[135] *Id.*

adoptions from China to the United States.[136] Thus, looking solely at the dates of effective implementation and the corresponding numbers, it is more plausible to blame the Convention for falling numbers than to credit it with rising numbers. Most likely, however, there is simply no association between the Hague Convention and the statistical rise and fall of Chinese adoptions to the United States. It is well documented that the rise in Chinese adoptions was precipitated by China's enforcement of strict population-control policies.[137] An unintended consequence of the so-called one-child policy was large-scale abandonment of baby girls: a phenomenon which itself is a part of a broader demographic issue of tens of millions of missing girls in China's population.[138] The Chinese government responded to the large-scale abandonment, and the accompanying burgeoning population of Chinese social welfare institutions, in part through developing the largest intercountry adoption sending program in the world.[139] Thus, it is China's attempt to manage a part of the unintended consequences of their population control policy that precipitated the rise in Chinese adoptions, rather than the Hague Convention.

It is interesting that the Chinese government developed an intercountry adoption system that was, in structure, Hague compliant, long before China signed or ratified the Convention. The Chinese system combines central government control of intercountry adoption with a system of government orphanages run at the provincial or local governmental level.[140] Thus, the Chinese system not only embodies the concept of a central authority, but also represents the ideal of Hague Conference participants who would have preferred adoption to be run as a government monopoly in which all significant adoption functions, including the care of children, are performed by government. The structure of the Chinese intercountry adoption system

---

[136] *See* CHINA: COUNTRY INFORMATION, *supra* note 126 (citing a peak of 7,903 Chinese adoptions in 2005, 6,492 Chinese adoptions in 2006, 5,453 Chinese adoptions in 2007, and 3,911 Chinese adoptions in 2008).

[137] *See* Nili Luo & David M. Smolin, *Intercountry Adoption and China: Emerging Questions and Developing Chinese Perspectives*, 35 CUMB. L. REV. 597, 599–600 (2005).

[138] *See* VALERIE M. HUDSON & ANDREA M. DEN BOER, BARE BRANCHES: SECURITY IMPLICATIONS OF ASIA'S SURPLUS MALE POPULATION 152–86 (2004); Avraham Ebenstein, *The "Missing Girls" of China and the Unintended Consequences of the One Child Policy*, 45 J. HUM. RESOURCES 87, 88 (2008); Susan Tiefenbrun & Christie J. Edwards, *Gendercide and the Cultural Context of Sex Trafficking in China*, 32 FORDHAM INT'L L.J. 731 (2009); Lesley Wexler, *Allowing Girls to Hold Up Half the Sky: Combining Norm Promotion and Economic Incentives to Combat Daughter Discrimination in China*, 7 CHI. J. INT'L L. 79 (2006).

[139] Luo & Smolin, *supra* note 137, at 597. *See generally* KAY ANN JOHNSON, WANTING A DAUGHTER, NEEDING A SON: ABANDONMENT, ADOPTION, AND ORPHANAGE CARE IN CHINA (Amy Klatzkin ed., 2004) [hereinafter NEEDING A SON].

[140] *See* Luo & Smolin, *supra* note 137, at 602.

was possibly due in part to the influence of the Hague Convention. However, the dominance of the Chinese government in social welfare institutions pre-dated the creation of the Hague Convention,[141] and it would seem characteristic of the Chinese government to open the country to intercountry adoption under the control and regulation of the Central government. From the Chinese perspective, intercountry adoption has diplomatic significance, and hence would be a matter subject to Central Government control.[142] Therefore, even if the Chinese government self-consciously used the Hague Convention's central authority structure as a model, internal policy considerations were probably the major impetus toward creation of a centrally-controlled, government-centered system.

Thus, both the structure of the Chinese system, and the rise of intercountry adoptions in China from 330 in 1993, to 6,857 a decade later in 2003,[143] most likely are due primarily to internal Chinese policies and interests, rather than the Hague Convention. The rise in intercountry adoptions from China was driven primarily by the response of the Chinese government to the unintended consequences of their population control policies, rather than by the influence of the Hague Convention.

Russia, while it signed the Hague Convention on September 7, 2000, has never ratified the Hague Convention.[144] Russia's increase in intercountry adoptions to the United States, from 746 in 1993, to 5,221 a decade later in 2003, and peaking in 2004 with 5,862 adoptions,[145] is, like China's, dramatic. Since Russia has never ratified the Hague Convention, this rise appears unrelated to the Convention. Like China, Russia's dramatic increase in intercountry adoption appears related to developments within Russia.

The first development within Russia was a longstanding failure of child welfare policy and practice within the Soviet Union and Russia. Both the Soviet Union and the Russian Federation emphasized institutional care rather than foster care for abandoned, relinquished, abused, and neglected

---

[141] *See* NEEDING A SON, *supra* note 139.

[142] *See* Luo & Smolin, *supra* note 137, at 616.

[143] *Compare* TOP COUNTRIES OF ORIGIN, *supra* note 3 (citing 330 adoptions in 1993), *and* DONALDSON, *Adoption Facts*, *supra* note 128 (citing 362 adoptions in 1993), *with* CHINA: COUNTRY INFORMATION, *supra* note 126 (citing 6857 adoptions in 2003).

[144] *See* Status Table, *supra* note 2.

[145] *Compare* DONALDSON, *Adoption Facts*, *supra* note 128 (citing 746 adoptions in 1993), *with* RUSSIA: COUNTRY INFORMATION, *supra* note 126 (citing 5221 adoptions in 2003 and 5862 adoptions in 2004); *see also* TOP COUNTRIES OF ORIGIN, *supra* note 3.

children. In addition, children with disabilities were abandoned and institutionalized in significant numbers. Thus, the government and society failed to provide appropriate services to assist and encourage families in keeping their children, and failed to develop appropriate alternatives, such as foster care or other family-based care, for children who could not remain with their families. Domestic adoption was very underdeveloped. Unfortunately, the condition and care of institutionalized children frequently was very poor, leading to profound damage in the development and lives of children.[146]

The collapse of the economy after the fall of communism further aggravated the problems of abandonment and poor quality institutional care. The problem of Russia's institutionalized children festered. At the same time, the fall of communism opened Russia in significant and practical ways to the West, making the large-scale development of intercountry adoption a practical possibility. In this context, intercountry adoption developed as a way of getting Russia's children out of highly damaging institutional care. However, even at its height, intercountry adoption involved only a small percentage of Russia's population of institutionalized children, and thus never served as a primary solution for those children.[147]

The third substantial contributor to the rise in intercountry adoptions was Guatemala. Guatemala exemplifies a country that rose in numbers while having a system clearly out of conformity to Hague Convention standards.[148] Indeed, Guatemala had the highest per-capita rate of

---

[146] *See* RUBEN GALLEGO, WHITE ON BLACK (Marian Schwartz trans., Harcourt Books 2006); KATHLEEN HUNT, ABANDONED TO THE STATE: CRUELTY AND NEGLECT IN RUSSIAN ORPHANAGES (Human Rights Watch 1998); DAVID TOBIS, MOVING FROM RESIDENTIAL INSTITUTIONS TO COMMUNITY-BASED SOCIAL SERVICES IN CENTRAL AND EASTERN EUROPE AND THE FORMER SOVIET UNION (2000); Lanny Endicott, Lecture on Child Welfare in Russia: A Brief History & Current Opportunities for the Practice and Policy Lecture Series (Oct. 17, 2008), *available at* http://lectureseries.oucpm.org/?p=176.; Kate Pickert, *When the Adopted Can't Adapt*, TIME, June 28, 2010, *available at* http://www.time.com/time/magazine/article/0,9171,1997439,00.html [hereinafter *When the Adopted Can't Adapt*].

[147] *See* ALAN PHILPS & JOHN LAHUTSKY, THE BOY FROM BABY HOUSE 10: FROM THE NIGHTMARE OF A RUSSIAN ORPHANAGE TO A NEW LIFE IN AMERICA (2009); Fred Hiatt, *Russia's Unwanted Children Being Adopted By West*, WASH. POST, Feb. 18, 1992, at A01; Miriam Horn, *A Dead Child, A Troubling Defense*, U.S. NEWS & WORLD REP., July 6, 1997; Gregory Feifer, *Russia's Halt on Adoptions Spotlights Conditions* (NPR radio broadcast Aug. 25, 2007), transcript *available at* http://www.npr.org/templates/transcript/transcript.php?storyId=9810880.

[148] *See* Smolin, *Child Laundering*, *supra* note 16, at 163–70; HAGUE CONFERENCE ON PRIVATE INT'L LAW, REPORT OF A FACT-FINDING MISSION TO GUATEMELA IN RELATIONSHIP TO INTERCOUNTRY ADOPTION (May 2007), *available at* http://www.hcch.net/upload/wop/mission_gt33e.pdf [hereinafter HAGUE GUATEMALA REPORT]. *See generally* Karen Smith Rotabi et al., *International Child Adoption in a Post-Conflict Society: A Multi-Systemic Assessment of Guatemala* [hereinafter Rotabi et al., *Guatemala Assessment*] (on file with the author); Schuster Inst. for Investigative Journalism, *Capsule Overview of Adoption Issues in Guatemala*, BRANDEIS UNIV., http://www.brandeis.edu/investigate/gender/adoption/guatemala.html [hereinafter Schuster, *Guatemala*

intercountry adoption of any top sending country, at its peak sending approximately one out of a hundred children in intercountry adoption to the United States.[149] Guatemala, unlike a number of other Latin American countries, did not participate in the creation of the Hague Convention.[150] Guatemala in 2002 and 2003 went through a very odd process of accession to the Hague Convention, followed by an attempt to invalidate that accession by judicial decision.[151] Guatemala was broadly viewed as an intercountry adoption system rife with child trafficking. In response, many receiving countries did not permit adoptions from Guatemala. Indeed, the vast majority of children sent for intercountry adoption went to the United States.[152] The United States government responded to abuses by requiring a DNA test of mother and child; when this proved inadequate, the government added a second required DNA test.[153] Guatemala's notary system operated through private attorneys, who were paid $15,000-20,000 per adoption by United States adoptive parents.[154] The rise of Guatemala as a sending country was a classic case of an adoption system fueled by

---

Overview]; Schuster Inst. for Investigative Journalism, *News Reports of Adoption Irregularities in Guatemala*, BRANDEIS UNIV., http://www.brandeis.edu/investigate/gender/adoption/GuatemalaNews.html (containing extensive links to news reports) [hereinafter Schuster, *Guatemala News Reports*].

[149] *See* Karen Rotabi & Alexandra W. Morris, *Adoption of Guatemalan Children: Impending Changes Under the Hague Convention for Intercountry Adoption*, SOC. WORK & SOC'Y NEWS MAG., July 30, 2007, *available at* http://www.socmag.net/?p=171; Selman, *21st Century*, *supra* note 122, at 580; Schuster, *Guatemala Overview*, *supra* note 148.

[150] *See generally* Van Loon Report, *supra* note 58; Hague Conference on Private Int'l Law, States Which Participated in the Seventeenth Session (1993), http://www.hcch.net/index_en.php?act=publications.details&pid=2964&dtid=28 (last visited Mar. 10, 2010).

[151] Press Release, Hague Conference on Private Int'l Law, News and Events: Permanent Bureau Team Assists Guatemala with the Implementation of the 1993 Hague Convention (July 19, 2007), *available at* http://www.hcch.net/index_en.php?act=events.details&year=2007&varevent=132 [hereinafter Guatemala Implementation]; HAGUE GUATEMELA REPORT, *supra* note 148; Smolin, *Child Laundering*, *supra* note 16, at 167; Jennifer Banks, Note, *The U.S. Market for Guatemalan Children: Suggestions for Slowing the Rapid Growth of Illegal Practices Plaguing the International Child Adoptions*, 28 SUFFOLK TRANSNAT'L L. REV. 31, 45–46 (2004); Schuster, *Guatemala Overview*, *supra* note 148.

[152] HAGUE GUATEMALA REPORT, *supra* note 148; Selman, *21st Century*, *supra* note 122, at 581; Smolin, *Child Laundering*, *supra* note 16, at 163–64; Haroldo Martinez & Russell Goldman, *U.S. Adoptions Fueled by Guatemalan Kidnappings*, ABC NEWS, May 13, 2008, *available at* http://abcnews.go.com/International/story?id=4787761&page=1; *see* Banks, *supra* note 151, at 39–40; Schuster, *Guatemala Overview*, *supra* note 148; Schuster, *Guatemala News Reports*, *supra* note 148.

[153] Press Release, U.S. Dep't of State, U.S. Embassy Uses DNA Testing to Protect Children Adopted in Guatemala (Aug. 2, 2007), *available at* http://www.jcics.org/DOS%20Guatemala%20Press%20Release%20080207.pdf; Banks, *supra* note 151, at 42–43; *see* Inés Benitez, *Guatemala: Whitewash for 'Adoption Paradise,'* INTER PRESS SERVICE NEWS AGENCY, June 5, 2007, *available at* http://ipsnews.net/news.asp?idnews=38041 (explaining that Canada, Germany, the Netherlands, Spain and the United Kingdom objected to Guatemala's 2002 ascension to the Hague Convention, and "have suspended adoptions from this country because of procedures that are not in compliance with the treaty, anomalies detected in adoption procedures, and reports of the buying and selling of children and baby theft"); Schuster, *Guatemala Overview*, *supra* note 148.

[154] Smolin, *Child Laundering*, *supra* note 16, at 168; Rotabi et al., *Guatemala Assessment*, *supra* note 148, at 22; Schuster, *Guatemala Overview*, *supra* note 148.

inordinately large amounts of money, with hundreds of millions of dollars flowing into this impoverished nation. In any event, it is clear that the Hague Convention made no contribution to Guatemala's adoption system during the period of its rise to the highest per capita sending country in the world, as Guatemala's notary system was generally viewed as being completely out of compliance with Hague standards.

Looking beyond the big three nations of China, Russia, and Guatemala, the most striking feature is the failure to create a stable and coherent system of intercountry adoption. In fact, few nations participate in the intercountry adoption system as sending nations to any statistically significant degree.[155] This statistic holds true when the picture is limited to the kinds of countries some might expect to be sending nations, such as poor or developing nations, nations with a significant population of poor citizens, or nations with particularly large numbers of "orphans." Most of the very poorest countries in the world have only minimal involvement as sending nations, and most of the countries with the largest numbers of literal orphans—children whose parents are dead—also have minimal involvement with intercountry adoption. This pattern was true in the period from 1990 to 1993, when adoption into the United States ranged from 6,500 to 8,500 annual adoptions,[156] remained true when intercountry adoptions peaked in 2004 at nearly 23,000 adoptions, and remains true through the recent decline to about 12,753 adoptions in 2009.[157]

The State Department's past practice of providing data on the top twenty countries in intercountry adoption had been helpful, but potentially misleading. The bottom six nations of the top twenty each had less than 100 adoptions in 2007;[158] with numbers this small, referring to them as "top sending nations" can give the false impression that they are contributing significantly to the statistical total of intercountry adoption. Beyond the "top twenty" nations are many poor and developing nations with significant numbers of literal orphans that send zero to ten children to the United States annually for intercountry adoption. Indeed, the entire continent of

---

[155] *See* ADOPTIONS TO THE UNITED STATES, *supra* note 3; TOP COUNTRIES OF ORIGIN, *supra* note 3; U. S. DEP'T OF STATE, IR3-IH3-IR4-IH4 Visa Issuances for FY 2009, *available at* http://adoption.state.gov/pdf/adoption_visa_issuance_2009.pdf [hereinafter FY 2009]; *see* Selman, Movement, *supra* note 122, at 216–17; Selman, *Quiet Migration*, *supra* note 123; Selman, *21st Century*, *supra* note 122.

[156] *See, e.g.*, TOP COUNTRIES OF ORIGIN, *supra* note 3 (range of 6,472 to 8,481); DONALDSON, *Adoption Facts*, *supra* note 128.

[157] ADOPTIONS TO THE UNITED STATES, *supra* note 3; FY 2009, supra note 155.

[158] *See* TOP COUNTRIES OF ORIGIN, *supra* note 3; ADOPTIONS TO THE UNITED STATES, *supra* note 3.

Africa, with its population of nearly a billion people, in 2007 sent less than half of what the tiny nation of Guatemala, population approximately 14 million, sent, and 68% of Africa's total came from one nation, Ethiopia.[159] Thus, most of Africa for most practical purposes was not a participant in the intercountry adoption system, at least in terms of sending children to the United States.

The failure to create a sustainable, ordered system of intercountry adoption is also reflected in the cycle in which sending nations increase international placements sharply, only to see their adoption systems subject to significant abuses. In response, intercountry adoption programs are sharply curtailed or even closed down. This cycle of abuse has been evident in the entire period of 1990 to the present, involving many Latin American countries, as well as Cambodia, Nepal, and Vietnam. Guatemala is a significant example of this pattern of cyclical, rather than stable, intercountry adoption systems. [160]

Overall, it is clear that the rise in intercountry adoptions in the first decade of the Convention was not caused by the Convention. Neither the most significant receiving nation, the United States, nor the most significant sending nations, China, Russia, and Guatemala, were significantly influenced by the Convention during this period. Moreover, the Convention was not able to create a sustainable system of intercountry adoption, which is not surprising, since many of the most significant participants in intercountry adoption were outside of the Hague system during this time. Instead, most potential sending countries maintained minimal involvement in intercountry adoption, and many that rose in numbers for a time became subject to abuses and either closed or sharply curtailed intercountry adoptions.

---

[159] *See* TOP COUNTRIES OF ORIGIN, *supra* note 3; ADOPTIONS TO THE UNITED STATES, *supra* note 3. In FY 2007, three of the top twenty sending nations were located on the African continent: Ethiopia, Liberia, and Uganda. The total number of adoptions from these three nations totaled 1,622, which included 1,254 Ethiopian children. *See* TOP COUNTRIES OF ORIGIN, *supra* note 3; ADOPTIONS TO THE UNITED STATES, *supra* note 3. Guatemala, by comparison, sent 4,727 children alone in FY 2007, more than twice as many as the three main African nations combined. *See* TOP COUNTRIES OF ORIGIN, *supra* note 3; ADOPTIONS TO THE UNITED STATES, *supra* note 3.

[160] *See* Smolin, *Child Laundering*, *supra* note 16, at 132–46, 163–70; Schuster, *Guatemala Overview*, *supra* note 148; Parents for Ethical Adoption Reform, *Nepal Resources*, PEAR, http://pearadoptinfo-nepal.blogspot.com/ (last visited July 31, 2010); Schuster Inst. for Investigative Journalism, *Corruption in International Adoptions*, BRANDEIS UNIV., http://www.brandeis.edu/investigate/gender/adoption/index.html (last visited July 31, 2010); Schuster Inst. for Investigative Journalism, *Adoption: Vietnam*, BRANDEIS UNIV., http://www.brandeis.edu/investigate/gender/adoption/vietnam.html (last visited July 31, 2010).

B. The Hague Convention and Recent Declines in Intercountry Adoptions to the United States

Intercountry adoptions to the United States have been declining since 2005.[161] These recent declines also are occurring in worldwide intercountry adoption statistics, in part because of the central place of the United States in the worldwide system, but also because declines are occurring in other significant receiving countries.[162] The statistical story of intercountry adoption since 2005, like that from 1993 to 2004, can be told in three parts. On the one hand, China, Russia, and Guatemala, which were primarily responsible for the large rise in intercountry adoptions, also account for much of the recent (and possibly future) declines.[163] Second, there is the special case of Korea, which has had the most stable and long term intercountry adoption program of any significant sending country, but which has been significantly reducing its involvement in intercountry adoption over the last four years. Third, the rest of the prospective sending countries continue to contribute a relatively small percentage of intercountry adoptions. Significantly, within this second group of nations are countries, such as Cambodia, Nepal, and Vietnam, that rise significantly for a time, only to be brought down by significant scandal, usually related to corruption, profiteering, and child laundering.

1. China, Russia, and Guatemela

a. China

The numbers of children coming to the United States from China peaked in 2005, a year after the overall peak of 2004, and have been sharply decreasing since. Intercountry adoptions from China to the United States have declined by more than 50% in just three years:

2004: 7,038

2005: 7,903

2006: 6,492

2007: 5,453

---

[161] *See supra* note 5 and accompanying text.

[162] *See* Selman, Movement, *supra* note 122, at 216–17; Selman, *Quiet Migration*, *supra* note 123; Selman, *21st Century*, *supra* note 122; *Statistics*, *supra* note 122.

[163] *See* ADOPTIONS TO THE UNITED STATES, *supra* note 3.

2008: 3,911

2009: 3,001[164]

The circumstances that made China the major sending nation now appear to have been a temporary phenomenon that is unlikely to be sustained. Whether due to relaxation of population-control policies, increasing incomes, increasing domestic adoptions, a shortage of girls produced by many years of unbalanced sex ratios, or increasing numbers of sex-selective abortions, it appears that fewer baby girls are available for intercountry adoption. One signal of this decrease has been significant baby trafficking scandals in China, some associated with intercountry adoption.[165] While the Chinese government has restricted press coverage of the child trafficking scandals associated with intercountry adoption, the information that is known suggests that the difficulties began as early as 2002 and have continued, despite sporadic prosecutions, to the present.[166] A country that was at one time overwhelmed with abandoned babies now has a black market in both boy and girl babies, suggesting a shortage. Although China has become increasingly restrictive with regard to who is permitted to adopt,[167] those rules cannot be the cause of the decline in adoptions, for China has increasingly long waiting times for prospective adoptive parents.[168] Thus, the problem is not a lack of potential adoptive parents, but rather a lack of adoptable babies.

China's intercountry adoption system is so large that it will likely remain a leading sending nation for some years to come. It appears, however, that the numbers of children coming from China are unlikely to reach anything close to their recent peaks anytime soon. China is now unable or unwilling to be such a prominent source of children for

---

[164] *Id.*; CHINA: COUNTRY INFORMATION, *supra* note 126; *see also* Australian Intercountry Adoption Network, Intercountry Adoption Statistics, *available at* http://www.aican.org/statistics.php?region=0&type=birth [hereinafter Statistics by Country of Origin].

[165] *See* Patricia J. Meier & Xiaole Zhang, *Sold Into Adoption: The Hunan Baby Trafficking Scandal Exposes Vulnerabilities in Chinese Adoptions to the United States*, 39 CUMB. L. REV. 87, 90–91 (2009); Barbara Demick, *Chinese Babies Stolen By Officials for Foreign Adoption*, L.A. TIMES, Sept. 20, 2009, *available at* http://www.latimes.com/news/nationworld/world/la-fg-china-adopt20-2009sep20,0,491086.story.; Schuster Inst. for Investigative Journalism, *News Reports of Adoption Irregularities in China*, BRANDEIS UNIV., http://www.brandeis.edu/investigate/gender/adoption/ChinaNews.html (last visited July 31, 2010) [hereinafter Schuster, *China Reports*].

[166] *See* Meier & Zhang, *supra* note 165; Demick, *supra* note 165; Schuster, *China Reports*, *supra* note 165.

[167] CHINA: COUNTRY INFORMATION, *supra* note 126 (listing China's restrictive policies on whom may adopt, which became effective May 1, 2007).

[168] *See* David Crary, *Wait Times Expand Sharply for Adoptions from China*, BOSTON GLOBE, Apr. 10, 2008, *available at* http://www.boston.com/news/nation/articles/2008/04/10/wait_times_expand_sharply_for_adoptions_from_china.

intercountry adoption. It is also notable that an increasing percentage of children offered for adoption by China are older and special needs children; thus, the reduced availability of healthy infants and toddlers is even greater than the raw numbers would indicate.

b. Russia

Adoptions from Russia to the United States peaked in 2004, and have declined dramatically since then:

2004: 5,862

2005: 4,631

2006: 3,702

2007: 2,303

2008: 1,857

2009: 1,586[169]

Some of the declines may be due to laudable Russian efforts to de-institutionalize children through foster care and domestic adoption.[170] Unfortunately, intercountry adoptions from Russia have also been negatively impacted by various abusive practices and poor practice standards, which have produced intermittent backlashes against intercountry adoption. Interestingly, child laundering is not the primary abuse within Russian adoptions, as few if any children come into orphanage care through abduction or purchase. There are potential fraud issues related to the question of whether children are actually free for adoption because most of the children have some kind of family tie. More broadly, the Russian system has been chaotic and open to various forms of corruption. Adoptive parents and adoption agencies from the United States have felt an over-riding impetus to get children out of the institutions in any way possible. They have been confronted with government officials who sometimes appear uncooperative or corrupt. The net result has been an often arbitrary and corrupted system with poor practice standards.[171]

---

[169] RUSSIA: COUNTRY INFORMATION, *supra* note 126; *see also* Statistics by Country of Origin, *supra* note 164.

[170] *See* Anna Arutunyan, *Foreign Adoptions Down in Russia As Foster Care Grows*, MOSCOW NEWS, Nov. 27, 2008, *available at* http://www.mnweekly.ru/news/20081127/55359067.html.

[171] For one Russian view in film form, see THE ITALIAN (Sony Pictures 2005); *see also* Janet Kriel, *The Bureaucratic Hell People Recommend*, PASSPORT MOSCOW MAG., *available at* http://www.passportmagazine.ru/

The poor practice standards have been fueled by a lack of professionalism and standards among agencies in the United States, and problems of corruption, chaos, and apathy in Russia. The most dramatic results of these problems have been the well-publicized horror of fourteen Russian adoptees being killed by their American adoptive parents.[172] At least some of these deaths seem to be the result of sending psychologically damaged, post-institutionalized children into adoptive homes unprepared for such children, and a lack of post-adoption resources to assist adoptive families and their children. It turns out that getting children out of institutions at all costs, without accurate and thorough evaluation of children and adoptive homes, intensive preparation of adoptive parents, and accessible and affordable post-adoption evaluation and services, is a prescription for disaster. Although fourteen out of the thousands of Russian adoptions is a small number, it is nonetheless a striking phenomenon. Furthermore, the fourteen dead children represent the extremes of a much broader phenomenon of post-institutionalized Russian children doing very poorly in their new environments. There is a much larger group of Russian children adopted into the United States who have been institutionalized, hospitalized, placed into the United States foster care system, or otherwise have failed to adapt to their adoptive placements. The highly publicized case of the Russian boy sent by his adoptive mother back to Russia is just one of numerous cases where adoptive parents have been overwhelmed by the behavior of their adopted Russian child.[173] Indeed, there is a significant literature and set of actors concerned with the profound problems of post-institutionalized Russian (and Eastern European) children.[174]

The poor practice standards involved in Russian adoptions were dramatically portrayed by the infamous adoption of Maria (Masha) Nikolaevna Yashenkova by the pedophile Matthew Mancuso.[175] Mancuso was a pedophile who, as a divorced, single male, requested adoption of "a

---

article/426.

[172] *See, e.g.*, *New Adoption Death Alarms Russia*, BBC NEWS, July 12, 2005, http://news.bbc.co.uk/2/hi/europe/4676513.stm [hereinafter *Adoption Death*].

[173] *See* Martin T. Stein et al., *International Adoption: A 4-Year-Old-Child with Unusual Behaviors Adopted at 6 Months of Age*, 114 PEDIATRICS 1425, 1425 (2004); *When the Adopted Can't Adapt*, *supra* note 146; *How to Prevent Adoption Disasters*, *Room for Debate*, N. Y. TIMES (Apr. 15, 2010), *available at* http://roomfordebate.blogs.nytimes.com/2010/04/15/how-to-prevent-adoption-disasters/.

[174] *See, e.g.*, DR. RONALD S. FEDERICI, HELP FOR THE HOPELESS CHILD: A GUIDE FOR FAMILIES (2d ed. 2003) ("With Special Discussion for Assessing and Treating the Post-Institutionalized Child"); Stein et al., *supra* note 173; *When the Adopted Can't Adapt*, *supra* note 146.

[175] *See generally* Smolin, *Child Laundering as Exploitation*, *supra* note 16, at 18-29 (describing adoption of Masha by Matthew Mancuso).

girl between the ages of five and six of the Caucasian race."[176] Mancuso turned Masha into a personal sex slave, and a prominent victim of child pornography, with an estimated half of those prosecuted for child pornography found to possess a photograph of Masha.[177] The question of how Mancuso had managed to adopt Masha through normal intercountry adoption channels and abuse her for nearly five years, caused Congress to hold a hearing on her adoption.[178] Critical steps in the intercountry adoption process had failed, including the home-study and post-placement process, despite the involvement of mainstream intercountry adoption actors in Masha's adoption. While Masha's story is extreme and unusual, the poor practice standards that produced it unfortunately are common.

A less dramatic, but still disquieting, episode associated with Russian adoptions has been the bankruptcy of Amrex. Amrex and its associated entities appears to have been significantly involved in a large number of Russian adoptions.[179] The Amrex story has never been well-researched by the mainstream press, and untangling the complex web of organizations, persons, and events associated with Amrex is beyond the scope of this Article. The Amrex story reveals the tendency of United States agencies to become reliant on intermediary persons and entities of questionable motivation and ethics. Such reliance presumably occurs because United States adoption agencies frequently place children from countries in which they lack any real experience or expertise, leaving them completely at the mercy of intermediaries they hire to perform critical functions within the sending countries.

The Russian government's response to their scandal-prone intercountry adoption system has been to place foreign agencies through difficult re-licensing and accreditation processes, to intermittently threaten moratoriums, and to begin promoting foster care and domestic adoption. Most recently, Russia and the United States have been moving toward

---

[176] *Sexual Exploitation of Children Over the Internet: Follow-up Issues to the Masha Allen Adoption: Hearing Before the Subcomm. on Oversight and Investigations of the Comm. on Energy and Commerce*, 109th Cong. 106–13 (2006), *available at* http://poundpuplegacy.org/files/SexualExploitationHearing.txt [hereinafter *Masha Allen Adoption Hearing*].

[177] *See id.*; *'Disney World Girl' Found, Safe* (CBS News television broadcast May 16, 2005); Testimony Submitted by Masha Allen to the H. Energy and Commerce Comm., Subcomm. on Oversight and Investigations, *Sexual Exploitation of Children over the Internet: What Parents, Kids and Congress Need to Know about Child Predators* (May 3, 2006), *available at* http://archives.energycommerce.house.gov/reparchives/108/Hearings/05032006hearing1852/Allen.pdf [hereinafter Allen statement].

[178] *See generally Masha Allen Adoption Hearing*, *supra* note 176.

[179] *See generally* Michael Pearson, *Adoption Services Firm Investigated Over Missing Funds*, ATL. J.-CONST., Oct. 3, 2006, *available at* http://poundpuplegacy.org/node/14107.

negotiating a bilateral adoption agreement.[180] Recent rising incomes in Russia may also be contributing to a decrease in abandonments, but even if that is so, the numbers of older children in Russian orphanages remains very high.[181] Although Russia has not yet effectively implemented large-scale alternatives to the institutionalization of children, it appears that the Russian government, due to poor practice standards and corruption, has decided to significantly limit intercountry adoption.

c. Guatemala

Guatemalan adoptions peaked later than Chinese and Russian adoptions. While overall adoptions to the United States peaked in 2004,[182] Russian adoptions peaked in 2004,[183] and Chinese adoptions peaked in 2005,[184] Guatemalan adoptions were still rising as late as 2007:

1998: 911[185]

1999: 1,002

2000: 1,516

2001: 1,610

2002: 2,419

2003: 2,328

2004: 3,264

2005: 3,783

2006: 4,135

2007: 4,727

---

[180] *See* Arutunyan, *supra* note 170; Office of Children's Issues, *Russia: Adoption Notice*, U.S. DEP'T. OF STATE (July 27, 2010), http://adoption.state.gov/news/russia.html; Joints Statements by the Presidents of the United States of America and the Russian Federation Concerning Intercountry Adoption, THE WHITE HOUSE (June 24, 2010), http://www.whitehouse.gov/sites/default/files/US-Russia%20Joint%20Statement%20on%20Intercountry%20Adoption.pdf; Anne Garrels, *Russian Attitudes Colder Toward Foreign Adoptions*, NATIONAL PUBLIC RADIO (Dec. 17, 2008), http://www.npr.org/templates/story/story.php?storyId=98360183 [hereinafter *Russian Attitudes*].

[181] *See Russian Attitudes*, *supra* note 180.

[182] *See supra* notes 3–5 and accompanying text.

[183] *See* RUSSIA: COUNTRY INFORMATION, *supra* note 126.

[184] *See* CHINA: COUNTRY INFORMATION, *supra* note 126.

[185] *See* TOP COUNTRIES OF ORIGIN, *supra* note 3; DONALDSON, *Adoption Facts*, *supra* note 128.

2008: 4,122

2009: 756[186]

The stark decline in intercountry adoptions from Guatemala can be attributed to the inevitable collapse of a system broadly viewed as corrupt, money-driven, and rife with child trafficking. From this perspective, the collapse of the system was just a matter of time.[187]

However, the Hague Convention did play a role in the dismantling of Guatemala's notoriously inadequate notarial intercountry adoption system. Guatemala in 2002 and 2003 went through an odd process of joining the Hague Convention by accession and then seeking to reverse that decision through a decision of the Constitutional Court of Guatemala.[188] The Guatemalan government subsequently viewed itself as not bound by the Convention, allowing the non-Hague compliant notary system to continue, bringing an estimated $300 to $400 million in additional adoption fees into the hands of Guatemalan attorneys in the period from 2003 to 2008.[189] The Hague Conference on Private International Law, however, viewed Guatemala as still bound by the Convention, and thus implicitly as a Hague nation in breach, rather than as a non-Hague nation.[190] As the United States moved toward finally ratifying the Hague Convention, it publicly agreed (as early as December 2006) that Guatemala should be viewed as a Hague country.[191] This meant that once the United States ratified the Hague Convention, it could no longer receive children from Guatemala under the non-compliant notarial system. By contrast, if Guatemala had been viewed as a non-Hague country, the United States could have continued to receive children under the notarial system, since those adoptions would not have been non-Hague adoptions and thus not evaluated under Hague standards. One wonders if the United States' decision to view Guatemala as a Hague country was strictly a legal

---

[186] GUATEMALA: COUNTRY INFORMATION, *supra* note 126; TOP COUNTRIES OF ORIGIN, *supra* note 3.

[187] *See* sources cited *supra* note 148; Smolin, *Child Laundering*, *supra* note 16, at 135–42, 163.

[188] *See* Smolin, *Child Laundering*, *supra* note 16, at 135–42, 163–70; Schuster, *Guatemala Overview*, *supra* note 148; Guatemala Implementation, *supra* note 151; HAGUE GUATEMALA REPORT, *supra* note 148.

[189] The calculation is my own, employed by multiplying the numbers of adoptions to the United States during this period (22,359), GUATEMALA: COUNTRY INFORMATION, *supra* note 126, by the typical amounts paid to Guatemalan attorneys ($15,000 to $20,000 per adoption), Smolin, *Child Laundering*, *supra* note 16, at 168; Rotabi et al., *Guatemala Assessment*, *supra* note 148; Schuster, *Guatemala Overview*, *supra* note 148.

[190] *See* Guatemala Implementation, *supra* note 151; HAGUE GUATEMALA REPORT, *supra* note 148.

[191] *See* U.S. DEP'T OF STATE, GUATEMALA: INTERCOUNTRY ADOPTIONS AND THE HAGUE CONVENTION (Dec. 15, 2006), http://www.jcics.org/DOS%20Guatemala%20Update%20-%20Dec%2015.pdf.

determination, or was driven by a desire to find a face-saving way of extracting the United States from the increasing embarrassment of being the primary receiving nation for the most notoriously corrupt large-scale sending nation in the world. This legal determination by the United States was likely intended to serve as an incentive for Guatemala to return to the path of implementing the Hague Convention. By this time, the vast majority of intercountry adoptions from Guatemala were to the United States, given the reluctance of other receiving nations to deal with Guatemala's notoriously corrupt notarial system.[192]

During 2007, the State Department intercountry adoption website issued various public warnings about adopting from Guatemala. Thus, in February 2007, the U.S. State Department posted a warning on its adoption website: "[DOS] strongly cautions American prospective adoptive parents contemplating adoption in Guatemala to carefully consider their options at this time."[193] The public posting cited the arrest in the United States of a "well-known adoption facilitator," and other indications that "the adoption process in Guatemala is not adequately protecting all children."[194] DOS specifically cited instances where "an imposter purports to be the biological mother of the child and where the biological parent(s) have been deceived and there has been no true relinquishment of parental rights."[195] Then, in March 2007, DOS went further, stating that "we cannot recommend adoption from Guatemala at this time. . . . [A]dopting a child in a system that is based on a conflict of interests, that is rampant with fraud, and that unduly enriches facilitators is a very uncertain proposition with potential serious life-long consequences."[196]

The Guatemalan Congress in May 2007 reaffirmed Guatemala's adherence to the Hague Convention, effective the end of 2007 (or January 1, 2008). Shortly thereafter, in August 2007, "dozens of Guatemalan police, soldiers, and government officials" raided a foster home as a part of an investigation of intercountry adoption-related trafficking.[197] The political

---

[192] *See supra* note 153 and accompanying text; Statistics by Country of Origin, *supra* note 164.

[193] U.S. DEP'T OF STATE, GUATEMALA STATUS OF INTERCOUNTRY ADOPTIONS, http://travel.state.gov/family/adoption/intercountry/intercountry_3147.html (last visited Mar. 14, 2010).

[194] *Id.*

[195] *Id.*

[196] *Frequently Asked Questions: Prospective Adoptive Parents of Guatemalan Children*, JOINT COUNCIL ON INT'L CHILDREN'S SERVS., http://www.jcics.org/Guatemala%20FAQ%20-%20March%202007.pdf (last visited Mar. 14, 2010).

[197] Mica Rosenberg, *Cleaning Up International Adoptions*, TIME, Aug. 29, 2007, *available at*

motivations for this stark change in Guatemalan policy are beyond the scope of this Article. Ironically, the Guatemalan government, faced with the threat of the United States closing down adoptions from Guatemala, was able in turn to threaten the United States with a Guatemalan-led closure, based on a refusal to send children to a non-Hague country, since the United States' ratification was not effective until April 1, 2008, while Guatemala's ratification was effective January 1, 2008.[198] The Guatemalan Congress, in December 2007, passed legislation creating a Guatemalan Central Authority, but permitted cases in process prior to December 31, 2007, to be completed under prior adoptions laws.[199] The ultimate result was that the old notarial system was closed down for new cases, with various measures being instituted to process approximately 900 pipeline or transition cases which had been initiated under the old system.[200]

In evaluating the 2008 and 2009 statistics, it should be kept in mind that these are fiscal year numbers: fiscal year 2008 actually began October 1, 2007, a time when cases were still being actively processed under the old system. Nonetheless, it is apparent that during 2008 and 2009 a substantial number of cases initiated under the old system were being processed as transition or pipeline cases. As the processing of pipeline cases has slowed, and as the Guatemalan government has failed to re-open a new, Hague-compliant system, the number of cases in 2009 dramatically fell.

In late 2009, the Guatemalan government announced a two year pilot program for "small numbers" of sibling groups, special needs, and older children, and the United States indicated possible interest. The United States struck a cautious tone in indicating that these steps did not necessarily indicate that new adoptions would start being processed "any time soon."[201] Rather, the United States remains "deeply concerned about the history of

---

http://www.time.com/time/printout/0,8816,1657355,00.html.

[198] *See* Press Release, U.S. Dep't of State, Adoptions in Guatemala: Department of State Urges American Citizens Not to Start Adoptions in Guatemala (Sept. 28, 2007), *available at* http://guatemala.usembassy.gov/uscawarning20070928.html ("Guatemala will stop processing adoptions to the United States beginning January 1, 2008, until U.S. accession to the Hague Convention takes effect.").

[199] Press Release, U.S. Citizenship and Immigration Servs., USCIS Announces New Guatemalan Adoption Legislation (Jan. 25, 2008), *available at* http://www.uscis.gov/files/pressrelease/Guatemala_Adoption_Law_Update_01.25.08.pdf.

[200] *U.S. Not Processing Guatemalan Adoptions*, GUAT. ADOPTION INFO. & NEWS, Mar. 6, 2009, http://www.guatadopt.com/archives/000979.html (referring to "more than 893 transition adoption cases").

[201] U. S. DEP'T OF STATE, GUATEMALA ADOPTION ALERT, http://adoption.state.gov/news/guatemala.html (last visited Mar. 14, 2010) [hereinafter GUATEMALA ALERT]; *see also Guatemala Hague Info: How Long Will It Take to Resume Adoptions from Guatemala?*, HAGUE EVALUATION, http://hagueevaluation.com/guatemala (last visited Mar. 14, 2010).

malfeasance in intercountry adoptions from Guatemala."[202] The State Department indicated that it had not yet evaluated whether Guatemala's new system was Hague compliant, apparently because details of the new system had not yet been released.[203] Thus, it seems likely that the numbers of intercountry adoptions from Guatemala in 2010 will be even lower than for 2009, as the processing of the remaining pipeline cases and the construction of a new, Hague-compliant system are both progressing quite slowly. Beyond that, if Guatemala does successfully build a new, Hague-compliant intercountry adoption system, the numbers of intercountry adoptions processed under such a system are likely to be significantly lower than occurred during the boom years under the corrupt notarial system.

2. South Korea and Declining Adoptions

South Korea has made a modest, yet significant, contribution to the decrease in adoptions from 2005 to 2009. As noted above, South Korean adoptions to the United States had been quite stable during the period of increasing adoptions, from 1993 to 2004, operating within a relatively narrow range of 1,500 to 2,000 annually, with 1993 (1,775) being slightly higher than 2004 (1,713). In the years since, South Korea has declined to a new norm of around 1,000 adoptions per year to the United States:

2005: 1,628

2006: 1,373

2007: 938

2008: 1,065

2009: 1,080[204]

South Korea has been a significant sending country for a half-century. Intercountry adoption from South Korea was initially a response to the dislocation and devastation of the Korean War, and the related issue of children fathered by United States soldiers.[205] The large-scale continuation

---

[202] GUATEMALA ALERT, *supra* note 201.

[203] *Id.*

[204] *See supra* note 133 and accompanying text.

[205] Tobias Hubinette, *Korean Adoption History*, *in* GUIDE TO KOREA FOR OVERSEAS ADOPTED KOREANS (Eleana Kim, ed., Overseas Korean Foundation 2004), *available at* http://www.tobiashubinette.se/adoption_history.pdf [hereinafter *Korean Adoption History*]; Catherine M. Bitzan, *Our Most Precious Resource: How South Korea Is Poised to Change the Landscape of International Adoption*, 17 MINN J. INT'L L. 121, 124–25 (2008); TOBIAS HUBINETTE, COMFORTING AN ORPHANED NATION 52–63 (Stockholm University 2005) [hereinafter ORPHANED NATION].

of intercountry adoption decades after cessation of active hostilities, and in times of successful economic development and significant prosperity, has become in many ways an anomaly. This continuation of intercountry adoption was based on two cultural factors: a lack of a cultural space for unwed mothers, leading a significant proportion of unwed mothers in Korea to relinquish their children for adoption, and the reluctance of South Korean couples and families to adopt.[206] These two cultural factors, coupled with the institutional momentum of the intercountry adoption system, led to the aberration of a country of substantial incomes and wealth remaining a substantial sending nation decades after attaining advanced economic development. Logically, a country of South Korea's income strata should be able to absorb into Korean families all of its own children in need of adoption. Hence, it should come as no surprise that the numbers of children leaving Korea for adoption declined over the last four years.[207]

South Korea is making efforts to promote domestic adoption as a way to take care of children within Korea, within the context of a society concerned with a very low reproduction rate and an aging and declining population. Some are making nascent efforts to create a cultural space for single/unwed mothers. There are concerns that domestic adoption within Korea often is practiced in a secretive way that fails to create or safeguard accurate records and information, a serious detriment when so many adoptees eventually seek the truth about their origins. Some may be concerned that South Korea will arbitrarily restrict the numbers of intercountry adoption before the country is culturally prepared to provide viable alternatives for children residing in orphanages. [208] While the full complexities of Korean adoptions are beyond the scope of this Article, in

---

[206] *See Korean Adoption History*, *supra* note 205; Bitzan, *supra* note 205, at 125–26; ORPHANED NATION, *supra* note 205, at 63–80; KOREAN WOMEN'S DEVELOPMENT INSTITUTE, REVIEWING ISSSUES ON UNWED MOTHERS' WELFARE IN KOREA: INTERCOUNTRY ADOPTION, RELATED STATISTICS, AND WELFARE POLICY IN DEVELOPED COUNTRIES (May 2009), *available at* http://jjtrenka.files.wordpress.com/2010/04/small-booklet-may-2009-kumsn.pdf [hereinafter KWDI]; Choe Sang-Hun, *Group Resists Korean Stigma for Unwed Mothers*, N.Y. TIMES, Oct. 7, 2009, at A6, *available at* http://www.nytimes.com/2009/10/08/world/asia/08mothers.html?_r=1 [hereinafter *Unwed Mothers*].

[207] *See* SOUTH KOREA: COUNTRY INFORMATION, *supra* note 133.

[208] *See* KWDI, *supra* note 206; *Unwed Mothers*, *supra* note 206; *Korean Adoption History*, *supra* note 205, at 133–37; Bitzan, *supra* note 205, at 125–26; Jane Jeong Trenka, *I heart KWDI and KUMNS*, JANE'S BLOG, (Apr. 28, 2010, 10:49 pm), http://jjtrenka.wordpress.com/2010/04/28/i-heart-kwdi-and-kumsn-2/; Lisa B. Ellingson, *Creating a Climate for "Best Interests": Recognizing Intercountry Adoption as a Disfavored Placement under the Hague Convention*, *in* PROCEEDINGS OF THE FIRST INTERNATIONAL KOREAN ADOPTION STUDIES RESEARCH SYMPOSIUM 15 (ed. Kim Park Nelson July 31, 2007) (available from author); Boon Young Han, *Contextualizing Modern Korean Adoption Law*, *in* PROCEEDINGS OF THE FIRST INTERNATIONAL KOREAN ADOPTION STUDIES RESEARCH SYMPOSIUM 37 (ed. Kim Park Nelson July 31, 2007) (available from author).

terms of the demographics of adoption it seems most likely that South Korean adoptions in the future will either maintain the new, lower rate of about one thousand children sent to the United States, or else, more likely, decline even further.

3. Declining Adoptions and the Failure To Create Sustainable Intercountry Adoption Systems in Most Prospective Sending Nations

The failure of most of the rest of the likely sending nations to develop sustainable intercountry adoption programs of any statistical significance is a very significant factor in past and (likely) future declines in intercountry adoption. Concerns with child trafficking in intercountry adoption were prominent enough to play a major role in the creation of the 1993 Hague Convention on Intercountry Adoption.[209] It took some fifteen years after creation of the treaty for the United States to ratify the agreement.[210] In the meantime, the Convention has been unable to create conditions under which significant numbers of children can be adopted internationally in systems free of significant profiteering, corruption, child trafficking, and child laundering. Instead, most countries avoid child laundering by minimizing or avoiding intercountry adoption, while other countries with even moderately significant intercountry adoption programs seem to suffer from continuing corruption and child laundering problems. This massive regulatory failure has made it impossible to develop a sustainable intercountry adoption system in the vast majority of potential sending nations. This regulatory failure is apparently not due to the imperfections of the Convention, but rather has been caused by the failure of significant receiving and sending nations to ratify and effectively implement the Convention.

Currently, United States intercountry adoption agencies are attempting to open and scale up new sending nations because intercountry adoptions are falling rapidly in China, Russia, and Guatemala, and adoption scandals are limiting intercountry adoptions from Cambodia, India, Nepal, and Vietnam. The most prominent new nation in statistical terms is Ethiopia, which has thus far experienced extreme rates of growth:

1999: 42

2000: 95

---

[209] *See supra* notes 26–117 and accompanying text.

[210] Status Table, *supra* note 2.

2001: 165

2002: 105

2003: 165

2004: 284

2005: 442

2006: 731

2007: 1,254

2008: 1,724

2009: 2,277[211]

No one anticipates, however, that Ethiopia will be able to replace more than a small fraction of the declines in China, Russia, and Guatemala. Further, there are already indications that Ethiopian adoptions, as they have risen sharply in number, have increasingly been subject to abusive adoption practices.[212] Ethiopia may be poised to be the next illustration of the cycle of abuse, whereby nations with rapidly increasing numbers are beset with abusive adoption practices, corruption, and scandal, eventually followed by shutdowns. With the special exception of the sharp increase in Haitian adoptions subsequent to the earthquake, there are no indications of other nations that can scale up within a few years to sending a thousand or more children annually to the United States for intercountry adoption.

Indeed, a look at the top fifteen countries for 2008 indicates why there were further declines in 2009, and further declines are expected in 2010:

(1) Guatemala: 4,122

(2) China: 3,911

(3) Russia: 1,857

(4) Ethipia: 1,724

(5) South Korea: 1,065

(6) Vietnam: 748

---

[211] U.S. DEP'T OF STATE, ETHIOPIA: COUNTRY INFORMATION, http://adoption.state.gov/country/ethiopia.html (last visited Mar. 14, 2010).

[212] *See Fly Away Children*, *supra* note 19; *Fly Away Home*, *supra* note 19; Schuster Inst. for Investigative Journalism, *Adoption: Ethiopia*, BRANDEIS UNIV., http://www.brandeis.edu/investigate/gender/adoption/ethiopia.html [hereinafter Schuster, *Ethiopia Report*].

(7) Ukraine: 490

(8) Kazakhstan: 380

(9) India: 308

(10) Columbia: 306

(11) Haiti: 301

(12) Philippines: 292

(13) Liberia: 254

(14) Taiwan: 219

(15) Nigeria: 149[213]

Of the nations in the top fifteen in 2008, three of them—Guatemala, Vietnam, and Liberia—representing more than 5,000 adoptions in 2008, are currently closed to new cases, all of them due in part to significant allegations of abusive adoption practices.[214] Haiti and India are both subject to significant and repeated charges of abusive adoption practices. China, Russia, and South Korea all appear to be in the process of permanently reducing the number of children they send for intercountry adoption. Under these circumstances, significant declines in intercountry adoption are expected, and it appears more and more likely that the prior period, from 1993 to 2004, will in retrospect appear as an extraordinary and temporary boom.

IV. THE HAGUE CONVENTION AND LATIN AMERICA

The impact of the Hague Convention on intercountry adoption from Latin America is controversial. As the preparatory materials reveal, Latin American countries, excluding Guatemala, played a significant role in the creation of the Convention. Further, those countries were particularly concerned with child trafficking issues.[215]

Some Latin American countries were sending significant numbers of children to the United States in the early 1990s, immediately before and

---

[213] *See* ADOPTIONS TO THE UNITED STATES, *supra* note 3.

[214] Smolin, *Child Laundering*, *supra* note 16, at 134; Nadene Ghouri, *Liberia's 'Orphan' Trade*, BBC NEWS, Nov. 14, 2008, *available at* http://news.bbc.co.uk/2/hi/programmes/crossing_continents/7726687.stm; U.S. DEP'T OF STATE, LIBERIA, http://www.state.gov/g/drl/rls/hrrpt/2007/100489.htm (last visited Mar. 1, 2010).

[215] *See supra* notes 106–10 and accompanying text.

after the creation of the Convention.[216] In many instances, those numbers sharply declined.[217] The following chart represents the high statistical point for some Latin American countries, compared with the numbers for 2009[218]:

Country	Adoption (1990s)	Adoptions (2009)
Brazil	228 (1990)	32
Columbia	521 (1991)	238
Costa Rica	64 (1992)	1
Chili	302 (1990)	0
El Salvador	123 (1991)	9
Honduras	249 (1992)	4
Paraguay	483 (1994)	0
Peru	705 (1991)	29

Commentators have drawn sharply different lessons from the large-scale statistical decline in most Latin American sending countries. Some adoption proponents blame anti-adoption ideology and organizations for promoting anti-adoption laws and policies in Latin America, which they argue have wrongfully led to the virtual shutdown of intercountry adoption from much of Latin America. This lesson has led some adoption proponents to defend Guatemala's adoption system, which like others had been significantly involved in adoption in the early 1990s, but unlike the others increased even those significant numbers nearly tenfold.[219] Thus, Guatemalan adoptions to the United States rose from a high in the early 1990s of 512 adoptions (1993), to a remarkable 4,727 adoptions in 2007.[220]

The contrary view is that Guatemala demonstrates what can happen when a long-standing pattern of child trafficking and related abuses in Latin American adoptions goes unchecked. This perspective perceives an

---

[216] *See* TOP COUNTRIES OF ORIGIN, *supra* note 3.

[217] *Id.*

[218] *See* U.S. DEP'T OF STATE, IR3-IH3-IR4-IH4 VISA ISSUANCES FOR FY-2009, *available at* http://adoption.state.gov/pdf/adoption_visa_issuance_2009.pdf ; TOP COUNTRIES OF ORIGIN, *supra* note 3.

[219] *See* Bartholet, Editorial, *supra* note 7.

[220] *Compare* DONALDSON, *Adoption Facts*, *supra* note 128 (citing 512 adoptions in 1993), *with* GUATEMALA: COUNTRY INFORMATION, *supra* note 126 (citing 4,727 adoptions in 2007); *see also* TOP COUNTRIES OF ORIGIN, *supra* note 3.

extraordinary degree of unbridled profiteering and trafficking in the Guatemalan adoption system. From this point of view, Guatemala confirms the wisdom of limiting intercountry adoptions in other Latin American countries, or at least the dangers of failing to respond adequately to adoption systems significantly affected by child laundering and related abuses.

Under either interpretation, child laundering and profiteering charges are central to the analysis of Latin American adoptions. Some adoption advocates tend to perceive child laundering charges as misleading or sensationalist means to further an underlying anti-adoption ideology. The contrary view is that abusive child laundering has been a real and significant phenomenon, which undermines the ideological legitimacy of intercountry adoption. Thus, the issues are not only the extent of such abuses, but also whether charges of child laundering are motivated by, or cause, anti-adoption ideology.

Latin America thus illustrates, as a region, the difficulty of establishing sustainable intercountry adoption systems in a context of charges of child laundering and profiteering. The most common results seem to be either a virtual shutdown or large-scale adoptions in a system notorious for profiteering and child-laundering. The third option, of a sustainable, ethically clean system, is rare: intercountry adoptions from Columbia have been statistically significant and stable over a substantial period of time, but Columbia has been the exception that proves the rule.

These conclusions are limited by their exclusive focus on Latin American adoptions to the United States. Some Latin American countries send children primarily to nations other than the United States, perhaps because of greater cultural ties, perhaps because for many years the United States was not a Hague Convention nation. Hence, a full examination of the impact of the Convention on Latin American adoptions would require a broader consideration of all nations receiving children from Latin America.

V. INTERCOUNTRY ADOPTION, THE HAGUE CONVENTION, AND INDIA: A CAUTIONARY TALE

India, which has a population of more than one billion people, more poor people than any other country in the world, relatively friendly ties with the United States, common use of English in legal and business matters, and an extensive and successful non-Resident Indian (NRI) population in the

United States of some two million people, might seem situated to send large numbers of children in intercountry adoption.[221] Instead, the numbers coming out of India to the United States are, on a per capita and absolute basis, consistently modest:

2009: 297

2008: 308

2007: 411

2006: 319

2005: 323

2004: 406

2003: 473

2002: 453

2001: 542

2000: 500

1999: 472

1998: 478[222]

The numbers from 1990 to 1997 are similar, falling within a range from 331 to 445 annual adoptions.[223]

These modest numbers occur in the context of a country that ratified the Hague Convention on Intercountry Adoption, effective June 2003.[224] Ratification of the Hague Convention had little impact on either the numbers of children coming out of India or on the operation of the Indian adoption system, presumably because the Indian system has long been compatible, in structure and philosophy, with the Hague Convention. Indeed, in 1984, almost a decade before the Hague Convention (1993), the Indian Supreme Court delineated a framework for Indian adoption that presaged, in significant ways, the Convention. Similarly, the Indian

---

[221] This section builds upon the author's previous articles on India's intercountry adoption system. *See generally* Smolin, *Child Laundering*, *supra* note 16, at 146–58; Smolin, *Two Faces*, *supra* note 18.

[222] U.S. DEP'T OF STATE, INDIA: COUNTRY INFORMATION, http://adoption.state.gov/country/India.html (last visited Mar. 14, 2010) [hereinafter INDIA: COUNTRY INFORMATION]; *see also* DONALDSON, *Adoption Facts*, *supra* note 128; TOP COUNTRIES OF ORIGIN, *supra* note 3.

[223] *See* TOP COUNTRIES OF ORIGIN, *supra* note 3; DONALDSON, *Adoption Facts*, *supra* note 128.

[224] Status Table, *supra* note 2.

Supreme Court's adoption case law also presaged in significant ways some provisions of the 1989 Convention on the Rights of the Child (CRC).

A comparison of the Indian Supreme Court instigated system for intercountry adoption, and the Hague Convention, illustrates the following shared principles, concerns, and approaches:

(1) *Emphasis on the need of children to grow up in families, rather than in institutions, and acceptance of intercountry adoption where necessary to achieve this goal.* The language of the Indian Supreme Court and the Hague Convention on the need of children for families is similar. Thus, the Indian Supreme Court stated: "[E]very child has a right to love and be loved and to grow up in an atmosphere of love and affection and of moral and material security and this is possible only if the child is brought up in a family."[225] The Hague Convention preamble begins with the statement: "Recognizing that the 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."[226]

(2) *The subsidiarity principle.* The Indian Supreme Court established the following clear order of priority[227]: (1) Child with biological family;[228] (2) Child adopted within India;[229] (3) Child adopted out of country by NRIs [Non-Resident Indians];[230] (4) Child adopted out of country by "adoptive couples where at least one parent is of Indian origin;"[231] (5) Child adopted out of country by non-Indian origin adoptive parent(s).[232] The Hague Convention and Convention on the Rights of the Child (CRC) include similar principles of subsidiarity, in terms of making family preservation the highest priority, and favoring in-country adoption over intercountry adoption. The Indian Supreme Court's favoritism for Non-resident Indians as adoptive parents is also consistent with the CRC, which emphasizes the "desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background."[233] The Hague Convention

---

[225] Lakshmi Kant Pandey v. Union of India, A.I.R. 1984 S.C. 469 (India).

[226] *See* Hague Convention, *supra* note 1, pmbl.

[227] *See* Smolin, *Two Faces*, *supra* note 18, at 427–28.

[228] *Lakshmi Kant Pandey*, A.I.R. 1984 S.C. at 251.

[229] *Id.* at 252.

[230] Lakshmi Kant Pandey v. Union of India, (1985) Supp. S.C.C. 701, 712–14 (India).

[231] *Id.* at 714.

[232] Lakshmi Kant Pandey v. Union of India, (1984) 2 S.C.C. 244, 252 (India).

[233] CRC, *supra* note 45, art. 20(3). On the general approaches of the CRC and Hague Convention to

similarly requires the State of origin to "give due consideration to the child's upbringing and his or her ethnic, religious and cultural background."[234]

(3) *Concern that unregulated intercountry adoptions could, or had, become a form of "profiteering and trafficking in children."* Both the Indian Supreme Court litigation and the Hague Convention on Intercountry Adoption were in significant part reactions to abusive practices, and thus were occasioned by the need to prevent child trafficking. Both the Indian Supreme Court and the Hague Convention sought to create a regulatory regime that would minimize or prevent child trafficking in the adoption system.[235]

(4) *Creation of a regulatory regime based on central government responsibility for the regulation of and integrity of intercountry adoption.* The Indian Supreme Court called for the creation of the Central Adoption Resource Agency (CARA), while the Hague Convention required the designation of a "Central Authority."[236]

(5) *Requirement that the critical functions involved in intercountry adoption be performed either by, or under the supervision of, the government, or government-accredited entities.* In India the central government (via CARA) accredits Indian agencies involved in intercountry adoptions, while also reviewing each intercountry adoption.[237] The Hague Convention requires that the respective Central Authority of each country of origin (sending nation) and receiving country be responsible for their respective functions, either through governmental entities or accredited entities.[238]

(6) *Limitations on financial aspects of intercountry adoption as a means of avoiding corruption and trafficking.* The Indian Supreme Court instigated limitations and regulations on adoption fees, costs, and donations, based specifically on the concern that uncontrolled money in the adoption system would create the conditions for child trafficking and profiteering.[239] The Hague Convention provisions are comparatively vague, but do forbid "remuneration which is unreasonably high in relation to services rendered," and "improper financial or other gain," while requiring professional fees to

---

subsidiarity, see Smolin, *Two Faces*, *supra* note 18, at 407–17.

[234] *See* Hague Convention, *supra* note 1, art. 16(1)(b).

[235] *See generally* Hague Convention, *supra* note 1; *Guidelines for Adoption from India—2006*, CENTRAL ADOPTION RESOURCE AUTHORITY, http://cara.nic.in/guide_inter_country.htm (last visited Mar. 14, 2010) [hereinafter CARA].

[236] *See* Hague Convention, *supra* note 1; CARA, *supra* note 235.

[237] CARA, *supra* note 235; Smolin, *Two Faces*, *supra* note 18, at 426–50; Arun Dohle, *Inside Story of an Adoption Scandal*, 39 CUMB. L. REV. 131, 136 (2009).

[238] Hague Convention, *supra* note 1, art. 6–13.

[239] CARA, *supra* note 235; Smolin, *Two Faces*, *supra* note 18, at 435–37.

be "reasonable."[240] Accredited bodies are limited to "non-profit objectives" and are subject to financial supervision by the state.[241]

India's creation of a Hague-like system even before the creation of the treaty creates a test case for the hope that the Convention will succeed in its stated objective to "prevent the abduction, the sale of, or traffic in children."[242] Unfortunately, intercountry adoption from India presents a cautionary tale. Significant adoption scandals in Andhra Pradesh, India, have led to the shutdown of adoption from that Indian state since 2001.[243] Those scandals undermined the central premises of the Hague Convention, as they involved repeated and systematic patterns of obtaining children illicitly. The repetitive nature of the scandals undermined the hope that a regulated system free of these abuses could be established in India. Additional adoption scandals in Chennai and Pune further undermined that hope.[244]

Indeed, the irony of the Indian adoption system is that it is simultaneously over-regulated and under-regulated. It is over-regulated because the Indian government has created an unusually large set of institutional actors who must pass upon each intercountry adoption, giving the impression of a slow and over-bureaucratic system. Given the difficulties of governmental corruption in India, the creation of multiple actors increases the opportunities for corruption, as each person who must sign-off on any particular adoption is in a position to demand an illicit payment for their approval.[245] The system, however, is simultaneously under-regulated, in the sense that one of the most important of the anti-corruption regulations in the system, the limitations on adoption fees, costs, and donations, have been systematically ignored and un-enforced.[246]

---

[240] Hague Convention, *supra* note 1, art. 32.

[241] *Id.* art. 11.

[242] *Id.* art. 1(b).

[243] *See generally* Smolin, *Two Faces*, *supra* note 18 (discussing the adoption scandals in Andhra Pradesh).

[244] *See* Smolin, *Child Laundering*, *supra* note 16, at 146–63; Smolin, *Two Faces*, *supra* note 18, at 456–74; Scott Carney, *Meet the Parents: The Dark Side of Overseas Adoption*, MOTHER JONES, Mar.–Apr. 2009, http://www.motherjones.com/politics/2009/03/meet-parents-dark-side-overseas-adoption; *see generally* Dohle, *supra* note 237 (discussing Indian adoption scandals); Schuster Inst. for Investigative Journalism, *News Reports of Adoption Irregularities in India*, BRANDEIS UNIV., *available at* http://www.brandeis.edu/investigate/gender/adoption/india.html (last visited July 10, 2010).

[245] *See* ASHA BAJPAI, ADOPTION LAW AND JUSTICE TO THE CHILD 170 (1996); Smolin, *Two Faces*, *supra* note 18, at 426–50; Dohle, *supra* note 237, at 136–45 (discussing the various agencies involved in the Indian adoption process).

[246] *See* Smolin, *Two Faces*, *supra* note 18, at 449–50; Smolin, *Child Laundering*, *supra* note 16, at 146–63; GITA

The result seems to be a system that, on a per capita basis sends relatively few children for adoption, while still being unable to ensure that those few are truly orphans who were in need of adoption. In addition, the complex and bureaucratic nature of the system makes India appear as an unreliable, slow, and difficult country from which to adopt.

Underlying these difficulties are unresolved questions as to the number of children truly in need of intercountry adoption. On the one hand, some adoption advocates perceive in India the characteristics of a society that should be filled with adoptable orphans: large-scale poverty, strong social disapproval of single motherhood, large numbers of children living in institutions and on the streets, and cultural and legal obstacles to domestic adoption. Based on these perceptions, some might expect that there would literally be hundreds of thousands of children in need of intercountry adoption in India at any given time. Instead, India is sending 300 to 400 children a year to the United States, and approximately 800 to 1,100 a year to all receiving countries.[247] In a context where *twenty-seven million* children are born annually in India, and some 158 million children age six and under live in India, it is clear that intercountry adoption is only affecting a tiny percentage of Indian children.[248]

The contrary viewpoint is that cultural norms in India have changed to the point where there generally are not enough healthy infants available for Indians wishing to adopt. While India does have a substantial number of poor people, it also has a dynamic and growing economy, and a rapidly increasing middle class. Hence, India potentially has large numbers of prospective adoptive parents—even if domestic adoption is limited to the infertile or the middle class, which are questionable limitations.[249] Thus, there are, at a minimum, millions of moderate- to high-income infertile couples in India who could be interested in domestic adoption, in a society where adoption is increasingly socially acceptable. From that perspective, it is entirely possible that the only Indian children truly in need of

---

RAMASWAMY & BHANGYA BHUKYA, THE LAMBADAS: A COMMUNITY BESIEGED: A STUDY ON THE RELINQUISHMENT OF LAMBADA GIRL BABIES IN SOUTH TELANGANA 4–5 (2001) (on file with author).

[247] *See* INDIA: COUNTRY INFORMATION, *supra* note 222; Statistics by Country of Origin, *supra* note 164; Selman, *21st Century*, *supra* note 122, at 380.

[248] Selman, *21st* Century, *supra* note 122, at 380 (.03 children adopted internationally for every 1000 live births); GOVERNMENT OF INDIA: MINISTRY OF WOMEN & CHILD DEVELOPMENT, ANNUAL REPORT 2001–2002, *available at* http://wcd.nic.in/chap6.htm (last visited July 10, 2010).

[249] *See* MCKINSEY GLOBAL INST., THE 'BIRD OF GOLD': THE RISE OF INDIA'S CONSUMER MARKET (May 2007), *available at* http://www.mckinsey.com/mgi/reports/pdfs/india_consumer_market/MGI_india_consumer_full_report.pdf; Daniel H. Pink, *The New Face of the Silicon Age: How India Became the Capital of the Computing Revolution*, WIRED, Feb. 7, 2004, *available at* http://www.wired.com/wired/archive/12.02/india.html.

intercountry adoption are much older and special needs children. The placing of healthy infants and toddlers outside of India could therefore be viewed as a violation of Indian and international standards of subsidiarity, and as a distortion created by the financial incentives associated with international adoption.

The lessons of adoption from India are therefore quite contestable. Central to the controversy are child laundering and related abusive practices. The Indian Supreme Court, faced with the spectre of an unregulated adoption system subject to abusive practices, simultaneously tried to prevent the abuses while justifying the system based upon the best interests of children.[250] If the regulations are ineffective, it undermines the entire ideal of intercountry adoption serving the needs of children for families. A profit-driven adoption system that buys and steals children to supply the wishes of rich Western nation adults lacks any defensible legitimacy.

Some might infer from the Indian experience that regulatory systems are hopeless, and thus that we must either permit intercountry adoptions in the hope that it does more good than harm despite the abuses, or ban intercountry adoption based on the view that it does more harm than good. My own view, however, is that the Indian system instead presents a different, yet unapplied lesson. India teaches the difference between effective and ineffective regulation of intercountry adoption. The specific lesson is that multiplying levels of bureaucracy, review, and institutional actors do not prevent or effectively limit child laundering, so long as the financial incentives for such child laundering remain. Thus, so long as adoption fees and donations are large enough to provide a substantial incentive for child laundering, the system will be vulnerable.

The real irony of the Indian adoption system is that at the outset, more than two decades ago, the Indian Supreme Court correctly stated the necessity of limiting financial aspects of intercountry adoption in the interest of avoiding child trafficking.[251] Yet, over more than two decades, those limitations have been published and then ignored. On the eve of United States' implementation of the Hague Convention in late 2007, the adoption fee and donation policies of many United States agencies were violative of CARA regulations.[252] Further, media and legal sources had frequently

---

[250] *See* Lakshmi Kant Pandey v. Union of India, A.I.R. 1984 S.C. 469, 2 S.C.C. 244 (India).

[251] *See id.*; *see also* Smolin, *Two Faces*, *supra* note 18, at 435–37.

[252] *See* Review of Agency India Fees (on file with author); *see also* Smolin, *Two Faces*, *supra* note 18, at 449–

found prominent Indian agencies to be demanding or receiving fees and donations well beyond CARA guidelines.[253] The primary response of CARA to such violations of its rules was apparently to raise fee limits while banning donations, leaving open the question of whether the new rules would be any more subject to enforcement than the old ones had been. It also raised the worry that the new, higher fee limits would essentially build into legitimate fees ample incentives for child laundering.

V. CONCLUSION

The Hague Convention was a response to the chaotic, corrupt, and abusive practices endemic to pre-Hague intercountry adoptions. The purpose of the Convention was to engender an orderly, ethical, intercountry adoption system free of child trafficking. Adoption advocates also saw the Hague Convention as providing a greater measure of legitimacy for intercountry adoption than exists under the Convention on the Rights of the Child.

Seventeen years after the creation of the Hague Convention, the Convention thus far has failed to meet its goals. Child laundering scandals have continued to arise in the Hague era in sending countries such as Cambodia, Chad, China, Guatemala, Haiti, India, Liberia, Nepal, Samoa, and Vietnam. Many potential sending countries, particularly in Africa and Latin America, have decided to close themselves to all or almost all intercountry adoptions, in significant part based on concern over abusive practices. Years of determined cheerleading by the adoption community have failed to cleanse intercountry adoption from its associations with scandal, corruption, trafficking, and profiteering. The boom in intercountry adoption that accompanied the initial decade after the creation of the Hague Convention is now abating, with further declines anticipated. The legitimacy that intercountry adoption sought has been diminished by a sense of lawlessness, despite the extensive regulation and bureaucratic procedures which often accompany it.

Ironically, then, the United States is entering its own initial period of Hague implementation at a time of failure and decline for intercountry adoption. One danger is that the Hague Convention will be seen as the cause of these declines. In fact, the Hague Convention neither caused the boom in intercountry adoptions that occurred from 1993 to 2004, nor has it been a primary cause of recent declines. The boom in intercountry

---

50; Dohle, *supra* note 237, at 181.

[253] *See* Smolin, *Two Faces*, *supra* note 18, at 456–74; Smolin, *Child Laundering*, *supra* note 16, at 146–63.

adoption was fueled largely by developments in China, Russia, and Guatemala that operated either independent of, or even in spite of, the Hague Convention. The declines in these key sending nations are not due primarily to the Hague Convention, but have arisen because of developments within those nations.

Sometimes nations that choose to close themselves off to intercountry adoption adhere to the Convention. Many other nations, however, which have never ratified the Convention, are also largely closed to intercountry adoption. Similarly, some significant sending nations have joined the Convention, while others have not. The Convention, in short, is flexible enough to encompass sending nations which are either open or closed to intercountry adoption. The Convention concerns minimum safeguards that must be put in place for intercountry adoptions; nations are left free to impose additional safeguards and limitations, or not, as they choose. Thus, it is wrong to blame the Convention itself for the choices some nations make to close themselves to intercountry adoption.

The Hague Convention has not yet been given a fair opportunity to meet its goal of creating an orderly and ethical intercountry adoption system. The Convention could hardly be effective when the United States, by far the most significant receiving nation, stood outside of its terms, and thus the fifteen-year delay in United States ratification necessarily slowed the progress of the Convention. The most significant sending nation, China, did not implement the Convention until 2006 (although in structure the Chinese adoption system has been Hague compliant for many years). Many significant sending nations, including South Korea, Russia, Ethiopia, and Vietnam, have not yet ratified the Convention. Some significant child laundering scandals occurred in nations, like Guatemala and Cambodia, that had, at the time of the scandals, not yet implemented the Convention.

If the Convention is going to be given a chance to work, however, certain lessons should be gleaned. Otherwise, the ratifications by China, the United States, and other significant nations in the intercountry adoption system may prove vain.

A brief summary of the relevant lessons would include the following:

(1) *Formal creation of the procedural and bureaucratic structures mandated by the Hague Convention is insufficient, by itself, to prevent abusive adoption practices.* The example of India teaches that merely having a central authority, accredited actors, and other formal procedural and bureaucratic features of the Hague Convention, is not sufficient to prevent significant corruption and child laundering practices. Although India did not ratify the Hague Convention

until 2003, it has had in formal terms a Hague-style intercountry adoption system since approximately 1990—three years before the Hague Convention was even adopted. Yet, India, both before and after formal Hague ratification, has suffered from very significant adoption scandals involving child laundering, profiteering, falsified documents, and corruption.

(2) *Effective enforcement of strict limitations on fees, donations, and all financial aspects of intercountry adoption is necessary to the achievement of an ordered and ethical intercountry adoption system.* The example of India also teaches that it is critically important for governments to enforce strict limitations on fees and donations. The failure to do so is particularly dramatic in India, as the Indian Supreme Court as far back as 1984 emphasized the necessity to do so to avoid child trafficking, and the Indian government has for several decades published limitations. Yet, the evidence is clear that those limitations have been systematically ignored by mainstream Indian and foreign (i.e., United States) actors in intercountry adoption. Both India and the United States have lacked the political will to enforce India's published limitations on fees and donations. Without such political will, the formal and external features of the Hague Convention may facilitate, rather than limit, child trafficking.

(3) *Government monopolization does not eliminate child laundering or other abusive adoption practices*. The example of China teaches that a virtual government monopoly of a nation's child welfare and intercountry adoption practice does not eliminate the risks of corruption and child laundering/trafficking. Some have argued that it is largely the presence of private, non-governmental actors that has caused intercountry adoption to be subject to abusive practices. China is a test case of that theory, as its system has not only been Hague compliant in structure long before China formally ratified Hague, but also has relied entirely on governmental actors, including a central authority and governmental social welfare institutions and orphanages. Unfortunately, recent evidence indicates that once China ceased to have overwhelming numbers of abandoned babies in its institutions, some institutions which had become dependent on intercountry adoption donations and fees began offering money for babies. Government orphanages, in short, are also subject to monetary incentives and corruption.

(4) *Governmental responses to child laundering have typically been extremely inadequate due to a lack of political will to confront the problem, a lack of understanding of the nature of child laundering, and the inherent limitations and dilemmas of responding to child laundering after it has already occurred.* The past treatments of significant

child laundering scandals in many sending nations, including Cambodia, China, Guatemala, India, Samoa, and Vietnam, indicate how difficult it can be for both receiving and sending nations to respond to this kind of wrongdoing. Authorities in sending nations often minimize the extent and significance of the misconduct. Ironically, by the time authorities take action, political and public pressure has built, and the government imposes a moratorium or ban. Receiving nations seem to only seriously investigate the unusual cases where their own nationals were knowingly involved in intentional misconduct. Thus, the most common situations, where the institutions and agencies in receiving nations are merely negligent, while the intentional misconduct is done by foreign facilitators, intermediaries, and orphanages, often escape real investigation by receiving nations. Further, even when investigations occur, receiving nations sometimes have a tendency to simply accept on faith the sometimes faulty assurances of authorities in sending nations. Sadly, in most child laundering cases the affected persons, including the original families, children, and adoptive parents, are left to largely fend for themselves, abandoned by their own agencies as well as the government actors who facilitated and allowed children to be laundered and trafficked.

These lessons suggest that if the Hague Convention is to be successful in its fundamental task of reducing "the abduction, the sale of, or traffic in children," the following steps will be necessary:

(1) *Strict limitations on fees and donations related to intercountry adoption must be created and vigorously enforced by both sending and receiving countries*. All financial aspects of intercountry adoption must be both limited and made fully transparent.

(2) *Receiving nations must recognize that they cannot simply outsource their own responsibilities for intercountry adoption to sending nations, due to limited government capacities, lack of political will, and corruption issues in many sending countries*. Thus, receiving nations must be willing to seriously investigate the critical steps occurring in sending countries, including especially the processes by which children are obtained and labeled as eligible for intercountry adoption. Although the Hague Convention may understandably give sending nations an important role in determining the child's eligibility for adoption, receiving nations as a matter of national sovereignty must make their own determinations of which children are eligible to enter their countries as adopted orphans. An interpretation of the Hague Convention that prevents or discourages receiving nations from independently investigating and evaluating the history and status of "orphans" would render the Convention itself counterproductive. The Convention was intended to create safeguards

for intercountry adoption, not remove them, and receiving country investigations and evaluations of orphan status are an important safeguard.

(3) *Specific cases of child laundering and child trafficking in the intercountry adoption system must be investigated in a manner analogous to an airplane crash*. Such situations are tragic, but create opportunities to learn what has gone wrong, and what can be done to avert future disasters. The current tendency to essentially privatize such wrongdoing as simply a problem for adoption triad members, without significant government investigation and involvement, must end.

(4) *Hague receiving countries, including particularly the United States, must apply equally vigorous regulatory and investigative approaches to adoptions from both Hague and non-Hague countries*. While intercountry adoptions from non-Hague countries may still be permissible, receiving countries should be equally vigilant with regard to all intercountry adoptions. Otherwise, even if the Convention eventually proves effective, a two-tier system will develop in which agencies are constantly opening up adoptions in non-Hague countries in order to escape increased safeguards. The current approach by the United States of only applying increased regulatory safeguards to adoptions from Hague countries seems nonsensical and should be discontinued.

The first seventeen years of experience since the creation of the Hague Convention teach that without these specific steps, the Convention itself will be ineffective or even counterproductive in relation to the harms of child trafficking, profiteering, corruption, and abusive adoption practices. The question for the future, therefore, is whether there will be the political will to impose, through the Convention or otherwise, the necessary regulatory and investigatory safeguards. Mere ratification of the Hague Convention will not, in itself, be sufficient.

Optimistically, it is possible to hope that governments, institutions, and persons with a stake in intercountry adoption will act to implement the necessary reforms. Hopefully, important stakeholders in intercountry adoption will realize that the only way to develop an ethical, orderly, and sustainable intercountry adoption system is to directly meet the challenges posed by abusive adoption practices, rather than avoiding the problem by minimizing the prevalence and significance of these abusive practices. Once significant stakeholders in intercountry adoption realize the necessity of reform, then the political will that created the Hague Convention can be marshaled toward effective implementation of the Convention.

Pessimists could point out the avoidant rhetoric and behavior of adoption advocates, which suggests that the adoption community itself will

be the greatest danger to the future of intercountry adoption. For if the adoption community continues to avoid and minimize the significance of child laundering in the past and present of intercountry adoption, the future of intercountry adoption will be dismal indeed.