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# Can the Center Hold? The Vulnerabilities of the Official Legal Regimen for Intercountry Adoption

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## CHAPTER NINE

### CAN THE CENTER HOLD? THE VULNERABILITIES OF THE OFFICIAL LEGAL REGIMEN FOR INTERCOUNTRY ADOPTION

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Amidst controversy, a legal regimen for intercountry adoption (ICA) has been developed over the past twenty-five years. The primary constituent parts are the 1989 UN-based Convention on the Rights of the Child ("CRC")<sup>1</sup> and the 1993 Hague Convention on Protection of Children and

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<sup>1</sup>. Convention on the Rights of the Child, November 20, 1989, 1577 U.N.T.S. 3 (hereinafter CRC).

Co-operation in Respect of Intercountry Adoption (Hague Convention).<sup>2</sup> Since the creation of those conventions, international and national legal efforts have focused on delineation and implementation of a set of standards based on their principles in the attempt to create a stable and reliable intercountry adoption *system*.<sup>3</sup> This project of the creation of a stable and reliable intercountry adoption system through a legal regimen based on the CRC and Hague Convention constitutes the primary legal approach to intercountry adoption in the world today. It also represents, in terms of perspectives on intercountry adoption, a middle pathway between viewpoints that are positioned as hostile to any kind of systematic practice of intercountry adoption and viewpoints that view intercountry adoption as the logical primary response to the vulnerable situation of millions of children in the world.

Part I of this article will summarize differing views of intercountry adoption, situating the CRC/ Hague Convention regimen within these competing views. Part II will discuss and evaluate the obstacles and threats to this legal regimen. The conclusion will very briefly comment on future prospects for the CRC/Hague legal regimen.

### Competing Perspectives on Intercountry Adoption

Perspectives on intercountry adoption (“ICA”) can be viewed as occurring along a pro/anti spectrum. The following can serve as a sketch of the range of views, beginning with the anti-intercountry adoption position, then moving to the most purportedly pro-intercountry position, and then the centrist CRC/Hague regimen. *The author’s descriptions of the varied viewpoints should not be interpreted as endorsement of those viewpoints.*

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<sup>2</sup> Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1138 (hereinafter Hague Convention).

<sup>3</sup> Hague Conference on Private International Law (“HCCH”), *Welcome to the Intercountry Adoption Section, Materials*, available at [http://www.hcch.net/index\\_en.php?act=text.display&tid=45](http://www.hcch.net/index_en.php?act=text.display&tid=45); D. Smolin, “The Corrupting Influence of the United States on a Vulnerable Intercountry Adoption System: A Guide for Stakeholders, Hague and Non-Hague Nations, NGOs, and Concerned Parties,” 15 *Journal of Law and Family Studies* 81, *Utah Law Review* 1065 (2013), available at: [http://works.bepress.com/david\\_smolin/14/](http://works.bepress.com/david_smolin/14/) (hereinafter Smolin, System).

## Against Intercountry Adoption

The position against any systemic practice of intercountry adoption has a number of often intertwined strands. These include: (1) intercountry adoption as a neocolonialist/postcolonial practice;<sup>4</sup> (2) development of an intercountry adoption system as necessarily undercutting efforts to develop a proper and functioning child and human welfare system;<sup>5</sup> (3) intercountry adoption as violating the subsidiary principle as defined by the CRC;<sup>6</sup> (4) The negative lifelong impacts of transracial, transcultural, and transnational adoption on the adoptee;<sup>7</sup> (5) intercountry adoption as a part of a broader pattern of extracting children from vulnerable mothers and families, through a comparison of ICA to the baby-scoop era of adoption,<sup>8</sup> the taking of children from native and indigenous peoples,<sup>9</sup> and large-scale stolen child scandals from Argentina and Spain.<sup>10</sup>

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<sup>4</sup> T. Hubinette, "From Orphan Trains to BabyLifts, Colonial Trafficking, Empire Building, and Social Engineering," in J. J. Trenka, J. C. Oparah, and S. Y. Shin, *Outsiders Within, Writings on Transracial Adoption* (2006).

<sup>5</sup> R. Post, *The Perverse Effects of The Hague Adoption Convention*, available at: [http://www.againstchildtrafficking.org/wp-content/uploads/Artikel\\_The\\_Perverse\\_Effects\\_of\\_the\\_Hague\\_Adoption\\_Convention-FINAL.pdf](http://www.againstchildtrafficking.org/wp-content/uploads/Artikel_The_Perverse_Effects_of_the_Hague_Adoption_Convention-FINAL.pdf) (hereinafter Post, Hague).

<sup>6</sup> Post, Hague, *supra* note 5.

<sup>7</sup> The literature on transracial adoption is vast, and of course not all of it is opposed to transracial adoption; one good starting place would be: J. J. Trenka, J. C. Oparah, and S. Y. Shin, *Outsiders Within, Writings on Transracial Adoption* (2006). See also H. McGinnis, S/ Livingston Smith, Dr. S. D. Ryan, and Dr. J. A. Howard, *Beyond Culture Camp* (E. B. Donaldson Institute, 2009), available at: [http://www.adoptioninstitute.org/research/2009\\_11\\_culture\\_camp.php](http://www.adoptioninstitute.org/research/2009_11_culture_camp.php).

<sup>8</sup> A. Fessler, *The Girls Who Went Away* (2007); <http://babyscoopera.com/> (web site containing documentation on the era in the U.S.); <http://www.originsnsw.com/> (web site contains extensive documentation on Australia, including issues of apologies).

<sup>9</sup> K. Rudd's national apology to Stolen Generation, Feb. 13, 2008, available at: <http://www.news.com.au/national-news/pm-moves-to-heal-the-nation/story-e6frfk9-1111115539560>, Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. §§ 1901-1963 (2006), at section 1901(4)(finding on wrongful takings of Native American Children). Prime Minister Harper offers full apology on behalf of Canadians for the Indian Residential Schools System, available at <http://www.aadnc-aandc.gc.ca/eng/1100100015644/1100100015649>.

<sup>10</sup> F. Goldman, "Children of the Dirty War," *New Yorker* (March 19, 2012), available at: [http://www.newyorker.com/reporting/2012/03/19/120319fa\\_fact\\_goldman](http://www.newyorker.com/reporting/2012/03/19/120319fa_fact_goldman) (Argentina). K. Adler, "Spain's stolen babies and the families who live a lie," *BBC*

### **Intercountry Adoption as a Neocolonialist/Postcolonial Act**

In one strand, intercountry adoption is viewed as a neocolonialist/postcolonial act that takes children from vulnerable and poor families, often from non-white racial or ethnic groups and often from nations that have been under colonial rule or neocolonial domination, and gives them to wealthy, predominately white families in rich nations who often had been involved in colonial rule or neocolonial domination.<sup>11</sup> In this context, European nations are viewed as prior colonial powers and the United States is viewed as a modern imperialist power that is viewed through the lens of neocolonialism.<sup>12</sup> While occasional, non-systematic practice of intercountry adoption might be viewed as tolerable under this viewpoint, any construction of an intercountry adoption *system* so reeks of neocolonialist/postcolonial exploitation as to be intolerable.

### **Intercountry Adoption as Necessarily Undercutting Development of a Proper and Functioning Child and Human Welfare System**

Another strand views an intercountry adoption system as necessarily undercutting efforts to develop a proper child and human welfare system. This viewpoint sometimes begins with the premise that any nation with a proper and functioning child and human welfare system will not be a nation of origin for intercountry adoption. Nations with functional human welfare systems would be able to take care of their own children, without having to send them away to another nation. This viewpoint also documents particular instances, past and present, where intercountry adoption has undercut attempts to develop the child welfare system by creating overwhelming financial inducements to favor intercountry adoption and diverting attention and resources away from development of

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*News* (October 16, 2011), available at: <http://www.bbc.co.uk/news/magazine-15335899> (hereinafter Adler, Spain).

<sup>11</sup> A. Binry, "Malawi, Madonna, Mercy and Neocolonialism," *Pambazuka News* (July 23, 2009), available at: <http://www.pambazuka.org/en/category/books/57933>. T. Hubinette, "From Orphan Trains to BabyLifts, Colonial Trafficking, Empire Building, and Social Engineering," in J. J. Trenka, J. C. Oparah and S. Y. Shin, *Outsiders Within, Writings on Transracial Adoption* (2006).

<sup>12</sup> K. Nkrumah, *Neocolonialism: the Last Stage of Imperialism* (1965): 239. S. King, "Challenging MonoHumanism: an Argument for Changing the Way We Think About Intercountry Adoption," *Michigan Journal of International Law* 30 (2009): 413.

the child welfare system.<sup>13</sup> The inference is then made that developing an intercountry adoption system and a child welfare system concurrently is unrealistic as a goal because the former will generally undercut the development of the latter.

### **The CRC as Negating Development of an Intercountry Adoption System**

An additional strand of the anti-ICA position interprets the CRC as necessarily negating the development of an intercountry adoption system. Under this viewpoint, since human rights requires development of robust human and child welfare systems, and since the subsidiarity principle as stated in the CRC favors domestic solutions, even including foster care and “any suitable manner”<sup>14</sup> of care, then by definition it would be a violation of children’s rights and human rights to develop a system and practice of intercountry adoption. From this point of view, it should be possible to develop some kind of suitable care for every child within the nation, even in developing nations and nations with transition economies. Where there are gaps in the child welfare system, effort should go toward filling those gaps rather than toward developing a systematic practice of sending children out of the nation.<sup>15</sup>

As will be explored below, this viewpoint generally interprets the Hague Convention as being fundamentally in conflict with the CRC, and hence can take a negative stance toward ratification and implementation of the Hague Convention.<sup>16</sup>

### **The negative life-long impacts of transracial, transcultural, and transnational adoption on adoptees**

Most intercountry adoptions are transracial and transcultural, as well as transnational. Of course there are exceptions, such as the promotion and practice of intercountry adoption from India by NRI (non-resident Indian) families. Nonetheless, it is typical in intercountry adoption to see black, Latino, and Asian children from Africa, Latin America, and East and

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<sup>13</sup> Post, Hague, *supra* note 5.

<sup>14</sup> CRC, *supra* note 1, art. 21(b).

<sup>15</sup> See Post, Hague, *supra* note 5.

<sup>16</sup> See Post, Hague, *supra* note 5.

South Asia being adopted by white families in the United States, Europe, Canada, and Australia.<sup>17</sup>

Some critics of ICA, including some adult adoptees, emphasize the lifelong loss, confusion, trauma, dislocation, and profound identity issues that accompany transracial, transculture, transnational adoptions.<sup>18</sup> Each of the three “trans” elements adds additional burdens. The literature just on transracial adoption as related to both intercountry and domestic adoption is vast, touching on issues of racism in the United States and other receiving nations, lifelong identity issues, and the problem of being one of the only representatives of a minority racial group in an otherwise overwhelmingly white classroom, neighborhood, or religious community/congregation.<sup>19</sup> Cross-cultural aspects of intercountry adoption often create substantial additional difficulties for adoptees, including the critical issue of language difference and the issues involved in acquiring and/or losing a language.<sup>20</sup> In older child adoption, the loss of a learned culture, including language, food, clothing, and practices related to every aspect of life can be overwhelming.<sup>21</sup> Thus, for example, an Eastern European older child adoption into a white adoptive family may not be perceived as transracial but still may have substantial transcultural dimensions. And of course the change of nationality involved is highly

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<sup>17</sup> U.S. Department of Health and Human Services, *Adopt USA* (based on survey data, 92% of children adopted internationally have white parents, while 19% of international adoptees are white).

<sup>18</sup> T. Hubinette, “Post-Racial Utopianism, White Color-Blindness and the Elephant in the Room: Racial Issues for Transnational Adoptees of Color,” in J. L. Gibbons and K. S. Robabi, *Intercountry Adoption* (2012): 221. J. J. Trenka, *The Language of Blood* (2005). J. J. Trenka, J. C. Oparah, and S. Y. Shin, *Outsiders Within, Writings on Transracial Adoption*, (2006).

<sup>19</sup> Sources cited *supra* notes 7 & 18. See also M. Freundlich, *The Role of Race, Culture, and National Origin in Adoption* (2000).

<sup>20</sup> B. Gindis, “Cognitive, Language, and Educational Issues of Children Adopted from Overseas Orphanages,” *Journal of Cognitive Education and Psychology* 4 (2005): 291-315, available at: <http://www.ingentaconnect.com/content/springer/jcep/2005/00000004/00000003/art00004>; Interview with Dr. B. Gindis (2003), available at <http://www.bgcenter.com/interview1.htm>. Cynthia Teeters, “Language Acquisition and Subtractive Bilingualism,” available at <http://www.eeadopt.org/articles-mainmenu-76/76-schooling/98-language-acquisition-and-subtractive-bilingualism.html>.

<sup>21</sup> See sources cited notes 18 & 20. See also *Girl, Adopted*, viewable at <http://worldchannel.org/programs/episode/girl-adopted/>.

significant, in part because in some instances nationality is intertwined with ethnic identity (i.e., Korea as the national homeland for ethnic Koreans), and also because nationality not only involves an identity, but also a tie to a specific place in the world.

While emphasizing the difficulties created by the various “trans” elements of intercountry adoption does not necessarily lead to an anti-ICA position, the more the difficulties are emphasized, the more it can trend in that direction. Emphasizing a high cost of loss and trauma to adoptees from ICA leads back to the question of whether ICA is truly “necessary,” or instead is pursued due to benefits to others, whether they be adoptive parents or persons or organizations who benefit financially or otherwise from the ICA system. This strand thus frequently is combined with other strands and results in a strengthening of the anti-ICA position.

**Intercountry adoption as a part of a broader pattern of extracting children from vulnerable mothers and families, through a comparison of ICA to the baby-scoop era of adoption, the taking of Native and Indigenous Population Children in Australia, Canada, and the United States, and the Illicit Taking of Children in Argentina and Spain**

The baby-scoop era is a term generally used to describe the period from about 1945 – 1980 when single/unwed mothers were often subjected to overwhelming social and legal pressure to relinquish their children for adoption. The baby-scoop era literature generally has focused on the English-speaking nations of Australia, Canada, New Zealand, the U.K., and the United States.<sup>22</sup>

Another context is provided by the large-scale taking of children from native/indigenous or aboriginal peoples, occurring particularly in Australia, Canada, New Zealand, and the United States.<sup>23</sup> In the United States, the enactment of the Indian Child Welfare Act of 1978<sup>24</sup> is a part of the response to this phenomenon.

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<sup>22</sup> A. Fessler, *The Girls Who Went Away* (2006). *The Baby Scoop Era Research Initiative*, [babyscoopera.com/](http://babyscoopera.com/); *Origins Australia*, available at <http://www.originsnsw.com/>.

<sup>23</sup> See sources cited *supra* note 9.

<sup>24</sup> Indian Child Welfare Act of 1978 (“ICWA”), 25 U.S.C. §§ 1901-1963 (2006).



In recent years, there have been two related scandals in Argentina and Spain involving a significant wrongful practice of taking children, with the children transferred to new families. In Argentina, this involved taking the children of leftists detained, and often murdered, during the so-called “dirty war” while Argentina was under a military dictatorship. The children were given to members or allies of the military and security forces.<sup>25</sup> In Spain, there have been allegations of very large numbers of children being declared dead or stillborn in Spanish hospitals and then secretly given or sold to other families beginning during the era of the dictatorship of Francisco Franco (1936 – 1975) and then continuing as late as the 1990s.<sup>26</sup>

None of these exploitative practices really involve intercountry adoption (except to the degree one considers native or tribal peoples as foreign nations). Nonetheless, opponents of intercountry adoption may see these wrongful actions as congruent with and providing a context for interpreting intercountry adoption, and as providing support for the neocolonialist/postcolonial interpretation of intercountry adoption. In addition, these exploitative practices create a context for interpreting exploitative intercountry adoption practices, such as child trafficking and child laundering.<sup>27</sup>

### **For a Minimally Regulated Intercountry Adoption System Facilitative of Large-scale Intercountry Adoption**

As the introduction mentioned, views on intercountry adoption run across a spectrum from the most anti-ICA to the most pro-ICA viewpoints. The following is intended as a summary of the most pro-ICA viewpoints. However, many who view themselves as proponents of ICA do not identify with all of these arguments. Indeed, this author’s perspective perceives the most strongly pro-ICA viewpoints as significantly responsible for causing the decline of ICA.<sup>28</sup> Hence, this section specifically describes those in favor of a minimally-regulated ICA system facilitative of large-scale ICA.

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<sup>25</sup> F. Goldman, “Children of the Dirty War,” *The New Yorker* (March 19, 2012), available at:

[http://www.newyorker.com/reporting/2012/03/19/120319fa\\_fact\\_goldman](http://www.newyorker.com/reporting/2012/03/19/120319fa_fact_goldman).

<sup>26</sup> See Adler, Spain, *supra* note 10.

<sup>27</sup> For a discussion of child trafficking and child laundering in intercountry adoption, See *infra* notes 85-89 and accompanying text.

<sup>28</sup> Smolin & System, *supra* note 3.

The argument for intercountry adoption begins with concern for very large numbers of children who are variously described as orphans, social orphans, unparented, institutionalized, and street children. These children, it is emphasized, need assistance and help now and cannot wait for the world's efforts at poverty-alleviation to succeed. In addition, while children also need an adequate standard of living as reflected by the provision of food, shelter, clothing, medical care, and education, what they need most is a family.<sup>29</sup> Children, according to the preambles to the CRC and to the Hague Convention, "should grow up in a family environment."<sup>30</sup> Indeed, the world community has come to understand that institutional care, particularly for young children, can be profoundly damaging and is not a permanent solution for unparented or orphan children.<sup>31</sup> Further, domestic adoption simply is not available, socially or legally, in many nations, or is not truly available for a significant subset of orphan and unparented children.<sup>32</sup>

Based on these concerns, presuppositions, and perceptions, some perceive intercountry adoption as the most immediate, practical, lasting, and best intervention and solution for literally millions of children. So long as children are living unparented in institutional care or on the streets in nations unable to provide them with permanent adoptive homes, intercountry adoption should be made available as expeditiously as possible. Governments should be actively facilitating intercountry adoption as a primary solution to this crisis in unparented and orphan

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<sup>29</sup> E. Bartholet, "The International Adoption Cliff, Do Child Human Rights Matter?," (hereinafter "Adoption Cliff"), pg. 193 of this volume; E. Bartholet and D. M. Smolin, "The Debate," in *Intercountry Adoption: Policies, Practices, and Outcomes* (ed. J.L. Gibbons & K. Rotabi 2012): 233-38 (hereinafter "The Debate"). E. Bartholet, "International Adoption: Thoughts on the Human Rights Issues," *Buffalo Human Rights Law Review* 13 (2007): 151(hereinafter "Human Rights").

<sup>30</sup> Hague Convention, *supra* note 2, pmbl.

<sup>31</sup> U.N. General Assembly, *Guidelines for the Alternative Care of Children* 64/142 (Feb. 24, 2010), available at [http://www.unicef.org/protection/alternative\\_care\\_Guidelines-English.pdf](http://www.unicef.org/protection/alternative_care_Guidelines-English.pdf). UNICEF; *At home or in a home?* (September 2010), available at: <http://www.unicef.org/protection/Web-Unicef-rapport-home-20110623v2.pdf>.

Some proponents of a minimally-regulated ICA system are quite critical of UNICEF and disagree with some relevant UNICEF policies; however, these citations support the proposition of international agreement that institutional care can be profoundly damaging to children.

<sup>32</sup> The Debate, *supra* note 29, at 234.

children. There should literally be hundreds of thousands of intercountry adoptions a year, as compared to the comparatively small peak of around 45,000 global intercountry adoptions that were reached in 2004---let alone the contemporary reality of less than 25,000 global intercountry adoptions a year, with only 7094 adoptions to the United States in 2013.<sup>33</sup>

Some proponents of intercountry adoption attribute the relatively modest numbers of intercountry adoptions and the severe statistical declines in intercountry adoption since the 2004 peak primarily to opposition to intercountry adoption. This opposition is stated as coming from diverse sources, including (1.) nationalism within countries of origin which values national sovereignty and pride over the well-being of children; (2.) opposition from human rights and children's rights organizations that are ideologically opposed to intercountry adoption, (3.) a media which publicizes the sensationalist stories of abusive adoption practices while largely missing the much bigger tragedy of unparented, orphan, institutionalized, and street children; (4.) various individuals who are characterized as anti-ICA. In addition, proponents perceive a failure of others who are not necessarily anti-ICA, but nonetheless fail to act decisively in favor of ICA, including especially the governments of receiving nations, such as the United States.<sup>34</sup>

Many of these ICA proponents perceive scandals and media coverage of abusive adoption practices essentially as distractions. They argue that such abusive practices are uncommon and that the correct response is criminal prosecution of the wrongdoers.<sup>35</sup> They also sometimes argue that some forms of corruption are not really harmful to children but merely facilitate adoptions that are otherwise ethical within legal systems where corruption is otherwise common.<sup>36</sup> Based on these viewpoints, proponents perceive facilitating large-scale intercountry adoption as more important than

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<sup>33</sup> E. Bartholet, *Adoption Cliff*, *supra* note 29. "FY 2013 Annual Report on Intercountry Adoption," *Office of Children's Issues*, available [http://travel.state.gov/content/dam/aa/pdfs/fy2013\\_annual\\_report.pdf](http://travel.state.gov/content/dam/aa/pdfs/fy2013_annual_report.pdf).

<sup>34</sup> E. Bartholet, *Adoption Cliff*, *supra* note 29. *The Debate*, *supra* note 29. E. Bartholet, *Human Rights*, *supra* note 29.

<sup>35</sup> See *The Debate*, *supra* note 29, at 237–38. E. Bartholet, *Human Rights*, *supra* note 29, at 185–91. Cf. K. Rasor, R.M. Rothblatt, E.A. Russo & J.A. Turner, "Imperfect Remedies: The Arsenal of Criminal Statutes Available to Prosecute International Adoption Fraud in the United States," *New York School Law Review* 55 (2010/2011): 801 (abuses are prevalent but current statutes are inadequate).

<sup>36</sup> E. Bartholet, *Human Rights*, *supra* note 29, at 185–91.

providing safeguards against abusive practices. Some such proponents are therefore quite suspicious of any regulations of ICA that could have the impact of slowing ICA or reducing the numbers of ICA.<sup>37</sup>

Some ICA proponents explicitly view ICA as an appropriate response to poverty.<sup>38</sup> The argument is that since anti-poverty programs at current scales will not reach all of the poor, and since ICA is an additional intervention that may assist those who otherwise might not be assisted, ICA thereby has a positive impact as a response to poverty. From this perspective, ICA does not divert resources away from other anti-poverty efforts but rather brings large numbers of persons, as adoptive parents, into the effort against global poverty who otherwise would not be involved to the same degree. In addition, some argue that many adoptive parents subsequently become donors who participate to a greater degree in global anti-poverty efforts as a consequence of their experience with ICA. According to this viewpoint, ICA is supplementary to and complementary of other anti-poverty efforts in that it provides to the involvement in anti-poverty efforts a potentially large additional group of participants. Further, ICA itself is viewed as a permanent solution to the problem of the poverty of the children adopted since once they are in their adoptive homes they will most probably never again experience poverty.<sup>39</sup>

### **The Official CRC/Hague Regimen**

This section will attempt to situate the CRC/Hague regimen within the context of the spectrum of anti/pro ICA positions outlined above. Given space limitations, this section will not attempt to comprehensively describe this regimen, but will instead concentrate on selected aspects of the regimen most relevant to this analysis.

It should be stressed, at the beginning, that the current CRC/Hague regimen is not identical to what a simple interpretative analysis of each separate Convention might indicate. Rather, this regimen has been created primarily by the Hague Conference on Private International Law

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<sup>37</sup> E. Bartholet, *The Debate*, *supra* note 29.

<sup>38</sup> E. Bartholet, *Human Rights*, *supra* note 29, at 182–85. R. Carlson, “Seeking the Best Interests of Children with a New International Law of Adoption,” *New York School Law Review* (2011): 31–38, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1788685](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1788685).

<sup>39</sup> *See ibid.*

(“HCCH”),<sup>40</sup> UNICEF,<sup>41</sup> International Social Services (“ISS”),<sup>42</sup> national governments, and other organizations and individuals working to implement a coherent legal framework and regimen for a stable and reliable intercountry adoption system. Toward that end, there has been an emphasis on interpreting the CRC and Hague Adoption Convention as complementary rather than contradictory elements of a greater whole. As in prior sections, the description below of certain perspectives on ICA should not be read as an endorsement of them by this author. However, this author serves as an Independent Expert for the HCCH on certain aspects of intercountry adoption and thus plays a minor role in the furtherance of the development of the legal regimen in question.

The official CRC/Hague legal regimen seeks to be both pro-ICA in several senses while also in another sense to be neutral in respect to ICA. The regimen is pro-ICA in that it was created to establish an orderly intercountry adoption system, an effort that would only make sense if ICA was viewed as at least potentially positive. Certainly, opponents of ICA generally would not invest in the creation of such a system. The regimen posits that, given two primary requisites---subsidiarity and safeguards---a functioning intercountry adoption system would be a positive contribution to child rights.<sup>43</sup>

On the other hand, the official regimen is neutral toward ICA in that it does not require nations adhering to the official regimen that ratify both the CRC and the Hague Convention to participate to any degree in intercountry adoption. Further, there are no circumstances that trigger a requirement of participation in ICA.<sup>44</sup> Thus, even nations with large

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<sup>40</sup>. [http://www.hcch.net/index\\_en.php?act=text.display&tid=45](http://www.hcch.net/index_en.php?act=text.display&tid=45) (HCCH Intercountry Adoption Section materials).

<sup>41</sup>. [http://www.unicef.org/media/media\\_41118.html](http://www.unicef.org/media/media_41118.html) (UNICEF statement on intercountry adoption, CRC, and Hague Adoption Convention)(hereinafter UNICEF statement).

<sup>42</sup>. <http://www.iss-ssi.org/2009/index.php?id=14> (ISS/IRC working on intercountry adoption issues based on the CRC and Hague Adoption Convention); <http://www.iss-ssi.org/2009/index.php?id=25> (describing ISS involvement and partnerships with UNICEF and others on issues related to alternative care of children).

<sup>43</sup>. Hague Convention, *supra* note 2., D. Smolin, “Child Laundering and the Hague Convention on Intercountry Adoption: The Future and Past of Intercountry Adoption,” *University of Louisville Law Review* 48 (2010): 441, 447–61, available at: [http://works.bepress.com/david\\_smolin/8/](http://works.bepress.com/david_smolin/8/) (hereinafter “Smolin, Future”).

<sup>44</sup>. See HCCH, *The Implementation and Operation of the 1993 Intercountry Adoption Convention Guide to Good Practice* (2008): 100–01, available

numbers of institutionalized or unparented or orphan children are not required to participate in ICA; they can always choose to instead respond to the problems of such children through in-country options. This reticence to require intercountry adoption should not be interpreted as a lack of concern for the vulnerability of children living under harmful conditions, but rather stems from a number of other factors. First, many nations lack the capacity to institute a proper intercountry adoption system, and it would be unwise to require them to place children internationally without such a capacity because it would likely lead to harmful, abusive, and negligent practices. Second, many nations with limited resources and capacity may not want to invest their limited government capacities and resources in development of an intercountry system since the investment of the same capacities and resources in other child or human welfare efforts may be much more efficient in assisting much larger numbers of children and families. Given these difficulties, it seems unwise to create standards that would require nations to participate in intercountry adoption. Of course, as a political matter, it is unlikely that nations would ratify a treaty that externalized outside of the nation the decision of if and when children should be permanently sent away from their nation of origin.

Some may perceive the official regimen as anti-ICA to the degree that it potentially limits the numbers of intercountry adoptions through a demand to adhere to the primary two prerequisites of subsidiarity and safeguards.<sup>45</sup> The failure of the legal regimen to require nations of origin to participate in ICA even when there are large numbers of unparented/orphan children suffering severe deprivations, is also interpreted by some as being anti-ICA. From the point of view of some in the pro-ICA movement, a legal regimen that creates “safeguards” in regard to ICA while not requiring ICA where children would otherwise languish in institutions is fatally unbalanced.<sup>46</sup>

From the point of view of the official regimen, however, the twin requirements of subsidiarity and safeguards are essential to the legitimation of ICA. In a world in which perhaps one billion people live under the

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at [http://www.hcch.net/index\\_en.php?act=publications.details&pid=4388](http://www.hcch.net/index_en.php?act=publications.details&pid=4388)

(hereinafter Guide to Good Practice No. 1).

<sup>45</sup> Hague Convention, *supra* note 2, Ch.2, art.4.

<sup>46</sup> S. Dillon, “The Missing Link: A Social Orphan Protocol to the United Nations Convention on the Rights of the Child,” *Human Rights and Globalization Law Review* 1 (2008): 39.

international standard for extreme poverty of \$1.25 a day, and in which another two billion living under \$2 a day are quite economically vulnerable,<sup>47</sup> it is exploitative and absurd to label the children of the poor as eligible for intercountry adoption. Taking children who already have a loving family away from that family distorts the fundamental purpose of adoption. Similarly, transporting children out of their country of origin where there are adequate in-country solutions subjects children to the harms inherent to such radical interventions because it removes the child much farther than is necessary from their origins. The farther the child travels from their native family, community, language, culture, and ethnic group, the more difficult and complex their inevitable identity issues will be as an adult.<sup>48</sup>

The subsidiarity principle is also designed to ensure that intercountry adoption is conducted for the best interests of the child, rather than due to the interests of others, such as adoptive families, or those who might benefit financially or otherwise from intercountry adoption. The official legal regimen reflects decades of global experience teaching the painful lesson that, unless it is properly regulated, intercountry adoption will be practiced for reasons unrelated to the best interests of children.<sup>49</sup> The demand side of intercountry adoption creates a huge pull factor that could threaten to become the primary basis of intercountry adoption, particularly given the financial and power advantages of prospective adoptive parents in rich countries as compared to the economic and power vulnerabilities of billions of people living in developing and transition economies. The opportunities for intermediaries to make huge profits from intercountry adoption can also become a dominating factor. The prospect that children will become commodified products through intercountry adoption, torn from their families and provided to the highest bidders, is substantial.<sup>50</sup>

The emphasis on safeguards in the official regimen occurs in a context of a significant history of child trafficking in intercountry adoption. While the

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<sup>47</sup>. "Poverty Reduction and Equity," The World Bank, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/EXTPA/0,,contentMDK:20040961~menuPK:435040~pagePK:148956~piPK:216618~theSitePK:430367~isCURL:Y,00.html>

<sup>48</sup>. CRC, *supra* note 1, at art. 20(3).

<sup>49</sup>. [http://www.unicef.org/media/media\\_41118.html](http://www.unicef.org/media/media_41118.html) (UNICEF statement on intercountry adoption).

<sup>50</sup>. *See ibid.* See also F. Fuentes and H. Boechat, *Investigating the Grey Zones of Intercountry Adoption* (ISS/IRS 2012)(hereinafter Grey Zones).

use of the term “trafficking” has become controversial in recent years, with more use of substitute terminology such as “trade in children” or this author’s popularization of “child laundering,” the original Conventions and related documents do not shy away from the term trafficking.<sup>51</sup> The objects clause of the Hague Adoption Convention states that the Convention’s safeguards are intended to “prevent the abduction, the sale of, or traffic in children”. The latter phrase is adapted from Article 35 of the CRC, which requires State Parties 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.”<sup>52</sup> The preparatory materials indicate that a major impetus for creation of the Hague Adoption Convention was the abusive practice of child trafficking for purposes of intercountry adoption. Hence the foundational Van Loon report, a key part of the Hague Convention preparatory materials, in the section on abusive practices discusses only child trafficking, providing a very clear explanation of both the methodologies and incidence of trafficking for purposes of intercountry adoption. Hence, it can be stated that a primary or fundamental purpose of the safeguards erected by the Hague Convention are the prevention of child trafficking for intercountry adoption.<sup>53</sup> More generally, safeguards are complementary to the subsidiarity principle; thus, the Hague Convention also has an object to “establish safeguards to ensure that adoptions take place in the best interests of the child and with respect to his or her fundamental rights as recognised in international law....”<sup>54</sup>

The reference to the child’s fundamental rights “as recognised in international law” in the objects section of the Hague Convention is a clear reference to the CRC.<sup>55</sup> The CRC establishes identity and family relationship rights based on the child’s birth identity, including the “right to know and be cared for by his or her parents,” and the right to preserve

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<sup>51</sup> D. Smolin, *Future*, *supra* note 43, at 443.

<sup>52</sup> *Cf.* Hague Convention, *supra* note 2, art. 1(b) and CRC, *supra* note 1, art. 35.

<sup>53</sup> 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), available at [http://www.hcch.net/upload/adoption\\_rpt1990vloon.pdf](http://www.hcch.net/upload/adoption_rpt1990vloon.pdf) [hereinafter Van Loon Report]; T. Maskew, “The Failure of Promise: The U.S. Regulations on Intercountry Adoption Under the Hague Convention,” *Administrative Law Review* (2008): 487, 491 (hereinafter Maskew).

<sup>54</sup> Hague Convention, *supra* note 2, Ch.1, art.1.

<sup>55</sup> *Ibid.*



such identity and family relationship rights.<sup>56</sup> The CRC's statements of subsidiarity principles are therefore not arbitrary but flow out of the fundamental CRC perspective that children have rights to their original family and identity. From this perspective, adoption could only be justifiable when efforts to preserve the child's original identity and family relationships, including re-unification efforts, have failed, cannot succeed, or where in circumstances of severe abuse or neglect the harms that would be caused by the child remaining with their family outweigh the harms caused by separation. In addition, intercountry adoption, which removes even more elements of a child's original identity than domestic solutions, cannot be justified when domestic solutions would be adequate to safeguard the best interests of the child.<sup>57</sup>

Hence, subsidiarity as a principle implements the child's rights under the CRC, protecting the child's identity and family relationship rights. Safeguards, in turn, implement and protect subsidiarity by ensuring that the demand for children and financial incentives do not cause children to be unnecessarily removed from their families, communities, and nations in violation of the subsidiarity principle and the children's rights as recognized under the CRC. The requisites of subsidiarity and safeguards are complementary and in service of protecting the rights of children in the context of children in danger of separation from, or already separated from, their families.

The official CRC/Hague legal regimen takes the threat posed by abusive adoption practices seriously. Child trafficking and other abusive practices are seen as fatally undermining the legitimacy of intercountry adoption. The erection of safeguards against such practices is not seen as an anti-ICA move, but to the contrary is understood as necessary to protect and legitimate ICA. Indeed, the experience of the generation that shaped the Convention was that child trafficking and other abusive practices were so severe a problem as to threaten the very survival of ICA. Child trafficking for purposes of intercountry adoption was understood then as a severe and real problem, not merely a hypothetical threat. Creating a global framework and system for ICA, and thereby reducing abusive adoption practices, was understood as necessary to the continuation of ICA. Absent such actions, nations would necessarily react to the severe abuses of child

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<sup>56</sup> CRC, *supra* note 1, Part 1, art. 7, 8.

<sup>57</sup> See CRC, *supra* note 1, at art. 20, 21.

trafficking by ending intercountry adoption. Safeguards were not intended to damage the practice of ICA, but rather to save ICA.<sup>58</sup>

HCCH, ISS, and others involved in the continuing development of the official legal regimen have continued to express concern with ongoing problems related to “the abduction, the sale of, or traffic in children” for intercountry adoption.<sup>59</sup> Unfortunately, major new scandals involving such practices have continued to develop. In many instances, such scandals have related to the fact that most intercountry adoptions in the world are not governed by the Hague Convention, which officially only applies when both nations have ratified the Convention. In instances of abusive practices involving Hague adoptions, and to the degree such occurs in nations that have ratified the Hague Convention, it raises the issue of the adequacy of the implementation of both the CRC and the Hague Convention. In the end, the legal regimen depends on vigorous implementation by nations, as the legal regimen has not created nor envisioned any international legal institutions to oversee the intercountry adoption system.<sup>60</sup> The HCCH, for instance, has no jurisdiction or capacity to intervene in individual cases; its role is basically facilitative and hence ultimately dependent on the actions of nation-states.<sup>61</sup>

The continued abusive practices in intercountry adoption despite development of the CRC/Hague Convention regimen, along with the frequent lack of investigations, accountability, and enforcement in the aftermath of the exposure of such practices, have frustrated many, including this author.<sup>62</sup> Some critics of ICA take such failures as an indication of the complete failure of the official regimen. However, proponents of the official regimen can acknowledge such failures and still perceive the establishment of positive norms for ICA that have transformed the practice of ICA in significant ways. Despite the failures,

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<sup>58</sup> Smolin, *Future*, *supra* note 43, at 447-61; Maskew, *supra* note 53; Van Loon Report, *supra* note 53.

<sup>59</sup> Hague Convention, *supra* note 2, pmbl, art. 1(b); Grey Zones, *supra* note 50; [http://www.hcch.net/index\\_en.php?act=text.display&tid=45](http://www.hcch.net/index_en.php?act=text.display&tid=45) (HCCH Intercountry Adoption Section documents evidencing continued concern with illicit practices).

<sup>60</sup> See Smolin, *System*, *supra* note 3.

<sup>61</sup> See HCCH, *Welcome to the Intercountry Adoption Section*, [http://www.hcch.net/index\\_en.php?act=text.display&tid=45](http://www.hcch.net/index_en.php?act=text.display&tid=45) (“...the Permanent Bureau of the Hague Conference has no mandate to assist in individual adoption cases”).

<sup>62</sup> Smolin, *System*, *supra* note 3.

from this perspective it could be said that ICA for the most part has been put in its proper place and role, which from the point of view of the official regimen means that it has been legally established that ICA is NOT the proper remedy for poverty, nor even the appropriate remedy for most children who have experienced some period of separation from their families. It has been legally established that it is *not* legitimate for the millions of adults and families in the wealthier receiving nations who are seeking children to parent to demand the large-scale transfer of young and healthy infants and toddlers from developing and transition economies.<sup>63</sup> In addition, there have been relatively positive models established in which ICA functions at moderate rates and generally involves special needs and much older children who could not successfully be placed for adoption in their own nation. Given the extraordinarily large demand for young healthy children in the world, and the extreme economic and power imbalances between the poor and vulnerable in developing and transition economies and the middle class to wealthy in rich nations, the official legal regimen can be viewed as having been relatively successful.

The pattern of significant abusive practices, scandal, and regulatory failure leading to closure of systems is paradoxically simultaneously a sign of both the failure and the power of the CRC/Hague legal regimen. The failure is obvious: it would be better if the legal regimen were able to prevent such significant degrees of abusive practices in the first instance, or at least lead to reform of broken systems. Another failure is the frequent impunity in individual cases of abusive adoption practices, as all too often even when the facts of individual cases become publicized and even notorious, there are no official investigations and no negative legal consequences for any of the persons or agencies who arranged the adoptions.<sup>64</sup> Nonetheless, the power of the legal regimen can be seen here as well, for otherwise the abusive practices could simply multiply and continue indefinitely with impunity. The system turns out not to be toothless, as it creates an environment where, even in non-Hague adoptions outside of that system, abusive practices are not tolerated over the longer term. In most nations, when large-scale systemic violations are publicized, eventually those systems are either closed or severely restricted.<sup>65</sup>

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<sup>63</sup> See U.N. Guidelines for the Alternative Care of Children, *supra* note 31, at art. 15; Nigel Cantwell, The Best Interests of the Child in Intercountry Adoption 72-73 (UNICEF 2014).

<sup>64</sup> See Smolin, *System*, *supra* note 3.

<sup>65</sup> See *ibid.* See also Smolin, *Future*, *supra* note 43, at 470.

In addition, there have been instances where the CRC/Hague regimen has been successful in reforming adoption systems that had been riddled by trafficking and scandal. For example, during the preparatory period of the Hague Convention, there was substantial concern with adoption trafficking in Latin America. Widespread ratification of the Hague Convention in Latin America followed and by most accounts significantly reduced the problem of adoption trafficking. While some pro-ICA critiques lament the severe decreases in the numbers of children coming from most Latin American nations, it would be wrong to view Latin America as having simply shut down ICA, for a number of Latin American nations have continued programs placing significant numbers of children internationally.<sup>66</sup> In addition, it is important to note that some Latin American nations have, over time, refocused their international placements on nations other than the United States---particularly Italy in recent years---so that just looking at the statistics on placements to the United States gives a misleading perception. In addition, international placements in many instances are focused overwhelmingly on much older children and special needs children, which can be viewed as an appropriate application of subsidiarity.<sup>67</sup> Thus, from the point of view of the official regimen, the CRC/Hague regimen has succeeded in much of Latin America in instituting both safeguards and subsidiarity. Of course, the story of Guatemala's plunge into widespread corrupt and abusive practices while simultaneously resisting the CRC/Hague regime, is, from this viewpoint, the exception that proves the rule.<sup>68</sup>

### **Obstacles and Threats to the Intercountry Adoption System**

Despite the relative successes of the official CRC/Hague legal regimen for intercountry adoption, very serious obstacles and threats to both the intercountry adoption system, and this legal regimen, remain. This section

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<sup>66</sup> *Ibid.* at 484-86.

<sup>67</sup> P. Selman, "Global Trends in Intercountry Adoption," *Adoption Advocate* 1 (2012): 44, available at [https://www.adoptioncouncil.org/images/stories/documents/NCFA\\_ADOPTION\\_ADVOCATE\\_NO44.pdf](https://www.adoptioncouncil.org/images/stories/documents/NCFA_ADOPTION_ADVOCATE_NO44.pdf).

<sup>68</sup> HCCH, *Report of a Fact-Finding Mission to Guatemala in Relation to Intercountry Adoption* (2007), available at: [http://www.hcch.net/upload/wop/mission\\_gt33e.pdf](http://www.hcch.net/upload/wop/mission_gt33e.pdf); Smolin, Future, *supra* note 43, at 467-69, 476-80.

reviews those threats, with limited commentary as to the prospects for overcoming them.

### **Purported tensions between the CRC and Hague Adoption Convention**

Some critics of ICA, and some proponents of ICA, share a perspective in which the CRC and the Hague Convention state fundamentally inconsistent interpretations of subsidiarity. In the narrow sense, the dispute is over the place of foster care and institutional care. Some interpret the CRC as favoring both foster care and institutional care in the country of origin over intercountry adoption, with the result that IAC is so rarely appropriate as to make any system of ICA violative of the CRC. By contrast, the Hague Convention is perceived as favoring intercountry adoption in a way that suggests the acceptance of very large-scale ICA, given the very large numbers of children living in foster and institutional care globally, and the limited practice of domestic adoption in many nations. Further, the perception is that the Hague Convention favors ICA over both domestic foster care and domestic institutional care, with only domestic adoption trumping intercountry adoption. Thus, some anti-ICA activists praise the CRC and condemn the Hague Adoption Convention, while some proponents of the most pro-ICA position condemn the CRC while praising at least the intent (if not the implementation) of the Hague Adoption Convention.<sup>69</sup> Both points of view threaten to undermine the interpretation of the official legal regimen, which is that the CRC and the Hague Adoption Convention are complementary and can be harmonized into a coherent legal regimen.

This obstacle is one of the easiest to overcome because the interpretation harmonizing the two Conventions is quite credible, even if not inevitable. Each of the two Conventions can credibly be interpreted more flexibly as to bring it closer to the other. The CRC states that intercountry adoption “may” be considered “if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin.”<sup>70</sup> The Hague Convention preamble recognizes that “intercountry adoption may offer the advantage of a permanent family

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<sup>69</sup> Sources at note 29; Post, Hague, *supra* note 5.

<sup>70</sup> CRC, *supra* note 1, art. 21.

to a child for whom a suitable family cannot be found in his or her State of origin.”<sup>71</sup>

The issue as to institutional care has been resolved through a widely-held viewpoint that in many circumstances such care is not a “suitable” manner of long-term care, and hence is often not an appropriate permanency plan under the CRC.<sup>72</sup> Since the CRC in this section does not specifically mention institutional care, there is no reason to presume that it views such as generally constituting “suitable” alternative care.

The conflict regarding foster care initially appears more direct because the CRC appears to specifically prioritize foster care in the country of origin above ICA while the Hague Convention has been read to prioritize only a “permanent” (hence adoptive) family in the country of origin above ICA. This interpretation, however, reads both Conventions too rigidly. The overriding interpretative principle of the CRC is that “[i]n all actions concerning children...the best interests of the child shall be a primary consideration.”<sup>73</sup> Hence, the issue of whether “foster care” in the nation of origin or whether intercountry adoption should have priority would depend ultimately on the question of the best interests of the child. In particular instances, the quality of the child’s foster care setting, the attachment of the child to foster parents, the age of the child, other existing ties or attachments of the child within his or her nation of origin, the capacity of the child to adapt to international placement, the nature of the proposed adoptive placement, and the wishes of the child (if old enough to consult) would also be significant.

Similarly, the Hague Convention embraces the best interests of the child as a fundamental principle of the Convention.<sup>74</sup> In addition, the Hague Convention only states that ICA “may offer the advantage of a permanent family,”<sup>75</sup> which is quite far from mandating that an international

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<sup>71</sup> Hague Convention, *supra* note 2, pmbl.

<sup>72</sup> See UNICEF Statement, *supra* note 41. U.N. Guidelines, *supra* note 31. CRC, *supra* note 1, art. 21.

<sup>73</sup> CRC, *supra* note 1, at art. 3.

<sup>74</sup> See Hague Convention, *supra* note 2, at pmbl & art. 1; see also *HCCH, Accreditation and Adoption Accredited Bodies: General Principles and Guide to Good Practice No. 2*, section 2.1.1 (2012) (“the best interests of the child is the primary consideration in all matters related to Convention adoptions”)(hereinafter *Guide to Good Practice No. 2*).

<sup>75</sup> Hague Convention, *supra* note 2, pmbl.

placement occur absent a domestic adoption. Indeed, there are no circumstances in which the Hague Convention mandates an intercountry adoption.<sup>76</sup> Hence, the CRC does not in every instance *forbid* ICA where a domestic foster placement exists and the Hague Convention does not *require* ICA whenever a child is in foster care and no domestic adoption is available. To the contrary, the Hague/CRC regimen correctly recognizes that both the CRC and the Hague Convention are much more flexible on this point, given that both emphasize the best interests of the child, and hence can be easily harmonized.<sup>77</sup>

**The Problem of Normalizing Deprivations of Rights  
and Equality in the Process of Purporting to Create a Stable  
and Reliable Intercountry Adoption**

ICA builds upon or causes the child's loss of their original identity and family relationship rights and usually arises in contexts of severe rights deprivations related to poverty or severe discrimination against the child and/or parents based on categories such as gender, religion, race, disability, caste, etc. In the context of China, the government's population control policies are often a major instigating factor related to parental decisions to abandon a child.<sup>78</sup> Thus, while the intercountry adoption system envisions parents making voluntary relinquishment or abandonment decisions, typically rights deprivations, discrimination, and coercive governmental or societal practices have sharply circumscribed the family's, parents', and child's choices.<sup>79</sup>

There is something highly artificial about the manner in which the official legal regimen tries to protect the process that immediately surrounds the parental relinquishment decision: for example, ensuring proper counseling, no financial inducement, and "freely" given consents<sup>80</sup> when the broader

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<sup>76</sup> See *supra* note 44.

<sup>77</sup> See D. M. Smolin, "The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals," *Seton Hall Law Review* 35 (2005): 403, 407-17. U.N. Guidelines, *supra* note 31. The Debate, *supra* note 29, at 241-43; CRC, *supra* note 1, at art 3; sources cited at note 74; UNICEF Statement, *supra* note 41.

<sup>78</sup> See K. Johnson, *Challenging the Discourse of Intercountry Adoption: Perspectives from Rural China*, in J. L. Gibbons & K.S. Rotabi, *Intercountry Adoption* (2012): 103, 105-06; D. Smolin, *The Missing Girls of China*, 41 *Cumb. L. Rev.* 1 (2011).

<sup>79</sup> See D. Smolin, *System*, *supra* note 3, at 85-93.

<sup>80</sup> See Hague Adoption Convention, *supra* note 2, at art. 4.

context is usually one of extreme trauma, exploitation, discrimination, desperation, and deprivation of the fundamental rights of both the original family and the child. There is also something strange and possibly incoherent about trying to build a reliable and safe intercountry adoption system, where everything is done properly and in a way that protects human rights, upon the underlying chaos and severe deprivations of human rights that typically surround the overall situation of the child and the child's original family.

The concept of an intercountry adoption system can normalize the underlying deprivations of rights and equality in a manner that can make system participants numb to those deprivations. For example, China has long been viewed as a preeminent and even model intercountry adoption system. More recent revelations of abusive adoption practices in China have caused questioning of that viewpoint.<sup>81</sup> However, apart from those abusive *adoption* practices, it is extremely strange to view China as a model system when the Chinese government, as well as the broader Chinese society, are so deeply complicit in the underlying deprivations of rights and equality that are the foundations for China's large numbers of intercountry adoptions. China's coercive population control policies coupled with societal gender discrimination have been the combined causes of probably most abandonments in China. In addition, China legally restricted and hence repressed domestic adoption, even as China opened to intercountry adoption: a preference for intercountry adoption over domestic adoption that constitutes a direct violation of subsidiarity.<sup>82</sup> Viewing China as a model intercountry adoption system implicitly normalizes China's coercive population control policy, societal discrimination against the girl child, and legal preference for intercountry over domestic adoption. Similar points could be made about the role of poverty in many countries of origin, such as Ethiopia, Uganda, DRC, Nepal, and India,<sup>83</sup> as well as the role of societal pressure on unwed mothers to relinquish their children, as in South Korea.<sup>84</sup>

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<sup>81</sup> See generally B. H. Stuy, *Open Secret: Cash and Coercion in China's International Adoption Program*, 44 Cumb. L. Rev. 355 (2014); D. Smolin, "The Missing Girls of China," *supra* note 78, at 59-64.; D. Smolin, *Future*, *supra* note 43, at 472;

<sup>82</sup> See D. Smolin, *Missing Girls*, *supra* note 78.

<sup>83</sup> See D. Smolin, "Intercountry Adoption and Poverty: A Human Rights Analysis," *Capital University Law Review* 36 (2007): 413. D. Smolin, *System*, *supra* note 3.

<sup>84</sup> See Smolin, *Future*, *supra* note 43 at 480-82 & sources cited at notes 205-08.



On the other hand, it is necessary to respond in a timely manner to the real-world situation of children who cannot wait for the achievement of a better world. By analogy, most opposed to war, or to a particular war, would not thereby refuse to provide injured soldiers with medical treatment, even if that could be seen as aiding the war effort. Hence, to the degree that intercountry adoption is viewed as an appropriate remedy for some vulnerable children, it can be viewed as not complicit in the deprivations of rights and equality that caused those children and families to be in such difficult, damaging, and traumatic circumstances.

The balance required by the CRC/Hague legal regimen is that governments and society should be active in combating the underlying deprivations of rights and equality that create the possibility of ICA, even as they are permitted (but not required) to run an active and lawful ICA system. The ICA system should not serve as a legitimation for the underlying deprivations of rights and equality; ICA should not practically slow parallel efforts to combat the underlying deprivations of rights and equality; ICA should not be the occasion of incentivizing or causing additional deprivations of rights and equality. The difficulty of maintaining this balance will always make the establishment of the official legal regimen extraordinarily difficult.

**Recurrent Scandals involving Abusive Adoption Practices,  
including Child Laundering, Child Trafficking, Falsification of  
Documentations, and the Negligent and Intentional Provision of  
False and Inaccurate Information in the Adoption Process**

Systematic abusive adoption practices have continued to recur in the two decades since creation of the Hague Convention. Of course, much of this has occurred in non-Hague adoptions. However, in many instances, one of the nations involved has ratified the Hague Convention. In some instances, seriously abusive practices have occurred in Hague adoptions. In addition, given the almost universal ratification of the CRC, these abusive adoption practices at a minimum constitute a failure of CRC implementation.<sup>85</sup>

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<sup>85</sup> G. Zones, *supra* note 50. D. Smolin, "Child Laundering : How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnaping, and Stealing Children," *Wayne Law Review* 52 (2006): 113 (hereinafter Smolin, *Child Laundering*). Smolin, *Future*, *supra* note 43.

A primary object of the Hague Convention is to create safeguards to prevent these abusive practices, such as “the abduction, the sale of, or traffic in children.”<sup>86</sup> A primary concern during the time when the Convention was being developed was that these abusive practices would destroy the trust necessary for the continuation of intercountry adoption.<sup>87</sup> Unfortunately, this threat has continued to the present time. Indeed, the steep declines in intercountry adoptions since 2004 are likely in large part a result of the aftermath of continued abusive adoption practices, which have caused many shutdowns, moratoria, slowdowns, and scandals.<sup>88</sup> The threats of child trafficking, corruption, profiteering, harvesting of children, and other abusive practices is a primary reason why many nations severely limit their involvement in intercountry adoption. From that perspective, the continuation of such abusive practices continues to be a primary threat to the development of an intercountry adoption system.

This difficulty underscores that the CRC/Hague regimen is dependent on vigorous implementation by both nations of origin and receiving nations. Unfortunately, there is often a lack of political will in that regard.<sup>89</sup> Much of the future of intercountry adoption depends on whether nations are willing to do the difficult work of investigating and prosecuting abusive adoption practices, as well as vigorously implementing the requisites of subsidiarity and safeguards. Decisions to save face often inhibit such investigations and prosecutions from occurring or from being of a sufficient scope to truly confront the extent of wrongdoing; deference to adoption agencies, other governments, bureaucracies, and other entrenched interests can inhibit implementation of subsidiarity and safeguards.

Abusive adoption practices in the end are a symptom of a system which has made a pretense of implementation of the CRC/Hague regimen by adhering to the externals of implementation while neglecting the more difficult substance. While there are instances of relatively successful implementation (even if imperfect), unfortunately there are far too many

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Smolin, *System*, *supra* note 3. Smolin, *Two Faces*, *supra* note 77. Smolin, *Missing Girls*, *supra* note 81.

<sup>86</sup> Hague Convention, *supra* note 2, art. 35.

<sup>87</sup> See Smolin, *Future*, *supra* note 43, at 453.

<sup>88</sup> See *Ibid.*

<sup>89</sup> HCCH Permanent Bureau, Discussion Paper on the Financial Aspects of Intercountry Adoption, Section 4.3 (2012) available at: [http://www.hcch.net/index\\_en.php?act=progress.listing&cat=8](http://www.hcch.net/index_en.php?act=progress.listing&cat=8).

instances of seriously flawed implementation as evidenced by continuing serious and often systemic abuses.

### **The Corrupting Influence of the United States as the Most Important Actor in the Intercountry Adoption System**

The United States has been the most significant nation in the development of the large-scale practice of intercountry adoption. Thus, the United States played a critical role in the development and long-term continuation of adoptions from South Korea. For many years, half or more of all intercountry adoptions were to the United States, although the proportion has declined to about 40% since 2009. The United States has been the dominant receiving nation for the entire modern history of intercountry adoption; by contrast, the dominant sending nations have varied significantly over time.<sup>90</sup>

The United States has an ambivalent, somewhat oppositional role to the CRC/Hague official regimen. First, the United States is one of the only nations in the world that has never ratified the CRC, and there are no realistic prospects for the United States to ratify anytime soon. Given the centrality of the CRC to the CRC/Hague regimen, this is a critical gap.<sup>91</sup>

Second, the United States has been somewhat of an outlier regarding Hague implementation. Although the United States obtained critical concessions on Convention language during the preparatory period, the United States did not ratify the Convention until 2008, meaning that for the first fifteen years of the Convention all adoptions to the United States were non-Hague adoptions.<sup>92</sup> The concessions obtained by the United States, regarding for-profit persons and agencies, and independent adoptions, reflect the distinctive child welfare ethos in the United States, whereby many aspects of adoption, child welfare, and humanitarian work are privatized, with lawyers and private organizations playing significant roles as intermediaries. Both for-profit and non-profit intermediaries are part of a privatized vision of both social entrepreneurship and for-profit business models being central to adoption and child welfare systems. This ethos is reflected in the United States government delegating accreditation and oversight functions to a private, non-profit entity, which in turn relies

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<sup>90</sup> See Smolin, *System*, *supra* note 3, at 81-82.

<sup>91</sup> See Smolin, *System*, *supra* note 3, at 97-105.

<sup>92</sup> E. J. Graff, *The Baby Business*, 17 Democracyjournal.org 27, no. 30 (2010).

on a volunteer peer-accreditation process staffed primarily by persons who work for private adoption agencies. This ethos is further reflected in the United States government's Hague implementation rules, which fail to provide any meaningful limitation on the financial aspects of intercountry adoption and which largely gut meaningful accountability for agencies. In particular, the Hague implementation regulations allow agencies to place enforceable waivers of liability in client contracts and to not be responsible for the actions of their foreign partners and intermediaries, with the result that agencies can displace accountability and responsibility for most of the tasks and functions central to ethical intercountry adoption.<sup>93</sup>

Unfortunately, the United States has a predominately corrupting and destructive impact on the developing intercountry adoption system. This can be seen most prominently in the cycle of abuse. Typically, large numbers of United States agencies move aggressively to open up new countries of origin: typically nations with chronic corruption, poor governmental capacity, large numbers of people living in extreme poverty, and a significant degree of child and human trafficking. The agencies often end up competing with one another for access to children, particularly young and healthy children. The agencies are able to charge large amounts of money for each adoption, a significant percentage of which they pay to facilitators, orphanage directors, and others within the country of origin. Intercountry adoptions typically rise rapidly. The sharp rise in intercountry adoption is frequently accompanied by the reality, and eventually the publicized scandal, of abusive adoption practices, including obtaining children illicitly by force, fraud, or funds; the creation of false documentation; intentionally inaccurate child study forms; etc. Eventually, the weight of the scandals engenders slowdowns, moratoria, or shutdowns. Once this happens, the United States agencies move on to opening up another country, and so the cycle repeats. This cycle of abuse eventually leads to a kind of *slash and burn adoption* in which countries of origin which have passed through one or more cycles of abuse become essentially inactive in intercountry adoption.<sup>94</sup>

The United States, however, brings significant strengths to the intercountry adoption system. These include a significant number of adults willing to adopt older and special needs children, a strongly pro-adoption

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<sup>93</sup> Smolin, *Child Laundering*, *supra* note 85, at 194, 196

<sup>94</sup> See Smolin, *Child Laundering*, *supra* note 85, at 132-35. Smolin, *Future*, *supra* note 43, at 470. Smolin, *System*, *supra* note 3, at 93-135.

culture, and a very large, activist NGO sector focused on child and human welfare. It is therefore particularly unfortunate that the refusal of the United States to adequately regulate in the areas of finances and agency accountability, and to reign in the agency activities that contribute to the cycles of abuse and to slash and burn adoption, are so negative as to outweigh those strengths. The United States has the potential to play a predominately positive role in the ICA system, but it would need to exercise the political will to confront the entrenched interests of agencies in order to do so.<sup>95</sup>

### **The Corrupting Role of a Global Demand for Adoptable Children**

There is an overwhelming demand among wealthy and middle class persons in many parts of the world today for healthy, young infants and toddlers. While infertility has always existed as a problem, the tendency of many to defer childbearing until later in life, changing patterns of family life such as gay unions and gay marriage, and the widespread practices of contraception and abortion, have greatly increased this demand.<sup>96</sup> Confusion about the meaning of concepts like “procreative and reproductive rights” coupled with this large-scale demand for children has led to a sense of entitlement, an often implicit feeling that adults who want to parent have a right to a healthy infant or toddler. Such a claimed right to adopt is problematic for two reasons: First, a child is not property but is a rights-bearing human person with a right to be raised by his or her natural parents; second, the natural parents have a right to raise their own children. From this perspective, there is and can be no *right to a child*, in the sense of a right to adopt or parent *someone else’s child*. However, the implicit belief that there is such a right, and that the intercountry adoption system is a part of the means of effectuating such a right, is a deeply corrupting factor in intercountry adoption.<sup>97</sup>

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<sup>95</sup> See Smolin, System, *supra* note 3, at 136-151.

<sup>96</sup> Cf. HCCH, *Note on the Financial Aspects of Intercountry Adoption* (June 2014), at section 4.2 (discussing problem of the demand for children as a pressure on the intercountry adoption system). G. Zones, *supra* note 50, at section 2.1.4.; D. Smolin and D. Smolin, *The Liberal Roots of the Modern Adoption Movement*, *Gazillion Voices* (2012) available at: <http://gazillionvoices.com/cover-stories-adoption-and-liberalism/#.UprJUdKKKk5>.

<sup>97</sup> *Guide to Good Practice* no. 2, *supra* note 74, at para. 2.

## The Tension between Different Models of Adoption

The CRC and Hague Convention both evidence awareness of different models of adoption and adoption-like practices. Such include full adoption, which involves a complete severance of the ties of the child to the original family, and full transfer into the adoptive family; simple adoption, in which the child still has acknowledged identity and legal ties to the original family and may not have full legal rights as a member of the adoptive family; and “kafalah of Islamic law,” which can appear more like a guardianship or perhaps a variant of simple adoption.<sup>98</sup> In broader terms, one can speak of cultures that practice various kinds of “additive” parenting and adoption, whereby the acknowledgement of new parents does not require the legal and social destruction of original parent-child relationships. This can be compared to the kind of “subtractive” full adoption model in the law of the United States, which requires a complete severance and legally destroys the parent-child relationship as a condition precedent to the granting of an adoption.<sup>99</sup> The growth of open adoption in what are otherwise full adoption contexts adds a contradictory element that has not yet been fully implemented into the law.<sup>100</sup>

<sup>98</sup> CRC, *supra* note 1, at art. 20(3). Hague Convention, *supra* note 2, at art. 26, 27.

<sup>99</sup> International Reference Center for the Rights of Children Deprived of Their Family, International Social Service, Fact Sheet no. 29 “Simple Adoption” Versus “Full Adoption: The Effects of Adoption” (2007). International Reference Center for the Rights of Children Deprived of Their Family, International Social Service, Monthly Review no. 1 (January 2006) “Simple Adoption” Versus “Full Adoption:” A National Choice with International Repercussions (2006). R. Hogbacka, University of Helsinki, “Address at the Interim Meeting of Family Sociology of the European Sociological Association: Transnational Adoption and the Exclusiveness and Inclusiveness of Families” (August 26-29, 2008) available at: [http://www.kumsn.org/main/index.php?document\\_srl=904](http://www.kumsn.org/main/index.php?document_srl=904).

<sup>100</sup> See E. B. Donaldson Adoption Institute, *Openness In Adoption* (March 2012), available at: [http://www.adoptioninstitute.org/publications/2012\\_03\\_OpennessInAdoption.pdf](http://www.adoptioninstitute.org/publications/2012_03_OpennessInAdoption.pdf). Child Welfare Information Gateway, *Postadoption Contact Agreements Between Birth and Adoptive Families*, (May 2011), available at [https://www.childwelfare.gov/systemwide/laws\\_policies/statutes/cooperative.pdf](https://www.childwelfare.gov/systemwide/laws_policies/statutes/cooperative.pdf). M. Freundlich, *The Impact of Adoption of Members of the Triad* (2001): 122. M. Cortez, “Proposal to create enforceable open adoption agreements stirs legislative debate,” *Deseret News* (February 5, 2013), available at <http://www.deseretnews.com/article/865572396/Proposal-to-create-enforceable-open-adoption-agreements-stirs-legislative-debate.html?pg=all>; Open Adoption as a Marketing Tool, Nov. 20, 2012, available at <http://firstmomout.wordpress.com/2012/11/20/open-adoption-as-a-marketing-tool/>

One of the fundamental difficulties with intercountry adoption is that parents living in a culture that practices various kinds of additive, simple, or guardianship like practices do not easily conceptualize that signing a document can make them a legal stranger to their own child. In addition, those adopting from nations that emphasize the full adoption model (even as sometimes complicated by a practice of open adoption) do not easily understand that original parents who relinquish may understand themselves still to be parents of their children. These different approaches, of course, are the occasion of abusive adoptive practices such as child laundering and child trafficking, as it is easy enough to foster a fraud on both original and adoptive families in this kind of context.<sup>101</sup>

A deeper problem for the CRC/Hague legal regimen is that while it theoretically is neutral as to these differing practices, there has nonetheless been an implicit favoritism toward full adoption that may be incongruent not only with many cultures, but also with the emergence of open adoption practice within nations where full adoption is legally normative. In the future, the CRC/Hague regimen may require some re-working in order to fully accommodate a world in which additive, simple, and open adoption models increasingly predominate.

## Conclusion

Most likely, the CRC/Hague legal regimen will continue to predominate, simply for lack of any reasonable competition on the international level. In addition, the regimen's inherent flexibility will also be of importance since the regimen can be accommodated to a wide range of positions on intercountry adoption, from a fairly strong anti-ICA position to a fairly

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<sup>101</sup>. This kind of confusion has been evident, for example, in difficulties with adoptions from Ethiopia. Cf. ISS/IRC, Ethiopia, Protection of the child deprived, or at risk of being deprived, of the family of origin (May 2006), available at [http://www.thewayforwardproject.org/file\\_uploads/E07%20Ethiopia%20-%20Protection%20of%20the%20Child%20Deprived%20of%20or%20at%20Risk%20of%20Being%2](http://www.thewayforwardproject.org/file_uploads/E07%20Ethiopia%20-%20Protection%20of%20the%20Child%20Deprived%20of%20or%20at%20Risk%20of%20Being%2). K. M. Bunkers, K. S. Rotabi, and B. D. Mezmur, "Ethiopia at a Critical Juncture in Intercountry Adoption and Traditional Care Practices," in J. L. Gibbons and K. S. Rotabi, *Intercountry Adoption* (2012). K. Joyce, "How Ethiopia's Adoption Industry Dupes Families and Bullies Activists," *Atlantic* (December 21, 2011), available at: <http://www.theatlantic.com/international/archive/2011/12/how-ethiopias-adoption-industry-dupes-families-and-bullies-activists/250296/>.

strong pro-ICA position, and everything in-between. For example, nations may adhere to the regimen and not participate at all in ICA.<sup>102</sup> On the other side, nations may adhere to the regimen and be leading nations of origin or receiving nations, as in instances such as China on the nation of origin side, or the United States, Italy, Canada, Spain, and the Netherlands, on the receiving nation side. While some opponents and proponents of ICA resist the regimen, this is likely a strategic error because the international community has deeply invested in the creation of the regimen and there really is no viable competing paradigm. In addition, those who try to find some basic incompatibility between the CRC and the Hague Convention are evidencing a strangely literalistic style of legal interpretation that misunderstands the nature of international human rights law, which is far more flexible, organic, and developmental in its approach. The Hague Convention was designed to be read in harmony with the CRC, not in opposition to it, and international organizations institutionally invested in the CRC, such as UNICEF, see the Hague Convention as implementing, rather than contradicting, the principles of the CRC.<sup>103</sup>

Thus, advocates on various sides of the ICA divide would be much wiser to advocate *within* the CRC/Hague legal regimen, for that is the most likely way to impact the development of what remains the only viable international legal regimen on this subject.

The future success of the legal regimen in creating a stable and reliable ICA system is more difficult to determine. It seems most likely that the numbers of ICA will continue to be relatively modest and perhaps will continue their recent trajectory of decline. Most likely, recent trends, in which very large and growing proportions will be special needs and much older child adoptions, will continue. These demographic trends could be viewed as a victory of the subsidiarity principle due to the implicit capacity of most nations to find families or suitable alternative care for young and healthy children. Unfortunately, it appears likely that revelations of abusive adoption practices will continue given recent reports, for example, from China, the DRC, Ethiopia, and Uganda.<sup>104</sup> As in the past, it is unlikely that remedies will be provided even in cases that become notorious, and yet this continuing pattern will serve as a kind of warning to many nations that will help inhibit the further spread of such

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<sup>102</sup>. See *supra* note 44.

<sup>103</sup>. Hague Convention, *supra* note 2, at preamble (invoking the CRC). UNICEF Statement, *supra* note 41.

<sup>104</sup>. See *supra* note 81; Smolin, System, *supra* note 3, at 126-27.



abusive practices while also suppressing participation in ICA due to fears that opening to ICA means opening to child trafficking. Those nations that have developed more stable systems will likely continue sending moderate numbers of mostly older and special needs children for some time, although some may decrease their numbers over time as their own capacities for in-country care improve.

Opponents of ICA will continue to be frustrated by the continuing tide of abusive practices. Proponents of ICA will continue to be frustrated by the relatively small and diminishing numbers, particularly as compared to their vision of very large and rapidly increasing numbers. Given the continued difficulty in adopting healthy infants and toddlers either domestically or internationally, recent trends toward assisted reproductive technologies (“ART”) will likely accelerate, which will increase international trade in human gametes and commercial international surrogacy.<sup>105</sup> Hence, the mixed yet significant success of the legal regimen for ICA will increasingly point to the need to develop increased international and national regulation of commercialized ART, as this is another area where the issue of the commodification of human beings and of the human procreative process will need to be addressed.<sup>106</sup>

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<sup>105</sup>. HCCH, *The private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements*, available at [http://www.hcch.net/index\\_en.php?act=text.display&tid=178](http://www.hcch.net/index_en.php?act=text.display&tid=178) (providing multiple relevant documents). K. Desai, “India’s Surrogate Mothers are risking their lives,” *The Guardian* (June 5, 2012), available at <http://www.theguardian.com/commentisfree/2012/jun/05/india-surrogates-impoverished-die>.

<sup>106</sup>. *See ibid.*

