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

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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 on December 12, 2007, with an effective date of April 1, 2008. 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. The next year, 2004, saw intercountry adoptions peaking at 22,990. 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

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4 ADOPTIONS TO THE UNITED STATES, supra note 3; TOP COUNTRIES OF ORIGIN, supra note 3.
Projections suggest that intercountry adoptions to the United States could fall below 10,000 in 2010, and below 8,000 by 2012. 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. 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. 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. 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. 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.


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. 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. Adoption advocates also blame the media for reporting negative and sensationalistic intercountry adoption stories. 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. 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.” Child laundering involves obtaining children illicitly through force, fraud, or financial inducement; providing

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


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.

false paperwork which identifies such illicitly obtained children as legally abandoned or relinquished “orphans”; and offering or placing these so-called “orphans” for adoption.\(^\text{17}\) 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.\(^\text{18}\)

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.\(^\text{19}\) 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.


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

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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. Some perceive the Convention as legitimating intercountry adoption. Some complain that the Convention does not mandate intercountry adoptions or provide children the right to an adoptive home, while others perceive the regulatory regime as inadequate to prevent abusive practices.

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.

23 See id.; see also Dillon, supra note 14, at 47–48.
24 See Dillon, supra note 14, at 47–48.
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.\textsuperscript{30} Thus, although the Convention states the principle that children should “grow up in a family environment,”\textsuperscript{31} the Convention does not create a right of an institutionalized child to intercountry adoption in the absence of a domestic adoptive placement.\textsuperscript{32} The Convention seeks to facilitate intercountry adoptions by safeguarding them from abusive practices, and by securing recognition in Contracting States of such adoptions.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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....”\textsuperscript{36} In addition, consent cannot be “induced by payment or compensation of any kind....”\textsuperscript{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


\textsuperscript{31} Hague Convention, supra note 1, pmbl.

\textsuperscript{32} See Dillon, supra note 14, at 47–48, 79.

\textsuperscript{33} Hague Convention, supra note 1, art. 1.

\textsuperscript{34} See HAGUE, GOOD PRACTICE GUIDE, supra note 30, at 100, 102.

\textsuperscript{35} Hague Convention, supra note 1, pmbl.

\textsuperscript{36} Id. art. 4(c)(1).

\textsuperscript{37} Id. art. 4(c)(3).
to re-unite the foster children with their families prior to termination of parental rights and adoption.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{41} Thus, some argue that intercountry adoption is required to effectuate the best interests and rights of institutionalized children.\textsuperscript{42} The difficulty with this argument, in terms of the Convention, is that this clause addresses “safeguards.”\textsuperscript{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

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\text{38 Adoption and Safe Families Act (AFSA), 42 U.S.C. § 671(a)(15) (2006). Under ASFA, reasonable efforts to re-unite are not required under certain aggravated circumstances, such as torture or sexual abuse. \textit{Id.} § 671(a)(15)(D).}


\text{40 Hague Convention, \textit{supra} note 1, pmbl. & art. 1.}

\text{41 \textit{Id.} art. 1(a).}

\text{42 See, e.g., Dillon, \textit{supra} note 14, at 44.}

\text{43 Hague Convention, \textit{supra} note 1, art. 1(a).}
\end{flushright}
general principle that the Convention does not oblige States to engage in intercountry adoption.\footnote{Hague, Good Practice Guide, supra note 30, at 102.}

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.\footnote{See Convention on the Rights of the Child, arts. 7, 8, 9, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].} 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.\footnote{See generally Smolin, Intercountry Adoption and Poverty, supra note 39.} 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.\footnote{See Hague Convention, supra note 1, pmbl. & art. 4(b).} 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.\footnote{See id. pmbl. & art. 1, 14–22.} The most obvious candidate is language in the preamble and objects sections addressing “the abduction, the sale of, or traffic in children.”\footnote{See id. pmbl. & art. 1(b).} 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...
which I have characterized as “child laundering.” 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.

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. 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.

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.” 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.” 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.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\section*{B. Child Laundering and the Work of Preparation}

\subsection*{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,\textsuperscript{59} who would later become the Secretary General of the Hague Conference on Private International Law.\textsuperscript{60} On the occasion of the United States deposit of ratification on December

\textsuperscript{56} Id. ¶ 59.

\textsuperscript{57} Id. ¶ 52.


\textsuperscript{59} See id.; see also Peter H. Pfund, Intercountry Adoption: The 1993 Hague Convention: Its Purpose, Implementation, and Promise, 28 Fam. L. Q. 35, 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).

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.
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 . . . .”

(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.”

(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.’” 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. “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.” 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.

(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. 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 51–53.
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 93–99.
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, 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. 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. 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.

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. 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.
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.
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)).


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. . . .”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{109} Id.

\textsuperscript{110} Id.

\textsuperscript{111} See infra notes 112–17.

\textsuperscript{112} Explanatory Report, supra note 52, ¶ 52 (quoting Hague Convention, supra note 1, pmbl.).

\textsuperscript{113} See id.
the latter clearly within both the preamble and the objects clause of the Convention. 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. 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.” 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. 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 trafficking.
trafficking. 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.”

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. The next year, 2004, saw intercountry adoptions reach a peak of 22,990. 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. Of course the predominate place of the United States as a receiving country, often constituting more than half of all intercountry adoptions.
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.


and 57% to 64% of all adoptions from 1997 to 2000. Each of these nations saw extremely large growth in raw numbers from 1993 to 2004: China grew from 330 to 7,038 adoptions, Russia grew from 746 to 5,862 adoptions, and Guatemala grew from 512 to 3,264 adoptions during those years. 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. 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. South Korea, incidentally, also has never ratified the Hague Convention. 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. 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


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.


134 Status Table, supra note 2.

135 Id.
adoptions from China to the United States. 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. 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. 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. 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. 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

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, 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. 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, 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. 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, 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 children.

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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 5662 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.\footnote{See \textit{Ruben Gallego, White on Black} (Marian Schwartz trans., Harcourt Books 2006); \textit{Kathleen Hunt, Abandoned to the State: Cruelty and Neglect in Russian Orphanages} (Human Rights Watch 1998); David Tobis, \textit{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, \textit{When the Adopted Can’t Adopt}, \textit{TIME}, June 28, 2010, available at http://www.time.com/time/magazine/article/0,9171,1997439,00.html [hereinafter \textit{When the Adopted Can’t Adopt}].}

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.\footnote{See \textit{Alan Philips & John Lahutsky, The Boy from Baby House 10: From the Nightmare of a Russian Orphanage to a New Life in America} (2009); Fred Hiatt, \textit{Russia’s Unwanted Children Being Adopted By West}, \textit{Wash. Post}, Feb. 18, 1992, at A01; Miriam Horn, \textit{A Dead Child, A Troubling Defense}, \textit{U.S. News & World Rep.}, July 6, 1997; Gregory Feder, \textit{Russia’s Halt on Adoptions Spotlights Conditions} (NPR radio broadcast Aug. 25, 2007), transcript available at https://www.npr.org/templates/transcript/transcript.php?storyId=9810880.}

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


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.\(^\text{155}\) 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,\(^\text{156}\) 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.\(^\text{157}\)

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;\(^\text{158}\) 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

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\(^{155}\) 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 128; 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 129.

\(^{157}\) 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. 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.

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.

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. 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. 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. 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 Guatemala

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.
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. 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. 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, those rules cannot be the cause of the decline in adoptions, for China has increasingly long waiting times for prospective adoptive parents. 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

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166 See Meier & Zhang, supra note 165; Demick, supra note 163; 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.

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

Some of the declines may be due to laudable Russian efforts to de-institutionalize children through foster care and domestic adoption. 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.

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


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://wwwpassportmagazine.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. 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. Indeed, there is a significant literature and set of actors concerned with the profound problems of post-institutionalized Russian (and Eastern European) children.

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. Mancuso was a pedophile who, as a divorced, single male, requested adoption of “a
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 relicensing 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

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

negotiating a bilateral adoption agreement. 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. 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, Russian adoptions peaked in 2004, and Chinese adoptions peaked in 2005, Guatemalan adoptions were still rising as late as 2007:

1998: 911
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


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.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{186} GUATEMALA: COUNTRY INFORMATION, supra note 126; TOP COUNTRIES OF ORIGIN, supra note 3.
\textsuperscript{187} See sources cited supra note 148; Smolin, Child Laundering, supra note 16, at 135–42, 163.
\textsuperscript{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.
\textsuperscript{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.
\textsuperscript{190} See Guatemala Implementation, supra note 151; HAGUE GUATEMALA REPORT, supra note 148.
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

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192 See supra note 153 and accompanying text; Statistics by Country of Origin, supra note 164.
194 Id.
195 Id.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{201} Rather, the United States remains “deeply concerned about the history of


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: 1,080204

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.
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. 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.

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. While the full complexities of Korean adoptions are beyond the scope of this Article, in

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

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. It took some fifteen years after creation of the treaty for the United States to ratify the agreement. 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: 2,277211

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) Ethiopia: 1,724
(5) South Korea: 1,065
(6) Vietnam: 748


(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

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. 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.

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

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

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

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

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216 See TOP COUNTRIES OF ORIGIN, supra note 3.
217 Id.
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

The numbers from 1990 to 1997 are similar, falling within a range from 331 to 445 annual adoptions. 222

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.


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.”

2. The subsidiarity principle. The Indian Supreme Court established the following clear order of priority: (1) Child with biological family; (2) Child adopted within India; (3) Child adopted out of country by NRIs [Non-Resident Indians]; (4) Child adopted out of country by “adoptive couples where at least one parent is of Indian origin”; (5) Child adopted out of country by non-Indian origin adoptive parent(s). 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.”

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226 See Hague Convention, supra note 1, pmbl.
229 Id. at 252.
231 Id. at 714.
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.”

(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.

(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.”

(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. 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.

(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. 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

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

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


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


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.” Accredited bodies are limited to “non-profit objectives” and are subject to financial supervision by the state.

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.” 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. 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.

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. 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.

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).
245 See ANHA 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. 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.

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. 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

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


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


\(^{251}\) 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. 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 adoptions...
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.