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**SAFEGUARDING THE INTERESTS OF CHILDREN IN
INTERCOUNTRY ADOPTION: ASSESSING THE
GATEKEEPERS**
D. MARIANNE BLAIR*

When properly regulated, intercountry adoption has enormous potential to improve the lives of some of the thousands of orphaned and abandoned children around the globe. In recent decades, advocates of intercountry adoption have worked tirelessly to promote the institution and to create a viable legal framework, through the development of public and private international conventions and domestic law reform, so that children have the opportunity to be raised by permanent families when such placements are not available in their countries of origin.

The base of this regulatory system is the Convention on the Rights of the Child (CRC),¹ a human rights treaty now ratified by all but a handful of nations,² which proclaims that the best interests of children must be the “paramount consideration” in any adoption system, and directs that intercountry adoptions be conducted with safeguards and standards equivalent to domestic adoption.³ An Optional Protocol to the CRC

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¹ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

² Office of the United Nations High Commissioner for Human Rights, Convention on the Rights of the Child, <http://www.ohchr.org/english/countries/ratification/11.htm> (last visited Apr. 14, 2006). One hundred ninety-two nations are currently parties to the CRC. *Id.* The United States is a signatory, but is one of the few nations in the world that is not a party to the Convention. *Id.*

³ CRC, *supra* note 1, art. 21.

(Optional Protocol),⁴ with 103 states parties,⁵ requires contracting nations to criminalize the improper inducement of consent and to enact laws and institute programs to deter the sale of children.⁶ The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Intercountry Adoption Convention),⁷ currently with sixty-eight contracting states,⁸ further implements the goals of the CRC by creating a framework of standards and practices, requiring governmental accreditation or approval of facilitators, and establishing central authorities in each nation to oversee its requirements.⁹ Both sending¹⁰ and receiving

⁴ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, annex II, U.N. Doc. A/RES/54/263 (May 25, 2000) [hereinafter *Optional Protocol*].

⁵ Office of the United Nations High Commissioner for Human Rights, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, http://www.ohchr.org/english/countries/ratification/11_c.htm (last visited Apr. 14, 2006). The United States is a party to the *Optional Protocol*, which it ratified on December 23, 2002. *Id.* See also the Reservations of the United States (under Declarations and Reservations, listed alphabetically by nation). *Id.*

⁶ *Optional Protocol*, *supra* note 4, annex II, arts. 3, 9–10.

⁷ *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, May 29, 1993, S. TREATY DOC. No. 105-51, 32 I.L.M. 1134 [hereinafter *Hague Intercountry Adoption Convention*].

⁸ A current list of states parties to the *Hague Intercountry Adoption Convention* can be found at the official website of the Hague Conference on Private International Law. *Hague Conference on Private International Law, Status Table: Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, http://www.hcch.net/index_en.php?act=conventions.status&cid=69 (last visited Apr. 14, 2006). The United States has signed the *Hague Intercountry Adoption Convention* and is currently working toward ratification in 2007. U.S. Department of State, *Implementation of the Hague Convention on Intercountry Adoption*, <http://www.state.gov/r/pa/prs/ps/2006/61274.htm> (last visited Apr. 14, 2006).

⁹ See generally *Hague Intercountry Adoption Convention*, *supra* note 7.

¹⁰ See, e.g., U.S. Department of State, *New Adoption Legislation in Belarus* (Feb. 14, 2005), http://travel.state.gov/family/adoption/notices/notices_2083.html (reporting that Belarus issued a new law in January 2005 that creates new restrictions and procedures for international adoption); Velina Todorova, *The New Legislation on International Adoption in Bulgaria: In the Interest of Children?*, in *THE INTERNATIONAL SURVEY OF FAMILY LAW* 119, 119–20 (Andrew Bainham & Bart Rwezaura eds., 2005) (critiquing Bulgaria's 2003 reforms to its Family Code); Jini L. Roby, *Understanding Sending Country's Traditions and Policies in International Adoptions: Avoiding Legal and Cultural Pitfalls*, 6 J.L. & FAM. STUD. 303, 310, 314, 321 (2004) (discussing the Republic of Marshall Islands's

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nations,¹¹ including the United States,¹² have also devoted considerable attention during the last decade to domestic legislative and regulatory reform of their transnational adoption practices.

Nevertheless, as the nations of the world move toward fully implementing the general directives of the CRC and the more specific requirements of its Optional Protocol and the Hague Intercountry Adoption Convention, they face enormous challenges in creating regulatory systems sufficient to ensure that transnational adoption will be conducted in a manner that best serves the needs of children. During the past two decades, the number of children adopted transnationally has increased dramatically.¹³ Just within the United States, the number of children

Adoption Act of 2002, which criminalizes solicitation from and creates protections for birth families and establishes a central adoption authority, and adoption reform in the nation of Georgia in 2003, which permits some international adoptions); Florida Ruth P. Romero, *Legal Challenges of Globalization*, 15 IND. INT'L & COMP. L. REV. 501, 535 (2005) (noting that Philippines passed the Intercountry Adoption Act of 1995, which created a Central Authority, permitted intercountry adoptions for the first time, and limited the number of foreign adoptions for the first five years); Olga A. Khazova, *Inter-Country Adoption: Though a Large Amount of Law, Still a Lot of Uncertainty*, in THE INTERNATIONAL SURVEY OF FAMILY LAW, *supra*, at 433 (surveying Russian legal reforms occurring over the past decade); Mary Hora, Note, *A Standard of Service that All Families Deserve: The Transformation of Intercountry Adoption Between the United States and the Russian Federation*, 40 BRANDEIS L.J. 1017 (2002) (discussing the impact of foreign adoption reforms in Russia pursuant to the nation's March 29, 2000 decree); U.S. Department of State, Notice to American Citizens Who Have Previously Adopted from Ukraine, http://travel.state.gov/family/adoption/notices/notices_2827.html (last visited Apr. 14, 2006) (announcing Ukraine's September 2005 decree calling for immediate suspension of acceptance of new adoption dossiers from six nations until post placement reporting requirements are met); U.S. Department of State, Text of U.S. – Vietnam Adoption Agreement, http://travel.state.gov/family/adoption/notices/notices_2555.html (last visited Apr. 14, 2006) (confirming joint measure to implement the Hague Convention and prevent trafficking).

¹¹ See, e.g., DEP'T OF HEALTH & CHILDREN, IRELAND, ADOPTION LEGISLATION: 2003 CONSULTATION AND PROPOSALS FOR CHANGE 79–83 (2005), http://www.dohc.ie/publications/pdf/adoption_legislation_2003_consultation_and_proposals_for_change.pdf?direct=1; Adoption (Intercountry Aspects) Act, 1999, c. 18, (Eng., Scot., & Wales), available at <http://www.opsi.gov.uk/acts/acts1999/19990018.htm>.

¹² See Intercountry Adoption Act of 2000, 42 U.S.C. §§ 14901–14954 (2000), and implementing regulations, 71 Fed. Reg. 8064 (Feb. 15, 2006) (to be codified at 22 C.F.R. pts. 96–98).

¹³ Ethan B. Kapstein, *The Baby Trade*, FOREIGN AFF., Nov./Dec. 2003, at 115, 116–19 (detailing the increase in international adoption); Romero, *supra* note 10, at 534 (stating
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immigrating to join adoptive families has more than tripled since 1990.¹⁴ Increased interest in intercountry adoption on the part of prospective adoptive parents, and an increased willingness in some nations of origin to place children, has altered not only the quantity of transnational adoptions, but also the nature of those facilitating these adoptions. Prior to the 1990s, most international adoption agencies were philanthropic or missionary organizations.¹⁵ During the past twenty years, however, the number of international adoption agencies in the United States has more than doubled, and many facilitators are now private or for-profit companies and individual entrepreneurs.¹⁶ While increased willingness on the part of families to adopt internationally and growth in the number of facilitators may expand the opportunities for children to find permanent homes, these trends also exacerbate the risks of unethical or negligent adoption practices that are harmful to children and magnify the need for regulation at both the international and domestic levels to deter such practices.

Although outright prohibition of intercountry adoption has few adherents in the international community,¹⁷ an intense debate has emerged

that international adoption worldwide nearly doubled in slightly over a decade, from 19,000 in 1988 to 34,000 in 2001).

¹⁴ U.S. Department of State, *Immigrant Visas Issued to Orphans Coming to the U.S.*, http://travel.state.gov/family/adoption/stats/stats_451.html (last visited Apr. 14, 2006) [hereinafter *Immigrant Visas*]. In 1990, 7,093 immediate relative orphan visas were issued by the United States government to children immigrating to the United States; in 2005, 22,728 visas were issued. *Id.* This is the immigration visa used by almost all of the children adopted from abroad by United States citizens. See 8 U.S.C. § 1101(b)(1)(F) (2000). For further explanation of orphan visa status, see D. MARIANNE BLAIR & MERLE H. WEINER, *FAMILY LAW IN THE WORLD COMMUNITY: CASES, MATERIALS, AND PROBLEMS IN COMPARATIVE AND INTERNATIONAL FAMILY LAW* 942–55 (2003).

¹⁵ *Implementation of the Hague Convention on Intercountry Adoption: Hearing Before the H. Comm. on International Relations*, 106th Cong. 141 (1999) (statement of Jerri Ann Jenista, American Academy of Pediatrics).

¹⁶ *Id.* (citing statistics from the International Concerns Committee for Children, which listed forty-six international adoption agencies in the early 1980s, and 176 in 1999).

¹⁷ One exception might be British M.E.P., Emma Nicholson, who has vigorously campaigned against intercountry adoption. In press releases, she makes the totally unsubstantiated assertion that while some children placed abroad end up in loving families, they are just as likely to be “subjected to paedophilia, child prostitution or domestic servitude.” Emma Nicholson, *Red Light on Human Traffic*, GUARDIAN UNLIMITED, July 1, 2004, <http://www.guardian.co.uk/child/story/0,,1250908,00.html>; accord Emma Nicholson, *Inter-Country Adoption and Romania*, <http://www.emmanicholson.org.uk/Romania.html> (follow *Wall Street Journal* “article” hyperlink) (last visited Apr. 14, 2006). While M.E.P.

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regarding the manner in which the institution should be regulated.¹⁸

Nicholson's views are extreme, there are some other scholars and international groups who, though not advocating the complete global prohibition of intercountry adoption, advance arguments that come close to this position. See, e.g., Andrew Bainham, *International Adoption from Romania – Why the Moratorium Should not Be Ended*, 15 CHILD. & FAM. L.Q. 223, 234–35 (2003) (arguing that Romania's moratorium on intercountry adoption should be maintained to prevent its breaching international conventions); Nimfa Cuesta Vilches, *Trafficking in Women and Children*, Address at the 4th World Congress on Family Law and Children's Rights 1 (Mar. 20–23, 2005), <http://www.lawrights.asn.au/docs/vilches2005.pdf> (referring, apparently, to international adoption in general as trafficking).

¹⁸ For a sampling of recent scholarship within the United States expressing concern with respect to the chilling effect of some types of international and domestic regulation, see Professor Elizabeth Bartholet's significant work in this area, cited *infra* note 19. See also, e.g., Sara Dillon, *Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption*, 21 B.U. INT'L L.J. 179, 215–21, 237–43 (2003); Lynn D. Wardle, *Parentlessness: Adoption Problems, Paradigms, Policies, and Parameters*, 4 WHITTIER J. CHILD. & FAM. ADVOC. 323, 346–53, 356–57, 360 (2005); Linda J. Olsen, Comment, *Live or Let Die: Could Intercountry Adoption Make the Difference?*, 22 PENN ST. INT'L L. REV. 483, 489–91, 523–25 (2004); cf. Amy Grillo Kales, *The Intercountry Adoption Act of 2000: Are Its Laudable Goals Worth Its Potential Impact on Small Adoption Agencies, Independent Intercountry Adoptions, and Ethical Independent Adoption Professionals?*, 36 GEO. WASH. INT'L L. REV. 477, 490–93 (2004).

Other recent articles within the United States have focused more specifically on the need for greater regulation. See, e.g., Jacqueline Bhabha, *Moving Babies: Globalization, Markets and Transnational Adoption*, 28 FLETCHER F. WORLD AFF. 181, 184–87, 190–93, 194–96 (2004); Kapstein, *supra* note 13, at 115–16, 123–25; Trish Maskew, *Child Trafficking and Intercountry Adoption: The Cambodian Experience*, 35 CUMB. L. REV. 619, 635–38 (2005); David M. Smolin, *The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals*, 35 SETON HALL L. REV. 403, 475–93 (2005) [hereinafter Smolin, *Adoption Scandals*]; David M. Smolin, *Intercountry Adoption as Child Trafficking*, 39 VAL. U. L. REV. 281, 321–25 (2004) [hereinafter Smolin, *Child Trafficking*]; Jennifer Banks, Note, *The U.S. Market for Guatemalan Children: Suggestions for Slowing the Rapid Growth of Illegal Practices Plaguering International Child Adoptions*, 28 SUFFOLK TRANSNAT'L L. REV. 31, 46–56 (2004); Kelly M. Wittner, Comment, *Curbing Child-Trafficking in Intercountry Adoptions: Will International Treaties and Adoption Moratoriums Accomplish the Job in Cambodia?*, 12 PAC. RIM. L. & POL'Y J. 595, 625–28 (2003).

The difference in these articles is one of emphasis. All of these articles recognize both the benefit of intercountry adoption in some circumstances and the need for some regulation, and each article focuses in various ways on the direction that regulation should take. For another avenue to explore the variety of views regarding the appropriate direction for regulation, see U.S. Department of State, Announcement of Publication on

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Professor Elizabeth Bartholet, one of the most widely-respected proponents of intercountry adoption, through her current and past scholarship, ably describes the risks of over-regulation, and cautions that recent international and domestic reforms have been used by opponents of intercountry adoption to stifle or delay such placements, to the detriment of waiting children.¹⁹ Though we are in fact in agreement on many points, in this Essay I wish to balance her valuable insights by sharing a different perspective, which is that the risks of inadequate regulation are equally compelling.

Intercountry adoption will continue to provide a viable option for children who need families only if international and domestic regulation can be strengthened so as to effectively deter some of the systemic inadequacies that have so tragically dis-served many children's needs. In this Essay, I will focus on two areas of concern—trafficking and the displacement of domestic adoption. Part I will review information that has emerged during the past decade regarding the pervasive nature of the problems associated with these issues. Part II will briefly review and assess current regulation and some anticipated reforms at the international and domestic levels aimed at avoiding similar abuses. Though each of these topics deserves far more detailed scrutiny than the scope of this Essay permits, I hope to convey through this brief overview my belief that it is vitally important for those who are deeply committed to intercountry adoption to critically examine current practices and continue to creatively explore the potential for increased regulation to address current deficiencies.

Department's Website of Public Comments Received on Proposed Hague Regulations, http://travel.state.gov/family/adoption/implementation/implementation_1519.html (last visited Apr. 14, 2006).

¹⁹ Elizabeth Bartholet, Morris Wasserstein Public Interest Professor of Law, Harvard Law School, Address at the Capital University Law School Wells Conference on Adoption Law: Weighing the Costs and Benefits of International Adoption Against the Alternative (Apr. 1, 2005) [hereinafter Bartholet Presentation]; accord ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING 143–63 (1993); Elizabeth Bartholet, *International Adoption*, in CHILDREN AND YOUTH IN ADOPTION, ORPHANAGES, AND FOSTER CARE (Lori Askeland ed., 2005); Elizabeth Bartholet, *International Adoption: Overview*, in 2 ADOPTION LAW AND PRACTICE § 10.04, at 10-30 to 10-36 (Joan Heifitz Hollinger ed., 1988 & Supp. 2004) [hereinafter Bartholet, *International Adoption: Overview*]; Elizabeth Bartholet, *International Adoption: Propriety, Prospects and Pragmatics*, 13 J. AM. ACAD. MATRIMONIAL LAW. 181 (1996) [hereinafter Bartholet, *Propriety, Prospects and Pragmatics*]; Elizabeth Bartholet, *International Adoption: Current Status and Future Prospects*, FUTURE CHILD., Spring 1993, at 89.

I. CREATING FAMILIES FOR CHILDREN OR CHILDREN FOR FAMILIES?

In a recent article, Professor Sara Dillon sets forth a compelling argument that a vibrant international network for intercountry adoption is a human rights imperative because of its potential to provide homeless and institutionalized children a greater opportunity to acquire a “family of [their] own.”²⁰ Professor David Smolin asserts persuasively that the current operation of intercountry adoption in many nations violates the human rights of children because ineffective regulation of the placement process has generated widespread child trafficking.²¹ Though they incorporate human rights analysis into their theses very differently, these scholars in fact share a common premise, one supported by most advocates of intercountry adoption, i.e., that the *children placed through intercountry adoption should be those who would be in need of families even if intercountry adoption did not exist.*²² Determining which children satisfy this criterion is tremendously difficult for members of the adoption community and the scholars who are assessing the institution, as well as for the regulators at both international and domestic levels striving to implement this standard.²³ Nevertheless, mounting evidence has emerged over the past decade suggesting that adoption practices creating children for intercountry adoption are neither isolated nor uncommon.

A. *Trafficking*1. *Cambodia*

While informed debate about the extent of trafficking in intercountry adoption would clearly benefit from additional authoritative investigation by governmental and international bodies,²⁴ the global scope of illicit practices is apparent even from the official reports and governmental responses that have become public in recent years. Most compelling in

²⁰ Dillon, *supra* note 18, at 189, 235–37; accord Olsen, *supra* note 18, at 484–85, 524–25 (arguing generally that promotion of intercountry adoption promotes the human rights of children).

²¹ Smolin, *Child Trafficking*, *supra* note 18, at 325.

²² Dillon, *supra* note 18, at 187–88; Smolin, *Child Trafficking*, *supra* note 18, at 284–85.

²³ See, e.g., Dillon, *supra* note 18, at 187–88, 234 (decrying the lack of empirical data supporting academic discourse on which children are homeless and for what reasons); Maskew, *supra* note 18, at 632–38 (relating a case history exposing the complexity of motivations and ambiguous evidence, which provide the basis for the author’s criticism of current standards).

²⁴ Dillon, *supra* note 18, at 182–85.

this regard are the findings of a recent investigation by the U.S. government into adoption practices in Cambodia.

Although adoption of Cambodian children by U.S. citizens occurred prior to the 1990s, Cambodia did not consistently enter the list of the top twenty nations sending children to the United States for orphan adoption until 1997.²⁵ Between 1997 and 2001, over 1,200 Cambodian children were placed for adoption in the United States.²⁶ During the autumn of 2001, U.S. embassy officials in Cambodia received notice from Cambodian human rights organizations regarding the recent abductions of two children.²⁷ The discovery of one of those infants in a local “orphanage” awaiting a U.S. adoption, and subsequent investigation by embassy staff revealing systemic documentation problems in many of the pending adoption files, raised serious concerns about immigration eligibility, ultimately triggering suspension of the processing of orphan petitions²⁸ for Cambodian children in December 2001.²⁹ As of the spring of 2006, this U.S. immigration moratorium had not been lifted.³⁰

The irregularities uncovered by the U.S. embassy staff prompted a criminal investigation by the U.S. Immigration and Customs Enforcement Office of the Department of Homeland Security (ICE), in conjunction with

²⁵ See *Immigrant Visas*, *supra* note 14.

²⁶ See *id.*

²⁷ U.S. Department of Justice, Questions and Answers: Adoption Processing in Cambodia, <http://uscis.gov/graphics/publicaffairs/questsans/qaadopt.htm> (last visited Mar. 20, 2006) [hereinafter Questions and Answers].

²⁸ *Id.* For an explanation of orphan petitions, see sources cited *supra* note 14. The suspension of the processing of orphan petitions prevents Cambodian children from immigrating to the United States for adoption. See Questions and Answers, *supra* note 27. Some children who were in the pipeline at the time of the suspension, however, were ultimately permitted to immigrate. *Id.* (reporting the processing of thirty-two petitioners with appointments previously scheduled). One scholar reports in an article published in the fall of 2005, that several hundred adoptions pending at the time of the moratorium were ultimately permitted to be completed. Maskew, *supra* note 18, at 623–25.

²⁹ Questions and Answers, *supra* note 27. The Justice Department reported that irregularities discovered by the U.S. embassy staff included discrepancies in the documentation that established the children had been abandoned, inadequate birth certificates, and a lack of records providing any explanation as to how the children had come to some of the orphanages. *Id.*

³⁰ For the most recent notice on the status of Cambodian adoptions by U.S. citizens, see U.S. Department of State, Important Notice Regarding Cambodian Adoptions – U.S. Embassy Statement (Mar. 4, 2004), http://www.travel.state.gov/family/adoption/notices/notices_479.html.

other federal agencies, in which special agents traveled to Cambodia during the spring of 2002 to determine if U.S. citizens were involved in trafficking.³¹ In a summary of their report, issued in November 2004, the investigators provided a detailed description of the systemic trafficking enterprise that they uncovered.³² Baby recruiters would routinely approach families in local villages about their willingness to sell a child.³³ When a potential child was located, the recruiter would be paid a commission of approximately \$50 by baby buyers.³⁴ The buyers, who were often “orphanage” directors or taxicab drivers, would then offer an infant’s family a fifty-kilogram bag of rice and payments ranging from \$20–\$200, a substantial sum in a nation in which the average annual gross national income per capita is around \$300.³⁵ Parents were sometimes told that they could visit their child at an orphanage in Cambodia, or that a rich family would raise their child in the United States and send the family money and photographs, and that the child could petition for the parents’ immigration

³¹ Press Release, U.S. Immigration & Customs Enforcement, Backgrounder: Operation Broken Hearts (Nov. 19, 2004), http://www.ethicanet.org/galindo_backgr.pdf [hereinafter Backgrounder].

³² *Id.* For a more detailed description of how the enterprise operated and the evidence uncovered by the investigators, see the presentation by Agent Richard Cross. Richard Cross, Senior Special Agent, U.S. Immigration & Customs Office Human Trafficking Unit, Address at the Cumberland School of Law Rushton Distinguished Lecture Series: Reforming Intercountry Adoption: Present Realities and Future Prospects, What Really Happened in Cambodia (Apr. 15, 2005), <http://www.adoptinginternationally.com/analysis.html> (under “Law Enforcement Presentation” select presentation format) [hereinafter Cross Presentation]. Agent Cross was one of the two special agents who traveled to Cambodia to conduct the ICE investigation. *Id.*

³³ Cross Presentation, *supra* note 32. Agent Richard Cross reported that recruiters would use posters that had a compilation of pictures sent back to Cambodia by American adoptive families, pictures that the adoptive families had been told would be directed to the Cambodian government. *Id.* These pictures were used to lure poor birth families with visions of the affluent life their child would be experiencing in the United States. *Id.*

³⁴ *Id.*

³⁵ *Id.* The World Bank reports that in 2003 the gross national income per capita for Cambodia, using the atlas statistical method, was 300 U.S. dollars per year. World Bank, Data & Statistics, http://www.worldbank.org/data/databytopic/reg_wdi.pdf (follow “World Development Indicators” hyperlink; then enter “Cambodia;” then enter “GNI per capita, Atlas method;” then enter “2003”) (last visited Mar. 20, 2006). Agent Cross reported that, at the time of his investigations, a standard income in Cambodia was approximately \$250 (in U.S. dollars) per year. Cross Presentation, *supra* note 32.

to the United States upon reaching adulthood.³⁶ The transactions were contingent on medical testing, however.³⁷ If a baby tested positive for AIDS or hepatitis, the baby was returned to the family.³⁸ If the tests were negative, the buyer paid the family and the baby was taken to a stash house, otherwise referred to as an “orphanage.”³⁹ In some instances, though, the family lived nearby and continued to care for the child until the day of the adoption.⁴⁰ A false paper trail was created for the infants by inventing new names and histories that were placed on birth certificates and adoption-related documents, which were then used to obtain legitimate Cambodian passports and U.S. immigration papers.⁴¹

In the course of their investigation, the ICE agents visited many of the stash houses, where they found conditions to be deplorable. Infants were lying in rusty cribs and hammocks covered in feces, the babies were often naked and filthy, and torn screens exposed the children to insects that could carry malaria.⁴² The dwellings were “hot, stuffy, and smelled of human excrement.”⁴³ Agent Richard Cross, one of the ICE agents who conducted the investigation, encountered infants lying unattended in pools of urine or covered in feces, and described conditions in the stash houses as “nasty,” “terrible,” and unfit even for animals.⁴⁴ He found conditions in these “chicken coops” set up to house infants awaiting adoption to be in stark contrast to the well-run, clean orphanage run by missionaries who refused to participate in the international adoption market.⁴⁵

³⁶ Cross Presentation, *supra* note 32. These representations regarding eligibility for the birth parents to immigrate were, of course, false. Federal law specifically precludes relative immigration on the basis of a birth relationship to a child who has subsequently been adopted by United States citizens. See 8 U.S.C. § 1101(b)(1)(E)–(F) (2000).

³⁷ Cross Presentation, *supra* note 32.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*; see also Sara Corbett, *Where Do Babies Come From?*, N.Y. TIMES MAG., June 16, 2002, at 42, 46.

⁴² Backgrounder, *supra* note 31, at 2; Government’s Sentencing Memorandum at 27–28, *United States v. Galindo*, No. CR03-187Z (W.D. Wash. Nov. 17, 2004), available at http://www.icasn.org/Galindo_prosecution.pdf.

⁴³ Backgrounder, *supra* note 31, at 2; see also Corbett, *supra* note 41, at 42–43 (describing one institution filled with 150 children in which the infants filled two rooms “the size of a convention hall” where “[m]osquitoes float[ed] in clouds”).

⁴⁴ Cross Presentation, *supra* note 32.

⁴⁵ *Id.* (including within the presentation, pictures of both the one “real” orphanage that he visited, and the many stash houses used to process infants awaiting adoption). In his

Out of the investigation, federal felony charges were brought in the United States against two sisters, Lauryn Galindo⁴⁶ and Lynn Devin,⁴⁷ who owned Seattle International Adoptions (SIA), the largest U.S. agency handling Cambodian adoptions.⁴⁸ Between January 1997 and December 2001, SIA placed over 700 of the more than 1,200 children who were adopted from Cambodia by U.S. citizens.⁴⁹ In fact, Ms. Galindo contends that she has “facilitated the majority of [adoptive] placements of Cambodian orphanage children in families all over the world.”⁵⁰ Ms. Devin directed the U.S. operation and recruited prospective adoptive parents in the United States, while Ms. Galindo worked in Cambodia to identify children for placement, transfer physical custody of children to prospective adoptive parents, and assist adoptive parents in filling out the INS forms to obtain visas.⁵¹

Both sisters were indicted on federal charges to commit visa fraud and money laundering,⁵² and both ultimately entered plea agreements.⁵³ Ms.

presentation, Agent Cross described the missionaries’ orphanage as a beautiful place in which over 100 children resided, only three of whom were babies. *Id.*; see also Government’s Sentencing Memorandum, *supra* note 42, at 27–28 (describing conditions of orphanages with which Lauryn Galindo was associated in March and April 2002 and April 2003).

⁴⁶ See generally Information, *United States v. Galindo*, No. CR03-187Z (W.D. Wash. June 21, 2004), available at <http://www.ethicanet.org/GalindoINFORMATION.pdf> [hereinafter Galindo Information].

⁴⁷ See generally Information, *United States v. Devin*, No. CR03-187Z (W.D. Wash. Dec. 10, 2003), available at http://www.ethicanet.org/Lynn_Devin_charges.pdf [hereinafter Devin Information].

⁴⁸ Thomas Fields-Meyer et al., *Whose Kids Are They?*, PEOPLE, Jan. 19, 2004, at 74, 75; Maureen O’Hagan, *Sentence Ends Adoption-Fraud Case*, SEATTLE TIMES, Dec. 18, 2004, available at http://seattletimes.nwsourc.com/html/localnews/2002123551_adoption18m.html.

⁴⁹ Robin McDowell, *Cambodian Babies Still Sold for Adoption*, BIRMINGHAM NEWS, Mar. 7, 2004, at 6A; see also Background, *supra* note 31, at 1; Immigration Visas, *supra* note 14.

⁵⁰ Defendant’s Sentencing Memorandum at 2, *United States v. Galindo*, No. CR03-187Z (W.D. Wash. Nov. 16, 2004), available at <http://ethicanet.org/GalindoDefMemo.pdf>. At her sentencing hearing, Ms. Galindo admitted to placing at least 800 Cambodian children for adoption. Cross Presentation, *supra* note 32.

⁵¹ O’Hagan, *supra* note 48; Cross Presentation, *supra* note 32.

⁵² Galindo Information, *supra* note 46; Devin Information, *supra* note 47.

⁵³ Plea Agreement, *United States v. Galindo*, No. CR03-187Z (W.D. Wash. June 23, 2004), available at <http://www.ethicanet.org/GalindoPLEA.pdf> [hereinafter Galindo Plea Agreement]; O’Hagan, *supra* note 48. Agent Cross observed that at the time of these

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Galindo admitted that she falsely reported children as orphans when she knew or had reason to know that some of the children had living parents or relatives.⁵⁴ After founding the agency, she amassed substantial wealth from adoption fees and “orphanage donations.”⁵⁵ The agency charged between \$10,500 and \$11,500 for each adoption, approximately \$3,500 of which was represented to adoptive parents as a donation to the “orphanage” for care of the children and improvement of the facilities.⁵⁶ The ICE investigators reported that there was little evidence from their

prosecutions, there was no statute that made baby trafficking of these infants a federal crime. Cross Presentation, *supra* note 32. When the Hague Intercountry Adoption Convention enters into force for the United States, criminal remedies will be available under 42 U.S.C. § 14944 for false or misleading statements or offering inducements intended to affect a relinquishment or consent to adoption. 42 U.S.C. § 14944 (2000). Agent Cross related that his investigation involved examination of over 140 immigration files randomly selected, and that his team had gathered evidence from those files on which he would have brought charges against Ms. Galindo for federal crimes related to over 100 adoptions if the case had gone to trial. Cross Presentation, *supra* note 32. Instead, when Ms. Galindo and her attorneys were confronted with the evidence gathered in the investigation, she entered a guilty plea to charges stemming from only seventeen of these adoptions in a plea agreement filed the day after the Information was filed. *Id.*; Government’s Sentencing Memorandum, *supra* note 42, at 3; *see also* Galindo Plea Agreement, *supra*, at 6–8; Galindo Information, *supra* note 46.

⁵⁴ Defendant’s Sentencing Memorandum, *supra* note 50, at 2–3, 17–20. Ms. Galindo admitted in her Sentencing Memorandum that she prepared or advised prospective adoptive parents to fill out visa application forms that falsely reported that children were orphans, or in some cases, switched the paperwork for children. *Id.*; Cross Presentation, *supra* note 32. She argued that the false paperwork she submitted was at the insistence of Cambodian government officials. *See* Defendant’s Sentencing Memorandum, *supra* note 50, at 17–19. Yet, U.S. government investigators documented large payments that she made to various government officials, including one high government official who was paid over \$50,000 on one day alone for twenty-nine adoptions in April 1999. Cross Presentation, *supra* note 32. Moreover, two of her Cambodian associates who located children for adoption told the investigators “that Galindo knew that payments were being made to birth mothers to induce them to give up their child for adoption.” Government’s Sentencing Memorandum, *supra* note 42, at 4. The investigators found receipts among her records indicating that locators sought reimbursement for expenses when children who had been recruited but failed the medical testing were returned. Cross Presentation, *supra* note 32.

⁵⁵ *See* Government’s Sentencing Memorandum, *supra* note 42, at 6–8, 19–23. Ms. Galindo and her co-conspirators received over \$150,000 just for the seventeen adoptions that formed the basis of the criminal charges. *Id.* at 3–4.

⁵⁶ Galindo Plea Agreement, *supra* note 53, at 6–7; *see also* Cross Presentation, *supra* note 32.

inspection of the facilities with which the agency had affiliated to verify that any substantial portion of these fees were used for that purpose, nor could Ms. Galindo's attorney verify the extent of these contributions.⁵⁷ Although she was a person of very moderate means prior to the foundation of the agency,⁵⁸ by 2001, Ms. Galindo had accumulated, in her own name or in the name of shell corporations she had created with family members, a beach home in Hawaii worth \$1.4 million, a Jaguar, and a number of substantial bank accounts.⁵⁹ In November 2004, Ms. Galindo was sentenced to eighteen months in prison, followed by three years of supervised release, 300 hours of community service, \$60,000 in restitution, and forfeiture of her interest in the beach house and the other proceeds of her crimes.⁶⁰ Ms. Devin was sentenced to six months of house arrest, forfeiture of \$110,000, payment of \$10,900 in restitution, and a \$30,000 fine.⁶¹

This is not, however, simply a tale of two sisters. While SIA may have facilitated up to two-thirds of the Cambodian international adoptions to the

⁵⁷ Cross Presentation, *supra* note 32. In 2002, Ms. Galindo is reported to have told the press that she donated \$400 of the \$3,500 "orphanage donation" to the orphanage, per child. Richard Sine, *Inquiry Spotlights Cambodian Baby "Locators"*, BOSTON GLOBE, June 16, 2002, at A8.

⁵⁸ See Defendant's Sentencing Memorandum, *supra* note 50, at 6–7. Ms. Galindo's statement suggests that her early work in international adoption in Cambodia, during the late 1980s and early 1990s, may initially have been limited and motivated by humanitarian goals. *Id.* at 8–13.

⁵⁹ See Government's Sentencing Memorandum, *supra* note 50, at 28–29, 39–40. The founding of the agency marked the beginning of financial schemes in which large amounts of money were collected. Though the Cambodian government at that time had no specific fees for international adoptions, substantial amounts were channeled to government officials, and substantial amounts were funneled into gifts to family members and shell corporations that enabled Ms. Galindo to amass vast personal wealth over a five-year period. See *id.* at 6–9; see also Cross Presentation, *supra* note 32 (providing detailed information regarding the proof compiled by the government of the profits Ms. Galindo and her corporations amassed).

⁶⁰ Press Release, U.S. Attorney's Office, W. Dist. of Wash., Hawaii Resident Sentenced to 18 Months in Prison in Cambodian Adoption Conspiracy (Nov. 19, 2004) http://www.justice.gov/usao/waw/press_room/2004/nov/galindo.htm.

⁶¹ O'Hagan, *supra* note 48. Ms. Devin received a lighter sentence because she cooperated with authorities and because the judge found that her motivation was to help the children rather than financial. *Id.* There was evidence that she was aware that children's identities had been substituted on documentation if the first adoption fell through, but no evidence that she was aware that payments were made to birth parents. *Id.*

United States during the five-year period before the U.S. moratorium was put in place, other facilitators unassociated with Ms. Galindo were also using these or similar tactics.⁶² ICE investigator Richard Cross reported that a ploy used by some of these facilitators was to inform birth parents that their children would be cared for in institutions in Cambodia and that they could get their children back when they “got on their feet.”⁶³ In fact, when these parents tried to later retrieve their children, they discovered the children had been placed for adoption overseas.⁶⁴ In other instances, some children may have simply been abducted.⁶⁵ Moreover, trafficking practices in Cambodia did not cease with the prosecution of Galindo and Devin.⁶⁶ As recently as March 2004, the press reported that traffickers continued to comb poor provinces in Cambodia offering parents as little as twenty dollars for their children.⁶⁷ In response to this systemic pattern of trafficking, during the past three years many other receiving nations, including France, Netherlands, Switzerland, Belgium, and Canada, have joined the United States in suspending international adoptions from Cambodia.⁶⁸ As recently as June 2004, the United Kingdom suspended

⁶² See Fields-Meyer et al., *supra* note 48, at 78 (relating story of adoptive parents who worked with a different agency and later discovered that their child was sold by her father). See also Press Release, Licadho: Cambodian League for the Promotion & Def. of Human Rights, Full Investigation Needed into Adoption Corruption & Abuses (Aug. 5, 2004), <http://www.licadho.org/press/files/74Press%20statement%20Galindo.pdf>, in which Licadho president Kek Galabru asserts that “[t]he problems go far wider than Galindo, Devin and their accomplices.”

⁶³ Cross Presentation, *supra* note 32.

⁶⁴ *Id.* (discussing facilitators other than Galindo); see also Backgrounder, *supra* note 31, at 2.

⁶⁵ Questions and Answers, *supra* note 27; see also Corbett, *supra* note 41, at 46–47 (recounting firsthand account of one such abduction).

⁶⁶ See McDowell, *supra* note 49.

⁶⁷ *Id.*

⁶⁸ *Id.* (noting that France and the Netherlands suspended international adoption from Cambodia in 2002); Press Release, Adoption Council of Can., Country Survey Reveals Status of International Adoption (July 30, 2005), <http://www.adoption.ca/news/050730cystatus.htm> (reporting that Canada, in March 2003, concluded that “the adoption process in Cambodia is open to abuse and insufficiently protects the interests of the children and the birth and adoptive parents”); Adoption-net, Britain Bans Cambodian Adoptions (June 24, 2004) <http://www.adoption-net.co.uk/> (follow “News” hyperlink; then follow “News Archive” hyperlink; then follow “2004” hyperlink; then follow “June, 2004” hyperlink; then follow “Britain bans Cambodian adoptions” hyperlink) (referencing Swiss and Belgian suspensions in recent years).

Cambodian adoptions after its own government investigators uncovered evidence of systemic falsification of documents and the use of payments or coercion to procure children.⁶⁹

Thus, the intercountry adoption network in Cambodia thwarted the very goals of international adoption advocates. It fostered the separation of hundreds of children from families who would otherwise have cared for them in their country of origin, and removed them to newly created holding stations in which they were subjected to deplorable conditions while awaiting a foreign adoption.⁷⁰ The burgeoning interest in intercountry adoption by American and European parents by 2002 had spawned the creation of new “orphanages” filled, not coincidentally, with predominantly female infants,⁷¹ who were systematically screened for

⁶⁹ Department for Education and Skills, Temporary Suspension of Adoptions from Cambodia, <http://www.dfes.gov.uk/adoption/cambodia/> (last visited Apr. 14, 2006) (announcing the June 22, 2004 suspension of adoption of Cambodian children by U.K. residents based on evidence of procurement of children by coercion and payments to birth mothers, as well as other concerns); see also Adoption-net, *supra* note 68 (quoting Margaret Hodge, Minister of State for Children, Young People, and Families, regarding the results of the government investigation).

⁷⁰ For insight into the devastating emotional impact of such practices on children who were old enough to be aware that they were being “sold” (and often several years older than they were represented to be), see the Victim Impact statement of Camryn Mosley as well as excerpts from statements by adoptive parents about the experiences of their children, some of whom were pried screaming from birth parents represented to the adoptive parents as “nannies.” See Government’s Sentencing Memorandum, *supra* note 42, at 9–21; Corbett, *supra* note 41, at 74, 82–83; Fields-Meyer et al., *supra* note 48, at 78. These sources similarly describe the emotional turmoil experienced by their adoptive families who discovered only months or years later that their children had been trafficked. First and secondhand accounts of the pain experienced by birth parents whose children were adopted without their knowledge are found in the Government’s Sentencing Memorandum, *supra* note 42, at 12–17, and Corbett, *supra* note 41, at 74 (reporting the account of Chanthea Chea).

⁷¹ See Cross Presentation, *supra* note 32 (reporting the large number of infants in the stash houses he visited, compared to relatively few older children); see also Corbett, *supra* note 41, at 44. Ms. Corbett cites a conversation with Kent M. Wiedemann, the U.S. Ambassador to Cambodia until May 2002, who confirmed that the “growing interest in Cambodian adoptions has resulted in new orphanages built expressly” to accommodate American adoptions. Corbett, *supra* note 41, at 44. He noted that the orphanages are “filled with children who seem custom-ordered to suit American tastes.” *Id.* Corbett describes her own visit to one such orphanage populated by infants who were predominantly female and relates accounts of recent police raids on other such institutions. *Id.* at 44–45. One Cambodian woman who lived near a stash house reported to Ms. Corbett

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health problems, i.e., the children most sought by prospective international adopters.⁷² Nor was it a coincidence that few such children were found in the relatively well-run institutions in Cambodia, filled with predominantly older children, whose staffs refused to participate in the baby market.⁷³

There are, of course, some children in Cambodia who are in fact orphaned or abandoned, and if permanent family placements cannot be found in Cambodia, international adoption might well serve their needs. Sadly, the proliferation of unregulated infant trafficking that clearly necessitated the moratoria by the United States and other Western nations⁷⁴

that she observed local transactions in which birth mothers were paid \$150 for boys and \$180 for girls. *Id.* at 45–46.

⁷² See Corbett, *supra* note 41, at 44. Agency workers report that the ratio of requests by American prospective adoptive parents for girls compared to requests for boys is four to one. *Id.* One study of children brought to the United States for international adoption indicated that between 1991 and 2001, 64% of the children immigrating to the United States for adoption were girls. EVAN B. DONALDSON ADOPTION INST., INTERNATIONAL ADOPTION FACTS (2002), <http://www.adoptioninstitute.org/FactOverview/international.html>. The authors suggest that one reason girls outnumber boys is that one-quarter of the children brought to the United States are from China, where most of the children available for international adoption are girls. *Id.* While undoubtedly this is a factor, it is also possible that many couples choose to adopt from China because the opportunity to adopt girls is so much greater in China. See sources cited *infra* notes 146–47. Another report by the Adoption Institute noted that 46% of the children adopted internationally by U.S. parents in 1998 were under the age of one, and almost 90% were under the age of five. EVAN B. DONALDSON ADOPTION INST., OVERVIEW OF ADOPTION IN THE UNITED STATES (2002), <http://www.adoptioninstitute.org/FactOverview.html>.

This observation is not made as a condemnation of prospective adoptive parents for preferring to adopt young children. Children adopted at a younger age often adjust better to their new environments, and benefit from less exposure to institutional life. See Dillon, *supra* note 18, at 236–37; Bartholet Presentation, *supra* note 19. In fact, this author adopted a healthy, infant daughter from China ten years ago.

⁷³ See Cross Presentation, *supra* note 32 (relating personal observation at the missionaries' well-run orphanage of an encounter with a woman who brought an infant she claimed to have found to the gates, attempted to sell the child, and took the infant away when she learned that the staff would not pay her for the baby); see also Corbett, *supra* note 41, at 44 (relating a similar incident at a "state-of-the art" orphanage operated by an American pediatrician).

⁷⁴ Though the moratoria did not completely quash infant trafficking, by 2004 Cambodia's Women's Affairs Minister reported that complaints about infant sales and thefts came to a "near standstill" after France and the United States, the two largest receiving nations for Cambodian children, halted Cambodian adoptions. McDowell, *supra* note 49.

may have blocked the opportunity for these children to find an adoptive placement.

2. *Other Sending Nations*

Although the systemic trafficking in Cambodia has been the most recently and extensively documented, the experience in Cambodia cannot be dismissed as an aberration. Similar concerns have surfaced in the past decade in many nations, including India, Guatemala, and Vietnam.

India experienced repeated adoption scandals in 1995, 1999, and 2001 in the state of Andhra Pradesh, involving many orphanages.⁷⁵ Most highly publicized were allegations of systemic baby buying,⁷⁶ particularly from a nomadic group known as the Lambadas.⁷⁷ In addition, the scrutiny generated by this outright trafficking exposed other illicit practices. Orphanage scouts induced parents to send children to institutions affiliated with international adoption facilitators through coercion, using various money-lending schemes, and through fraudulent representations that the institutions would operate like boarding schools, where children would be educated and could be visited by their parents.⁷⁸ In fact, when the children arrived at the institutions, their identities were subsequently changed and they were placed for international adoption.⁷⁹ Although both the scope of trafficking and the investigations triggered by the scandals were smaller in scale than the nation-wide inquiry in Cambodia,⁸⁰ Indian state government officials in Andhra Pradesh did launch their own investigation, which

⁷⁵ For a detailed account of the alleged practices and criminal investigations in Andhra Pradesh, see Smolin, *Adoption Scandals*, *supra* note 18, at 456–75.

⁷⁶ Raymond Bonner, *A Challenge in India Snarls Foreign Adoptions*, N.Y. TIMES, June 23, 2003, at A3.

⁷⁷ Gregory Katz, *The Pounds 18 Babies*, FIN. TIMES MAG., June 19, 2004, available at 2004 WLNR 14545757; Gita Ramaswamy, *The Baby Harvest: Scandal over Westerners "Shopping" for Children in India*, NEW INTERNATIONALIST, Aug. 2003, at 6, 6, available at http://www.findarticles.com/p/articles/mi_m0JQP/is_359/ai_107489447; Y.S. Rajasekhara Reddy, *Adoption Scandal Shows Govt Inaction*, TIMES INDIA, Jan. 31, 2002, available at http://www1.timesofindia.indiatimes.com/cms.dll/articleshow?art_Id=1295181525.

⁷⁸ Adopting Internationally, An Indian Adoption Story, <http://www.adoptinginternationally.com/stories.html> (last visited Apr. 14, 2006).

⁷⁹ See Smolin, *Adoption Scandals*, *supra* note 18, at 462.

⁸⁰ *Id.* at 451. "There has never been a comprehensive investigation by Indian or United States authorities as to the accuracy of such charges . . . , [although] at various points in time government actors have given the charges [of child buying] substantial credence" *Id.*

ultimately led to a shutdown of international adoptions by that state,⁸¹ criminal charges and imprisonment of certain orphanage directors,⁸² and in 2005 the conviction of the coordinator of one orphanage and nine other individuals for actions related to the 2001 scandal.⁸³ Concern over the events in Andhra Pradesh was sufficiently grave to cause the province of Quebec to halt Indian adoptions in 2001.⁸⁴ Ultimately, the recurrent trafficking in Andhra Pradesh and perceptions of an inadequate response by governmental and international bodies prompted a highly politicized debate both within India and in the international media about the validity of India's participation in international adoption under any circumstances,⁸⁵ thereby impeding the adoption not only of infants, but also of older children with unmet health needs who were unlikely to find permanent placements within India.⁸⁶

Guatemala has also been a target of particular international concern. In July 1999, the U.N. Special Rapporteur of the Commission on Human

⁸¹ Katz, *supra* note 77 (citing Shalini Misra, director of the Women and Child Welfare Department in Andhra Pradesh in 2001, who contends that the Indian state's inquiry "established a definite link between baby trafficking and international adoption"); *see also* Smolin, *Adoption Scandals*, *supra* note 18, at 473 (stating that no international adoptions from Andhra Pradesh occurred from August 2003 through July 2004).

⁸² Smolin, *Adoption Scandals*, *supra* note 18, at 457–58 (reporting that the 1999 scandals prompted police raids and the imprisonment of two orphanage directors, who were ultimately released without ever being formally tried).

⁸³ *10 Convicted in Child Adoption Case*, HINDU, Aug. 31, 2005, available at <http://www.thehindu.com> (follow "Datewise" hyperlink under "Archives"; then enter Aug. 31, 2005; then follow "Andhra Pradesh" hyperlink under "News"; then select title of article from list).

⁸⁴ Press Release, Adoption Council of Can., Survey of Countries Reveals Closures, Slowdowns in International Adoption (June 9, 2004), <http://www.adoption.ca/news/040609cystatus.htm> (reporting that in May 2001, Quebec's International Adoption Secretariat suspended adoptions from India to Quebec); CBC News, *Quebec Halts Adoptions from India*, May 5, 2001, http://www.cbc.ca/cgi-bin/templates/view.cgi?/news/2001/05/04/adoption_pmc_010504.

⁸⁵ *See, e.g.*, Smolin, *Adoption Scandals*, *supra* note 18, at 465–74 (providing accounts of the impact of Andhra Pradesh scandals on anti-intercountry adoption activists); Katz, *supra* note 77 (describing efforts of Gita Ramaswamy, leader of the anti-adoption movement in Andhra Pradesh, whose goal is to close the entire Indian foreign adoption system, and the opposition of Shalini Misra, Women and Child Welfare Department Director, to foreign adoption); Ramaswamy, *supra* note 77, at 6 (critiquing international adoption); Reddy, *supra* note 77 (critiquing governmental response).

⁸⁶ Katz, *supra* note 77 (highlighting blocked adoption of ten-year-old with significant health challenges requiring medical care).

Rights on the Sale of Children, Child Prostitution and Child Pornography visited that nation and reported conditions similar in many respects to those described above in Cambodia.⁸⁷ A network of nurseries, known as “casas cunas” (crib houses), and foster placement for infants awaiting private placement for adoption have been created by private attorneys, who in Guatemala are able to facilitate extrajudicial private adoptions with minimal governmental supervision.⁸⁸ The rapporteur reported that payments to birth parents⁸⁹ as well as coercion were common,⁹⁰ and that kidnapping was a significant problem.⁹¹ She concluded that “trafficking of

⁸⁷ U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, *Report of the Special Rapporteur on the Sale of Children, Child Prostitution, and Child Pornography*, U.N. Doc. E/CN.4/2000/73/Add.2 (Jan. 27, 2000) (*prepared by Ofelia Calcetos-Santos*) [hereinafter *Report of the Special Rapporteur*].

⁸⁸ *Id.* paras. 25–29.

⁸⁹ *Id.* para. 33; see also Letta Tayler, *Robbing the Cradle: Adoptions Under Fire in Guatemala*, NEWSDAY, Oct. 26, 2003, at A4, available at LEXIS, News Library, Allnws file (reporting that teams of scouts regularly visit poor neighborhoods and brothels offering pregnant women \$625 to \$2,500 for newborns).

⁹⁰ *Report of the Special Rapporteur*, *supra* note 87, para. 35; Elizabeth Mistry, *Briton Who Spoke Out over “Illegal” Adoptions Faces Prison*, INDEPENDENT (U.K.), Jan. 22, 2004, at 7, (reporting allegations that illiterate women are promised free medical care in hospitals, and are given contracts for adoption that they do not understand); Ethica, Guatemala (Feb. 2003), <http://www.ethicanet.org/item.php?recordid=guatemalappaper> (reporting that birth mothers are offered medical care, but given a bill for services if they choose to parent their child after birth); Resource Center of the Americas, *International Adoption: The Baby Trade* (Nov. 2000), http://www.americas.org/item_278 (reporting that loan practices are also used as a means of coercion); see also Tayler, *supra* note 96 (reporting schemes to hire pregnant women as nannies and maids, and then forcing them to relinquish by threats of violence or trumped up criminal charges).

⁹¹ *Report of the Special Rapporteur*, *supra* note 87, paras. 13, 31, 38; Rosie Goldsmith, *Guatemala’s Baby Business*, BBC NEWS, Sept. 1, 2000, http://news.bbc.co.uk/1/hi/programmes/crossing_continents/879859.stm (reporting interview with birth mother living on streets whose infant was abducted at gunpoint); Tayler, *supra* note 89 (reporting a kidnapping in 2003 of a child who was later discovered in a crib house).

The delivery of kidnapped children to international adoption channels is not a new phenomenon in Guatemala. A U.N. sponsored truth commission, as well as a report by the human rights office of Guatemala’s Catholic archbishop’s office, support allegations that over 1,000 children disappeared during a period of civil war in the early 1980s, many of whom were delivered by military officers to unsuspecting adoptive parents abroad. Resource Center of the Americas, *supra* note 90.

babies and young children for intercountry adoption exists in Guatemala on a large scale.”⁹²

In 2000, UNICEF commissioned the Latin American Institute for Education and Communication (ILPEC) to study adoption in Guatemala.⁹³ The ILPEC report described how the network of intermediaries affiliated with attorneys, referred to as “jaladoras,” as well as attorneys themselves, would solicit pregnant women to relinquish their children by offering various sums of money.⁹⁴ That same year, Guatemalan international adoption was the focus of much discussion at the Special Commission on the Practical Operation of the Hague Intercountry Adoption Convention,⁹⁵ where delegates noted concerns communicated by both UNICEF and various European contracting states to the Commission regarding reports of “fraudulent acts and profiteering,” the absence of appropriate governmental oversight, and the relatively low percentage of international adoptions from orphanages.⁹⁶ The delegates recommended that, to the extent possible, Hague Convention receiving nations should apply Convention standards and safeguards to intercountry adoption arrangements that they make even with noncontracting states (which at that time included Guatemala).⁹⁷

Serious concerns over trafficking in Guatemala have been expressed by many individual nations as well. The Netherlands,⁹⁸ Ireland,⁹⁹ Spain,¹⁰⁰ Iceland,¹⁰¹ and several Canadian provinces¹⁰² have suspended international

⁹² *Report of the Special Rapporteur, supra* note 87, para. 90.

⁹³ *Ethica, supra* note 90.

⁹⁴ ILPEC GUATEMALA, ADOPTION AND THE RIGHTS OF THE CHILD IN GUATEMALA 49 (2000), http://www.iss-ssi.org/Resource_Centre/Tronc_DI/ilpec-unicef_english_report_2000.pdf. ILPEC reported that these allegations were confirmed by interviews with social workers, judges, and orphanage personnel conducted in 1999. *Id.*

⁹⁵ HAGUE CONFERENCE ON PRIVATE INT’L LAW, REPORT AND CONCLUSIONS OF THE SPECIAL COMMISSION ON THE PRACTICAL OPERATION OF THE HAGUE CONVENTION OF 29 MAY 1993 ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION 28 NOVEMBER–1 DECEMBER 2000 paras. 48–57 (2001), available at <http://hcch.e-vision.nl/upload/scrpt33e2000.pdf>.

⁹⁶ *Id.* para. 48.

⁹⁷ *Id.* para. 56.

⁹⁸ Mistry, *supra* note 90; Tayler, *supra* note 89.

⁹⁹ Mistry, *supra* note 90; Tayler, *supra* note 89.

¹⁰⁰ Tayler, *supra* note 89.

¹⁰¹ Posting of Bruce Harris to http://www.americas.org/item_281 (Nov. 2000).

¹⁰² Adoption Council of Can., *supra* note 68 (reporting that Guatemala adoptions had been suspended since 2001, and that the Canadian embassy advised that issues of child

adoptions from Guatemala at various times within the past five years. Guatemala itself, in response to allegations of trafficking, has initiated investigations¹⁰³ and closed international adoptions for a period of time beginning in 2001.¹⁰⁴ Both the United Kingdom¹⁰⁵ and the United States,¹⁰⁶ which continue to permit their citizens to adopt Guatemalan children, now require DNA testing as a measure to deter abductions, and in some cases U.S. embassy staff randomly interview birth mothers to try to ensure that they are not being paid or coerced.¹⁰⁷ Moreover, when Guatemala acceded to the Hague Intercountry Adoption Convention in 2002, five nations—Canada, Germany, Netherlands, Spain, and the United Kingdom—objected to acceptance of Guatemala's accession, generally asserting that Guatemala did not yet have necessary measures in place to implement the Convention.¹⁰⁸

The extent to which intercountry adoption in Guatemala is systemically corrupt, as well as the direction of future reform, remains a subject of intense debate.¹⁰⁹ Many private attorneys in Guatemala and the

trafficking continue to arise); Adoption Council of Can., *supra* note 84 (reporting that in 2001, the Ontario and British Columbia ministries for adoption announced that they would no longer facilitate Guatemalan adoptions).

¹⁰³ Mistry, *supra* note 90 (noting that Casa Alianza, a children's rights non-governmental organization, investigated illegal adoptions at the request of the Guatemalan solicitor general); Tayler, *supra* note 89 (reporting investigations of ninety-five potentially fraudulent adoptions by special prosecutor Sandra Zayas).

¹⁰⁴ Adoption Council of Can., *supra* note 84.

¹⁰⁵ Department for Education and Skills, Guatemala 1 (Nov. 6, 2004), <http://www.dfes.gov.uk/adoption/pdfs/guatemala.pdf>.

¹⁰⁶ As part of obtaining approval for the immigration of a child from Guatemala, ICE requires DNA testing in all cases in which a child is released for adoption by an identifiable birth mother. U.S. Department of State, International Adoption: Guatemala, http://www.travel.state.gov/family/adoption/country/country_389.html (last visited Apr. 14, 2006).

¹⁰⁷ *Id.*; see also Laurie Stern, Nine Months in Guatemala (Nov. 2000), http://www.americas.org/item_279; Tayler, *supra* note 89.

¹⁰⁸ Hague Conference on Private International Law, Details (Sept. 3, 2003), http://www.hcch.net/index_en.php?act=status.comment&csid=767&disp=type.

¹⁰⁹ Ethica, *supra* note 90 (summarizing the divergent points of view); see also Harris, *supra* note 101 (providing a critical appraisal); Resource Center of the Americas, *supra* note 90 (offering a generally critical description of Guatemalan international adoption and detailing allegations of corruption and coercion in international adoption from Latin America from the 1980s to 2000); Stern, *supra* note 107 (recognizing instances of abduction and abuse, but offering a generally positive account of consensual decisions by birth mothers to choose adoptive placement, the reasons for these choices, the positive care by the majority of foster mothers with whom the author came in contact during her nine

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agencies with whom they work defend the current system,¹¹⁰ contending that most Guatemalan adoptions are not the product of baby buying, but instead are symptomatic of the nation's extreme poverty¹¹¹ and

months in Guatemala, the efforts of the Guatemalan attorney general's office to scrutinize the system, and the limited factual basis for the Report of the Special Rapporteur); Postings of Virginia Carr et al. to http://www.americas.org/item_280 (Nov. 2000) (providing excerpts from letters supporting various individuals and organizations in Guatemala involved in international adoption).

This debate also sparked a defamation case that has been litigated at all levels of the Guatemalan court system, as well as the Inter-American Commission on Human Rights. *Bruce Harris to Go on Trial in January*, GUAT. HUM. RTS. UPDATE (Guat. Human Rights Comm'n/USA, Wash., D.C.), Dec. 15, 2003, at 5, available at <http://www.ghrc-usa.org/Publications/vol15no24.pdf>. Susana Maria Luarca Saracho brought a defamation, perjury, and calumny criminal action against Bruce Harris, the regional director for Casa Alianza, an organization that has been highly critical of international adoption practices in Guatemala. *Id.* The action was brought following comments made by Mr. Harris at a press conference that Luarca used improper influence to move her adoption cases forward. *Id.* A pre-trial ruling by the Guatemala Constitutional Court, which rejected a freedom of expression defense, became the basis for a petition by Mr. Harris in proceedings before the Inter-American Commission on Human Rights. *Bruce Campbell Harris Lloyd v. Guatemala*, Case 12.352, Inter-Am. C.H.R., Report No. 14/02 (2002), available at <http://www.cidh.org/annualrep/2002eng/guatemala.12352.htm> (declaring Mr. Harris's petition admissible). In February 2004, a Guatemalan court cleared Mr. Harris of the criminal charges, a decision subsequently appealed to the Guatemalan Supreme Court by Ms. Luarca. *CSJ Hears New Appeal in Harris Case*, GUAT. HUM. RTS. UPDATE (Guat. Human Rights Comm'n/USA, Wash., D.C.), Sept. 15, 2004, at 5-6, available at <http://www.ghrc-usa.org/Publications/vol16no18.pdf>.

¹¹⁰ See, e.g., Ethica, *supra* note 90 (observing that attorneys and agencies currently working in Guatemalan international adoptions emphatically disagree with much of the information in the U.N. and ILPEC reports); Goldsmith, *supra* note 91 (reporting an interview with Guatemalan attorney, Fernando Linares, who stated that "actual illegalities make up only a fraction of one per cent"); Tayler, *supra* note 89 ("[A]doption agencies and lawyers . . . [in Guatemala] and in the United States adamantly deny widespread problems."); Alan Zarembo, *A Place to Call Home*, NEWSWEEK (Atlantic Edition), July 15, 2002, at 27, available at LEXIS, News Library, Allnws file (reporting an interview with Susana Luarca, who admits paying "humanitarian assistance" to birth mothers and contending that stricter regulations and a central adoption authority would delay or stop adoptions).

¹¹¹ Stern, *supra* note 107 (observing that the six birth mothers she met were economically desperate); see Resource Center of the Americas, *supra* note 90 (observing in 2000 that an estimated 80% of the Guatemalan population lives in poverty and 40% are illiterate). The World Bank ranks Guatemala as 117th of 208 nations in per capita income by the atlas method, and 131st using the purchasing power parity measurement of

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comparatively low utilization of contraception.¹¹² Most relinquishing parents, they assert, do so because they are unable to care for their children.¹¹³ When Guatemala acceded to the Hague Intercountry Adoption Convention in 2002, some private adoption attorneys in Guatemala launched a successful challenge to the constitutionality of the accession, convincing the Constitutional Court that accession was not a presidential power enumerated in the Guatemalan Constitution.¹¹⁴ Guatemala adoption attorneys are similarly mounting opposition¹¹⁵ to new legislation proposed by the government of Guatemala in 2005 that would create a central government agency to monitor international adoptions, interview prospective parents, and provide more governmental oversight.¹¹⁶ It may be impossible to objectively determine whether relinquishments are induced by coercion, financial incentives, and misrepresentations in Guatemala to the same extent as they appear to have been in Cambodia. Nevertheless, continued efforts to block governmental oversight in Guatemala by those who reap the greatest profits from the current system,¹¹⁷ in the absence of effective alternative reform proposals, will do little to assuage the ongoing concerns of the international community.

comparison for 2004. World Bank, GNI per capita 2004, Atlas method and PPP 2 (July 15, 2005), <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GNIPC.pdf>.

¹¹² Roberto Santiso-Galvez & Jane T. Bertrand, *The Delayed Contraceptive Revolution in Guatemala*, 63 HUM. ORG. 57, 57 (2004). The authors note that contraceptive prevalence in Guatemala is 38%, compared with 80% in Costa Rica; 76% in Brazil, Columbia, and the United States; 69% in Mexico; and 68% in Peru. *Id.* They attribute this phenomenon to a variety of political, religious, cultural, ethnic, and economic factors. *Id.* at 58–62.

¹¹³ Ethica, *supra* note 90; Goldsmith, *supra* note 91.

¹¹⁴ See Hague Conference on Private International Law, Notifications of Guatemala (Sept. 3, 2003), http://www.hcch.e-vision.nl/index_en/php?act=status.comment&csid=767&disp=resdn (explaining Guatemala's notification to the Hague Conference of Private International Law of the decision of the Constitutional Court of Guatemala finding Guatemala's accession to the convention unconstitutional); see also Banks, *supra* note 18, at 45–46 (describing the role of adoption attorneys in the litigation).

¹¹⁵ Posting on behalf of Susana Luarca to <http://www.guatadopt.com/archives/000296.html> (Sept. 23, 2005, 12:15 PM) (praising efforts to challenge constitutionality of new reform legislation).

¹¹⁶ Sergio de Leon, *Guatemala Considers Law to Better Regulate Foreign Adoptions*, NCTIMES.COM (San Diego), Feb. 8, 2005, http://www.nctimes.com/articles/2005/02/09/news/nation/17_11_452_8_05.txt.

¹¹⁷ de Leon, *supra* note 116 (reporting in 2005 that agencies charge \$20,000 to \$40,000 for each Guatemalan adoption, most of which goes to the Guatemalan attorneys, the institution that cares for the child, and the agency; small amounts (up to \$700) are also
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Cambodia, India, and Guatemala are not the only countries of origin in which concerns about adoption trafficking have surfaced. Illegal adoption practices and charges of child selling in Vietnam¹¹⁸ led to the suspension of adoptions between it and Canadian provinces over the past five years,¹¹⁹ which prompted tighter domestic controls by Vietnam¹²⁰ and a series of bilateral agreements with receiving nations.¹²¹ Within the past two years, illegal child trafficking networks have been uncovered in Madagascar,¹²² and a Texas adoption agency employee was recently convicted of

apportioned to the birth mother); Goldsmith, *supra* note 91 (reporting that in 2000, Guatemalan adoption attorneys earned “anything up from £10,000 per child”).

¹¹⁸ Clare Arthurs, *Vietnam Plan to End Baby Trafficking*, BBC News, Jan. 9, 2002, <http://news.bbc.co.uk/1/hi/world/asia-pacific/1750152.stm> (reporting prosecution of sixteen people in Ho Chi Minh involved in a baby-selling ring); MAPS, News from Vietnam (Aug. 20, 2002), <http://www.mapsadopt.org/vietnamnews.html> (reporting that about two dozen people had been jailed within the previous few years for soliciting birth parents and “falsifying documents for hundreds of children sold to adoption brokers”); *Vietnam Police Charge 14 with Child Trafficking*, VIETNAM NEWS, July 5, 1999, <http://perso.wanadoo.fr/patrick.genuin/canθο/vnnews/childtra.htm> (reporting charges against fourteen in Ninh Binh for alleged involvement in international baby selling, and reporting that in May 1999 a Vietnamese court failed to reach a verdict in a trial of eleven others charged with trafficking 199 children in An Giang).

¹¹⁹ Adoption Council of Can., *supra* note 68 (observing that a two-and-a-half year moratorium between Canada and Vietnam ended on June 27, 2005 when the countries signed a bilateral agreement); Adoption Council of Can., *supra* note 85 (reporting that the Ontario and British Columbia ministries of adoption ceased facilitating adoptions from Vietnam in 2001 amid allegations of illegal practices in Vietnam).

¹²⁰ MAPS, *supra* note 118 (reporting new legislation, Government Decree No. 68/2002/ND-CP, which created a central intercountry adoption agency and required licensing of foreign agencies and bilateral agreements between Vietnam and receiving nations).

¹²¹ The United States entered a bilateral agreement with Vietnam on June 21, 2005. Agreement Between the United States of America and the Socialist Republic of Vietnam Regarding Cooperation on the Adoption of Children, U.S.-Vietnam, June 21, 2005, Hein’s No. KAV 7494, available at http://www.travel.state.gov/pdf/vn_final_agreement.pdf. Canada entered its bilateral agreement with Vietnam on June 27, 2005. Adoption Council of Can., *supra* note 68. Agreements have been signed between Vietnam and other nations as well, including France, Italy, Denmark, Sweden, and Ireland. Adoption Council of Can., *supra* note 84.

¹²² Tim Healy, *Madagascar Breaks Child Traffic Ring*, BBC NEWS, Apr. 16, 2004, <http://news.bbc.co.uk/2/hi/africa/3633087.stm> (noting that trafficking has increased during the past four years in Madagascar, and relating the arrest of eight men and the rescue of eleven babies from a house where they were being prepared for overseas adoption).

trafficking Mexican birth mothers who were paid or coerced to relinquish infants after they had been smuggled across the border.¹²³ Nor has the United States, when it acts as a country of origin, been immune from allegations of international trafficking, as the infamous case of the “Internet Twins” so tragically illustrates.¹²⁴ The global scope of trafficking was perhaps best illuminated by Ethica, a non-profit organization promoting ethical adoption practices. In 2003, Ethica reported that, of the forty nations that had made the top twenty list of nations sending children to the United States for adoption within the previous fifteen years, 43% were temporarily or effectively closed to intercountry adoption.¹²⁵ Most of these closures, Ethica suggested, were prompted by concerns on the part of sending or receiving nations, or both, related to abduction, trafficking, and corruption.¹²⁶

Virtually all adoption advocates condemn practices that separate children from their birth families as a result of fraud, coercion, or financial enticement. Trafficking inflicts enormous pain on children unnecessarily separated from their families and homelands, birth families forever separated from their children, and adoptive families who discover they have been unwitting participants in deceptive adoption schemes.¹²⁷ Mere condemnation, however, will not address the legal, social, or economic conditions that foster trafficking, nor stem the increasing tide of moratoria

¹²³ *Adoption Agency Gives Up License*, WOAI.COM (San Antonio), Mar. 17, 2005, http://www.woai.com/news/local/story.aspx?content_id=81BE0987-FF9C-4E04-B4EE-7B4D110AF4.

¹²⁴ *E.g.*, Carl Butler, *Kilshaw Baby Broker to Face Trial in States*, DAILY POST (Liverpool), Aug. 9, 2004, at 13, available at LEXIS, News Library, Allnws file. In 2000, a widely-publicized adoption scandal occurred in which the Kilshaws, a Welsh couple, paid £8,200 to adopt twins through a U.S. internet facilitator, despite the fact that the twins had already been placed with a California couple. *Id.* The Kilshaws managed to bring the children to Northern Wales by quickly filing for adoption in Arkansas, but a British High Court judge ruled that the Kilshaws were unfit to provide care to the children and ordered that the twins be returned to America and placed with child welfare authorities in the U.S. *Id.*; see also Natalie Clark, *Oh No, They're Back*, DAILY MAIL (London), Apr. 23, 2005, at 22, available at LEXIS, News Library, Allnws file. Criminal charges were placed against the facilitator, Tina Johnson, but were later dropped in December 2005. Robert Patrick, *Adoption Broker Charges Bias by FBI*, ST. LOUIS POST-DISPATCH, Mar. 21, 2006, at A5.

¹²⁵ Ethica, *The Statistics Tell the Story!* (2003), <http://www.ethicanet.org/item.php?recordid=statistics> (defining “effectively closed” as generating fewer than twenty-seven orphan petitions per year).

¹²⁶ *Id.*

¹²⁷ See *supra* note 70.

that follow in its wake. Those who endorse intercountry adoption as a beneficial option worthy of preservation must proactively initiate reforms to eradicate trafficking. Without such reforms, both sending and receiving nations will continue initiating moratoria that prevent children truly in need of homes from potentially finding them abroad.

B. Intercountry Adoption Displacing Domestic Adoption

Even when financial gain, fraud, and coercion play no role in separating a child from a birth family, intercountry adoption is an appropriate alternative for that child only when a permanent family is not available in the child's country of origin. During the past decade, intercountry adoption has frequently drawn criticism if governmental policies or the lure of placement fees and "donations" steer children to international placement when domestic placement might otherwise have been possible. This phenomenon has been a particular source of controversy in many of the nations from which U.S. citizens have frequently adopted during the past decade.

Scrutiny of the Indian adoption system, initially prompted by the trafficking scandals, revealed that at least in some Indian states, Indian prospective adopters were subjected to stricter requirements for adoption than foreign prospective parents.¹²⁸ Moreover, the Indian press reports a shortage of children available for domestic adoption in states from which a comparatively high number of foreign adoptive placements occur.¹²⁹ Even though Indian national law requires that at least 50% of adoptions must be intra-country¹³⁰ and creates a preference for domestic adopters,¹³¹ Indian

¹²⁸ Smolin, *Adoption Scandals*, *supra* note 18, at 469–70. Indians seeking to adopt were required to be infertile or childless, and the income requirements placed upon Indian applicants rendered the majority of Indian families in Andhra Pradesh ineligible to adopt, despite the fact that these families could provide for the children consistently with the local standard of living. *Id.* at 470.

¹²⁹ *Id.* at 474. Professor Smolin notes that Maharashtra, which borders Andhra Pradesh, generated over 35% of foreign adoptive placement (based on 2000 statistics), but in 2004 the Indian press reported a shortage of children available and waiting lists for domestic adoption. *Id.* 474 & n.323; *see also* Roli Srivastava, *Adoption Agencies Faced with Shortage of Children*, *TIMES INDIA*, Mar. 12, 2004, available at <http://timesofindia.indiatimes.com/articleshow/555283.cms> (reporting statistics from Mumbai and Mahalaxmi). Professor Smolin makes a similar assertion about Andhra Pradesh. *See* Smolin, *Adoption Scandals*, *supra* note 18, at 470.

¹³⁰ *Handling with Kid Gloves*, *FIN. EXPRESS*, July 16, 2005, available at 2005 WLNR 11195769. In 2002, approximately 1,200 Indian children were adopted domestically, and almost 800 were adopted by Americans and Europeans. Bonner, *supra* note 76.

scholars as well as anti-adoption advocates assert that Indian adoption agencies and facilitators favor Western couples because of the high fees involved and thus violate the preference guidelines.¹³²

In Romania, concern that intercountry adoption practices retarded domestic adoption contributed to the moratorium it initially imposed in 2001.¹³³ Though the trafficking concerns that plagued Romania in the

¹³¹ Ramaswamy, *supra* note 77, at 6.

¹³² *Id.*; *Handling with Kid Gloves*, *supra* note 130 (interviewing Vinita Bhargava, head of the Department of Child Development, Lady Irwin College, New Delhi).

¹³³ See Bainham, *supra* note 17, at 225–27 (attributing the initial moratorium, imposed in October 2001 and maintained by a series of extensions thereafter, in part to the impact of the intercountry adoption system on domestic adoptions); see also *In the Best Interest of the Children?: Romania's Ban on Inter-country Adoption: Hearing Before the Commission on Security and Cooperation in Europe*, 109th Cong. (2005), available at <http://www.csce.gov/> (follow "Hearings & Briefings" hyperlink; then follow link adjacent to September 14, 2005; then follow "Unofficial Transcript" hyperlink) [hereinafter *Hearing Before Commission on Security and Cooperation in Europe*] (statement of Maura Harty, Assistant Secretary, Bureau of Consular Affairs, U.S. Department of State) (stating 2001 moratorium was taken in response to concerns raised in USAID Report, which is cited *infra* note 134).

The decision to implement the moratorium was heavily influenced by the European Parliament and the European Union. See Sarah Sargent, *Suspended Animation: The Implementation of the Hague Convention on Intercountry Adoption in the United States and Romania*, 10 TEX. WESLEYAN L. REV. 351, 365–70 (2004). In 2001, a British baroness, Emma Nicholson, Rapporteur for the European Parliament, publicly called for a two year moratorium, or for the European Union to cease talks with Romania about joining the E.U., prompting the Romanian Committee for Adoptions to suspend registration of new adoption requests for one year. *Id.* at 367–68. The moratorium is still in place, due at least in part to continued pressure from Baroness Nicholson and the European Union. See, e.g., *Romania: Putting a Stop to Baby Sales*, N.Y. TIMES, June 2, 2004, at A12; *Romania: Adoption Dispute with Europeans*, N.Y. TIMES, Feb. 5, 2004, at A6; *Romania Politics: In an EU Pickle over Adoption*, EIU VIEWSWIRE, Feb. 23, 2004, at 1, available at 2004 WLNR 13971949; see also *Hearing Before Commission on Security and Cooperation in Europe*, *supra* (referencing throughout, statements of several witnesses to continued pressure from the European Union, and the possibility of processing pipeline cases after European Union vote).

Though the moratorium was initially temporary, it was extended periodically, and has now effectively been made permanent by Romanian legislation passed in June 2004 that limits intercountry adoptive placements to biological grandparents living abroad, effective January 1, 2005. *Hearing Before Commission on Security and Cooperation in Europe*, *supra* (statement of Maura Harty); *id.* (statement of Romanian Ambassador to the United States Sorin Ducaru).

early 1990s¹³⁴ appear to have diminished after creation of a centralized system and tighter regulation in the mid-1990s,¹³⁵ a point system was created as part of that reform effort that channeled children to agencies for placement based on each agency's level of financial contribution.¹³⁶ The point system was designed for the laudable purpose of generating financial support for child welfare programs in Romania, including abandonment prevention and family reunification programs.¹³⁷ Nevertheless, a study of Romanian adoption completed for the U.S. Agency for International Development in Romania in 2001, prior to imposition of the moratorium, concluded that the system discouraged adoption of Romanian children by Romanians.¹³⁸ Because domestic adoptions had to be processed for free, government and private bodies had no incentive to facilitate domestic placements.¹³⁹ Study participants reported waiting lists of Romanian families trying to adopt, and the diversion of children—particularly infants—from domestic to foreign placement, even when members of their own birth families wished to adopt them.¹⁴⁰ During the first half of 2000, the average age of children adopted domestically was three years old, whereas the average age of children placed for adoption abroad during the same period was ten months old.¹⁴¹

Even though Romanian law created a sixty-day preference period for domestic placement, the preference was rarely applied, and other aspects of Romanian adoption law made domestic adoption more difficult and time-

¹³⁴ See, e.g., MICHAEL W. AMBROSE & ANNA MARY COBURN, REPORT ON INTERCOUNTRY ADOPTION IN ROMANIA 5 (2001), available at http://www.dec.org/pdf_docs/PNACW989.pdf; Dillon, *supra* note 18, at 249.

¹³⁵ See AMBROSE & COBURN, *supra* note 134, at 2 (reporting that in interviews with both Romanian and non-Romanian professionals involved in intercountry adoption in comprehensive study of Romanian adoption prepared for the U.S. Agency for International Development (USAID) in Romania, the authors received no information about the exchange of any individual child for money or other value). For an overview of the Romanian legal framework for regulation of intercountry adoption in effect in January 2001, see *id.* at 15–21. See also Bainham, *supra* note 17, at 225–27, describing some of the reforms implemented during the 1990s.

¹³⁶ AMBROSE & COBURN, *supra* note 134, at 2.

¹³⁷ *Id.*

¹³⁸ *Id.* (reporting that most of the study participants confirmed this conclusion).

¹³⁹ *Id.* at 7.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

consuming than intercountry adoption.¹⁴² Romanians familiar with the operation of the child protective system asserted that children considered highly “adoptable” who entered the system would be placed in orphanages for adoption regardless of whether adoption was the best option for the particular child because the local government would receive funding only if a foreign adoption was completed.¹⁴³ In the absence of financial incentive, they maintained, these children would not have been placed for adoption at all.¹⁴⁴ Since the moratorium has been imposed, domestic adoption in Romania, as well as family reunification and foster placement, have correspondingly increased.¹⁴⁵

In the People’s Republic of China, the underdevelopment of domestic adoption has similarly been a primary focus of concern.¹⁴⁶ During the 1980s and 1990s, as China strengthened the enforcement of its population control laws, often referred to in the West as the “One Child Policy,”¹⁴⁷

¹⁴² *Id.* Professor Bainham reports that in 2000, Romania experienced approximately 1,250 domestic adoptions compared to approximately 3,000 intercountry adoptions. Bainham, *supra* note 17, at 226. By comparison, six years earlier (1994), before imposition of the point system, there were approximately 2,750 domestic adoptions in Romania, more than double the figure for 2000, and about 2,000 intercountry adoptions of Romanian children. *Id.*

¹⁴³ AMBROSE & COBURN, *supra* note 134, at 7.

¹⁴⁴ *Id.*

¹⁴⁵ See *Hearing Before the Commission on Security and Cooperation in Europe*, *supra* note 133. This statement is not made to imply this author’s support for permanent extension of the moratorium, but merely as further evidence that the international adoption system, as it operated in Romania prior to 2001, stifled development of a domestic adoption system, and may have discouraged reintegration with birth families.

¹⁴⁶ See, e.g., Kay Johnson, *Politics of International and Domestic Adoption in China*, 36 LAW & SOC’Y REV. 379, 379 (2002); Nili Luo & David M. Smolin, *Intercountry Adoption and China: Emerging Questions and Developing Chinese Perspectives*, 35 CUMB. L. REV. 597 (2005).

¹⁴⁷ See, e.g., KARIN EVANS, THE LOST DAUGHTERS OF CHINA 102–16 (2000); Luo & Smolin, *supra* note 146, at 599–604; Barbara Stark, *Baby Girls from China in New York: A Thrice-Told Tale*, 2003 UTAH L. REV. 1231, 1241–43. The “One Child Policy” is actually more complex than this description implies. Based on a governmental announcement in 1980 that each couple should have only one child, EVANS, *supra*, at 103, the policy has always had some exceptions. *Id.* at 104, 109. For example, ethnic minorities were allowed two children, *id.* at 104, and in rural areas, two or even three children have been permitted. *Id.* at 109. In addition, two parents who are themselves “only children” are permitted to have two children. Interview by China.org.cn with Zhao Bingli, Vice Minister, State Family Planning Comm’n, P.R.C. (Oct. 18, 2002), <http://www.china.org.cn/english/>

thousands of abandoned infants, primarily girls, quickly pushed China's social welfare institutions to capacity.¹⁴⁸ In 1991, China passed its first national adoption law,¹⁴⁹ paving the way of the international adoption of approximately 35,000 Chinese children during the following decade.¹⁵⁰ That same law, however, codified restrictions that limited the adoption of abandoned children to childless parents over the age of thirty-five,¹⁵¹ restrictions that were not strictly enforced in the international adoption context.¹⁵² The new law thus severely restricted the ability of domestic Chinese families to formally adopt children who were in the care of the Chinese state orphanages.¹⁵³ Though many Chinese families did in fact continue to informally adopt thousands of abandoned children during the 1990s through traditional customary adoption practices,¹⁵⁴ these families

2002/Oct/46138.htm [hereinafter China.org.cn]. In 1988, the policy was revised to permit one son or two children. EVANS, *supra*, at 115.

Enforcement of the policy has waxed and waned slightly over the past two decades. *See id.* at 108. Though at first promoted through birth control programs, slogans, and policies delaying marriage, the policy came to be enforced by local family planning officials through such draconian methods as forced sterilization and forced abortions (even at eight or nine months into the pregnancy); employer monitoring of employees' menstrual cycles and pregnancies; and punishments for violations, which could include fines, jail, destruction of homes, and loss of employment or governmental benefits. *Id.* at 103–11. The family planning policy was ultimately codified in 2002 in the Population and Family Planning Law, *see* China.org.cn, *supra*, and governmental authorities envision a gradual shift from mandatory administrative orders to more effective public education on contraception in order to achieve its goals. *Id.*; Stark, *supra*, at 1242.

Though by no means a simple explanation or justification, China's population control policies must be viewed against the backdrop of the Chinese famine that occurred between 1958 and 1961, said to be the "most severe famine in recorded history," in which almost 30 million people died, half under the age of ten. EVANS, *supra*, at 101; *see also* NICHOLAS D. KRISTOF & SHERYL WUDUNN, CHINA WAKES: THE STRUGGLE FOR THE SOUL OF A RISING POWER 66 (1994).

¹⁴⁸ *See* Luo & Smolin, *supra* note 146, at 601. Though Chinese families typically desire both daughters and sons, Johnson, *supra* note 146, at 385–86 (reporting that the ideal family is considered to be one boy and one girl), a son is required for "economic support in old age and to continue the family line." *Id.*; *see also* EVANS, *supra* note 147, at 111.

¹⁴⁹ *See* Johnson, *supra* note 146, at 389.

¹⁵⁰ *Id.* at 390.

¹⁵¹ *Id.* at 389.

¹⁵² *See id.*

¹⁵³ *Id.*

¹⁵⁴ *See id.* at 386.

were often penalized if discovered by the family planning officials.¹⁵⁵ They also had a difficult time registering and obtaining legal status for their children, which was critical to obtain advanced educational and other governmental benefits for the children.¹⁵⁶ Although the government created a well-organized, centralized system for facilitating international placements during the 1990s, no similar system has been developed to foster domestic adoption, and during the 1990s, local Chinese orphanages did little to recruit domestic placements for institutionalized children.¹⁵⁷

In 1999, Chinese adoption law was revised to lower the age limit for adopting parents to thirty and to permit families with healthy children to adopt children from social welfare institutions.¹⁵⁸ Though a critical reform, scholars have noted that publicity of the revisions has been local and sporadic, implementing regulations requiring written permission from family planning officials has deterred families with children from adopting in many areas, and those who adopted children outside of the institutions have had difficulty taking advantage of the new law.¹⁵⁹ Nevertheless, adoption statistics for the year 2000 did signal a trend of increasing domestic adoption of both institutionalized children and non-institutionalized children, which may in part be attributable to the 1999 reform.¹⁶⁰

The operation of intercountry adoption in China has not been maligned with allegations of systemic trafficking to the same degree as some of the

¹⁵⁵ EVANS, *supra* note 147, at 115–16 (noting that families who took in foundlings were penalized in the same manner as if they had given birth to a child over the quota without permission).

¹⁵⁶ Johnson, *supra* note 146, at 391.

¹⁵⁷ *See id.* at 386–90 (reporting that in the early 1990s, many Chinese citizens were not even aware of the location or existence of many of the orphanages).

¹⁵⁸ *Id.* at 390; *see also* Adoption Law (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 4, 1998, effective Apr. 1, 1999), arts. 6, 8 (P.R.C.), *available at* http://www.fwcc.org/China_adoption_law_98.htm. Although the law appears to limit adoption by families with children to children residing in the welfare institutions, art. 8, Professor Johnson suggests that provisions permitting families with children to adopt foundlings outside of institutions are “buried deep within the fine print of the law.” Johnson, *supra* note 146, at 390.

¹⁵⁹ *See* Johnson, *supra* note 146, at 391.

¹⁶⁰ *See id.* at 392. Professor Johnson reports that government statistics for the year 2000 indicate that 10,700 domestic adoptions of children from welfare institutions and orphanages, and at least 37,000 registered domestic adoptions of foundlings outside of the welfare institution system. *Id.* This compares with approximately 6,700 international adoptions of Chinese children during the same year. *Id.*

nations discussed earlier in this Essay,¹⁶¹ nor was it initially the lure of that system that created disincentives for domestic adoption.¹⁶² Most observers agree that China's family planning policies were initially the primary force underlying the abandonment and subsequent adoption of thousands of the infant girls populating state institutions,¹⁶³ and family planning policies clearly motivated restrictions on domestic adoption as well.¹⁶⁴ Nevertheless, scholars have expressed concern that the flow of funds created by international adoption, while being appropriately utilized to make significant improvements in the social welfare institutions and to

¹⁶¹ Xin Ren, Professor, Cal. State Univ., Presentation at the International Bureau for Children's Rights Conference on Making Children's Rights Work: National & International Perspectives: Trafficking in Children: China and Asian Perspective 2 (Nov. 20, 2004), http://www.ibcr.org/PAGE_EN/2004%20Conference%20documents/Ren_ENG.pdf. Until very recently, reports of outright trafficking in China have been associated primarily with domestic adoption rather than intercountry adoption. *Id.* In 2000, a national survey of Chinese police reported that 10,768 children were abducted and sold in trafficking in China between 1980 and 1999, but this trafficking was largely attributed to domestic illegal adoption. *Id.*; see also *Chinese Babies Found in Luggage*, BBC News, Mar. 22, 2003, <http://news.bbc.co.uk/2/hi/asia-pacific/2877039.stm>. This may have been due in part to the centralized bureaucracy that controls intercountry adoption in China, the legal restrictions on abandonment and relinquishment, the restrictions on domestic adoption, and the comparatively large numbers of children that, since the early 1990s, have been available for foreign adoption. See Johnson, *supra* note 146, at 386–92. In the spring of 2006, however, an orphanage director and nine others were sentenced for buying and selling infant girls, some abandoned and some abducted, between 2002 and 2005, who were then adopted through social welfare institutions in Hunan province through both international and domestic placements. Police believed the group trafficked seventy-eight abducted children in 2005 alone, many of whom were adopted by foreigners. Geoffrey York, *China Jails Nine in Baby Scandals; Abducted Children Sold to Orphanages*, GLOBE & MAIL (Toronto), Feb. 27, 2006, at A12, available at 2006 WLNR 3353174; *Baby Trafficking Leads to Prison Terms, Firings*, TULSA WORLD, Feb. 26, 2006, at A2, available at LEXIS, News Library, Tlswld file.

¹⁶² See Johnson, *supra* note 146, at 386–92.

¹⁶³ Stark, *supra* note 147, at 1242–43; see Luo & Smolin, *supra* note 146, at 610–11.

¹⁶⁴ Johnson, *supra* note 146, at 388–90. Birth planning officials were reported as influential in shaping the restrictions of the 1991 adoption law and opposed to the 1999 adoption reforms, fearing that adoption by families who already had a child would create a loophole in the one-child policy. See *id.* at 391. Various concerns have been suggested, including that birth families would use adoption to try to hide the birth of a daughter in order to try for an over-quota son, see *id.* at 389, perhaps placing the daughter with relatives and then adopting her back, or permitting relatives to adopt her. See Luo & Smolin, *supra* note 146, at 612–13.

provide developmental and educational programs for children who remain, might also draw the attention of orphanage officials away from the development of domestic adoption in their areas.¹⁶⁵ Some orphanage officials, in fact, are reported to have set fees for domestic adoption at the same level as international adoption (U.S. \$3,000, or approximately 25,000 yuan), an amount that very few Chinese could afford.¹⁶⁶ Other observers caution that the desire for a continued flow of adoptable infants must not repress dialogue and response in receiving nations to the complex intersection of human rights issues and the execution of family planning policies¹⁶⁷ or, of particular concern during the early 1990s, to the conditions for children who remain in state care.¹⁶⁸ It is critical that those who regulate adoption within China, and governmental bodies and private agencies in receiving nations that facilitate Chinese adoptions, commit to proactive measures that will continue to nurture and develop domestic adoptive placement for China's abandoned infants, even if such policies will ultimately eliminate or minimize the need for international placement of these children.¹⁶⁹

Thus, while intercountry adoption has united thousands of children with loving families outside their countries of origin, scrutiny of the institution over the past decade by domestic governmental agencies in both sending and receiving nations, various international bodies, and scholars also reveals that serious systemic inadequacies in many nations have permitted some children to be placed for adoption abroad who, but for the lure of financial gain at some level of the international adoption system,

¹⁶⁵ Johnson, *supra* note 146, at 387–88.

¹⁶⁶ *Id.* at 392.

¹⁶⁷ See Stark, *supra* note 147, at 1248–54. Stark also reviews human rights instruments that intersect with the execution of China's family planning policies, observing that the "one-child policy both violates human rights and promotes them," in that some enforcement measures have violated mothers' reproductive rights, while at the same time the policy furthers economic rights of society in general and "women's equality in particular by countering traditional social and cultural pressures to bear sons." *Id.* at 1254.

¹⁶⁸ See Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, 10 YALE J.L. & FEMINISM 101, 143 (1998) (commenting on the obligation of the adoption community to speak out, as some did, when abusive conditions in countries of origin are uncovered).

¹⁶⁹ Debunking the myth that there is no cultural basis for adoption in Chinese culture, Professor Johnson explores the strength of contemporary support and interest in adoption in China by tracing historical patterns of adoption and reporting the results of an empirical study of almost 800 families that adopted domestically in China between 1996 and 1999. See Johnson, *supra* note 146, at 382–84.

would have remained with their families or been placed in their countries of origin. When trafficking and displacement of domestic adoption are systemic, the welfare of individual children and their birth and adoptive families is jeopardized and the institution of international adoption falls into disrepute. The following section examines the standards created by international and domestic law to address issues of trafficking and displacement, and the necessity of implementing these standards in a manner that successfully addresses these issues.

II. REGULATING AT THE INTERNATIONAL AND DOMESTIC LEVEL: DOES OUR REGULATORY CUP RUNNETH OVER OR REQUIRE REPLENISHMENT?

A. *Trafficking*

Over the past two decades, much attention has been devoted to designing regulatory measures to deter child trafficking and improper financial gain related to international adoption. At the international level, although many other instruments address the topic,¹⁷⁰ three conventions form the centerpiece for current international regulation on a global scale: the Convention on the Rights of the Child (CRC), the Hague Intercountry Adoption Convention, and the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography. Much of the domestic regulation created during this period has been prompted by, or designed to implement, these international instruments.¹⁷¹

The Convention on the Rights of the Child, a human rights treaty drafted under the auspices of the United Nations, addresses trafficking through general policy directives.¹⁷² It requires that states parties “[t]ake all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in

¹⁷⁰ See, e.g., Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors, May 24, 1984, O.A.S. T.S. No. 62, 24 I.L.M. 460 (a regional convention drafted under the auspices of the Organization of American States, currently with six contracting states); European Convention on the Adoption of Children, Apr. 24, 1967, 634 U.N.T.S. 256 (a regional convention drafted under the auspices of the Council of Europe, currently with eighteen contracting states); Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, G.A. Res. 41/85, at 265, U.N. Doc. A/Res/41/85 (Dec. 3, 1986) (a nonbinding resolution of the U.N. General Assembly).

¹⁷¹ See *supra* note 10.

¹⁷² See *supra* note 3 and accompanying text.

it.”¹⁷³ It further obligates member states to take all appropriate measures, on both domestic and international levels, “to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.”¹⁷⁴ To effectuate these objectives, the CRC encourages the creation of additional multilateral agreements that would ensure that international adoptive placements are carried out by competent authorities.¹⁷⁵

In response to this invitation, the Hague Intercountry Adoption Convention was promulgated by the Hague Conference on Private International Law to implement CRC directives by providing a more detailed regulatory framework.¹⁷⁶ The Hague Intercountry Adoption Convention establishes governmental bodies, known as central authorities, within each contracting nation to oversee Convention adoptions and to ensure that the Convention’s standards are implemented.¹⁷⁷ Although the Convention directly regulates only adoptions between two nations that are both parties to the Convention,¹⁷⁸ its practical impact is broader, as Convention countries have been urged by the Special Commission on the Practical Operation of the Convention to apply Convention standards, to the extent possible, with non-contracting nations as well.¹⁷⁹

A primary goal of the Hague Intercountry Adoption Convention is to establish safeguards to prevent the abduction, sale, or trafficking of children.¹⁸⁰ Central authorities, directly or through other governmental authorities, are charged with the duty to take measures to prevent improper financial gain.¹⁸¹ They must further ensure, in each individual adoption, that consents have not been induced by compensation or payment; are given voluntarily, after counseling regarding their effect; and, if given by a birth mother, take place only after a child’s birth.¹⁸² Directors, administrators, and employees of adoption agencies are prohibited from receiving unreasonably high remuneration, and only costs, expenses, and

¹⁷³ CRC, *supra* note 1, art. 21(d).

¹⁷⁴ *Id.* art. 35.

¹⁷⁵ *Id.* art. 21(e).

¹⁷⁶ Hague Intercountry Adoption Convention, *supra* note 7, pmb1.

¹⁷⁷ *See id.* art. 6.

¹⁷⁸ *Id.* art. 2. The Convention applies only if a child habitually resides in one contracting state and is adopted by a habitual resident of another contracting state. *Id.*

¹⁷⁹ HAGUE CONFERENCE ON PRIVATE INT’L LAW, *supra* note 95, para. 56.

¹⁸⁰ Hague Intercountry Adoption Convention, *supra* note 7, art. 1.

¹⁸¹ *Id.* art. 8. In addition, article 32(1) directly prohibits individuals from deriving improper financial gain from intercountry adoption activities.

¹⁸² *Id.* art. 4.

reasonable professional fees may be charged or paid in connection with intercountry adoption.¹⁸³ As a further measure to prevent trafficking, the Convention directly prohibits contact between prospective adoptive parents and a child's birth parents or other caretakers until after a governmental entity has established that the child is adoptable, determined that intercountry adoption is in the best interests of the child, and ensured that the necessary consents have been obtained.¹⁸⁴ Most importantly, the Convention limits the performance of many critical functions to either accredited, non-profit agencies or to other bodies or individuals, operating on a for-profit basis who are especially approved to facilitate international adoption.¹⁸⁵ Although the Convention does permit contracting nations to allow these "for-profit" approved bodies to perform certain functions, they must meet the other accreditation standards applied to the non-profit entities,¹⁸⁶ and countries of origin are expressly permitted to choose to work only with the non-profit, accredited entities.¹⁸⁷ In addition, the preparation of home studies and other reports must be done under the supervision of a governmental or non-profit accredited entity.¹⁸⁸

The third global convention to address trafficking, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, just entered into force on January 18, 2002.¹⁸⁹ It requires member states to prohibit the sale of a

¹⁸³ *Id.* art. 32(2)–(3).

¹⁸⁴ *See id.* art. 29. The Convention excludes family adoptions from this restriction and permits the government of the country of origin to create further exceptions, subject to whatever conditions it wishes to impose. *Id.*

¹⁸⁵ *See id.* art. 22. Accreditation standards are set forth in articles 10 and 11, and require that an accredited body demonstrate competence; pursue non-profit objectives; be directed and staffed with qualified personnel, trained and experienced in intercountry adoption, who operate under a system of ethical standards; and be subject to supervision of its finances, operation, and composition by governmental authorities. *Id.* arts. 10–11. Approved bodies or individuals must generally meet the same criteria, except that they are not required to be non-profit. *Id.* art. 22. Reports concerning the suitability of prospective adoptive parents (home studies) and the reports containing the background information on a child referred for adoption, however, must be prepared under the responsibility of a governmental authority or an accredited, non-profit agency. *Id.* art. 22(5).

¹⁸⁶ *Id.* art. 11.

¹⁸⁷ *See id.* art. 12.

¹⁸⁸ *Id.* art. 22(5). For a more in-depth analysis of the Hague Convention, see, e.g., Richard R. Carlson, *The Emerging Law of Intercountry Adoptions: An Analysis of the Hague Conference on Intercountry Adoption*, 30 TULSA L.J. 243 (1994).

¹⁸⁹ Office of the United Nations High Commissioner for Human Rights, *supra* note 5.

child, defined as the transfer of a child for “remuneration or any other consideration,”¹⁹⁰ and specifically directs these nations to impose criminal sanctions and legal liability (criminal, civil, or administrative) upon intermediaries who improperly induce or attempt to induce consent to adoption in violation of applicable international legal instruments on adoption.¹⁹¹ Buttressing the two earlier conventions, the Optional Protocol requires that member states “take all appropriate legal and administrative measures to ensure that all persons involved in the adoption of a child act in conformity with applicable international instruments.”¹⁹² The Convention further requires inter-governmental cooperation with prosecutions,¹⁹³ proactive steps to adopt laws and programs to deter trafficking,¹⁹⁴ public education and training to promote awareness of the harmful effects of trafficking,¹⁹⁵ and, of particular relevance to receiving nations such as the United States, initiatives to combat the root causes of poverty and underdevelopment that enhance the vulnerability of children to such practices.¹⁹⁶

Because the CRC, the Hague Intercountry Adoption Convention, and the Optional Protocol are still relatively new, their effectiveness cannot yet be fairly judged by the instances of systemic trafficking described above that have continued to plague the institution of intercountry adoption over the past decade.¹⁹⁷ Obviously, the key to effective deterrence will lie in the legislation enacted in both sending and receiving nations to implement the broad directives of these conventions. While detailed examination of all such legislation is beyond the scope of this Essay, a small beginning to the task of assessment might be to ask, if the Hague Intercountry Adoption Convention and the Optional Protocol had been in effect in both the United

¹⁹⁰ Optional Protocol, *supra* note 4, annex II, arts. 1, 2(a).

¹⁹¹ *Id.* art. 3(1)(a)(ii). In its Reservations, Understandings, and Declarations filed at the time the United States ratified the Convention, the United States declared its understanding that “improperly inducing consent” means “knowingly and willfully inducing consent by offering or giving compensation for the relinquishment of parental rights.” Office of the United Nations High Commissioner for Human Rights, *supra* note 5.

¹⁹² Optional Protocol, *supra* note 4, annex II, art. 3(5).

¹⁹³ *Id.* annex II, arts. 5–6, 10.

¹⁹⁴ *Id.* annex II, art. 9(1).

¹⁹⁵ *Id.* annex II, art. 9(2).

¹⁹⁶ *Id.* annex II, art. 10(3). For a more detailed analysis and critique of the Optional Protocol, see, e.g., Smolin, *Child Trafficking*, *supra* note 18, at 299–320.

¹⁹⁷ See *supra* Part I.A.

States and Cambodia during the past decade,¹⁹⁸ would it have made a difference? Clearly, payments or fraudulent representations made to birth families to induce relinquishments would have violated many tenets of these Conventions. But the real issue is, what mechanisms might the Conventions or their implementing legislation have had in place to detect consents induced by payments or fraud or to deter such practices?

From the perspective of the sending nation, the Hague Convention requires governmental authorities, either judicial or administrative,¹⁹⁹ to confirm in each case that a child is adoptable, that the consents have not been induced by compensation, and that the consenting parents understand that adoption results in termination of their parental rights.²⁰⁰ Imposing this verification process upon a governmental authority is an important safeguard, requiring some level of scrutiny beyond that of the private orphanage director, attorney, or facilitator who reaps the profit of any trafficking. Governmental verification, of course, is not a complete panacea, if government officials are subject to bribes or corruption. In Cambodia, for instance, governmental authorities issued documentation declaring the parents of all the children whose adoptions were facilitated by Ms. Galindo had the status of "unknown," and she asserted that governmental authorities themselves refused to insert information regarding birth parents into records when it was available.²⁰¹ During the

¹⁹⁸ The United States is currently a party to the Optional Protocol, *see* Office of the United Nations High Commissioner for Human Rights, *supra* note 5, and is a signatory to the Hague Intercountry Adoption Convention, which received the advice and consent of the U.S. Senate in the autumn of 2000, and is anticipating ratification in 2007. U.S. Department of State, *supra* note 8. The United States is a signatory to the CRC, but has not ratified it. *Supra* note 2. Cambodia became a party to the CRC in 1992 and to the Optional Protocol in May 2002, *see supra* notes 2, 5, but it is not yet a signatory or a party to the Hague Intercountry Adoption Convention. *See* Hague Conference on Private International Law, *supra* note 8.

¹⁹⁹ When the United States acts as a sending nation, this screening will be required to be performed by a U.S. court when the Hague Convention goes into effect. *See* 42 U.S.C. § 14932(b) (2000). The legislative history of the Convention, however, permits this function to be carried out by the Central Authority itself or by either judicial or administrative authorities. G. PARRA-ARANGUREN, EXPLANATORY REPORT ON THE CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION para. 111 (1993), *available at* <http://hcch.e-vision.nl/upload/expl33e.pdf>.

²⁰⁰ Hague Intercountry Adoption Convention, *supra* note 7, art. 4.

²⁰¹ *See* Defendant's Sentencing Memorandum, *supra* note 50, at 17 (asserting that the Cambodian officials at the MSALVA, as a matter of standard practice, treated every child

(continued)

investigation, prosecutors noted that Ms. Galindo had frequently transferred money to government officials, despite the fact that there were no official fees to process adoptions.²⁰² Thus, the sufficiency of a governmental verification process alone is questionable. Nevertheless, it is reasonable to assume that the scrutiny imposed by a Central Authority responsible for implementation of Convention standards,²⁰³ funded by reasonable processing fees covering the actual costs of operation, and the development of uniform procedures for obtaining and verifying consent, would provide some counterbalance to widespread corruption. Equally important is the requirement that the placement of a child for intercountry adoption can only be performed by an accredited non-profit entity or an approved for-profit individual or entity who meets the same accreditation standards and is subject to the supervision of governmental authorities.²⁰⁴ The ongoing accountability and transparency required by the accreditation and approval process, though not an impervious shield to corruption, will limit the entry of entrepreneurs who have little experience, skill, or interest in child-protection services. Moreover, the international oversight, though loose, afforded by the appointment of Special Commissions of the Hague Conference periodically to review the Convention's practical operation, might have some additional impact on motivating systemic compliance.²⁰⁵

The other aspect of Hague Convention implementation that might have more effectively deterred the Cambodian trafficking by Ms. Galindo's agency, had the Convention been in effect, is the accreditation process that agencies and individuals will be required to undergo in the receiving nations, such as the United States, in order to arrange international

for whom they processed adoption papers as abandoned and with parents unknown, even when information regarding parents was available, in order to save processing time).

²⁰² See Cross Presentation, *supra* note 32; see also Government's Sentencing Memorandum, *supra* note 42, at 3-4; Defendant's Sentencing Memorandum, *supra* note 50, at 15-18.

²⁰³ Article 33 requires governmental authorities to report violations of Convention standards to the Central Authority, which has ultimate responsibility within the member state to ensure appropriate action is taken. Hague Intercountry Adoption Convention, *supra* note 7, art. 33.

²⁰⁴ *Id.* arts. 16-19, 22.

²⁰⁵ See *id.* art. 42. A Special Commission convened in 2000, see HAGUE CONFERENCE ON PRIVATE INT'L LAW, *supra* note 95, and again convened in September 2005. Hague Conference on Private International Law, News and Events (Sept. 16, 2005), http://www.hcch.net/index_en.php?act=events.details&year=2005&varevent=110 (noting that the Special Commission on Operation of the Intercountry Adoption Convention, with representatives of sixty-six nations, would convene on Sept. 17, 2005 at The Hague).

adoptions.²⁰⁶ The Intercountry Adoption Act of 2000 (IAA),²⁰⁷ passed by the U.S. Congress to implement the Hague Intercountry Adoption Convention,²⁰⁸ reflects the Convention's standards²⁰⁹ by requiring that agencies accredited to facilitate intercountry adoptions must be (1) nonprofit adoption agencies licensed by the states in which they operate; (2) staffed by qualified persons trained to provide intercountry adoption services; (3) utilizing social service professionals (who are subject to ethical standards) for functions requiring application of clinical skills and judgment; and (4) in compliance with certain specific operational, reporting, record-keeping, and financial requirements.²¹⁰ Private individuals or entities certified as approved bodies to facilitate intercountry placement must meet all of the same requirements, with the exception that they can operate on a for-profit basis and need not be state-licensed adoption agencies.²¹¹ As part of the accreditation and approval process, the fees, financial records, and compensation of all directors and staff of both accredited agencies and approved bodies will be scrutinized.²¹² Implementing regulations also prohibit compensation of any individual through incentive fees or contingent fees based on the number of children placed.²¹³ Accredited agencies and approved persons are further prohibited from making, or permitting agents to make, any payments directly or indirectly to parents or others as inducement for release of a child.²¹⁴ They

²⁰⁶ Hague Intercountry Adoption Convention, *supra* note 7, art. 10.

²⁰⁷ 42 U.S.C. §§ 14901–14954 (2000).

²⁰⁸ *See id.*

²⁰⁹ Hague Intercountry Adoption Convention, *supra* note 7, art. 11.

An accredited body shall (a) pursue only non-profit objectives according to such conditions and within such limits as may be established by the competent authorities of the State of accreditation; (b) be directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of intercountry adoption; and (c) be subject to supervision by competent authorities of that State as to its composition, operation, and financial situation.

Id.

²¹⁰ 42 U.S.C. § 14923(b)(1)(B)–(D), (G) (2000).

²¹¹ *Id.* § 14923(b)(2); *see also id.* § 14922(a)(2).

²¹² 71 Fed. Reg. 8140–42 (Feb. 15, 2006) (to be codified at 22 C.F.R. §§ 96.25, 96.33–34).

²¹³ *Id.* at 8142 (to be codified at § 96.34).

²¹⁴ *Id.* at 8143 (to be codified at § 96.36).

must further show that they have both written policies and training in place to enforce this mandate.²¹⁵

So what impact would an operational IAA have had if it had been in effect over the past decade? The requirements for anti-trafficking policies and training may eliminate some unintentional misconduct, but are unlikely to deter intentional misbehavior. On the other hand, the financial audits required by the accreditation and periodic review process²¹⁶ might well have picked up some of the irregularities in the financial records and operational budgets of Ms. Galindo's agency, SIA, at an earlier stage, and the professional training requirements might have dissuaded entrepreneurs such as Ms. Galindo and her sister from entering the international adoption arena in the first place.

Ultimately, it was the current enforcement mechanism for U.S. immigration restrictions that brought the trafficking in Cambodia to the attention of criminal prosecutors.²¹⁷ The immigration restrictions of receiving nations can play an important role in implementing Hague Convention requirements. In the United States, it will be the Department of Homeland Security, Bureau of Immigration and Citizenship Services (ICS) and its enforcement arm, Immigration and Customs Enforcement (ICE), that will serve to provide oversight for the process of screening prospective adoptive parents,²¹⁸ as well as to bear ultimate responsibility to determine that children satisfy the criteria to immigrate.²¹⁹ Under current law, ICE requirements for obtaining an immediate relative visa for adopted children²²⁰ operate to provide some screening against trafficking. Current

²¹⁵ *Id.*

²¹⁶ The IAA requires that accreditation be renewed every three to five years, § 14923(b)(3), and the regulations suggest that accreditation would normally be renewed every four years, and entities would be monitored annually. 71 Fed. Reg. at 8153 (to be codified at 22 C.F.R. §§ 96.60, 96.66). A complaint review process provides additional oversight. *Id.* at 8153 (to be codified at § 96.66).

²¹⁷ See *supra* notes 25–48 and accompanying text.

²¹⁸ See 42 U.S.C. § 14913 (conferring this responsibility on the Attorney General, to whom the former Immigration and Naturalization Service (INS) was responsible, and whose duties under the Cabinet reorganization that occurred subsequent to passage of the IAA are now assumed by ICE); see also David A. Isaacson, *Correcting Anomalies in the United States Law of Citizenship by Descent*, 47 ARIZ. L. REV. 313, 318–19 (2005).

²¹⁹ See Hague Intercountry Adoption Convention, *supra* note 7, arts. 5, 17 (requiring that governmental authorities in the receiving state determine that the child is eligible to enter and reside permanently, prior to placement of the child in the custody of the adoptive parents).

²²⁰ 8 U.S.C. § 1151(b)(2)(A)(i) (2000).

regulations forbid issuance of visas if adoptive parents or someone acting on their behalf gives money or other consideration to induce release of the child,²²¹ although in the past this provision has proven to be of limited effectiveness.²²² In addition, current requirements to be eligible for a visa to immigrate to join an adoptive family in the United States (i.e., an “orphan” visa) prevent relinquished children from immigrating if their birth parents are married, or if they are born to an out-of-wedlock mother (or otherwise have only one parent) who is capable of supporting them consistently with local standards.²²³ These restrictions have been criticized as unnecessarily restrictive,²²⁴ and will actually be eased when the Hague Intercountry Adoption Convention goes into effect for the United States, expanding immigration eligibility due to other perceived safeguards in Convention adoptions.²²⁵

The increased criminal liability and enforcement mandated by the Optional Protocol might ultimately create additional deterrence as well. At the time Ms. Galindo was prosecuted, there was no federal crime directly prohibiting child trafficking.²²⁶ She and her sister were prosecuted for visa fraud and money laundering.²²⁷ The laws of many states do criminalize child trafficking,²²⁸ but may not be applicable to activity occurring outside of their jurisdictions. When the Hague Intercountry Adoption Convention enters into force for the United States, criminal and civil penalties under the IAA will go into effect for making false statements or factual misrepresentations; offering, soliciting, or accepting compensation to influence or affect a relinquishment or consent to adoption; or engaging an

²²¹ 8 C.F.R. § 204.3(i) (2005).

²²² See, e.g., Maskew, *supra* note 18.

²²³ See 8 U.S.C. § 1101(b)(1)(F) (2000) and 8 C.F.R. § 204.3, which limit the eligibility of voluntarily relinquished children to those of sole or surviving parents incapable of providing proper care.

²²⁴ See, e.g., Bartholet, *Propriety, Prospects and Pragmatics*, *supra* note 19, at 187–88.

²²⁵ See Intercountry Adoption Act of 2000, Pub. L. No. 106-279, § 302(a)(3), 114 Stat. 825, 838–39 (to be codified at 8 U.S.C. § 1101(b)(1)(G)), which will become effective upon entry into force of the Hague Intercountry Adoption Convention for the United States and will permit children to qualify for orphan visas if they have been relinquished by two living parents incapable of providing proper care for the child (by local standards) or by a sole and surviving parent, which in some circumstances includes an out-of-wedlock mother, with no requirement that the sole parent be incapable of providing support.

²²⁶ *Supra* note 53.

²²⁷ Galindo Information, *supra* note 46; Devin Information, *supra* note 47.

²²⁸ E.g., OKLA. STAT. ANN. tit. 21 §§ 865–69 (West 2002) (making trafficking in children a felony in Oklahoma).

agent to do so, within the United States or abroad.²²⁹ Commentators have observed the difficulty in obtaining convictions for trafficking, given the problems of proof and the often murky line between payments for prebirth expenses and inducements for relinquishment.²³⁰ Nevertheless, the blatant and systemic exchanges unearthed by U.S. investigators in Cambodia might well have subjected American adoption facilitators such as Ms. Galindo to more extensive prosecution if the IAA had been in effect and applicable. Unfortunately, the IAA currently applies only to Convention adoptions, leaving a gap that, even after United States ratification, will make it inapplicable to many intercountry adoptions in which U.S. citizens are involved.²³¹ If the United States is to be in full compliance with its treaty obligations under the Optional Protocol, this gap will need to be closed.

Will full implementation of the Hague Intercountry Adoption Convention and the Optional Protocol solve the problem of trafficking, or rather, as critics allege, will it stifle intercountry adoption? In all

²²⁹ 42 U.S.C. § 14944(a), (c) (2000). Criminal sanctions for a violation include imprisonment for up to five years and a fine up to \$250,000. *Id.* § 14944(c). The Attorney General is also empowered to bring a civil action to seek civil penalties (up to \$50,000 for the first violation and up to \$100,000 for each succeeding violation). *See id.* § 14944(a)–(b). The Act does not, however, create a private right of action in federal court. *Id.* § 14954.

²³⁰ *See Maskew, supra* note 18, at 625–32 (discussing the reticence of the ICS to determine child buying has occurred, and thus to deny a visa on that basis); Smolin, *Child Trafficking, supra* note 18, at 302–25 (observing that domestic adoption fails to provide a clear demarcation that would be useful in the international adoption arena).

²³¹ Of the twenty-five nations that have been on the list of the top twenty countries of origin for children immigrating to the United States during 2002, 2003, and 2004, fourteen nations (China, Guatemala, India, Columbia, Belarus, Philippines, Bulgaria, Poland, Mexico, Thailand, Brazil, Azerbaijan, Romania, and Peru) are parties to the Hague Intercountry Adoption Convention, and eleven (Russia, Korea, Ukraine, Kazakhstan, Vietnam, Ethiopia, Liberia, Nepal, Nigeria, Haiti, and Cambodia) are not. *Compare Immigrant Visas, supra* note 14, with Hague Conference on Private International Law, *supra* note 8. Though Russia has not yet ratified, it signed the treaty in 2000 (the same year that the United States passed implementing legislation), Hague Conference on Private International Law, *supra* note 8, indicating that Russia might also be working its way through the preparation process for ratification at some future date. Media reports, however, suggest that recent deaths of children adopted from Russia at the hands of their U.S. adoptive parents might be stalling the ratification process, due to concern about the fate of Russian adopted children abroad. *See Ann Hornaday, Don't End Their Hope of a Home, WASH. POST*, Sept. 16, 2005, at A31.

likelihood, universal ratification and implementation of these treaties would not totally eliminate intercountry trafficking, but broad-based participation by the international community would produce within each nation some uniformity of standards and a centralization of governmental accountability and transparency that has the potential to deter many of the systemic problems experienced over the past decade. A reason for optimism in this regard is the fact that two of the nations that have most effectively centralized their intercountry adoption system, the People's Republic of China and Korea, have experienced relatively fewer trafficking scandals in their intercountry adoption systems.²³²

One frequently articulated concern, however, is that centralized regulation will become so complex and burdensome that it both hinders adoption and fails to deter corruption. Certainly, centralization that is implemented poorly could have that potential. Professor Smolin has commented that the elaborate system for foreign adoptions created by India's Central Adoption Resource Agency (CARA) might illustrate this phenomenon.²³³ All Indian agencies handling foreign adoptions must be licensed by the state and CARA, and both domestic and foreign agencies must be non-profit.²³⁴ All placements for foreign adoption must be approved by CARA, local Voluntary Coordinating Agencies (which issue certificates of unsuccessful efforts to place a child domestically), a local scrutinizing agency (appointed to review the voluntariness of surrender, guard against illicit profiteering, and ensure adoption is in the child's best interests), the Indian placing agency, the foreign agency, and the local court, and traveling permission must be obtained from the Indian immigration authorities.²³⁵ Yet this complex system of safeguards did not eliminate the repeated trafficking scandals in Andhra Pradesh.²³⁶ Professor Smolin observes that Indian family law scholar, Asha Bajpai, suggests that the bureaucracy of this system is so complex that it might actually create a

²³² The majority of trafficking in China is reported to be related to domestic adoption. See *supra* note. China's domestic adoption system is not regulated with the same level of centralized governmental supervision. See *supra* note 157 and accompanying text. But, for one recent media report of a trafficking scandal related to international adoption, see York, *supra* note 161.

²³³ Smolin, *Adoption Scandals*, *supra* note 18, at 443-48.

²³⁴ See *id.* at 443-44.

²³⁵ See *id.* at 443-46.

²³⁶ See *id.* at 450-56.

likelihood of corruption.²³⁷ However, conceding that centralization could have this potential, nothing in the Hague Intercountry Adoption Convention, the CRC, or the Optional Protocol demands a quadri-level scrutiny of each individual adoption. Accountability and centralized oversight of the facilitators and the process can occur under simpler centralized models.

Another concern raised about implementation of the Hague Intercountry Adoption Convention is that the Convention would be implemented in a manner that would sentence children to years in institutions or prohibit parental relinquishments.²³⁸ Neither of these outcomes, however, are the necessary consequence of centralized control. The experience of Korea and China with centralization of standards and governmental oversight of intercountry adoption, though not originally connected to implementation of the Hague Convention,²³⁹ suggests that centralization can be implemented without eliminating the ability of birth parents to relinquish, dismantling foster care for children awaiting adoption, or unduly extending the stay of children in institutions. In both of these nations, intercountry adoption is strictly regulated by the central government. Yet most children from Korea and China are placed with adoptive parents abroad at a very young age,²⁴⁰ and many are now cared for in foster care prior to placement.²⁴¹ Although direct placement by birth

²³⁷ *Id.* at 446 (citing ASHA BAJPA, ADOPTION LAW AND JUSTICE TO THE CHILD 170 (1996)).

²³⁸ *Cf.* Hannah Wallace, An In-Depth Look at Adoption from Guatemala (Mar. 1999), <http://www.adoptionsintl.org/articles/0399.htm>; Posting on behalf of Susana Luarca, *supra* note 115.

²³⁹ China just ratified the Convention in September 2005 and Korea has not yet signed or ratified the Convention. Hague Conference on Private International Law, *supra* note 8.

²⁴⁰ *E.g.*, Family Adoption Consultants of Ohio, Korea, <http://www.adoption-global.org/korea.htm> (last visited Mar. 20, 2006) (noting that the average age of children from Korea at placement is six to twelve months old); Family Adoption Consultants of Ohio, China, <http://www.adoption-global.org/china.htm> (last visited Mar. 20, 2006) (noting that the average age of children from China is eleven to fifteen months old); Holt International, Holt's International Programs, <http://www.holtintl.org/adoption/criteria.shtml> (last visited Mar. 20, 2006) (showing that Korean children are five to twenty months old at placement and that Chinese children are between eight and thirty months old, although special needs children from either country may be older).

²⁴¹ AMBROSE & COBURN, *supra* note 134, at 24–25 (discussing, by way of comparison, foster care for children from Korea placed for intercountry adoption); Holt International, China: Is There a Child Waiting for You?, <http://www.holtintl.org/china/> (last visited Jan. 5, 2006) (discussing the foster care program Holt International has developed in China).

parents is rare in China, due to its population control policies,²⁴² in Korea most of the children in the intercountry adoption system have been relinquished by birth parents, rather than abandoned.²⁴³ Centralization of governmental supervision over adoption, ipso facto, precludes none of these things.

Placement of children at a very young age is an important goal. It is not, as some adoption critics suggest, simply pandering to the unreasonable desires of prospective adoptive parents. Though adoption at any age may, for some children, be a beneficial option, children who have been placed at a very young age will experience less disruption related to the transition from former caregivers, adjust more easily to a new language and culture, and have a greater opportunity to bond with their adoptive families. They will also be less vulnerable to the developmental delays that accompany inadequate institutional care.²⁴⁴ It is therefore of utmost importance to design a regulatory system implementing the Hague Convention that fosters, rather than hinders, early placement.²⁴⁵ Fear that a centralized system will unduly extend institutionalization of children in Guatemala, for example, is fueled by its current government-operated orphanage system, which predominantly serves children who have been abandoned rather than relinquished.²⁴⁶ It is reported that abandonment decrees in this system can

²⁴² The 1999 Adoption Law of the People's Republic of China permits "parents unable to rear their children due to unusual difficulties" to place their children for adoption. Adoption Law (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 4, 1998, effective Apr. 1, 1999), art. 5 (P.R.C.), available at http://www.fwcc.org/China_adoption_law_98.htm. It also prohibits parents of a child adopted by others from bearing any more children in violation of the regulations on family planning on the ground of having placed their child for adoption. *Id.* art. 19. Thus, most of the children in China available for adoption have been abandoned.

²⁴³ See AMBROSE & COBURN, *supra* note 134, at 24–25 (reporting that children abandoned at local orphanages are not eligible for intercountry adoption; the children placed abroad are those whose birth parents have placed them for adoption).

²⁴⁴ *Hearing Before Commission on Security and Cooperation in Europe*, *supra* note 133 (statement of Dr. Dana Johnson) (asserting that children in institutional care lose one month of physical growth, motor development, and speech development for every three months they spend in an institution, and from age four months through twenty-four months of age, they will lose one to two I.Q. points per month of institutional care, not all of which is recoverable by subsequent familial care, and reporting studies indicating that children in institutional care over two years have a higher incidence of conduct disorders, attachment problems and significantly below normal I.Q.s).

²⁴⁵ See Dillon, *supra* note 18, at 235–43.

²⁴⁶ See Ethica, *supra* note 90.

take up to seven years to obtain.²⁴⁷ It is small wonder that the current public system, clogged with such excessive delays, is an unattractive alternative.

Development of an adequate child protection infrastructure and reasonable methods of determining that abandoned children are eligible for adoption at a very early age need not be inconsistent with implementation of the Hague Intercountry Adoption Convention, and in fact, should be an important component of the implementation legislation. Moreover, receiving nations, as part of their obligation under the Optional Protocol to attack the root causes of trafficking and to provide financial and technical assistance,²⁴⁸ should support the efforts of developing nations to create an adequate child protection infrastructure. That infrastructure should provide birth parents with viable options to relinquishment and abandonment, but at the same time should create: an efficient mechanism for voluntary relinquishment by parents who make that choice; timely determinations of adoption eligibility for abandoned children; and appropriate foster care networks for children awaiting placement, through licensing of pre-existing facilities or creation of new public or private foster care systems.

B. Primacy of Domestic Adoption

Both the CRC and the Hague Intercountry Adoption Convention direct that a child should be placed for adoption in the child's country of origin, rather than abroad, when domestic placement is possible. Article 21 of the CRC explicitly cautions member states to consider intercountry adoption for a child only "if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin."²⁴⁹ Thus, not only domestic adoption, but other suitable forms of in-country care are afforded primacy under the CRC's directives. Member states are further required to ensure that all adoptive placements are made considering "the desirability of continuity in the child's upbringing and to the child's ethnic, religious, cultural and linguistic background."²⁵⁰

²⁴⁷ *Id.*

²⁴⁸ Optional Protocol, *supra* note 4, annex II, art. 10 (requiring states parties to address the root causes of the sale of children and to provide "financial, technical or other assistance through existing multilateral, regional, bilateral or other programmes"); *see also* Kapstein, *supra* note 13, at 124–25 (recommending foreign aid by the United States earmarked for child welfare and adoption issues in countries of origin).

²⁴⁹ CRC, *supra* note 1, art. 21(b).

²⁵⁰ *Id.* art. 20(3).

In regard to the primacy of domestic placement, the Hague Intercountry Adoption Convention takes a more flexible approach than that suggested by the strict language of the CRC. While some scholars have expressed concern that the CRC might be interpreted to prioritize both domestic foster care and suitable institutional care over intercountry adoption,²⁵¹ the Hague Convention, in its preamble, emphasizes the importance of a child growing up in a “family environment,” and suggests that intercountry adoption might offer the advantage of a permanent family to a child for whom a suitable family cannot be found in the child’s country of origin.²⁵² This goal is implemented through the Convention’s requirement that an intercountry adoption occur only after governmental authorities determine that it is in the child’s best interests, after considering the other possibilities for placement within the child’s country of origin,²⁵³ a directive far more flexible than imposition of a precondition that no domestic foster care or suitable institutional care be available.

More recent support for this flexible approach is found in UNICEF’s Position on Intercountry Adoption, released in January 2004, which suggests that for children who cannot be raised by their own families, an appropriate family environment should be sought in preference to institutional care.²⁵⁴ UNICEF acknowledges that intercountry adoption is one of a range of options that may be considered, and that for “individual children who cannot be placed in a permanent family setting in their countries of origin, it may indeed be the best solution.”²⁵⁵

²⁵¹ Scholars note that Article 20 of the CRC recognizes foster placement, kafalah, adoption, or placement in suitable institutions as possible solutions for children in need of care outside their families, and suggest that the language in Article 21, relegating intercountry adoption to circumstances in which no suitable care can be found in the country of origin, therefore prioritizes intercountry adoption after suitable institutional care. See, e.g., Carlson, *supra* note 188, at 259–65; Dillon, *supra* note 18, at 206–07; Alexandra Maravel, *The U.N. Convention on the Rights of the Child and the Hague Conference on Private International Law: The Dynamics of Children’s Rights Through Legal Strata*, 6 *TRANSNAT’L L. & CONTEMP. PROBS.* 309, 313–14, 317–18 (1996).

²⁵² Hague Intercountry Adoption Convention, *supra* note 7, pmb1.

²⁵³ *Id.* arts. 1, 4(b). For an excellent discussion of the legislative history of the drafting of these provisions, and the compromise reflected therein, see Carlson, *supra* note 188, at 255–65.

²⁵⁴ UNICEF, UNICEF’s Position on Inter-country Adoption (Jan. 15, 2004), http://www.unicef.org/media/media_15011.html.

²⁵⁵ *Id.* In this statement, UNICEF expresses strong support for the Hague Convention on Intercountry Adoption. *Id.*

Thus, it is clearly the intent of both conventions to mandate domestic placement over intercountry adoptive placement, when domestic adoptive placement can be timely achieved. If domestic adoption is not a realistic option, a determination regarding whether domestic foster placement or institutional placement is “suitable” for a particular child, and therefore should be preferenced over an international placement, depends on the child’s individual circumstances. For some children who are happily living in a stable foster care placement with a family with whom they have bonded or in a small, well-run group home with caretakers to whom they are attached, such a domestic placement may be more suitable, particularly if the children are older. The European Court of Human Rights recognized this principle in a recent decision, *Pini v. Romania*,²⁵⁶ in which the court found the interests of foreign adoptive parents could not prevail over the interests of two ten-year-old girls who objected to their foreign adoption and wished to remain in the social and family environment of the group home in which they had been raised.²⁵⁷ On the other hand, for thousands

²⁵⁶ App. Nos. 78028/01, 78030/01 (Eur. Ct. H.R. June 22, 2004), <http://www.echr.coe.int/ECHR> (follow “Case-Law” hyperlink, then follow “HUDOC” hyperlink; then enter “78028/01” in “Application Number” field). The case was filed by Italian parents against Romania following years of attempting to obtain custody of two girls whom they had legally adopted under Romanian law at the age of nine and a half. *Id.* paras. 1–24. Although the girls had apparently indicated some desire to be adopted initially, after the adoptions were finalized, the girls, who had not yet met their adoptive families, objected and ultimately sought vacation of their adoption decrees. *Id.* paras. 76–84. The girls had spent most of their childhood in an institution that raised them in small living units of seven or eight children, each with permanent staff, whom they referred to as “substitute” “aunts” and “mothers.” *Id.* paras. 77, 94. They had made good friends and been given the opportunity to study dance and music, play sports, and even travel abroad. *Id.* paras. 94–98. Their private institution apparently opposed the adoption, and had prevented the girls from receiving the many letters that their adoptive families had written them. *Id.* para. 99. The appeals dragged on for years in the Romanian courts, and in all that time, the adoptive families had been permitted to meet the children only once. *Id.* paras. 1–21. The Court ruled six to one that there had been no violation of family life under Article 8 of the Convention, because the children’s interests in opposing the adoption outweighed those of the adoptive parents. *Id.* at 36, 43. Nevertheless, the Court deplored the manner in which the adoptions were conducted—denying the adoptive parents the opportunity for any meaningful contact with the children and denying the children any psychological support or preparation prior to placement—and determined, by a vote of four to three, that the process and delay in enforcement of the adoption decrees denied the adoptive parents their right to a fair hearing under Article 6 of the Convention, entitling them to monetary damages. *Id.* at 38–43.

²⁵⁷ *Id.* paras. 156, 165–66.

of children, particularly those in temporary foster placements or institutional settings that fail to meet their physical or emotional needs, international adoptive placement presents a favorable option when domestic adoptive placement is not available. The two conventions, when construed together, afford governmental authorities in a child's country of origin the ability to make these individualized determinations, considering each child's age and individual situation.

Sending and receiving nations attempting to reform their intercountry adoption practices in order to encourage domestic adoption in countries of origin face many challenges. Often, countries of origin need financial assistance to develop or improve both child protective services and a social service infrastructure that can build and facilitate domestic adoption. Yet utilization of funds from prospective adoptive parents or adoption agencies in receiving nations, if directly tied to the quantity of children placed abroad, has often deterred local officials from encouraging domestic adoption.²⁵⁸ Financial assistance programs must therefore be devised that do not tie assistance directly to individual adoptions, or individual intermediaries, but instead pool funding and perhaps channel it through a Central Authority or international agency. Professor Dillon has suggested that an international fund be created, funded by a portion of adoption fees from each family adopting from abroad, which could be disbursed where needed to countries requiring assistance to pay for programs that would facilitate meaningful implementation of Hague Convention principles.²⁵⁹ In the absence of an international organization willing to facilitate such a program,²⁶⁰ bilateral financial assistance between governments, again funded by fees from adopters from the receiving nation, might be a step in that direction.

Another challenge is to strike the appropriate balance between making children available to domestic adopters, while at the same time avoiding imposition of requirements that unduly prolong the stay of children in

²⁵⁸ See *supra* Part I.A.

²⁵⁹ See Dillon, *supra* note 18, at 239–41.

²⁶⁰ The Hague Conference on Private International Law might itself be an appropriate agency to undertake such a project. It may not currently have the infrastructure to operate such a program, however. Nevertheless, such an undertaking would be consistent with the call from the Special Commission that met in 2000, encouraging receiving nations to provide support to improve national child protection services without compromising the integrity of the adoption process or creating a dependency on income derived from international adoption. HAGUE CONFERENCE ON PRIVATE INT'L LAW, *supra* note 95, para. 47.

institutions or foster care while awaiting adoption. Clearly, countries of origin need to examine both their adoption laws, to ensure that foreign adopters do not receive more favorable treatment, and their domestic fee schedules, to ensure that domestic adoption fees are affordable for average citizens.²⁶¹ Centralized oversight of the distribution of the fees generated by intercountry adoption, as suggested above, might deter domestic displacement as well as trafficking. More challenging is to determine the appropriate period of time after which the country of origin should determine a domestic placement is not possible. Although the Hague Intercountry Adoption Convention does not establish any specific time limits for a domestic search prior to international placement, the time limitations created for international placement by some sending nations have evoked concern that children languish unnecessarily in orphanages awaiting adoption.²⁶² Obviously, the appropriate length for a search for domestic placement will vary by nation, but the length should be informed by the number of children eligible for adoption living in state care, as compared to the demand for domestic adoption, taking into account the potential for increased demand resulting from heightened recruitment efforts.²⁶³ By beginning the search for a family as early as possible,²⁶⁴ and

²⁶¹ In a July 2005 survey of 1,500 Russians, 54% reported that they felt it was difficult for a Russian family to adopt a child from a Russian orphanage (although the nature of the difficulty was not reported). Polls Say Russians Oppose Adoption of Their Children by Foreigners, Favor Stricter Regulations, http://adoptionblogs.typepad.com/adoption/2005/08/poll_says_russi.html (Aug. 17, 2005). Over the past decade, domestic adoption in Russia has decreased from 12,115 children in 1994 to 6,913 in 2004, whereas adoption of Russian children by foreigners has increased from 2,196 in 1994 to 9,419 in 2004. *Foreign Adoption Rate on the Rise*, INTERFAX, June 6, 2005, http://www.interfax.ru/e/B/0/0.html?id_issue=11307094.

²⁶² Russia, for example, is reported to have recently enacted legislation mandating that children must be placed in a regional database for at least two months and the federal database for six additional months before the child will be eligible for international placement. Russia Tightens Adoption Restrictions, http://adoptionblogs.typepad.com/adoption/international_adoption (June 2, 2005). Prior to this legislation, which took effect in January of 2005, children were required to be on the federal register only three months before international placement. *Id.*

²⁶³ Russia's Education and Science Ministry, which runs the federal database used to seek domestic adopters, listed 175,000 children eligible for adoption (out of 260,000 estimated to live in orphanages and similar institutions), although fewer than 7,000 domestic adoptions of these children occurred in 2004. *Id.*

creating a waiting period based on a realistic assessment of the potential for domestic placement, effective implementation of the Hague Convention can be achieved without requiring most children to endure long delays in institutional care.²⁶⁵

The difficulty in obtaining accurate information about the opportunity for domestic placement hampers not only the policymakers within a country of origin, but also thwarts meaningful debate and policy discussions in receiving nations and the international community. International adoption advocates frequently, and in good faith, contend that programs encouraging domestic adoption leave thousands of children in institutions.²⁶⁶ Others make the equally valid assertion that intercountry adoption siphons off children, particularly the youngest children, who could be placed in their countries of birth.²⁶⁷ In Romania, for example, will domestic adoption currently or soon be able to meet the needs of Romania's children in state care?²⁶⁸ In trying to assess this question, one hears widely divergent accounts. In 2005, following almost four years of moratoria, Romanian officials reported that the majority of children who are left in maternity hospitals are now reintegrated with their birth families, fewer children are entering the initial system, and the number of Romanian families seeking adoption has dramatically increased.²⁶⁹ Yet others contend that these reintegration statistics reflect the fact that birth parents are now forced to take custody of children that they would otherwise

²⁶⁴ HAGUE CONFERENCE ON PRIVATE INT'L LAW, *supra* note 95, para. 30. One suggestion at the Special Commission was that a search for a possible family begin as soon as a child enters an institution. *Id.*

²⁶⁵ Delegates to the Hague's Special Commission in 2000 agreed that implementation of the Convention should not require lengthy delays in adoptive placement and noted that long delays associated with a search for a domestic family placement were against a child's best interest. *Id.* para. 28.

²⁶⁶ See sources cited *supra* note 19.

²⁶⁷ See sources cited *supra* notes 129, 133.

²⁶⁸ Investigators for USAID concluded in 2001, prior to the moratorium, that there were waiting lists in some judets of Romania seeking to adopt. AMBROSE & COBURN, *supra* note 134, at 7.

²⁶⁹ *Hearing Before Commission on Security and Cooperation in Europe*, *supra* note 133 (statement of Ambassador Ducaru) (reporting that out of the 4,614 children left in maternity hospitals and pediatric sections in 2004, 2,389 were reintegrated with their birth families, 940 were placed in foster families, and 768 were placed in private centers; only 436 children under a year old entered the residential system in 2004 and only 22% of the children in the residential care system were under ten years old; and at the beginning of 2005, 1,047 Romanian families seeking adoption were registered on the national register).

choose to place for adoption, and that the statistics do not accurately reflect the thousands of children who remain in Romanian institutions.²⁷⁰ Both assertions are made by well-intentioned advocates, and yet the debate is colored by many other political realities, both in Romania and abroad.²⁷¹

Both the prevention of trafficking and the implementation of strategies to encourage domestic placement without abandoning children to state care would be greatly enhanced by development of an international oversight body, authorized and equipped to perform independent evaluation of the operation of intercountry adoption in areas of the world where problems are identified. This concept has been suggested by several scholars, including Professor Sarah Dillon²⁷² and Trish Maskew, Executive Director of Ethica.²⁷³ No such body currently exists on a permanent basis. The Hague Conference's Special Commissions on the Intercountry Adoption Convention have met at five-year intervals, and are not permanently available or staffed for fact-finding missions that can be executed quickly. The Committee on the Rights of the Child has the responsibility to review periodic implementation reports for nations that are party to the Optional Protocol or the CRC, both of which address trafficking issues, as well as the authority to review the efforts of nations that are party to the CRC to implement its directives mandating the primacy of domestic placement.²⁷⁴ But the Committee on the Rights of the Child operates on a five-year review cycle,²⁷⁵ and bears oversight responsibility for a myriad of children's issues. Thus, prompt assessment of crises related to international adoption may not be easily addressed within that framework. Ultimately, the development of a small but permanent oversight body with

²⁷⁰ *Id.* (statement of Debra Murphy Scheumann) (indicating that the statistics on decreased abandonment reflect fewer abandonment designations by Romanian courts and the fact that birth parents are given no choice but to take children back, and reporting 80,000 remain in Romanian public care).

²⁷¹ See *supra* note 133 (referencing the impact of pressure of the European Union and European Parliament on the imposition and continuation of Romania's moratorium); see also *Hearing Before Commission on Security and Cooperation in Europe, supra* note 133 (statement of Debra Murphy Scheumann) (reflecting concern that E.U. pressure will result in moratoria in the Ukraine and Bulgaria). The fact that hearings were held, at Senator Sam Brownbeck's instigation, in the U.S. Senate regarding Romania's adoption policy is one reflection of the political pressure on both sides of the debate.

²⁷² See Dillon, *supra* note 18, at 182-83, 255.

²⁷³ Interview with Trish Maskew, Executive Dir., Ethica in Birmingham, Ala. (Apr. 15, 2005).

²⁷⁴ CRC, *supra* note 1, art. 44; Optional Protocol, *supra* note 4, annex II, art. 12.

²⁷⁵ CRC, *supra* note 1, art. 44; Optional Protocol, *supra* note 4, annex II, art. 12.

a multinational staff, committed to the principles of the Hague Intercountry Adoption Convention, might best serve to gather the information needed by policymakers at both the domestic and international levels to ensure that intercountry adoption operates without corruption in a manner that most effectively serves the welfare of children.²⁷⁶

CONCLUSION

The past decade has witnessed not only a continuing upsurge in intercountry adoptive placements, but also a migration of entrepreneurs into a field once dominated by humanitarian and philanthropic organizations.²⁷⁷ Fees and payments that do not seem extraordinary by the standards of wealthier nations create strong incentives in impoverished nations to increase the flow of infants into the intercountry adoption system, even when that flow is sustained by trafficking, coercive or fraudulent practices, or the displacement of domestic adopters.

Advocates of intercountry adoption ignore the incidence of systemic trafficking and displacement of domestic adoption occurring during the past decade at their peril. Exposure of systemic trafficking and displacement problems in countries such as Cambodia, India, Guatemala, and Romania bring intercountry adoption into disrepute, fuel the arguments of those who are simply opposed to intercountry adoption on political or philosophical grounds, and spur new moratoria by both sending and receiving nations.

The eradication of systemic trafficking and the development of effective child protective and domestic adoption systems, complimented where needed by a well-regulated intercountry adoption network, can best be accomplished by universal commitment to these goals and a viable international framework for the operation of intercountry adoption. Currently, the Hague Intercountry Adoption Convention and the Optional Protocol, implementing the broad directives of the CRC, provide the best opportunity to achieve this global consensus and execute a united attack. Failure to ratify, or efforts to obstruct implementation of the Hague Intercountry Adoption Convention²⁷⁸ and the Optional Protocol ultimately dis-serve the interests of the international adoption community and of the

²⁷⁶ Ideally, such a body could be affiliated with the Permanent Bureau of the Hague Conference of Private International Law, yet authorized to investigate the operation of intercountry adoption in nations that are not yet a party to the Hague Intercountry Adoption Convention, with the permission of the non-member nation.

²⁷⁷ See sources cited *supra* notes 13–16.

²⁷⁸ See *supra* notes 114–17 and accompanying text.

children, birth families, and adoptive families that they are designed to protect. Instead, increased efforts should be directed toward creating implementing legislation in sending and receiving nations that more clearly defines, effectively detects, and criminally sanctions practices that induce consent by payment, fraud, or corruption; creates systems of centralized oversight and accountability that minimize bureaucratic delay and expense; fosters domestic adoption where possible while enabling children to be placed expeditiously; and channels financial assistance from receiving nations to sending nations in a manner not directly linked to individual placements. In addition, the creation of a small international body, committed to the principles of the Hague Intercountry Adoption Convention and capable of performing expeditious fact-finding investigation and oversight to the global intercountry adoption network, would foster appropriate and timely international and domestic response to crises, when they occur. These measures should help to ensure that the system of intercountry adoption remains focused on its mission: to serve those children whose need for permanent families must be met by, rather than created by, the intercountry adoption network.

