

Intercountry Adoption: Past, Present and Future Concerns Regarding its Existence and Regulation.

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ABSTRACT

Inter-country adoption is the practice by which adults resident in one country adopt a child resident in another country. Commentators have been mooting a number of options in regard to the future of inter-country adoption. Such options include - amending the Hague Convention so as to strengthen its effect; drafting an entirely new Convention on inter-country adoption so as to increase control; ceasing legal regulation and control of the practice, in effect accepting that private international law is an inappropriate forum for such regulation; and banning the practice of inter-country adoption altogether, in a bid to cease abuses associated with inter-country adoption. This paper assesses these options in light of the history of inter-country adoption and its associated problems.

I. INTRODUCTION

“...the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding”¹

Adoption is not a new event. On the contrary, this universal practice can be traced as far back as Biblical times.² The movement of children across international borders for the purposes of adoption, however, is a relatively recent occurrence. This activity, known interchangeably as “inter-country adoption” or “international adoption”, involves “a child living in one country, the prospective adoptive parents living in another country, and the transfer of the child to that country to live there with the adoptive parents”.³ The practice first gained widespread public attention in

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¹ Hague Conference on Private International Law: Final Act of the 17th Session, Including the

Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption, Convention No.33, 29 May 1993, 32 I.L.M 1134, extract from preamble [hereinafter Hague Convention].

² Carro, J.L., “Regulation of Inter-country Adoption: Can the Abuses Come to an End?” (1994-1995) 18 *Hastings Int'l & Comp. L. Rev.* 121, 121.

³ Jareborg, M.J., “Convention on Protection of Children and Co-Operation in Respect of Inter-country Adoption” (1994) 63 *Nordic J. Int'l L.* 185, 185.

the 1950s during the aftermaths of World War Two and the Korean War and at the time few could predict how immensely popular it would become. What began as a global humanitarian effort to rescue poor children of the world has today, due to phenomena created by modern day society,⁴ become an increasingly viable solution for childless families.

Since its inception, and throughout its steady climb in popularity, the practice of intercountry adoption has been surrounded by intense moral debate. Proponents of the practice argue that across the world millions of homeless children are in need of food, shelter and care and that if intercountry adoption is a means by which such needs can be met, then the practice should be encouraged and regulated accordingly. Opponents, on the other hand, question the utility of intercountry adoption, contending the practice not only robs a child of its cultural background, but is also used to conceal the underlying social problems of poor countries. They insist that elimination of intercountry adoption would be in everyone's best interest. No matter what position one adopts, intercountry adoption exists and has continued to rise in frequency in recent decades. Regulation of the practice has always seemed a necessary means by which to protect the parties involved.

In the period between the 1950s and the early 1990s, the practice of intercountry adoption began to increase rapidly, prompting the international legal community to make several attempts to regulate and control the practice via the creation of international instruments. Unfortunately these attempts, including the United Nations Convention on the Rights of the Child ("CRC"), proved unsuccessful. This is primarily because such instruments failed to specify uniform procedures to be followed by participating countries. Without effective, uniform controls, the incidences of baby selling escalated in certain countries, including Romania and Peru, throughout the early 1990s. During this time, when many children were stolen from their birth parents and sold to the highest bidder, it became evident that a global uniform standard was required. In 1993 the Hague Convention on Protection of Children and Co-operation in Intercountry Adoption ("Hague Convention") was an instrument created to address these problems.

The Hague Convention represents the culmination of the work carried out by the 68 member and non-member States present at the 17th session of the Hague Conference on Private International Law. Although other international instruments on the subject exist, the Hague Convention is the first to create a system of co-operation between countries participating in adoptions. It sets down minimum standards and also outlines a detailed adoption procedure for all countries to follow. It also works to distribute responsibilities between the countries that send the children for adoption ("sending countries") and the countries that receive the children ("receiving countries").

Although the Hague Convention has arguably improved on past international instruments by bringing uniformity to the area, it is not flawless. One of the biggest criticisms of the Hague Convention is that its implementation by major sending and receiving countries has been a difficult and sometimes impossible task. Many sending countries have either delayed implementation, failed to implement the Convention, or have implemented it but unsuccessfully. Such countries include China, Korea and Romania. While most major receiving countries have managed to

⁴ Carro, J.L., "Regulation of Intercountry Adoption: Can the Abuses Come to an End?" (1994-1995) 18 *Hastings Int'l & Comp. L. Rev.* 121, 121.

successfully implement the Convention, the United States as one of the world's most influential countries and the largest receiver of children for adoption, has not done so. The Hague Convention has also been criticised for creating a dual system of intercountry adoption by allowing adoptions between member and non-member countries. Another key critique relates to inherent structural flaws. For example, the Hague Convention fails to expressly prohibit baby selling and fails to clearly define important terms such as "adoption" and "orphan". Moreover, the Convention lacks an enforcement mechanism or a means by which to review the success of the Convention in participating countries. Despite these suggested flaws, others argue the Hague Convention is workable and has substantially improved the practice of intercountry adoption.

There a number of options available to the international community regarding the future of intercountry adoption. Firstly, the Hague Convention, the most successful Convention on the topic, could be amended which would help strengthen its overall effectiveness. Alternatively, the international community could draft an entirely new Convention on the topic, specifically addressing the failures of past attempts. The international community could also choose to cease regulation of the practice, in effect leaving the market in children to be controlled by the forces of demand and supply. An extreme option would be to place a universal ban on the practice of intercountry adoption.

This paper will review the operation of the Hague Convention and discuss which of these options is preferable. The first part will provide a brief history of the rise of intercountry adoption and describe some current trends. The second part will outline the moral debate surrounding the practice of intercountry adoption by presenting arguments in favour of its regulation and opposing arguments in favour of its complete abolition. The third part will examine the problems which precipitated the Hague Convention including the ineffectiveness of past laws to adequately regulate the practice and the subsequent evidence, in the form of child trafficking, that a uniform global standard was required. The fourth part will provide a summary of the Hague Convention, outlining the ways in which it has improved on past international instruments such as the CRC. The fifth part will present a critique of the Convention, examining the barriers to its successful implementation, the problems arising from intercountry adoptions between member and non-member countries, and the textual flaws of the Convention. Finally, the paper will conclude with an analysis of the possible future options available for the practice of intercountry adoption.

II. INTERCOUNTRY ADOPTION: THE PHENOMENON

The practice of intercountry adoption was virtually non-existent in the first half of the 20th century. It was not until the devastating aftermath of the Second World War that the world first began to recognise the possibility of transnational adoption.⁵ This realisation came following intense media coverage that conveyed the plight of dislocated families and refugee children in war-torn countries. The widespread concern for these children spurred a global humanitarian movement to rescue

⁵ Hillis, L, "Intercountry Adoption Under the Hague Convention: Still an Attractive Option for Homosexuals Seeking to Adopt?" (1998-1999) 6 *Ind. J. Global Legal Stud.* 237, 239.

thousands of orphaned and abandoned children who were innocent victims of the war.⁶

Although World War Two saw an abundance of homeless children available for adoption, it was not until the Korean War in the early 1950s that the practice of intercountry adoption truly received global awareness.⁷ In the years following that war, the Korean government struggled to rebuild its devastated economy and society. During this time, and while harsh conditions persisted, a great many children became available for adoption.⁸ Between 1953 and 1981 a significant number of Korean adoptions took place primarily by United States citizens wishing to save these children from their predicament and provide them with a safe and secure home.⁹

In the 40 years following the Second World War and the Korean War, the world saw a steady annual increase in the number of intercountry adoptions. Although intercountry adoption was originally spurred by the aftermath of wars, the phenomenon has in recent decades reflected the “more general awareness of developing world poverty and developed world privilege.”¹⁰ In addition, the social and political upheaval in many of the sending regions like Russia, Eastern Europe and Latin America¹¹ have influenced the rise in intercountry adoption. During hard times, families in the sending countries, and the countries themselves, have found it difficult to care for all their orphaned children and have used intercountry adoption as a mechanism to provide these children with families.

Intercountry adoption continues to be popular with over 42,000 children leaving their country of birth each year to be raised by adoptive parents in a foreign country.¹² The practice of intercountry adoption has shifted from its roots of being only a humanitarian act, driven by the need to find placements for homeless children, to a widely accepted option for childless persons wishing to create a family.¹³ This shift in motivation for intercountry adoption has been facilitated by the continual societal changes experienced by many industrialised nations post

⁶ Olsen, L.J., “Live or Let Die: Could Intercountry Adoption Make the Difference?” (2003-2004) 22 *Penn St. Int'l L. Rev.* 483, 497.

⁷ Katz, L.M., “A Modest Proposal? The Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption” (1995) 9 *Emory Int'l L. Rev.* 283, 286.

⁸ *Ibid.*

⁹ Thompson, N.S., “Hague is Enough? A Call for More Protective, Uniform Law Guiding International Adoptions” (2004) 22 *Wis. Int'l L.J.* 441, 445.

¹⁰ Wallace, S.R., “International Adoption: The Most Logical Solution to the Disparity between the Numbers of Orphaned and Abandoned Children in Some Countries and Families and Individuals Wishing to Adopt in Others?” (2003) 20 *Ariz. J. Int'l & Comp. L.* 689, 693.

¹¹ Fleisher, A., “The Decline of Domestic Adoption: Intercountry Adoption as a Response to Local Adoption Laws and Proposals to Foster Domestic Adoption” (2003-2004) 13 *S. Cal. Rev. L. & Women's Stud.* 171, 176.

¹² The figure 42,000 represents the estimated number of intercountry adoptions in the year 2003. This represents a large increase from the estimated number of adoptions in the periods 1980-89, which was 17-18,000 p/a and 1993-1997 which was 23,354 p/a., See Selman, P., *Trends in intercountry adoption 1998-2003: A demographic analysis*, paper presented at the First Global Conference On Adoption Research. Copenhagen, 9-10 September 2005, p.7-8.

¹³ Kleiman, E.L., “Caring for our own: Why American Adoption Law and Policy Must Change” (1997) *Colum. J.L. & Soc. Probs.* 327, 333.

World War Two, which has seen the number of domestically adoptable children steadily decline in those countries.¹⁴

The societal changes that have occurred in industrialised nations in recent decades and that have led to the dramatic decrease in the number of domestically available children include: the increased use of contraceptives, the legalisation of abortion and the “increased tendency and social acceptance of single parents choosing to keep their children”.¹⁵ Whilst the supply of domestically adoptable children has decreased in these nations, the demand for adoptable children has increased not only as a result of the above factors but also because of progressively high infertility rates.¹⁶

The Western baby shortage in recent years has forced many couples to look abroad to find the children they so desperately want.¹⁷ Simultaneously, the dire circumstances in poor, overseas countries have created situations in which there are few prospective adopters compared with the vast number of children in need of permanent homes.¹⁸ Given these circumstances, intercountry adoption has been seen to provide a “solution” to the problem of parentless children and childless parents.¹⁹

Another factor that may have contributed to the popularity of intercountry adoption is that it is arguably more flexible than domestic adoption and therefore a method by which certain categories of want-to-be parents including singles, and people from minority races have come to favour.²⁰ The reason for this is that domestic adoption agencies often deem these categories of people ineligible to adopt or alternatively place them very low on the waiting list.²¹ The increasing practice of open adoption, where the birth parents choose the adoptive parents, also creates problems for these categories of people. Intercountry adoption, on the other hand, seems a viable alternative because rankings for intercountry adoptions are arguably less strict and intercountry adoptions are less likely to be contested.²²

Intercountry adoption may also help to alleviate a common concern amongst many categories of adoptive parents that their adopted child’s biological parents will return and attempt to regain custody. This concern for many adoptive parents is often premised on the fear that, despite having already developed a loving parental attachment to their adopted child, this could be undermined when the biological

¹⁴ Gates, C.J., “China’s Newly Enacted Intercountry Adoption Law: Friend or Foe?” (1999-2000) 7 *Ind. J. Global Legal Stud.* 369, 371.

¹⁵ Thompson, N.S., “Hague is Enough? A Call for More Protective, Uniform law Guiding International Adoptions” (2004) 22 *Wis.Int’l L.J.* 441, 446.

¹⁶ Gates, C.J., “China’s Newly Enacted Intercountry Adoption Law: Friend or Foe?” (1999-2000) 7 *Ind. J. Global Legal Stud.* 369, 372.

¹⁷ Wallace, S.R., “International Adoption: The Most Logical Solution to the Disparity between the Numbers of Orphaned and Abandoned Children in Some Countries and Families and Individuals Wishing to Adopt in Others?” (2003) 20 *Ariz. J. Int’l & Comp. L* 689, 693.

¹⁸ Gates, C.J., “China’s Newly Enacted Intercountry Adoption Law: Friend or Foe?” (1999-2000) 7 *Ind. J. Global Legal Stud.* 369, 373.

¹⁹ Hillis, L., “Intercountry Adoption Under the Hague Convention: Still an Attractive Option for Homosexuals Seeking to Adopt?” (1998-1999) 6 *Ind. J. Global Legal Stud.* 237, 238.

²⁰ Wallace, S.R., “International Adoption: The Most Logical Solution to the Disparity between the Numbers of Orphaned and Abandoned Children in Some Countries and Families and Individuals Wishing to Adopt in Others?” (2003) 20 *Ariz. J. Int’l & Comp. L* 689, 694.

²¹ *Ibid.*

²² Hillis, L., “Intercountry Adoption Under the Hague Convention: Still an Attractive Option for Homosexuals Seeking to Adopt?” (1998-1999) 6 *Ind. J. Global Legal Stud.* 237, 248.

parent/s arrive.²³ Intercountry adoption arguably reduces these concerns because with the costs and distance involved, it seems much less likely such fears would eventuate when the child is adopted from an overseas country.²⁴

In summary, intercountry adoption is a practice that has steadily grown in popularity since the beginning of the last half of the 20th century. Today, children available for adoption are not just war victims, but come from poor countries across the globe. These millions of children orphaned and abandoned every year have little chance of being domestically adopted or sufficiently cared for in their own countries.²⁵ The motivation for prospective parents to adopt internationally has shifted from being purely humanitarian - every child's right to a family - to being a more "self-centred parental motivation of every family's right to a child".²⁶

While many view intercountry adoption as a positive way of matching children without families to families without children,²⁷ intercountry adoption is not without its critics. Since its beginnings, intercountry adoption has been surrounded by intense moral debate.²⁸ Even today, scholars remain divided on the topic of intercountry adoption: its merits and appropriateness in solving the problem of homeless children.²⁹ In light of the political, economical and social debate surrounding the practice, prospective parents are generally encouraged to embrace the joy that arises from the adoption of a foreign child, but to also be ready to accept the possible criticisms that may follow.³⁰ The following chapter addresses some of these arguments from differing perspectives.

III. REGULATION OR ABOLITION? – THE MORAL DEBATE

As indicated in the last chapter, intercountry adoption is seen by some as an ideal solution to placing homeless children while others perceive it to be the cause of more problems than it solves.

A. Intercountry Adoption and the Best Interests of the Child: the Arguments Supporting the Need for Regulation

In general, supporters of intercountry adoption place emphasis on what is in the best interests of the child. Supporters suggest that adoption allows a child to grow and develop in a loving family environment, as opposed to institutional care, and often represents a homeless child's only realistic opportunity at being part of a permanent

²³ Kales, A.G., "The Intercountry Adoption Act of 2000: Are it's Laudable Goals Worth It's Potential Impact on Small Adoption Agencies, Independent Intercountry Adoptions, and Ethical Independent Adoption Professionals?" (2004) 36 *Geo. Wash. Int'l L. Rev.* 477, 480.

²⁴ *Id.*, 481.

²⁵ Katz, L.M., "A Modest Proposal? The Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption" (1995) 9 *Emory Int'l L. Rev.* 283, 287.

²⁶ Olsen, L.J., "Live or Let Die: Could Intercountry Adoption Make the Difference?" (2003-2004) 22 *Penn St. Int'l L. Rev.* 483, 489.

²⁷ Thompson, N.S., "Hague is Enough? A Call for More Protective, Uniform law Guiding International Adoptions" (2004) 22 *Wis. Int'l L.J.* 441, 444.

²⁸ Gates, C.J., "China's Newly Enacted Intercountry Adoption Law: Friend or Foe?" (1999-2000) 7 *Ind. J. Global Legal Stud.* 369, 375.

²⁹ Thompson, N.S., "Hague is Enough? A Call for More Protective, Uniform law Guiding International Adoptions" (2004) 22 *Wis. Int'l L.J.* 441, 451.

³⁰ Gates, C.J., "China's Newly Enacted Intercountry Adoption Law: Friend or Foe?" (1999-2000) 7 *Ind. J. Global Legal Stud.* 369, 376.

family.³¹ They further argue that receiving food, shelter and care is in every child's best interests, even if it occurs in a country different to where the child was born.³² From this perspective, some commentators argue intercountry adoption is a positive practice that should be encouraged.³³ In addition, many believe the practice "saves" children from poor and unsanitary conditions in their birth country.³⁴ Intercountry adoption is arguably a preferable option to a child being raised in an institution in their country of origin or in foster care, or on the streets. Even in first world countries like Australia, sobering research exists outlining the inherent dangers of prolonged foster and institutional care.³⁵ If the wealthy developed countries of the world are unable to find solutions to the known dangers of prolonged foster care and provide sound institutional care to children, how can it be expected of underdeveloped countries.

Some supporters also contend that developed nations, like the United States, are in a better position than many of the poorer countries to provide and care for the world's orphaned and abandoned children.³⁶ Supporters suggest that adopting parents from developed nations, are often more willing and able to cultivate a child's psychological and emotional needs.³⁷ In addition, it is often found in sending countries that for a variety of cultural, political and economic reasons, domestic adoption is not a workable solution to the problem of homeless children. Therefore, without the possibility of intercountry adoption, these orphaned and abandoned children would be denied the opportunity to be part of a loving and caring family.³⁸

For supporters of intercountry adoption, the reality is that across the world millions of children each year are abandoned, living on the streets in destitute conditions, or living in dismal, unsanitary orphanages.³⁹ These children are offered little protection and are in need of permanent loving homes. To the proponents, the plight of these children "bear horrific testimony to the pressing need for adoption"⁴⁰ and from this perspective, they argue against the political, moral and ethical objections to intercountry adoption, which they believe lack legitimacy because they ultimately "sacrifice the concrete good of children to ideological idols."⁴¹

B. Baby Selling and Other Underhanded Practices: the Arguments in Favour of Eliminating the Practice

³¹ Thompson, N.S., "Hague is Enough? A Call for More Protective, Uniform law Guiding International Adoptions" (2004) 22 *Wis.Int'l L.J.* 441, 452.

³² Liu, M, "International Adoption: An Overview" (1994) 8 *Temp. Int'l & Comp. L.J.* 187, 193

³³ Olsen, L.J., "Live or Let Die: Could Intercountry Adoption Make the Difference?" (2003-2004) 22 *Penn St. Int'l L.Rev.* 483, 489.

³⁴ Wallace, S.R., "International Adoption: The Most Logical Solution to the Disparity between the Numbers of Orphaned and Abandoned Children in Some Countries and Families and Individuals Wishing to Adopt in Others?" (2003) 20 *Ariz. J. Int'l & Comp. L* 689, 706.

³⁵ Monaghan G & Young, L., *Family Law in Australia* (6th ed, 2006) at para. 15.

³⁶ Liu, M, "International Adoption: An Overview" (1994) 8 *Temp. Int'l & Comp. L.J.* 187, 193

³⁷ Thompson, N.S., "Hague is Enough? A Call for More Protective, Uniform law Guiding International Adoptions" (2004) 22 *Wis.Int'l L.J.* 441, 452.

³⁸ Wallace, S.R., "International Adoption: The Most Logical Solution to the Disparity between the Numbers of Orphaned and Abandoned Children in Some Countries and Families and Individuals Wishing to Adopt in Others?" (2003) 20 *Ariz. J. Int'l & Comp. L* 689, 707.

³⁹ Smolin, D.M., "Intercountry Adoption as Child Trafficking" (2004-2005) 39 *Val.U.L.Rev* 281, 283.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

Those against intercountry adoption strongly criticise the argument that saving a child from horrible living conditions is sufficient motivation for intercountry adoption.⁴² They argue that intercountry adoption represents the loss of a vital national asset in the sending countries and its existence is a “shameful admission to the world of the governments inability to care for its own”.⁴³ Others contend that uprooting a child from its birth country is not in the best interests of the child because it strips the child of its group link and deprives a child of its ethnic and cultural background.⁴⁴ Further, opponents assert that raising children in foreign lands may expose them to an increased risk of discrimination.⁴⁵

At the forefront of arguments against intercountry adoptions is the assertion that such adoption has led to the creation of black markets for baby selling. With the high demand for foreign babies persisting in industrialised nations, activities such as kidnapping, child abduction, child trafficking and financial exploitation have become prevalent in sending countries, where entrepreneurs will take advantage of the demand with the expectation of the high return.⁴⁶ Such illegal activities have persisted in many sending countries despite increased international and domestic regulation and do not operate in the child’s best interests – such ventures function solely for profit.⁴⁷

Intercountry adoption has also been criticised for promoting exploitation and imperialism.⁴⁸ This view is prevalent among the poor, developing nations, which view intercountry adoption as another means by which dominant white societies can exploit and steal their natural resources.⁴⁹ Intercountry adoption is therefore portrayed as a way in which residents of wealthy countries can use their money and power to “steal” vulnerable children of the poor countries.⁵⁰ This view is in direct contrast to the view in developed nations, that intercountry adoption represents a humanitarian attempt to “rescue” children.

C. Intercountry Adoption and Countries’ Domestic issues: the Arguments of Underlying Issues

In the United States, intercountry adoption has also been linked to the foster care crisis.⁵¹ Opponents argue that while intercountry adoption continues to be a popular choice for prospective parents in the United States an unprecedented number of

⁴² Liu, M, “International Adoption: An Overview” (1994) 8 *Temp. Int’l & Comp. L.J.* 187, 195.

⁴³ Gates, C.J., “China’s Newly Enacted Intercountry Adoption Law: Friend or Foe?” (1999-2000) 7 *Ind. J. Global Legal Stud.* 369, 375.

⁴⁴ Thompson, N.S., “Hague is Enough? A Call for More Protective, Uniform law Guiding International Adoptions” (2004) 22 *Wis.Int’l L.J.* 441, 453.

⁴⁵ *Ibid.*

⁴⁶ Wallace, S.R., “International Adoption: The Most Logical Solution to the Disparity between the Numbers of Orphaned and Abandoned Children in Some Countries and Families and Individuals Wishing to Adopt in Others?” (2003) 20 *Ariz. J. Int’l & Comp. L* 689, 710.

⁴⁷ *Ibid.*

⁴⁸ Olsen, L.J., “Live or Let Die: Could Intercountry Adoption Make the Difference?” (2003-2004) 22 *Penn St. Int’l L.Rev.* 483, 490.

⁴⁹ Wallace, S.R., “International Adoption: The Most Logical Solution to the Disparity between the Numbers of Orphaned and Abandoned Children in Some Countries and Families and Individuals Wishing to Adopt in Others?” (2003) 20 *Ariz. J. Int’l & Comp. L* 689, 709.

⁵⁰ Smolin, D.M., “Intercountry Adoption as Child Trafficking” (2004-2005) 39 *Val.U.L.Rev* 281, 283.

⁵¹ Wallace, S.R., “International Adoption: The Most Logical Solution to the Disparity between the Numbers of Orphaned and Abandoned Children in Some Countries and Families and Individuals Wishing to Adopt in Others?” (2003) 20 *Ariz. J. Int’l & Comp. L* 689, 711-712.

“American-born children continue to enter the foster care system”.⁵² State and federal laws and policies in the United States have been blamed for creating the situation in which it is difficult for prospective parents to adopt domestically, forcing them to search abroad for children. It has been argued that such domestic laws should be amended to encourage Americans to care for their own orphaned and abandoned children.⁵³

Opponents of intercountry adoption also argue that the participating countries have used the practice as a bandaid to “conceal the economic and social needs of the underdeveloped countries.”⁵⁴ They assert that intercountry adoption allows sending countries to ignore the underlying causes of the high number of orphans in their countries. For example, intercountry adoption has arguably allowed China to ignore the need to change its one-child policy, which for over 20 years has caused a staggering number of children to be orphaned and abandoned.⁵⁵ Some critics argue that those who really care about these children should spend the money on providing assistance to children within their own societies instead of spending their time and money to take the children away from their country of origin.⁵⁶ Countering this argument, the proponents of intercountry adoption argue that social change and improvement is a slow process and that waiting for it to occur entails sacrificing an existing generation of orphaned and abandoned children who need homes and families now.⁵⁷

In summary, the position of those opposed to intercountry adoption is that the practice is no more than a quick fix solution to the world’s persisting problem of homeless children. Accordingly, the problems that exist in poor sending countries that contribute to the high number of orphans require a long-term solution and fundamental change. Without such a solution, it is inevitable that the inequalities existing between rich and poor nations will be perpetuated, and innocent children will continue to be the victims.

Intercountry adoption is one of those “hot” topics that will no doubt always be surrounded by intense controversy and debate. While both sides make valid arguments, the most important thing to bear in mind when considering the pros and cons of intercountry adoption is the best interests of the children. Indeed, the main issue of contention for both camps centres on their divergent views as to what constitutes “best interests”.⁵⁸ Proponents of intercountry adoption focus their

⁵² Id, 712.

⁵³ Kleiman, E.L., “Caring for our own: Why American Adoption Law and Policy Must Change”

(1997) *Colum. J.L. & Soc. Probs.* 327, 328.

⁵⁴ Gates, C.J., “China’s Newly Enacted Intercountry Adoption Law: Friend or Foe?” (1999-2000) 7 *Ind. J. Global Legal Stud.* 369, 375.

⁵⁵ Wallace, S.R., “International Adoption: The Most Logical Solution to the Disparity between the Numbers of Orphaned and Abandoned Children in Some Countries and Families and Individuals Wishing to Adopt in Others?” (2003) 20 *Ariz. J. Int’l & Comp. L* 689, 711.

⁵⁶ Smolin, D.M., “Intercountry Adoption as Child Trafficking” (2004-2005) 39 *Val.U.L.Rev* 281, 283.

⁵⁷ Wallace, S.R., “International Adoption: The Most Logical Solution to the Disparity between the Numbers of Orphaned and Abandoned Children in Some Countries and Families and Individuals Wishing to Adopt in Others?” (2003) 20 *Ariz. J. Int’l & Comp. L* 689, 711.

⁵⁸ Unfortunately, the best interests test is well recognised for its indeterminacy. This is because it is highly subjective in nature and as such is capable of being manipulated to suit several sides of any one argument: see Elster, J, *Solomonic Judgments*, (Cambridge:

arguments solely on what they believe to be the best interests of the child – the acquisition of food, shelter and care. Opponents on the other hand take a more contextual view recognising that although the best interests of the child is important other interests exist and need to be considered; for example, the interests of the sending countries.

Within the debate, one thing seems certain: intercountry adoption is a phenomenon that is unlikely to cease anytime soon. Therefore perhaps the real focus should be on improving the existing system of regulation and making it work the best way it can. This would increase protection and decrease the negative consequences of intercountry adoption for all parties involved, especially the children.

IV. PROBLEMS PRECIPITATING THE HAGUE CONVENTION

The previously mentioned moral debate precipitates the necessity for effective, uniform regulation that will adequately protect the parties involved.

A. The Ineffectiveness and Non-Uniformity of Past Regulations

While many argue that intercountry adoption should be abolished, it has nevertheless been entrenched in the international community for some time. While the practice exists it is important it be regulated so that those involved are protected as much as possible. One of the biggest problems precipitating the Hague Convention was not the lack of regulation, but the lack of uniformity of intercountry adoption rules and procedures.⁵⁹ The absence of uniform procedures allowed countries to regulate international adoptions freely according to their own schemes.⁶⁰ The divergent laws existing in the various jurisdictions meant intercountry adoption procedures were fraught with inconsistencies and complexities, which in turn created a “plethora of problems for all parties involved.”⁶¹ Prospective adoptive parents were confronted with “enormous bureaucratic red tape”⁶² which led to delays and generated considerable frustration and confusion.

Since the 1960s, when it had become apparent that intercountry adoption was more than just a passing phenomenon, the international human rights community has made several attempts to bring “international consistency to the legal treatment of intercountry adoption”⁶³ specifically in the form of Declarations and Conventions.⁶⁴

Cambridge University Press, 1989), pp. 134-138, extracted in Parkinson, P, & Behrens, J, *Australian Family Law in Context*, 3rd ed, (Sydney: Lawbook Co., 2004)

⁵⁹ Kales, A.G., “The Intercountry Adoption Act of 2000: Are it’s Laudable Goals Worth It’s Potential Impact on Small Adoption Agencies, Independent Intercountry Adoptions, and Ethical Independent Adoption Professionals?” (2004) 36 *Geo. Wash. Int’l L. Rev.* 477, 482

⁶⁰ Lippold, J.M., “Transnational Adoption From an American Perspective: The Need for Universal Uniformity” (1995) 27 *Case. W Res. J. Int’l L.* 465 at 467

⁶¹ *Ibid.*

⁶² Bisignaro, S.M., “Intercountry Adoption Today and the Implications of the 1993 Hague Convention on Tommorrow” (1994-1995) 13 *Dick. J. Int’l L.* 123, 126.

⁶³ Katz, L.M., “A Modest Proposal? The Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption” (1995) 9 *Emory Int’l L. Rev.* 283, 288.

⁶⁴ A Declaration is a formal statement, which refers to the common standard of achievement. They generally fall within the category of “soft law” so are not legally binding (Malanczuk, P, *Akehurst’s Modern Introduction to International Law*, (7th ed, 1997), 54). Conventions are a recognised source of international law. States that sign and ratify a

For the most part, the Declarations and Conventions pertaining to intercountry adoption have been aimed at protecting children against potential abuses.⁶⁵ These legal instruments have encountered significant criticism for their failure to bring uniformity to the practice of intercountry adoption and for their failure to diminish the international baby selling (black market) trade.⁶⁶ The lack of specificity and clarity within the instruments and their internal omissions, limitations and ambiguities may also be to blame.

Convention are legally bound by its terms (Vienna Convention on the Law of Treaties 23 May 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 art(2)(1)(a)).

⁶⁵ Wallace, S.R., "International Adoption: The Most Logical Solution to the Disparity between the Numbers of Orphaned and Abandoned Children in Some Countries and Families and Individuals Wishing to Adopt in Others?" (2003) 20 *Ariz. J. Int'l & Comp. L* 689, 694.

⁶⁶ Bisignaro, S.M., "Intercountry Adoption Today and the Implications of the 1993 Hague Convention on Tommorrow" (1994-1995) 13 *Dick. J. Int'l L.* 123, 149.

1. The Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoption⁶⁷

The first attempt at establishing internationally uniform procedures for intercountry adoption occurred when member States of the Hague Conference met in 1965.⁶⁸ Concluding on 15 November 1965, the 1965 Hague Convention addressed general issues of “jurisdiction, choice of law and mutual recognition of adoptions.”⁶⁹ It enjoyed limited success with only three countries ratifying it: Austria, Switzerland and the United Kingdom of Great Britain and Northern Ireland.⁷⁰ It has since been denounced, and is therefore not currently in force.⁷¹

The scope of the Convention received trenchant criticism for being too restrictive.⁷² For the Convention to be applicable the child being adopted had to be under the age of 18 and the adopter had to qualify as a national and habitual resident of one of the Contracting States. If the adopters were married, both had to so qualify.⁷³

The Convention was also criticised for its failure to define consent and abandonment in relation to orphan status⁷⁴ and because it vested concurrent jurisdiction over adoption to the adopter’s national country of origin and the adopter’s country of habitual residence, rather than in the child’s country of origin.⁷⁵ Some have argued that this is problematic because the child’s country of origin “may be better able to determine if the adoption is in the child’s best interest”.⁷⁶ Additionally, the Convention’s many exceptions, reservations and restrictions have been blamed for its inability to unify the rules and processes of intercountry adoption.⁷⁷ For example, Article 15 essentially provided an escape clause permitting States to disregard any provision in the Convention that they considered to be against their “public policy”. The inclusion of such clauses in effect denied any possible uniformity the Convention may have offered and is undoubtedly the reason why it failed to achieve full ratification.⁷⁸

2. The European Convention on the Adoption of Children.⁷⁹

⁶⁷ Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions, 15 Nov 1965, 4 .I.L.L 338 [hereinafter 1965 Hague Convention].

⁶⁸ Gates, C.J., “China’s Newly Enacted Intercountry Adoption Law: Friend or Foe?” (1999-2000) 7 *Ind. J. Global Legal Stud.* 369, 377.

⁶⁹ Katz, L.M., “A Modest Proposal? The Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption” (1995) 9 *Emory Int’l L. Rev.* 283, 288-289.

⁷⁰ Convention #13 Status Table at *Hague Conference on Private International Law* http://www.hcch.net/index_en.php?act=conventions.status&cid=75 (10 March 2006).

⁷¹ *Ibid.*

⁷² Bogard, H, “Who are the Orphans?: Defining Orphan Status and the Need for an International Convention on Intercountry Adoption” (1991) 5 *Emory Int’l L. Rev.* 571, 593.

⁷³ 1965 Hague Convention, art. 1.

⁷⁴ Bogard, H, “Who are the Orphans?: Defining Orphan Status and the Need for an International Convention on Intercountry Adoption” (1991) 5 *Emory Int’l L. Rev.* 571, 592.

⁷⁵ 1965 Hague Convention, art. 3.

⁷⁶ Bisignaro, S.M., “Intercountry Adoption Today and the Implications of the 1993 Hague Convention on Tomorrow” (1994-1995) 13 *Dick. J. Int’l L.* 123, 133.

⁷⁷ Bogard, H, “Who are the Orphans?: Defining Orphan Status and the Need for an International Convention on Intercountry Adoption” (1991) 5 *Emory Int’l L. Rev.* 571, 594.

⁷⁸ Bisignaro, S.M., “Intercountry Adoption Today and the Implications of the 1993 Hague Convention on Tomorrow” (1994-1995) 13 *Dick. J. Int’l L.* 123, 133.

⁷⁹ European Convention on the Adoption of Children, 24 Apr 1967, 634 U.N.T.S. 256; C.E.T.S No.58. hereinafter European Convention].

With a goal of promoting the welfare of adopted children by accepting common principles and practices, the member States of the Council of Europe met at Strasbourg on 24 April 1967.⁸⁰ The outcome of this meeting was to establish a set of rules for intercountry adoption. This second attempt at standardising intercountry adoption procedures became legally binding for those States that had become party to it on 26 April 1968.⁸¹ The European Convention is currently in force and has been ratified by eighteen member States of the Council of Europe.⁸² Its effectiveness at bringing international uniformity to the practice of intercountry adoption, however, is questionable as discussed below.

The European Convention applies to intercountry adoptions of unmarried children under the age of eighteen.⁸³ Additionally, the adopters must be between the ages of twenty-one and thirty-five, unless the adopters are the child's parents, or other exceptional circumstances exist.⁸⁴ This provision is problematic for two reasons. First, the age limit conflicts with national laws in France and Italy, which require adopters to be at least 35 years of age.⁸⁵ Second, the age bracket is not consistent with overall trends in marriage and child rearing ages, with many delaying marriage and children until later in life.⁸⁶

While the European Convention has enjoyed more success than the 1965 Hague Convention, it has still been widely criticised. One such criticism is that the European Convention does not require States to respect the adoption laws of other States. This means that there is no guarantee an adoption validly carried out in one State will be recognised in another.⁸⁷ The European Convention also fails to address the issue of consent in relation to abandonment.⁸⁸ It has been argued that in order to determine when consent is necessary, abandonment needs to be sufficiently defined and addressed.⁸⁹ Additionally, although the European Convention permits alternative consent by "any person or body who may be entitled,"⁹⁰ when consent from the parents is unavailable, it fails to specify who qualifies as such a "body."⁹¹ As a result of these flaws, it is generally agreed the European Convention has failed to have any useful effect on the practice and procedures of intercountry adoption. It

⁸⁰ Bogard, H, "Who are the Orphans?: Defining Orphan Status and the Need for an International Convention on Intercountry Adoption" (1991) 5 *Emory Int'L Rev.* 571, 590.

⁸¹ Carro, J.L., "Regulation of Intercountry Adoption: Can the Abuses Come to an End?" (1994-1995) 18 *Hastings Int'l & Comp. L. Rev.* 121, 148.

⁸² As of 28 May 2006 - Convention #58 - European Convention on the Adoption of Children, Council of Europe Status Table at <<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=058&CM=7&DF=5/28/2006&CL=ENG>> (28 May 2006)

⁸³ European Convention, art. 3.

⁸⁴ *Id.*, art. 7.

⁸⁵ Bisignaro, S.M., "Intercountry Adoption Today and the Implications of the 1993 Hague Convention on Tomorrow" (1994-1995) 13 *Dick. J. Int'l L.* 123, 134.

⁸⁶ Gates, C.J., "China's Newly Enacted Intercountry Adoption Law: Friend or Foe?" (1999-2000) 7 *Ind. J. Global Legal Stud.* 369, 379.

⁸⁷ Gates, C.J., "China's Newly Enacted Intercountry Adoption Law: Friend or Foe?" (1999-2000) 7 *Ind. J. Global Legal Stud.* 369, 379

⁸⁸ Bogard, H, "Who are the Orphans?: Defining Orphan Status and the Need for an International Convention on Intercountry Adoption" (1991) 5 *Emory Int'L Rev.* 571, 591-592.

⁸⁹ Bisignaro, S.M., "Intercountry Adoption Today and the Implications of the 1993 Hague Convention on Tomorrow" (1994-1995) 13 *Dick. J. Int'l L.* 123, 134.

⁹⁰ European Convention, art.5(1)(a).

⁹¹ Bogard, H, "Who are the Orphans?: Defining Orphan Status and the Need for an International Convention on Intercountry Adoption" (1991) 5 *Emory Int'L Rev.* 571, 592.

fails to adequately protect the rights of children and others involved in the adoption process and therefore leaves great scope for corruption.⁹²

3. The United Nations Convention on the Rights of the Child⁹³

Recognising the importance of the human rights of children, and reiterating the principles set forth in the United Nations Declaration of the Rights of the Child,⁹⁴ the CRC was unanimously adopted by the United Nations General Assembly on 20 November 1989.⁹⁵ On the first day it was open for signature, a record sixty-one countries signed it.⁹⁶ In accordance with Article 49, the CRC entered into force⁹⁷ on 2 September 1990 - the 30th day following the deposit of the 20th State's instrument of ratification (or accession). On this day, the CRC set a record "for the fastest entering into force of a human rights treaty".⁹⁸ Today, the CRC boasts 192 State parties⁹⁹, which means virtually all industrialised nations having ratified or acceded to the terms of the CRC. The United States and Somalia are two of the last nations who have not yet ratified the CRC.¹⁰⁰ The Convention sets forth four important principles: non-discrimination; the best interests of the child; the right to life, survival and development; and respect for the views of the child.¹⁰¹

At its inception, the CRC was considered groundbreaking in the area of human rights law. It was thought that the CRC would not only revolutionise the practice of international adoption law, but would also provide "a strong force in the fight against abuses in intercountry adoption."¹⁰² Despite its near-universal ratification, the ongoing occurrence of baby trafficking tragedies in countries such as Peru and

⁹² Bisignaro, S.M., "Intercountry Adoption Today and the Implications of the 1993 Hague Convention on Tommorrow" (1994-1995) 13 *Dick. J. Int'l L.* 123, 134.

⁹³ United Nations Convention on the Rights of the Child, 20 Nov 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 [hereinafter CRC].

⁹⁴ United Nations Declaration on the Rights of the Child, (1959) G.A. Res. 1386, U.N. GAOR, 14th Sess., Supp. No.21, U.N. Doc A/4354.

⁹⁵ Wallace, S.R., "International Adoption: The Most Logical Solution to the Disparity between the Numbers of Orphaned and Abandoned Children in Some Countries and Families and Individuals Wishing to Adopt in Others?" (2003) 20 *Ariz. J. Int'l & Comp. L.* 689, 696.

⁹⁶ Graff, N, "Intercountry Adoption and the Convention on the Rights of the Child: Can the free Market in Children be Controlled?" (2000) 27 *Syracuse J. Int'l L. & Com.* 405, 412.

⁹⁷ When a treaty "enters into force", it becomes legally binding between participating States. Typically, the provisions of the treaty determine the date on which the treaty enters into force. However, where the treaty does not specify a date, there is a presumption that the treaty is intended to come into force as soon as all the negotiating states have consented to be bound by the treaty. In the case of multilateral treaties, it is common to provide for a fixed number of States to express their consent for entry into force, as is the case for the CRC pursuant to art. 49: See "United Nations Treaty Collection –Treaty Reference Guide" at <<http://untreaty.un.org/English/guide.asp#entry>> (23 May 2006) and for rules regarding "entry into force" generally see the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679, art. 24.

⁹⁸ Graff, N, "Intercountry Adoption and the Convention on the Rights of the Child: Can the free Market in Children be Controlled?" (2000) 27 *Syracuse J. Int'l L. & Com.* 405, 412.

⁹⁹ As of 14 November 2003 see Convention on the Rights of the Child, Status of Ratification, United Nations High Commissioner for Human Rights at <<http://www.unhchr.ch/html/menu2/6/crc/treaties/status-crc.htm>> (23 April 2006).

¹⁰⁰ Dow, U, "Birth Registration: The 'first' right", *The Progress of Nations* (1998), Civil Rights Commentary at <www.unicef.org/pon98/06-13.pdf> (23 April 2006).

¹⁰¹ Graff, N, "Intercountry Adoption and the Convention on the Rights of the Child: Can the free Market in Children be Controlled?" (2000) 27 *Syracuse J. Int'l L. & Com.* 405, 412 – See CRC art. 2,6 & 12.

¹⁰² Graff, N, "Intercountry Adoption and the Convention on the Rights of the Child: Can the free Market in Children be Controlled?" (2000) 27 *Syracuse J. Int'l L. & Com.* 405, 412.

Romania in the early 1990s, revealed the CRC's inability to control such problems and highlighted the urgent need for a more effective and specific Convention on the topic.¹⁰³

Despite good intentions to provide measures to "prevent the abduction of, the sale of, or traffic in children",¹⁰⁴ the CRC arguably lacks force because it fails to specify uniform measures with which to combat these problems. Rather, it relies on national laws to provide the solution.¹⁰⁵ Additionally, the Convention fails because of its creation of an inapt hierarchy (the empowering of the family unit above and before the child); its failure to provide a system in which the rights of infants are protected¹⁰⁶ and its failure to "provide clear guidance as to what factors are to be taken into account in determining the child's best interests".¹⁰⁷ Further, the CRC does not insist on mandatory adherence to its terms by contracting States.¹⁰⁸ This optional implementation means the opportunity for confusion and corruption remain.

The various legal instruments listed above have all attempted to bring much needed regulation and uniformity to the practice of intercountry adoption. While the drafting of the instruments reflect a universal recognition of the need to regulate the practice, the international legal community prior to 1993 failed in its attempts to draft a comprehensive and effective legal instrument addressing the many issues associated with intercountry adoption.¹⁰⁹ Despite the increased awareness of the problem and increased regulations, corruption and confusion remained prevalent. In the early 1990s, baby trafficking reached new heights in many sending countries, which found themselves unable to turn to the law to protect them from rapacious receiving countries. This continuing corruption provided ample evidence of the need for a new, effective and comprehensive law on intercountry adoption.

B. Child Trafficking and Other Acts Evidencing the Need for More Effective Regulation

In the years after the first attempts at regulation of intercountry adoption, the lack of uniformity in procedures and ineffectiveness of international instruments, coupled with immoral conduct on the part of unethical adoption intermediaries, facilitators, professionals and entrepreneurs, resulted in abuses such as child trafficking, black market baby selling, abduction, financial exploitation and coercion.¹¹⁰ These

¹⁰³ Bisignaro, S.M., "Intercountry Adoption Today and the Implications of the 1993 Hague Convention on Tomorrow" (1994-1995) 13 *Dick. J. Int'l L.* 123, 134.

¹⁰⁴ CRC, art. 35.

¹⁰⁵ Bisignaro, S.M., "Intercountry Adoption Today and the Implications of the 1993 Hague Convention on Tomorrow" (1994-1995) 13 *Dick. J. Int'l L.* 123, 134-135.

¹⁰⁶ Graff, N., "Intercountry Adoption and the Convention on the Rights of the Child: Can the free Market in Children be Controlled?" (2000) 27 *Syracuse J. Int'l L. & Com.* 405, 419.

¹⁰⁷ Wallace, S.R., "International Adoption: The Most Logical Solution to the Disparity between the Numbers of Orphaned and Abandoned Children in Some Countries and Families and Individuals Wishing to Adopt in Others?" (2003) 20 *Ariz. J. Int'l & Comp. L.* 689, 697.

¹⁰⁸ Bisignaro, S.M., "Intercountry Adoption Today and the Implications of the 1993 Hague Convention on Tomorrow" (1994-1995) 13 *Dick. J. Int'l L.* 123, 136.

¹⁰⁹ Carro, J.L., "Regulation of Intercountry Adoption: Can the Abuses Come to an End?" (1994-1995) 18 *Hastings Int'l & Comp. L. Rev.* 121, 148.

¹¹⁰ Kales, A.G., "The Intercountry Adoption Act of 2000: Are it's Laudable Goals Worth It's Potential Impact on Small Adoption Agencies, Independent Intercountry Adoptions, and Ethical Independent Adoption Professionals?" (2004) 36 *Geo. Wash. Int'l L. Rev.* 477, 483.

activities escalated in the early 1990s despite international regulations designed to prevent them. The ease and frequency with which these illicit activities were occurring alarmed the international community and highlighted how problematic the lack of uniform procedures had become.¹¹¹

A number of factors in addition to the lack of uniformity of intercountry adoption laws have contributed to the prevalence of such activities. For example, the shortage of adoptable babies in Western countries like the United States means the demand for adoptable babies is high.¹¹² At the same time, many undeveloped countries, for various economical and political reasons, have an oversupply of orphaned and abandoned babies. Additionally, these poorer countries have high demand for the US dollar thus adoption is “big business”.¹¹³ It has been argued that despite increased restrictions on the practice of intercountry adoption, the negative activities associated with it have increased simultaneously to the practice itself.¹¹⁴ In response to the reports of corruption and black market baby selling, many countries, throughout the 1990s, revised their adoption laws and in some instances completely banned foreign adoption for periods of time.¹¹⁵

¹¹¹ Kales, A.G., “The Intercountry Adoption Act of 2000: Are it’s Laudable Goals Worth It’s Potential Impact on Small Adoption Agencies, Independent Intercountry Adoptions, and Ethical Independent Adoption Professionals?” (2004) 36 *Geo. Wash. Int’l L. Rev.* 477, 483.

¹¹² Wallace, S.R., “International Adoption: The Most Logical Solution to the Disparity between the Numbers of Orphaned and Abandoned Children in Some Countries and Families and Individuals Wishing to Adopt in Others?” (2003) 20 *Ariz. J. Int’l & Comp. L.* 689, 711.

¹¹³ *Ibid.*

¹¹⁴ Stein, J.G., “A Call to End Baby Selling: Why the Hague Convention on Intercountry Adoption Should be Modified to Include the Consent Provisions of the Uniform Adoption Act” (2001-2002) 24 *T. Jefferson L. Rev.* 39, 64.

¹¹⁵ Carro, J.L., “Regulation of Intercountry Adoption: Can the Abuses Come to an End?” (1994-1995) 18 *Hastings Int’l & Comp. L. Rev.* 121, 124.

1. The Romanian Baby Bazaar

One of the most publicised abuses of the intercountry adoption system to date is the “Romanian Baby Bazaar”, which occurred following the fall of former Romanian dictator Nicolae Ceausescu in 1990.¹¹⁶ During his reign, Ceausescu initiated a procreation policy in a bid to increase Romania’s population. The policy outlawed all artificial contraception, including abortion, and required women to have at least five babies.¹¹⁷ If women did not do so, they faced losing their jobs, medical care and housing.¹¹⁸

Twenty five years of these population growth measures, combined with widespread poverty in Romania, left over 100,000 children without parental care and living in orphanages and other institutions where they were neglected, malnourished and forced to live in “unsanitary” conditions.¹¹⁹ The widespread media attention that conveyed the plight of these Romanian babies led to the flood of empathetic Westerners into Romania seeking to “rescue” these children.¹²⁰ Resulting directly from this flood of hopeful adoptive parents, dealers were able to exploit the opportunity created, in the process pocketing a large profit.¹²¹

National laws applicable in Romania at the time allowed baby sellers to evade the requirements of birth parent consent, since most of the orphans were abandoned due to poor economic conditions. Thousands of children were auctioned and sold to the highest bidder. An otherwise humanitarian act was quickly transformed into an illegal black market.¹²²

Amidst the adoptions scandals, the Romanian government in 1991 temporarily blocked all intercountry adoptions in order to reconsider their legislation. A series of new laws were introduced, mostly on a trial and error basis, with the purpose of banning private adoptions and encouraging domestic adoption.¹²³ In 2001, after a request from the European Union to improve their adoption system, or forget talks to enter the Union, the Romanian Government declared a moratorium on all adoptions from abroad.¹²⁴ Although it was originally intended to be in place for only two years, the moratorium is currently still in place and there has been no indication of removing it. This is despite constant pressure from the United States Government to remove the ban.

¹¹⁶ Bisignaro, S.M., “Intercountry Adoption Today and the Implications of the 1993 Hague Convention on Tomorrow” (1994-1995) 13 *Dick. J. Int’l L.* 123, 128-129.

¹¹⁷ Carro, J.L., “Regulation of Intercountry Adoption: Can the Abuses Come to an End?” (1994-1995) 18 *Hastings Int’l & Comp. L. Rev.* 121, 137.

¹¹⁸ Olsen, L.J., “Live or Let Die: Could Intercountry Adoption Make the Difference?” (2003-2004) 22 *Penn St. Int’l L.Rev.* 483, 499.

¹¹⁹ Bisignaro, S.M., “Intercountry Adoption Today and the Implications of the 1993 Hague Convention on Tomorrow” (1994-1995) 13 *Dick. J. Int’l L.* 123, 129.

¹²⁰ Olsen, L.J., “Live or Let Die: Could Intercountry Adoption Make the Difference?” (2003-2004) 22 *Penn St. Int’l L.Rev.* 483, 499.

¹²¹ Bisignaro, S.M., “Intercountry Adoption Today and the Implications of the 1993 Hague Convention on Tomorrow” (1994-1995) 13 *Dick. J. Int’l L.* 123, 129.

¹²² Bisignaro, S.M., “Intercountry Adoption Today and the Implications of the 1993 Hague Convention on Tomorrow” (1994-1995) 13 *Dick. J. Int’l L.* 123, 129.

¹²³ Carro, J.L., “Regulation of Intercountry Adoption: Can the Abuses Come to an End?” (1994-1995) 18 *Hastings Int’l & Comp. L. Rev.* 121, 140.

¹²⁴ Sargent, S., “Suspended Animation: The Implementation of the Hague Convention on Intercountry Adoption in the United States and Romania” (2003-2004) 10 *Tex. Wesleyan L. Rev.* 351, 367.

2. Baby Selling in Peru

In 1991, “against a background of rising prices, increasing malnutrition, epidemics of cholera, rabies and tuberculosis and an escalating guerrilla war, babies were the one commodity guaranteed to sell and command high prices”.¹²⁵ Peru was an attractive destination for adoptive parents in the 1990s because the adoption process was fast and simple, and the laws of the country both permitted single people to adopt and had no upper age limit for adoptive parents.¹²⁶ Peru was at the time the third most popular sending state, ranked after Korea and Romania.¹²⁷

Investigations undertaken in Peru during the 1990s uncovered several illegal adoption rings and revealed that children in Peru were being kidnapped or bought from mothers for as little as five dollars, with representatives claiming a massive profit.¹²⁸ Some reports exposed representatives “renting” the womb of women and pressuring them to sell their babies.¹²⁹ As a result of these findings, Peru placed foreign adoption under strict governmental control.¹³⁰

3. Other Sending Countries

In the 1990s, many other sending countries reviewed and ultimately altered their adoption laws amidst baby trafficking scandals. For example, in 1990 Brazil imposed new restrictions on intercountry adoptions, placing them directly under governmental control;¹³¹ Colombia strengthened their adoption laws in 1990 eliminating private adoption;¹³² and Sri Lanka adopted tougher penalties that impose prison terms and fines for anyone caught running baby farms.¹³³

Although the many sending nations responded to the illegal activity in relation to intercountry adoption, following these tragedies it was apparent that a uniform, global standard was required in order to eliminate the problems of baby trafficking. Sending nations do not want their children to be “cast into an unchannelled stream of commerce”.¹³⁴ What they want, and deserve, is for their children to be adequately guarded by the law.¹³⁵ In recognition of the failures of past legal instruments in providing a strong, uniform system, the Hague Convention was created.¹³⁶ It was

¹²⁵Crowley, M, *Trade in Babies Boom in Peru*, SUNDAY TIMES, 16 June 1991, at 1 quoted in Bisignaro, S.M., “Intercountry Adoption Today and the Implications of the 1993 Hague Convention on Tomorrow” (1994-1995) 13 *Dick. J. Int'l L.* 123, 128.

¹²⁶Carro, J.L., “Regulation of Intercountry Adoption: Can the Abuses Come to an End?” (1994-1995) 18 *Hastings Int'l & Comp. L. Rev.* 121, 132.

¹²⁷*Ibid.*

¹²⁸*Id.*, 131-132.

¹²⁹Bisignaro, S.M., “Intercountry Adoption Today and the Implications of the 1993 Hague Convention on Tomorrow” (1994-1995) 13 *Dick. J. Int'l L.* 123, 128.

¹³⁰Carro, J.L., “Regulation of Intercountry Adoption: Can the Abuses Come to an End?” (1994-1995) 18 *Hastings Int'l & Comp. L. Rev.* 121, 132.

¹³¹*Id.*, 133.

¹³²Carro, J.L., “Regulation of Intercountry Adoption: Can the Abuses Come to an End?” (1994-1995) 18 *Hastings Int'l & Comp. L. Rev.* 121, 134.

¹³³*Id.*, 136.

¹³⁴Carlson, R.R., “The Emerging Law of Intercountry Adoptions: An Analysis of the Hague Conference on Intercountry Adoption” (1994-1995) 30 *Tulsa L. J.* 243, 246.

¹³⁵*Ibid.*

¹³⁶Graff, N, “Intercountry Adoption and the Convention on the Rights of the Child: Can the free Market in Children be Controlled?” (2000) 27 *Syracuse J. Int'l L. & Com.* 405, 420.

thought at the time of its inception that this Convention would finally provide a much needed, effective solution.¹³⁷

V. THE HAGUE CONVENTION: ESSENTIAL ELEMENTS

As detailed above, the poor quality of past international instruments and the subsequent escalation of baby trafficking in the 1990s, highlighted the need for a uniform global standard on intercountry adoption. The international community responded to this need with the creation of the Hague Convention. The intention of the drafters of the Convention was to create a system that would eliminate the problems surrounding intercountry adoption such as child selling and child abduction.¹³⁸ It has been labelled by some to be a “revolutionary step towards a global law”¹³⁹ and has been praised for its commitment to children¹⁴⁰ and its efforts to protect the welfare and best interests of orphaned and abandoned children worldwide.¹⁴¹

The Hague Convention was initiated in May 1993 when delegates from more than 60 nations around the world, met in the Netherlands to take part in the 17th session and centenary of the Hague Conference on Private International Law.¹⁴² The goal of the session was to discuss the delicate situation of intercountry adoption and address the abuses and problems associated with it.¹⁴³ The session ended with the drafting of the Hague Convention, which was unanimously adopted on 29 May 1993 by the 66 (member and non-member) States present.¹⁴⁴ On 1 May 2005, the Convention entered into force between the first three countries that ratified it: Mexico, Romania and Sri Lanka.¹⁴⁵ Currently 68 States have joined the Hague Convention.¹⁴⁶

The Preamble to the Hague Convention emphasises the importance of providing a child with a loving family environment. It also states a preference for the child to remain with its biological family, but nevertheless acknowledges intercountry adoption as a feasible alternative, where a suitable family cannot be found in the child’s country of origin. By setting minimum standards to be followed by the

¹³⁷ Bisignaro, S.M., “Intercountry Adoption Today and the Implications of the 1993 Hague Convention on Tomorrow” (1994-1995) 13 *Dick. J. Int’l L.* 123, 139.

¹³⁸ Carro, J.L., “Regulation of Intercountry Adoption: Can the Abuses Come to an End?” (1994-1995) 18 *Hastings Int’l & Comp. L. Rev.* 121, 148.

¹³⁹ Hillis, L., “Intercountry Adoption Under the Hague Convention: Still an Attractive Option for Homosexuals Seeking to Adopt?” (1998-1999) 6 *Ind. J. Global Legal Stud.* 237, 237.

¹⁴⁰ Marquez, G., “Transnational Adoption: The Creation and Ill Effects of an International Black Market Baby Trade” (2000) 21 *J. Juv. L.* 25, 36.

¹⁴¹ Hillis, L., “Intercountry Adoption Under the Hague Convention: Still an Attractive Option for Homosexuals Seeking to Adopt?” (1998-1999) 6 *Ind. J. Global Legal Stud.* 237, 237.

¹⁴² Jareborg, M.J., “Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption” (1994) 63 *Nordic J. Int’l L.* 185, 185.

¹⁴³ Hillis, L., “Intercountry Adoption Under the Hague Convention: Still an Attractive Option for Homosexuals Seeking to Adopt?” (1998-1999) 6 *Ind. J. Global Legal Stud.* 237, 240.

¹⁴⁴ Jareborg, M.J., “Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption” (1994) 63 *Nordic J. Int’l L.* 185, 185.

¹⁴⁵ Intercountry Adoption: Hague Convention on Intercountry Adoption and the Intercountry Adoption Act of 2000: Background, U.S Department of State Bureau of Consular Affairs at <http://travel.state.gov/family/adoption/convention/convention_2290.html> (30 March 2006)

¹⁴⁶ As of 20 January 2006 – Convention #33 Status Table at *Hague Conference on Private International Law* <http://www.hcch.net/index_en.php?act=Conventions.status&cid=69> (25 March 2006).

receiving States and the sending States, the Hague Convention endeavours to terminate the abduction, the sale of, or traffic in children.¹⁴⁷

The Convention's three primary goals are articulated in Article 1. The first objective is to ensure that the international adoption is in the child's best interest with respect for his or her internationally recognised fundamental rights. The second objective is to create a co-operative system between the receiving and sending States, in efforts to curtail the abduction and sale of children and prevent other abuses. The final objective is to guarantee that intercountry adoptions, in conformity with the Hague Convention's requirements, are recognised in both States.¹⁴⁸

The Convention applies when spouses or a single person ordinarily resident in one contracting State, seek to adopt a child under the age of 18, who is ordinarily resident in another contracting State.¹⁴⁹ As noted by some scholars, the Convention "does not apply to refugees or internationally displaced children who are not habitually resident in a contracting nation".¹⁵⁰

Chapter 2 of the Hague Convention sets out requirements for intercountry adoption by allocating responsibility between the sending State and the receiving State.¹⁵¹ Competent authorities of the sending States must ensure, among other things, that the child is adoptable and that the adoption will be in the child's best interests. In discharging this duty the sending State must first consider the possibility of placing the child within the State. Additionally, the authorities must ensure that either the birth parents or institutions whose consent is required have freely given informed, counselled and written consent and that the giving of consent was not induced by the payment of money or compensation of any kind.¹⁵²

Authorities of the receiving State must ensure that the prospective adopting parents are suitable and eligible to adopt and have received counselling as necessary. It must also be determined that the prospective parents have (or will have) authorisation for the child to enter and reside permanently in the receiving country.¹⁵³ The effect of these investigatory procedures is that birth parents are prevented from coming forward in the future and claiming their child is not an orphan.¹⁵⁴ Upon satisfaction that the applicants are eligible and suitable to adopt, the receiving State must then prepare a detailed report to be transmitted to the sending State.¹⁵⁵ Likewise, pursuant to Article 16, the sending State must prepare and transmit a report to the receiving State. No adoption is to be granted until the competent authorities in both States have verified compliance with the requirements set out in the Convention.¹⁵⁶

¹⁴⁷ Hague Convention, preamble.

¹⁴⁸ Id, art. 1.

¹⁴⁹ Id, art. 2, art. 3.

¹⁵⁰ Carlson, R.R., "The Emerging Law of Intercountry Adoptions: An Analysis of the Hague Conference on Intercountry Adoption" (1994-1995) 30 *Tulsa L. J.* 243, 249.

¹⁵¹ Gates, C.J., "China's Newly Enacted Intercountry Adoption Law: Friend or Foe?" (1999-2000) 7 *Ind. J. Global Legal Stud.* 369, 381.

¹⁵² Hague Convention, art. 4.

¹⁵³ Id, art. 5.

¹⁵⁴ Kimball, C.E., "Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption" (2004-2005) 33 *Denv. J. Int'l L. & Pol'y* 561, 570.

¹⁵⁵ Hague Convention, art. 15.

¹⁵⁶ Jareborg, M.J., "Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption" (1994) 63 *Nordic J. Int'l L.* 185, 190.

To ensure that the duties imposed by the Hague Convention are discharged and administered properly, Chapter 3, Article 6 requires contracting States to establish a National Central Authority to oversee the entire intercountry adoption process.¹⁵⁷ Federal States, States with more than one system of law, and States having autonomous territorial units, are permitted to appoint more than one Central Authority.¹⁵⁸ The duties the Convention requires the Central Authorities to undertake are set out in Articles 7-9 of the Convention. Although the Convention allows the Central Authority to delegate some of these functions to specially accredited bodies, and sets out criteria in relation to accreditation,¹⁵⁹ the Central Authority must remain the contact point and main source of information relating to intercountry adoptions.¹⁶⁰ Moreover, it is the Central Authority's responsibility to ensure that all appropriate measures are taken to "prevent improper financial or other gain with an adoption and to defer all practices contrary to the objects of the Convention".¹⁶¹

Historically, one of the problems cited with intercountry adoption has been recognition. An intercountry adoption recognised by the laws of one contracting State did not guarantee it would be recognised by the laws of another.¹⁶² Problems identified with lack of recognition include delay and high costs.¹⁶³ Some families have often had to complete the adoption procedure twice to ensure its validity - once in the child's country of origin and then again in the country in which the child was brought to live.¹⁶⁴ The Hague Convention has helped alleviate this problem by mandating recognition of all adoptions that are made in accordance with the provisions of the Convention.¹⁶⁵ Recognition under the Convention requires acknowledging the legal construction of a parent-child relationship between the child and their adoptive parents and the parental responsibilities of the adoptive parents attached thereto.¹⁶⁶ Moreover, the Convention terminates the pre-existing parental relationship between the child and his or her biological parents.¹⁶⁷ Contracting States may refuse recognition only when they have determined that an adoption is "manifestly contrary to its public policy, taking into account the best interests of the child".¹⁶⁸

The Hague Convention has vastly improved on prior legal instruments. Firstly, the Hague Convention recognises the longevity of intercountry adoption and expressly identifies it as a feasible alternative to an "adequate domestic family", placing it above foster and institutional care. This is unlike the CRC, which expressly places

¹⁵⁷ Kimball, C.E., "Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption" (2004-2005) 33 *Denv. J. Int'l L. & Pol'y* 561, 570.

¹⁵⁸ Hague Convention, art. 6(2).

¹⁵⁹ Criteria for accreditation set out in Hague Convention, art. 9-13.

¹⁶⁰ Hillis, L, "Intercountry Adoption Under the Hague Convention: Still an Attractive Option for Homosexuals Seeking to Adopt?" (1998-1999) 6 *Ind. J. Global Legal Stud.* 237, 242.

¹⁶¹ Hague Convention, art. 8.

¹⁶² Hillis, L, "Intercountry Adoption Under the Hague Convention: Still an Attractive Option for Homosexuals Seeking to Adopt?" (1998-1999) 6 *Ind. J. Global Legal Stud.* 237, 245.

¹⁶³ Bisignaro, S.M., "Intercountry Adoption Today and the Implications of the 1993 Hague Convention on Tomorrow" (1994-1995) 13 *Dick. J. Int'l L.* 123, 144.

¹⁶⁴ Carlson, R.R., "The Emerging Law of Intercountry Adoptions: An Analysis of the Hague Conference on Intercountry Adoption" (1994-1995) 30 *Tulsa L. J.* 243, 250-251.

¹⁶⁵ Hague Convention, art. 23(1).

¹⁶⁶ *Id.*, art. 26(1)(a),(b).

¹⁶⁷ *Id.*, art. 26(1)(c).

¹⁶⁸ *Id.*, art. 24.

intercountry adoption as a last resort.¹⁶⁹ In doing so, the CRC in effect, disempowers itself. The Hague Convention, on the other hand, created in itself the power to regulate by recognising the practice and addressing it directly.¹⁷⁰ Secondly, the Hague Convention breaks down national walls by creating an international co-operation mechanism and by setting minimum requirements to be followed by participating nations rather than merely attempting to standardise laws among nations.¹⁷¹ The Hague Convention, unlike other international instruments, spells out in exhaustive detail the procedures that all participating countries should follow in intercountry adoptions.

Notwithstanding these improvements, and given the debate about the utility of intercountry adoptions, the real question is whether the Hague Convention has provided sufficient safeguards for children and other parties involved in the process to guard against the worst excesses of associated activities such as child trafficking and abduction.

VI. THE HAGUE CONVENTION – DOES IT WORK?

As discussed above, the Hague Convention aims to bring uniformity to the practice of intercountry adoption by setting common procedures to be followed by member States. By providing the first “formal intergovernmental stamp of approval”¹⁷² on intercountry adoption, the Convention creates in itself the power to control the practice.¹⁷³ The Convention has arguably remedied many of the textual flaws of other treaties on the subject, and in many ways has succeeded where others have failed. As a complete instrument the Hague Convention looks impressive on paper and since its inception has showed much promise. Thirteen years from its commencement the questions are - Does it work? To what extent have the objectives of the Convention been achieved? If the Convention is still limited – what are the reasons? Analysing the problems that have surfaced so far and examining the reasons why such problems have occurred can answer these questions.

A. Teething Problems – Issues Concerning the Implementation of the Hague Convention

While the underlying ideals of the Convention have received worldwide support, one of the biggest problems the Convention has had to face to date, and the one that has arguably suspended its success, is the failure of many countries to ratify the Convention. Since the treaty entered into force in May 1995,¹⁷⁴ many countries,

¹⁶⁹ Banks, J, “The U.S Market for Guatemalan Children: Suggestions for Slowing Rapid Growth of Illegal Practices Plaguing International Child Adoptions” (2004) 28 *Suffolk Transnat'l L. Rev.* 31, 44.

¹⁷⁰ Graff, N, “Intercountry Adoption and the Convention on the Rights of the Child: Can the free Market in Children be Controlled?” (2000) 27 *Syracuse J. Int'l L. & Com.* 405, 426.

¹⁷¹ Bisignaro, S.M., “Intercountry Adoption Today and the Implications of the 1993 Hague Convention on Tomorrow” (1994-1995) 13 *Dick. J. Int'l L.* 123, 140.

¹⁷² Pfund, P, “1993 Hague Convention on Intercountry Adoption: Briefing Paper (Revised)”, U.S Dep't of State (May 1995) quoted in Sargent, S, “Suspended Animation: The Implementation of the Hague Convention on Intercountry Adoption in the United States and Romania” (2003-2004) 10 *Tex. Wesleyan L. Rev.* 351, 362.

¹⁷³ Graff, N, “Intercountry Adoption and the Convention on the Rights of the Child: Can the free Market in Children be Controlled?” (2000) 27 *Syracuse J. Int'l L. & Com.* 405, 426.

¹⁷⁴ Convention #33 Status Table at *Hague Conference on Private International Law* <http://www.hcch.net/index_en.php?act=Conventions.status&cid=69> (25 March 2006).

both senders and receivers, have encountered immense difficulty in implementing the Convention into their domestic laws and therefore have been unable to adhere to the protections that the Convention would otherwise provide.¹⁷⁵ Arguably, the Convention's success can only be measured by how many countries are willing to abide by the letter of the Convention and enforce its provisions within their domestic realm.¹⁷⁶ The Convention cannot be expected to achieve its stated goals of creating uniformity in adoption procedures and preventing baby selling and other abuses without co-operation from the major receiving and sending States.

As with all international Conventions, the Hague Convention is voluntary in nature.¹⁷⁷ This means the Hague Convention is only effective if a large number of States that participate in intercountry adoption volunteer to become party to the Convention and thus accede to the regulations that the Convention sets out. To become a party to the Hague Convention, States must sign and ratify the treaty. The Vienna Convention on the Law of Treaties defines ratification as "the international act whereby a state indicates its consent to be bound to a treaty... in the case of multilateral treaties [such as the Hague Convention], the usual procedure is for the depositary to collect the ratifications of all States".¹⁷⁸ The depositary of the Hague Conventions is the Ministry of Foreign Affairs of the Kingdom of the Netherlands.¹⁷⁹ Upon ratification, the provisions of the treaty legally bind member States and those States are expected to abide by the provisions and promote the goals of the Convention.

Therefore ratification of the Hague Convention begins when States draft legislation that implements the terms of the Convention. This legislation eventually becomes part of a country's domestic laws via the various methods employed by each country. Following this, the implementing legislation is deposited at the Ministry of Foreign Affairs in Netherlands. When these two steps are complete the Convention is ratified and enters into force for the ratifying country.

Conventions can fail to bring about radical change in the international sphere if they are not ratified by a significant number of States. For example the first Hague Convention on intercountry adoption in 1965 was ratified by only three States and is now ineffective. To receive support from a host of countries, there must be widespread international consensus as to the content of the Convention particularly from countries that are in a position of influence. In addition to achieving consensus, a Convention must also be capable of implementation into the domestic realm of these countries, against the backdrop of differing cultural and economic environments. There appears to be considerable consensus in relation to the Hague Convention's underlying objective, principles and procedures as evidenced by the

¹⁷⁵ Sargent, S, "Suspended Animation: The Implementation of the Hague Convention on Intercountry Adoption in the United States and Romania" (2003-2004) 10 *Tex. Wesleyan L. Rev.* 351, 379

¹⁷⁶ Sargent, S, "Suspended Animation: The Implementation of the Hague Convention on Intercountry Adoption in the United States and Romania" (2003-2004) 10 *Tex. Wesleyan L. Rev.* 351, 378-379.

¹⁷⁷ The idea that international law operates on the concept of *jus genitum voluntarium* (the consent and practice of States) was derived from Hugo Grotius (1583–1645) in his major work *De Jure Belli ac Pacis* (translated as "Concerning the Law of War and Peace") (1625).

¹⁷⁸ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679, arts.2 (1) (b), 14 (1) and 16.

¹⁷⁹ Frequently Asked Questions, *Hague Conference on Private International Law*, at <http://www.hcch.net/index_en.php?act=faq.details&fid=39> (25 March 2006).

number of countries that have signed the Convention.¹⁸⁰ Where the Hague Convention has stumbled is the ease of implementation by its signatories. A number of States have failed to implement the Hague Convention into their domestic realm, implemented it but unsuccessfully, or consistently postponed in implementing it. As a result, difficulty in implementation has proven to be one of the biggest barriers to success for the Hague Convention so far. The cause of these implementation problems arguably stems from (at least in part) the structure of the Hague Convention itself, which seems to have impeded compliance by many poor sending countries.¹⁸¹

1. The Hague Convention and its Failure to Address Issues of Compliance

The framework of the Hague Convention has been blamed for creating inequalities between sending and receiving countries.¹⁸² For example, compliance with the procedures set out in the Hague Convention, including the establishment of a Central Authority, requires immense resources – including time, money and effort. Logically, wealthier receiving countries are generally in a better position than sending countries to bear the economic burdens posed by compliance.¹⁸³ Moreover, the Hague Convention does not prevent contracting States from participating in intercountry adoptions with non-contracting States.¹⁸⁴ The result is that many countries, particularly the poorer sending nations, have not been compelled to ratify the treaty. It seems there is no advantage for poorer countries in diverting significant financial resources in efforts to ratify the treaty, when receiving member countries are able to participate in adoptions with them whether they have signed or not.

Although receiving countries are free to refuse involvement in adoptions with non-complying countries, it is unlikely they would do so. The main reason is that the demand for adoptable children in their own countries is often so great that they would find it hard to be too selective as to which countries they deal with.¹⁸⁵

In light of these problems, it has been argued that the Hague Convention should have emphasised the need for compliance by restricting contracting States to adoptions with other contracting States¹⁸⁶ and should have expressly insisted on ratification or accession by signatories. By requiring compliance, the Hague Convention would have arguably provided a strong incentive for countries to accede to the provisions of the treaty.

In addition to the problems allegedly caused by the Hague Convention itself, are the many societal, political, cultural and financial issues experienced by a number of countries participating in intercountry adoption. Such barriers have proven fatal to

¹⁸⁰ 52 countries have signed as at 20 January 2006 – Convention #33 Status Table at *Hague Conference on Private International Law* at

<http://www.hcch.net/index_en.php?act=conventions.status&cid=69> (25 March 2006).

¹⁸¹ Kimball, C.E., “Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption” (2004-2005) 33 *Denv. J. Int’l L. & Pol’y* 561, 572.

¹⁸² *Ibid.*

¹⁸³ *Id.*, 563.

¹⁸⁴ *Id.*, 582-583.

¹⁸⁵ Kimball, C.E., “Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption” (2004-2005) 33 *Denv. J. Int’l L. & Pol’y* 561, 573.

¹⁸⁶ *Id.*, 583-584.

the implementation efforts of some of the countries that face them. This is so much so it is arguable that even if incentives had been provided via the text of the Hague Convention itself, these additional barriers would still have prevented successful implementation.

2. Financial, Political and Cultural Barriers Delaying the Ratification of the Hague Convention

Barriers to the successful implementation of the Hague Convention differ from State to State and encompass a wide range of problems. The financial costs of compliance, along with the effort required to implement provisions into domestic law, have proven to be major stumbling blocks for most countries, even in wealthy countries like the United States. In addition to financial burdens, many sending countries such as Korea and China, have had to tackle certain societal and cultural issues in their countries and these have greatly hindered their ability to comply with the requirements of the Hague Convention.¹⁸⁷ Further, immense political pressure can impede successful implementation, as has been the case in Romania. The experiences of many countries in complying with the Hague Convention, including prominent sending countries like Korea, Romania and the People's Republic of China and significant receiving countries such as the United States, collectively demonstrate the inherent difficulty in implementation and enforcement of the Convention.¹⁸⁸

¹⁸⁷ Kimball, C.E., "Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption" (2004-2005) 33 *Denv. J. Int'l L. & Pol'y* 561, 578.

¹⁸⁸ Sargent, S, "Suspended Animation: The Implementation of the Hague Convention on Intercountry Adoption in the United States and Romania" (2003-2004) 10 *Tex. Wesleyan L. Rev.* 351, 379.

a. Political Oppression and Cultural Opposition Threatening Ratification by Major Sending Countries

The predominant sending countries have changed over time. Commonly cited causes of intercountry adoption include famine, disease, immense poverty, political upheaval and war.¹⁸⁹ In the early post-war years, for example, the main sending countries were those defeated in war – Greece, Italy, Germany and Japan. Throughout the period 1950-1979 the main source of adoptee children to the United States was Korea. In the 1980s Korea, Columbia and India were the major sending countries with Romania being the leading source of children for a brief period in the 1990s.¹⁹⁰ By 1995, China and Russia had emerged as the main sources for children both for the United States and many other receivers. Today, China, Russia, Korea, and Guatemala are the biggest senders.¹⁹¹ Most of these sending countries, along with many of the smaller senders, have failed to ratify the Hague Convention.

Implementation of the Convention by the sending countries is essential if the Hague Convention is to achieve its goal of preventing child selling and kidnapping. This is because countries of origin have historically been the major perpetrators of illegal child trafficking schemes. The measures taken by governments of these countries have largely proven ineffective in controlling such trafficking abuses. High demand from wealthy receiving countries coupled with the frequent over-supply of infants in the sending countries continues to provide an environment ripe for corruption, and makes for a highly profitable business in baby selling. Sending countries are not often in a position to protect their orphaned and abandoned children and need the protection that the Hague Convention offers. For these reasons it has been imperative that as many sending countries as possible ratify the Convention. Even though the Hague Convention is the most likely means by which these countries may gain international protection, ratification has proven difficult, if not impossible for many of these countries.

Compliance by sending countries is an extremely onerous task. This is because the Convention places a huge burden on sending States to investigate the legality of orphaned and abandoned children and to determine whether intercountry adoption would be in the child's best interests.¹⁹² In addition to political and economic issues, many sending countries have also had to deal with cultural issues, which have added an extra barrier to implementation. Korea, Romania and China are specific examples of sending countries that have for various reasons struggled to properly implement or comply with the Convention.

i. Cultural Opposition in Korea

¹⁸⁹ Selman, P, *The Movement of Children for Intercountry Adoption: A Demographic Perspective*, Poster Presentation (P27.5) under session S27 – International Migration-Macro At XXIVth IUSSP General Population Conference, Salvador, Bahia, Brazil 18-24 Aug, 2001, 14.

¹⁹⁰ *Id.*, 9.

¹⁹¹ Selman, P, *Trends in intercountry adoption 1998-2003: A demographic analysis*, paper presented at the First Global Conference On Adoption Research. Copenhagen, 9-10 September 2005, 14.

¹⁹² Kimball, C.E., "Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption" (2004-2005) 33 *Denv. J. Int'l L. & Pol'y* 561, 581.

Korea has been a large supplier of children for intercountry adoption since they commenced adoptions in 1955 following the end of the Korean War. Between 1963 and 1975, Korea dominated the scene, accounting for nearly 15,000 out of a total 34,568 intercountry adoptions.¹⁹³ The United States has always been the major destination for a high percentage of these children, with the number of Korean children entering the United States annually peaking at over 6,000 in the mid 1970s.¹⁹⁴ Today, South Korea continues to be a major sending country with one of the highest rates of intercountry adoption.¹⁹⁵ Despite being a popular sending country, Korea is not currently a signatory to the Convention.

Perhaps the biggest factor to Korea's opposition to the Convention is a combination of national pride and cultural barriers. Bloodlines are viewed as particularly important in Korean culture and there is a widespread belief in the Korean culture that adoption by foreigners deprives a child of its heritage and character.¹⁹⁶ Koreans believe that intercountry adoption is a shameful practice but nevertheless have participated in the practice out of necessity. Throughout the 1990s the Korean government passed laws that they hoped would encourage Koreans to adopt Korean children, rather than allow these children to be adopted to foreigners. In a bid to decrease intercountry adoption, the Government even offered incentives such as housing loans and tax exemptions to citizens that adopted. These incentives were ultimately unsuccessful as very few Koreans were willing to adopt outside of their family bloodlines given their cultural beliefs.¹⁹⁷

In 1997 the Korean government announced a 20-year plan to phase out intercountry adoption by the year 2020.¹⁹⁸ Although the birth rate is low in South Korea, there has been a continuing problem of the stigma associated with unmarried parenthood. Combined with the lack of a comprehensive welfare system, it has become virtually impossible for a single mother without financial support to keep her child.¹⁹⁹ Despite the Korean Government's clear objection to the practice of intercountry adoption, Korea has proven to be a country that has been so strongly influenced by factors of inertia that it has made it hard, or at least almost impossible, to stop intercountry adoption.²⁰⁰

¹⁹³ Selman, P, *The Movement of Children for Intercountry Adoption: A Demographic Perspective*, Poster Presentation (P27.5) under session S27 – International Migration-Macro At XXIVth IUSSP General Population Conference, Salvador, Bahia, Brazil 18-24 Aug, 2001, 9.

¹⁹⁴ *Id.*, 18.

¹⁹⁵ In 2003, South Korea was ranked fourth largest sending country, accounting for 2,306 out of the estimated 40,000 intercountry adoptions that year. See Selman, P, *Trends in intercountry adoption 1998-2003: A demographic analysis*, paper presented at the First Global Conference On Adoption Research. Copenhagen, 9-10 September 2005, p.16.

¹⁹⁶ Kimball, C.E., "Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption" (2004-2005) 33 *Denv. J. Int'l L. & Pol'y* 561, 579-580.

¹⁹⁷ Kimball, C.E., "Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption" (2004-2005) 33 *Denv. J. Int'l L. & Pol'y* 561, 580.

¹⁹⁸ Selman, P, *The Movement of Children for Intercountry Adoption: A Demographic Perspective*, Poster Presentation (P27.5) under session S27 – International Migration-Macro at XXIVth IUSSP General Population Conference, Salvador, Bahia, Brazil 18-24 Aug, 2001, 18

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*

In summary, it is arguable that even if Korea were in a more favourable financial position to adopt the Hague Convention, they would still choose not to. In such a case they would be more likely to eliminate intercountry adoption on the grounds that it offends their long-standing cultural beliefs, and allocate their resources towards improving the care of children in their own country.

ii. Political Pressure and International Scrutiny in Romania

Romania was a major sending country in the 1990s, accounting for at least one third of all intercountry adoptions in 1990/91. In 1996 Romania was ranked “fourth as a source of children in USA and for Euradopt agencies”.²⁰¹ Romania signed the Hague Convention on 29 April 1993 and was one of the first three countries (along with Mexico and Sri Lanka) to ratify the treaty, which it did on 28 Dec 1994. The Convention entered into force in Romania on 5 April 1995.²⁰² From the very beginning, Romanian implementation of the Hague Convention was plagued with problems in “financial arrangements and accusations of child trafficking”.²⁰³

The regulations drafted by Romania in 1996 to implement the Convention received widespread criticism for failing to provide adequate protection for children and for not functioning in the best interests of the child.²⁰⁴ The regulations were accused of creating a legal framework ripe for corruption and child trafficking worldwide.²⁰⁵ Romania’s adoption system came under intense scrutiny amidst Romania’s efforts to become a member of the European Union. Several reports during negotiations uncovered the horrific conditions of child institutions in Romania, detailing how children were abused, starved and neglected.²⁰⁶ It was made a condition of entry to the Union that Romania undertake measures to reform its failing adoption system.²⁰⁷

In 2000, under the new government of Prime Minister Nastase, a de facto suspension of international adoptions occurred.²⁰⁸ This was not the first time, nor the last, that international adoptions had ceased in Romania. Trafficking scandals and reports of corruption continued to surface and in January 2001 a review of Romania’s intercountry adoption system identified several “financial-related concerns” existing in Romania.²⁰⁹ It appeared that due to the large sums of money involved in intercountry adoption, any attempts at national reform had been

²⁰¹ Selman, P, *The Movement of Children for Intercountry Adoption: A Demographic Perspective*, Poster Presentation (P27.5) under session S27 – International Migration-Macro at XXIVth IUSSP General Population Conference, Salvador, Bahia, Brazil 18-24 Aug, 2001 16.

²⁰² Convention #33 Status Table at *Hague Conference on Private International Law* <http://www.hcch.net/index_en.php?act=conventions.status&cid=69> (25 March 2006).

²⁰³ Sargent, S, “Suspended Animation: The Implementation of the Hague Convention on Intercountry Adoption in the United States and Romania” (2003-2004) 10 *Tex. Wesleyan L. Rev.* 351, 380.

²⁰⁴ Intercountry Adoption - Hague Implementation Important Notices: *Update on Romanian Moratorium on International Adoptions* (10 June 2004) – U.S. Department of State Bureau of Consular Affairs at <http://travel.state.gov/family/adoption/notices/notices_2211.html> (25 March 2006).

²⁰⁵ Comm’n of the European Cmty’s., Final Report on Romania’s Application for Membership of the European Union and the State of Negotiations, COM(2001) 710 final at 7.

²⁰⁶ Comm’n of the European Cmty’s., Draft Report on Romania’s Membership Application to the European Union and the State of Negotiations, COM(2000) 710 at 13.

²⁰⁷ Sargent, S, “Suspended Animation: The Implementation of the Hague Convention on Intercountry Adoption in the United States and Romania” (2003-2004) 10 *Tex. Wesleyan L. Rev.* 351, 365-366.

²⁰⁸ Romania and International Adoption - Press Information, 2004, *Joint Council on International Children’s Services* at <<http://www.jcics.org/JCICSPressInformationRO.pdf>> p.1. (25 March 2006)

²⁰⁹ Sargent, S, “Suspended Animation: The Implementation of the Hague Convention on Intercountry Adoption in the United States and Romania” (2003-2004) 10 *Tex. Wesleyan L. Rev.* 351, 368.

“diverted by the global market for children from or through Romania”.²¹⁰ In 2001 the situation in Romania was said to have reached “crisis proportions”.²¹¹ The continuous scandals highlighted Romania’s apparent inability to control intercountry adoption to the level expected of a country that had ratified the Hague Convention.²¹²

In response to the crisis, and accompanied by pressure from European Parliament’s Rapporteur for Romania, British MEP Emma Nicholson of the Romanian Adoption Committee announced a one-year moratorium on intercountry adoptions commencing 21 June 2001.²¹³ The effect of the moratorium was to formalise the de facto suspension that had been in effect since 2000. The government continually extended the moratorium “pending passage and implementation of new legislation intended to reform Romania’s adoption system”.²¹⁴

In October 2001 the Romanian government issued an ordinance stating that child protection was one of the priorities of the governing program for 2001-2004, in connection with Romania's integration with the European Union.²¹⁵ Three months later the Romanian Government issued an Emergency Ordinance that allowed applications for international adoption to be processed if the case fell under “extraordinary circumstances” (ie special needs or older children) and the adoption was considered to be in the child's best interest.²¹⁶ Between 2002 and 2003 new adoption laws were drafted and submitted for public comment. In late 2003 and early 2004, the emergency ordinance was repealed following negative press about the high number of international adoptions that were being allowed via the emergency ordinance. At this time there was also talk that Romania’s entry into the European Union was in serious jeopardy.²¹⁷

In March 2004 new draft adoption laws were approved by the Romanian Cabinet and signed by the Romanian president Iliescu on 21 June.²¹⁸ The effect of the new

²¹⁰ Comm’n of the European Cmty’s., Draft Report on Romania’s Membership Application to the European Union and the State of Negotiations, COM(00) 710 at 13-14.

²¹¹ Sargent, S, “Suspended Animation: The Implementation of the Hague Convention on Intercountry Adoption in the United States and Romania” (2003-2004) 10 *Tex. Wesleyan L. Rev.* 351, 367.

²¹² Selman, P, *The Movement of Children for Intercountry Adoption: A Demographic Perspective*, Poster Presentation (P27.5) under session S27 – International Migration-Macro At XXIVth IUSSP General Population Conference, Salvador, Bahia, Brazil 18-24 Aug, 2001, 16.

²¹³ Romania and International Adoption - Press Information, 2004, *Joint Council on International Children’s Services* at <<http://www.jcics.org/JCICSPressInformationRO.pdf>> p.1 (25 March 2006).

²¹⁴ *Ibid.*

²¹⁵ OUG No. 121: Romania and International Adoption - Press Information, 2004, *Joint Council on International Children’s Services*, at <<http://www.jcics.org/JCICSPressInformationRO.pdf>> p.2. (25 March 2006)

²¹⁶ The Emergency Ordinance amended OUG 121: Romania and International Adoption - Press Information, 2004, *Joint Council on International Children’s Services*, at <<http://www.jcics.org/JCICSPressInformationRO.pdf>> p.2. (25 March 2006).

²¹⁷ Romania and International Adoption - Press Information, 2004, *Joint Council on International Children’s Services*, at <<http://www.jcics.org/JCICSPressInformationRO.pdf>> p.2. (25 March 2006).

²¹⁸ The new laws were published in the Romanian Government Monitor on June 22, making them official: Intercountry Adoption – Hague Implementation Important Notices: *Update on Romanian Adoption Moratorium*, (August 2004) – U.S. Department of State Bureau of Consular Affairs at <http://travel.state.gov/family/adoption/notices/notices_475.html> (4 April 2006).

laws was to ban all intercountry adoptions, with the only exception being when the child had relatives up to the second-degree in the adoptive family abroad. Second-degree relatives are defined as grandparents or siblings.²¹⁹ There have been strong reactions to the Romanian laws, particularly since they create a system in which children remain for years in state care without parents.²²⁰ It is estimated today that over 37,000 Romanian children still live in institutions.²²¹ This is contrary to the objectives of the Convention, which favours the placement of a child in a family abroad above institutional care in the child's country of origin.²²²

The Romanian experience highlights that quick implementation does not guarantee the success of a Convention.²²³ Although Romania was quick to enact laws, the laws were not sufficient at preventing the commonly associated abuses of intercountry adoption. Amidst international attention and scrutiny, and plagued with baby trafficking scandals and corruption, the Romanian Government found reform of their adoption system to be an impossible task. The financial incentives for baby trafficking have constantly won out over any protection the Convention may have offered.²²⁴ These overwhelming domestic issues, combined with the intense political pressure Romania encountered during its quest to become a member of the European Union, provided less incentive for Romania to reform their adoption laws and merely encouraged them to just discard them altogether.

iii. Cultural Opposition and Domestic Policy in China

The People's Republic of China emerged in 1995 as one of the main sources of children for intercountry adoption. From this time data shows that the number of children sent from China has continually increased.²²⁵ In 2003, of the estimated 40,000 children adopted internationally, 11,000 came from China. The United States is the biggest receiver of Chinese orphans, adopting 7,906 in the period October 2004-September 2005.²²⁶ Being such a major sending country since the 1990s, it has always been important to the Hague Convention's success that China ratify it and consequently provide increased protection to those involved in the process. China signed the Hague Convention in 2000 and since that time has received constant

²¹⁹ Romania and International Adoption - Press Information, 2004, *Joint Council on International Children's Services*, at <<http://www.jcics.org/JCICSPressInformationRO.pdf>> p.1. (25 March 2006).

²²⁰ Intercountry Adoption – Hague Implementation Important Notices: *Update on Romanian Adoption Moratorium*, (August 2004) – U.S. Department of State Bureau of Consular Affairs at <http://travel.state.gov/family/adoption/notices/notices_475.html> (4 April 2006).

²²¹ Romania and International Adoption - Press Information, 2004, *Joint Council on International Children's Services*, at <<http://www.jcics.org/JCICSPressInformationRO.pdf>> p.2. (25 March 2006).

²²² Hague Convention, preamble.

²²³ Sargent, S, "Suspended Animation: The Implementation of the Hague Convention on Intercountry Adoption in the United States and Romania" (2003-2004) 10 *Tex. Wesleyan L. Rev.* 351, 380.

²²⁴ Sargent, S, "Suspended Animation: The Implementation of the Hague Convention on Intercountry Adoption in the United States and Romania" (2003-2004) 10 *Tex. Wesleyan L. Rev.* 351, 365.

²²⁵ Selman, P, *The Movement of Children for Intercountry Adoption: A Demographic Perspective*, Poster Presentation (P27.5) under session S27 – International Migration-Macro At XXIVth IUSSP General Population Conference, Salvador, Bahia, Brazil 18-24 Aug, 2001, 10.

²²⁶ Implementation of the Hague Convention on Intercountry Adoption – U.S. Department of State FACTSHEET (February 15 2006) at <<http://www.state.gov/r/pa/prs/ps/2006/61274.htm>> (25 March 2006).

criticism and scepticism at its potential ability to ratify the terms of the Convention. This criticism was founded on a belief that the combined obstacles of China's domestic policy and cultural background would be too great to overcome and allow for successful implementation.

Combined with a cultural preference for male children China's one-child policy, which originated in the 1980s, has long encouraged parents in China to abandon their female babies until a male child arrives.²²⁷ When viewed in its social context, this domestic law has the consequence of directly conflicting with the Convention's goal of taking all appropriate measures to allow the child to remain in his or her natural family.²²⁸ Additionally, China has historically blocked intercountry adoption, predicated upon a cultural policy that children should be looked after by relatives or friends within China. However, with institutions overwhelmed by the number of abandoned babies, China has of necessity had to relax its laws to allow foreigners to adopt its children.²²⁹ Chinese adoption laws state that adoptions must not conflict with domestic laws and family policy.²³⁰ The effect of this is that Chinese parents who give their child up for adoption are not allowed to have another child without violating the domestic laws of China.²³¹

For these reasons it was thought that, in order for China to ratify the Hague Convention, China would need to make drastic changes to its domestic laws. China's adoption laws and cultural beliefs in regard to family directly conflict with the objectives set out in the Hague Convention. Many argued that it would be near impossible for China to alter such long-standing cultural beliefs and law and therefore ratification of the Hague Convention would be no small or easy accomplishment.²³²

Despite these cultural and political hurdles, and in the face of constant scepticism, China completed ratification in late 2005. China deposited its instrument of ratification with the Netherlands Ministry of Foreign Affairs on 16 September 2005 and the Convention entered into force for China on 1 January 2006, making China an official "Hague Country".²³³ On that date, China became the 67th State to join the Hague Convention.²³⁴ China's ratification as the largest sending country is a huge success for the Hague Convention.

²²⁷ Luo, N & Smolin, D.M., "Intercountry Adoption and China: Emerging Questions and Developing Chinese Perspectives" (2004-2005) 35 *Cumb. L. Rev.* 597, 600.

²²⁸ Kimball, C.E., "Barriers to the Successful Implementation of the Hague Convention on Protection of UChildren and Cooperation in Respect of Intercountry Adoption" (2004-2005) 33 *Denv. J. Int'l L. & Pol'y* 561, 579.

²²⁹ *Ibid.*

²³⁰ Adoption Law of the People's Republic of China - Order of the President of the People's Republic of China No.54 (1 April 1992) Ch 1, art. 3. at <http://www.fwcc.org/China_adoption_law_98.htm#secta> (20 March 2006) .

²³¹ Kimball, C.E., "Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption" (2004-2005) 33 *Denv. J. Int'l L. & Pol'y* 561, 579.

²³² Kimball, C.E., "Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption" (2004-2005) 33 *Denv. J. Int'l L. & Pol'y* 561, 579

²³³ Commonwealth Adoptions International Inc., *China Adoption*, at <<http://www.commonwealthadoption.org/international-adoption-china.php>> (25 March 2006).

²³⁴ Hague Conference on Private International Law – News and Events - China joins the Hague Intercountry Adoption Convention (16 September 2005) at <http://hcch.e-vision.nl/index_en.php?act=events.details&year=2005&varevent=110> (25 March 2006) .

Given that ratification has occurred only recently it is not surprising that there exists little available information as to the way in which China was able to overcome the many cultural obstacles to reconcile the terms of the Hague Convention with its conflicting domestic family laws and policies. It will be partly significant for the future success of the Hague Convention to see how China was able to overcome such major barriers to ratify the Hague Convention.

Although it took China six years to complete ratification, some countries have taken even longer to do so. Despite receiving countries being generally quick to implement the Hague Convention, the United States - the world's largest receiver of foreign children- has still not ratified the Hague Convention.

b. The (nearly) Successful Ratification by Key Receiving Countries

The seven main receiving countries since the 1980s have been the United States, France, Italy, Germany, Canada, Spain and Sweden. Other countries that receive a significant number of children for adoption include Switzerland, Netherlands, Norway and Denmark.²³⁵ Factors common among the major receiving States include: low birth rates; low infant mortality rates and high gross national product.²³⁶ It is important that all major receiving countries conform to the Hague Convention because their high demand for orphans in sending countries contribute immensely to the occurrence of the many abuses connected to intercountry adoption. In general, implementation of the Hague Convention should be easier to accomplish for these receiving countries than it has been for the sending countries. This is because the major receiving countries are generally wealthier and have far less cultural and political barriers to overcome. Out of the seven major receiving countries, all bar the United States have ratified the Hague Convention.²³⁷

However, the experience of the United States in implementing the treaty highlights that even wealthy receiving countries can find implementation of international treaties difficult. The United States has had to confront several financial and business related barriers that have lead to an extremely long delay in ratifying the provisions of the Hague Convention. The hurdles experienced by the United States, although vastly different from the political and cultural barriers faced by sending countries like Korea, Romania and China, again highlight just how onerous and difficult the task of compliance can be in the realm of international law.

²³⁵ Selman, P, *The Movement of Children for Intercountry Adoption: A Demographic Perspective*, Poster Presentation (P27.5) under session S27 – International Migration-Macro At XXIVth IUSSP General Population Conference, Salvador, Bahia, Brazil 18-24 Aug, 2001, 6-8.

²³⁶ Gross National Product ("GNP") is between \$20-36,000 for the receiving countries. In comparison, GNP for all other sending countries is less than \$4,000 (other than Korea (\$10,500) and Brazil (\$4,790)). Infant mortality is between 4 -7 for the receiving countries and up to 110 per 1,000 for the sending countries. See Selman, P, *The Movement of Children for Intercountry Adoption: A Demographic Perspective*, Poster Presentation (P27.5) under session S27 – International Migration-Macro At XXIVth IUSSP General Population Conference, Salvador, Bahia, Brazil 18-24 Aug, 2001, p.15-16.

²³⁷ Canada and Sweden were the first key receiving countries to ratify the Hague Convention, in 1996 and 1997 respectively. France, Italy and Germany ratified in 1998, 2000 and 2001, respectively: Convention #33 Status Table at *Hague Conference on Private International Law* <http://www.hcch.net/index_en.php?act=Conventions.status&cid=69> (25 March 2006).

i. Delay in the USA: The Financial and Business Related Barriers to Implementation

For the last 30 years, the United States has been the largest recipient of foreign children for adoption.²³⁸ The annual number of international adoptions in the United States since the 1970s has increased consistently.²³⁹ The latest statistics from October 2004-September 2005 reveal that the United States citizens adopted 22,739 orphans from around the world.²⁴⁰ On 31 March 1994 the United States signed the Hague Convention, demonstrating its support for the objectives behind the treaty. Becoming a signatory also indicated the United States' intent to proceed with efforts to ratify the terms of the Convention.²⁴¹

More than a decade after signing, and despite being one of the wealthiest countries in the world, the United States has still not ratified the Hague Convention.²⁴² Without ratification none of the intercountry adoption practices required by the Hague Convention can be enforced in the United States. This failure to implement the terms of the Hague Convention has caused worldwide confusion and concern, particularly given that the United States actively participated in not only negotiations but also in the drafting of the Hague Convention.²⁴³

Although not completed, the United States has taken several steps towards the ratification of the Hague Convention. The first step was completed in 1998 when (former) President Clinton, in accordance with the US Constitution, transmitted an "article-by-article legal analysis",²⁴⁴ of the Convention to the US Senate, recommending consent be given.²⁴⁵ The Hague Convention received the consent of the Senate on 20 September 2000, subject to the passage of implementing legislation.²⁴⁶ The legislation, which passed both houses of Congress and was signed into law by President Clinton on 6 October 2000, is the Intercountry Adoption Act of 2000 ("IAA").²⁴⁷ In accordance with United States law, all legislation must be accompanied by regulations.²⁴⁸ A proposed set of regulations for

²³⁸ Selman, P, *The Movement of Children for Intercountry Adoption: A Demographic Perspective*, Poster Presentation (P27.5) under session S27 – International Migration-Macro At XXIVth IUSSP General Population Conference, Salvador, Bahia, Brazil 18-24 Aug, 2001, 7.

²³⁹ The mean number of annual adoptions between 1980-1989 was 7,761, which increased to 10,070 adoptions in the period 1993-1997 (See Selman, P, 2001, p.6). By 2000, the figure had risen to 17,718 and in 2003 was 21,616 (See Selman, P, 2005, p.9).

²⁴⁰ Of these intercountry adoptions 58.2% were from countries that have joined the Hague Convention, see - Implementation of the Hague Convention on Intercountry Adoption – U.S. Department of State FACTSHEET (February 15 2006) at <<http://www.state.gov/r/pa/prs/ps/2006/61274.htm>> (25 March 2006).

²⁴¹ Kimball, C.E., "Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption" (2004-2005) 33 *Denv. J. Int'l L. & Pol'y* 561, 574.

²⁴² *Id.*, 573.

²⁴³ Marquez, G, "Transnational Adoption: The Creation and Ill Effects of an International Black Market Baby Trade" (2000) 21 *J. Juv. L.* 25, 37.

²⁴⁴ Intercountry Adoption: Hague Convention on Intercountry Adoption and the Intercountry Adoption Act of 2000: Background, U.S Department of State Bureau of Consular Affairs at <http://travel.state.gov/family/adoption/convention/convention_2290.html> (30 March 2006)

²⁴⁵ Olsen, L.J., "Live or Let Die: Could Intercountry Adoption Make the Difference?" (2003-2004) 22 *Penn St. Int'l L. Rev.* 483, 521.

²⁴⁶ *Ibid.*

²⁴⁷ *Ibid.*

²⁴⁸ Hendy, M.D., "The Hague Convention and the United State's Ratification Journey" (2005)

the IAA was drafted by the Department of State between 2000-2003 and released for public comment on 15 September 2003.²⁴⁹ During this period, “the adoption community diligently examined the proposed regulations and offered comments and suggestions for modifications to the regulations. The Department received approximately 1,500 public comments on the proposed regulations”.²⁵⁰

The delay in US ratification has, at least in part, been due to the lengthy process of reviewing these public comments.²⁵¹ This is because each public comment received an official response from the Department of State.²⁵² In addition to reviewing the public comments, many adoption agencies have expressed their opposition to the terms and requirements of the IAA. This has contributed to the delay in ratification.²⁵³

Smaller adoption agencies in the United States have argued that compliance with the terms of the IAA may potentially cause them to go out of business. This is because the regulations impose greater liability on agencies and increased costs.²⁵⁴ Additionally, many agencies expressed concern that because the regulations hold agencies accountable for the actions of overseas entities, they would have to pay prohibitively increased premiums to extend their insurance coverage.²⁵⁵ In light of these concerns, the United States has consistently postponed its ratification of the Hague Convention.

However, on 15 February 2006 the US Department of State published the final version of the implementing regulations in the Federal Register. The next step is for the US Department of State to finalise the accreditation procedures and for adoption agencies to obtain Hague accreditation. Once this has occurred and the list of accredited agencies has been published, the United States will deposit the instruments of ratification at the Hague. Three months after the United States deposits the instrument, the Hague Convention will enter into force for the United States and the process of ratification will be complete.²⁵⁶ The US Department of

available at <<http://www.jcics.org/JCICS%20Hague%20Overview%20Article.pdf>> p.1. (4 April 2006).

²⁴⁹ Maskew, T, “Child Trafficking and Intercountry Adoption: The Cambodian Experience” (2004-2005) 35 *Cumb. L. Rev.* 619, 637.

²⁵⁰ Hendy, M.D., “The Hague Convention and the United State’s Ratification Journey” (2005) available at <<http://www.jcics.org/JCICS%20Hague%20Overview%20Article.pdf>> p.2. (4 April 2006).

²⁵¹ Kimball, C.E., “Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption” (2004-2005) 33 *Denv. J. Int’l L. & Pol’y* 561, 574.

²⁵² Hendy, M.D., “The Hague Convention and the United State’s Ratification Journey” (2005) available at <<http://www.jcics.org/JCICS%20Hague%20Overview%20Article.pdf>> p.2. (4 April 2006).

²⁵³ Kimball, C.E., “Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption” (2004-2005) 33 *Denv. J. Int’l L. & Pol’y* 561, 576.

²⁵⁴ *Ibid.*

²⁵⁵ Kimball, C.E., “Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption” (2004-2005) 33 *Denv. J. Int’l L. & Pol’y* 561, 577.

²⁵⁶ Hendy, M.D., “The Hague Convention and the United State’s Ratification Journey” (2005) available at <<http://www.jcics.org/JCICS%20Hague%20Overview%20Article.pdf>> p.4-5 (4 April 2006).

State predicts full ratification will occur in 2007.²⁵⁷ Others have predicted ratification may potentially be as late as 2008.²⁵⁸

As a result of the United States lethargic approach to ratification, many States, whose children have been prime targets in the past, have blocked the United States from the adoption market.²⁵⁹ This is because sending countries increasingly prefer to send their children to countries that have legally committed themselves to the terms and objectives of the Hague Convention, even if they themselves have not.²⁶⁰ The global trend since the early 1990s has been for many sending countries to defend themselves from the loss of their children by passing domestic laws to bring an end to the export of their children to rapacious foreign countries like the United States, which have not ratified the Hague Convention.²⁶¹ Countries that have blocked US citizens from adopting their children at one time or another include Mexico, Brazil, Peru, Romania and Paraguay.²⁶²

Notwithstanding the United States' slow approach to ratification, the breadth of the problems associated with intercountry adoption is universally recognised.²⁶³ This recognition has lead countries like the United States to take measures to guard against the abuses of intercountry adoption. For example, the US Department of State now demands compulsory DNA testing from all intercountry adoptions from Guatemala.²⁶⁴ This procedure was introduced following an admission by the US Government that child trafficking had become a problem in Guatemala, in a bid to reduce fraudulent adoptions.²⁶⁵ In addition, following the recent Tsunami disaster on 26 December 2004, and the subsequent flood of Americans interested in adopting Tsunami orphans, the US Department of State announced its decision to prohibit the adoption of Tsunami children by United States citizens.²⁶⁶ The Department concluded that adoption would not be in the best interests of the Tsunami children. Among the reasons given for the decision were reports of child trafficking for illegal adoption of Tsunami children and that, in the wake of the disaster, countries of

²⁵⁷ Implementation of the Hague Convention on Intercountry Adoption - US Department of State FACTSHEET (February 15 2006) at <http://www.state.gov/r/pa/prs/ps/2006/61274.htm> (25 March 2006).

²⁵⁸ Hendy, M.D., "The Hague Convention and the United State's Ratification Journey" (2005) available at <http://www.jcics.org/JCICS%20Hague%20Overview%20Article.pdf> p.5. (4 April 2006).

²⁵⁹ Graff, N, "Intercountry Adoption and the Convention on the Rights of the Child: Can the free Market in Children be Controlled?" (2000) 27 *Syracuse J. Int'l L. & Com.* 405, 427.

²⁶⁰ Pfund, P.H., "Protecting Children's Rights Through the Hague Conventions" 4 *Loy. Poverty L.J.* 217, 225.

²⁶¹ Graff, N, "Intercountry Adoption and the Convention on the Rights of the Child: Can the free Market in Children be Controlled?" (2000) 27 *Syracuse J. Int'l L. & Com.* 405, 430.

²⁶² Marquez, G, "Transnational Adoption: The Creation and Ill Effects of an International Black Market Baby Trade" (2000) 21 *J. Juv. L.* 25, 38; Graff, N, "Intercountry Adoption and the Convention on the Rights of the Child: Can the free Market in Children be Controlled?" (2000) 27 *Syracuse J. Int'l L. & Com.* 405, 427.

²⁶³ Graff, N, "Intercountry Adoption and the Convention on the Rights of the Child: Can the free Market in Children be Controlled?" (2000) 27 *Syracuse J. Int'l L. & Com.* 405, 427.

²⁶⁴ Intercountry Adoption - Country Specific Information: GUATEMALA – U.S Department of State Bureau of Consular Affairs at http://travel.state.gov/family/adoption/country/country_389.html (28 May 2006)

²⁶⁵ Gramajo, G "Intercountry Adoptions in Guatemala: A Growing Industry" (2000) 7(1) *Human Rights Tribune* at <http://www.hri.ca/tribune/viewArticle.asp?ID=2551> (28 May 2006)

²⁶⁶ Intercountry Adoption - Hague Implementation Important Notices: *Update on Adoption of December 26 Tsunami Victims*, (3 January 2006) - U.S. Department of State Bureau of Consular Affairs at http://travel.state.gov/family/adoption/notices/notices_2017.html (24 May 2006)

origin were having difficulties determining whether children were in fact legally orphaned. In addition, the Department of State believed that given the strong possibility that children would be suffering from substantial trauma, a move to a foreign country would only exacerbate the emotional distress suffered by the children.²⁶⁷

Ratification of the Hague Convention is in the best interests of all receiving countries and this is particularly true for the world's largest receiving country, the United States. US ratification would mean countries that have previously refused or restricted adoptions to United States citizens would allow access once ratification is complete.²⁶⁸ It is also important that America ratify because as one of the wealthiest and arguably most influential countries in the world, its failure to move on the issue has caused other countries to delay compliance.²⁶⁹ The international community has already failed in several attempts to control the abuses associated with intercountry adoption and it has been argued that it will continue to fail without the compliance of the United States.²⁷⁰ Given past trends, for example the failure of United States to ratify the CRC and the CRC's subsequent failure, some have questioned whether "anything can really be accomplished on the stage of international law without the active support and participation of the US".²⁷¹

²⁶⁷ Kimball, C.E., "Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption" (2004-2005) 33 *Denv. J. Int'l L. & Pol'y* 561, 562.

²⁶⁸ Marquez, G, "Transnational Adoption: The Creation and Ill Effects of an International Black Market Baby Trade" (2000) 21 *J. Juv. L.* 25, 38.

²⁶⁹ *Id.*, 37-38.

²⁷⁰ Graff, N, "Intercountry Adoption and the Convention on the Rights of the Child: Can the free Market in Children be Controlled?" (2000) 27 *Syracuse J. Int'l L. & Com.* 405, 430.

²⁷¹ *Id.*, 428.

B. Intercountry Adoptions Between Member and Non-Member States: The Dual System

Despite the non-ratification or slow ratification of major sending and receiving States, the practice of intercountry adoption has continued to take place between member and non-member States.²⁷² For example, although China has now ratified the Convention and the United States has not, the Chinese government has assured the United States Government that adoptions between the two countries will continue uninterrupted.²⁷³ While the Hague Convention does not expressly prohibit intercountry adoptions between member and non-member States, the procedures and standards set out in the Hague Convention are only applicable to adoptions between two contracting States.²⁷⁴ This means that adoptions between member and non-member countries follow different standards and procedures. The Hague Convention has long been criticised for creating this dual system of intercountry adoption.²⁷⁵

Since the Hague Convention is not applicable to adoptions between member and non-member States, the means by which the adoption process often occurs is via agreements between two or more countries governing adoptions between them. For example, France (a member of the Convention) and Vietnam (a non-member) have entered into an agreement regulating intercountry adoptions between them.

A Special Commission has commented on this practice along with other important issues relating to the practical operation of the Hague Convention. The Special Commission was convened under Article 7 of the Hague Conference to review the practical operation of the Hague Convention and evaluate the Convention's effectiveness.²⁷⁶ Fifty-eight States were represented at the first meeting which took place in Netherlands from 28 November to 1 December 2000.²⁷⁷

The Commission noted that many sending countries that were party to the Hague Convention were not allowing intercountry adoptions to receiving countries that had

²⁷² Increasingly however, vulnerable sending States are refusing to participate in intercountry adoptions with countries that have failed to ratify the Convention.

²⁷³ Intercountry Adoption – Country Specific Information CHINA (February 2006) U.S. Department of State Bureau of Consular Affairs at <http://travel.state.gov/family/adoption/country/country_365.html> (25 March 2006).

²⁷⁴ Hague Convention, art. 2(1).

²⁷⁵ Hendy, M.D., "The Hague Convention and the United State's Ratification Journey" (2005)

available at <<http://www.jcics.org/JCICS%20Hague%20Overview%20Article.pdf>> p.1. (4 April 2006).

²⁷⁶ Sargent, S, "Suspended Animation: The Implementation of the Hague Convention on Intercountry Adoption in the United States and Romania" (2003-2004) 10 *Tex. Wesleyan L. Rev.* 351, 362.

²⁷⁷ The meeting took place pursuant to the Decision of the Eighteenth Session of the Hague Conference on Private International Law. Of the 58 States present - 50 were parties to the Convention (16 of these were non-members of the Conference) and 8 were members of the Conference but not yet parties to the Convention: See - 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, (Nov/Dec 2000), Hague Conference on Private International Law, at <[http://hcch.e-
vision.nl/upload/scrpt33e2000.pdf](http://hcch.e-
vision.nl/upload/scrpt33e2000.pdf)> para 1 (p.14) (10 March 2006) [hereinafter Special Commission Report]

not yet ratified the Hague Convention.²⁷⁸ The Commission also recognised the increased practice of bilateral agreements between countries, including agreements between Convention countries and non-Convention countries.²⁷⁹ The Commission noted that there was widespread concern that such agreements seemed to “supplant rather than to supplement the Convention”.²⁸⁰ The Commission addressed these concerns in their report and made the following recommendation:

Recommendation 11: “States Parties, as far as practicable, apply the standards and safeguards of the Convention to the arrangements for intercountry adoption which they make in respect of non-Contracting States. States Parties should also encourage such States without delay to take all necessary steps, possibly including the enactment of legislation and the creation of a Central Authority, so as to enable them to accede to or ratify the Convention.”²⁸¹

A second meeting of the Special Commission was held from 17-23 September 2005. In the concluding report, the Special Commission reaffirmed recommendation 11 of their 2000 report.²⁸²

The recommendations made by the Commission in both the 2000 meeting and the 2005 meeting, recognise that permitting intercountry adoption between members and non-members has the potential to supplant the provisions of the Convention. The recommendations of the Special Commission were designed to reduce this potential by encouraging contracting States to apply the Convention’s safeguards when concluding agreements with non-members. Additionally, the recommendation encourages member states to promote ratification of the Convention to non-members. The recommendations were made with the intention that, if followed, there would be a move to greater ratification. However this end has not been achieved thus far, and seems unlikely unless changes are made to the recommendations.

C. The Hague’s Shaky Structure

As discussed above, the success of the Hague Convention has been weakened by the failure of countries to ratify it. It has been argued that, were the main players to ratify it, the Hague Convention would otherwise succeed in achieving its goals.²⁸³ It is important to evaluate the validity of this argument. In order to do so it is useful to imagine that all major sending and receiving countries have signed and ratified the Hague Convention.

²⁷⁸ One expert suggested this position should be modified, at least regarding States that have signed although not yet ratified the Convention: See Special Commission Report, para 106.

²⁷⁹ Special Commission Report, para 104.

²⁸⁰ Special Commission Report, para. 105.

²⁸¹ *Id.*, para. 56.

²⁸² See Conclusions and Recommendations of the Second Meeting 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 (17-23 Sept, 2005) at <http://www.hcch.net/upload/wop/concl33sc05_e.pdf> para. 19. (10 March 2006)

²⁸³ Kimball, C.E., “Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption” (2004-2005) 33 *Denv. J. Int’l L. & Pol’y* 561, see 583.

If all major sending and receiving countries have signed and ratified the Hague Convention, the question that remains is whether the provisions of the Convention create a strong enough framework to prevent, or at least substantially reduce, baby trafficking and black markets. Some have argued that the Hague Convention, although commendable for its efforts, suffers from a number of drafting flaws, which could ultimately see the Hague Convention fail to achieve its objectives. Flaws that have been identified in the Hague Convention include weak baby selling guidelines, lack of enforcement mechanisms and ambiguous terms that lead to non-uniformity. It has been argued that, collectively, these fundamental problems may impede the ultimate success of the Hague Convention.

1. Weak Baby Selling Guidelines

It has been argued that the provisions fall short of achieving the Hague Convention's stated goal of preventing baby trafficking for a number of reasons.²⁸⁴ Firstly, the Convention does not outlaw baby selling nor does it require member States to ban the practice via their domestic laws.²⁸⁵ Further, the Hague Convention does not require States to punish baby sellers.²⁸⁶ Rather, the Hague Convention tries to prevent baby selling indirectly by requiring member countries to comply with the procedural rules it sets out in relation to intercountry adoption, hoping such compliance will prevent people from continuing in baby selling.²⁸⁷ Unfortunately, without the threat of sanctions with consequence, those interested in the highly profitable business of baby selling are unlikely to be persuaded to discontinue such activities.²⁸⁸

Secondly, the Hague Convention does not ban independent adoptions by private individuals or agencies.²⁸⁹ The banning of private adoption was resisted by a number of countries during negotiations leading to the drafting of the Hague Convention, especially the USA.²⁹⁰ The problem with allowing private adoptions to operate is that they are prone to abuse and have historically been one of the biggest sources of baby selling in susceptible countries like Romania.²⁹¹ The Hague Convention also fails to provide punishment for unethical agents "selling" children

²⁸⁴ Stein, J.G., "A Call to End Baby Selling: Why the Hague Convention on Intercountry Adoption Should be Modified to Include the Consent Provisions of the Uniform Adoption Act" (2001-2002) 24 *T. Jefferson L. Rev.* 40, 76.

²⁸⁵ Croft, G.M., "The Ill Effects of a United States Ratification of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption" (2004-2005) 33 *Ga. J. Int'l & Comp. L.* 621, 635.

²⁸⁶ Stein, J.G., "A Call to End Baby Selling: Why the Hague Convention on Intercountry Adoption Should be Modified to Include the Consent Provisions of the Uniform Adoption Act" (2001-2002) 24 *T. Jefferson L. Rev.* 40, 76.

²⁸⁷ *Ibid.*

²⁸⁸ Croft, G.M., "The Ill Effects of a United States Ratification of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption" (2004-2005) 33 *Ga. J. Int'l & Comp. L.* 621, 635.

²⁸⁹ Stein, J.G., "A Call to End Baby Selling: Why the Hague Convention on Intercountry Adoption Should be Modified to Include the Consent Provisions of the Uniform Adoption Act" (2001-2002) 24 *T. Jefferson L. Rev.* 40, 76.

²⁹⁰ Triseliotis, J., "Intercountry Adoption: Global Gift or Global Trade?" (Summer 2000) 24(2) *Adoption & Fostering* 45, at 51.

²⁹¹ Croft, G.M., "The Ill Effects of a United States Ratification of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption" (2004-2005) 33 *Ga. J. Int'l & Comp. L.* 621, 635.

for profit.²⁹² Without a ban on private adoptions, or a punishment in place where questionable payments are discovered, it is arguable such abuses will continue to occur.

Thirdly, the Hague Convention fails to provide a means by which countries can uncover illegitimate adoption service providers or illegal adoption schemes.²⁹³ The Hague Convention does not provide countries with tools of investigation, for example, and therefore such schemes are likely to continue to operate.²⁹⁴

In summary, given the existing practice and high rewards for baby selling, if specific measures are not taken to eradicate the practice it is unlikely to be eradicated, notwithstanding ratification.²⁹⁵

²⁹² Stein, J.G., "A Call to End Baby Selling: Why the Hague Convention on Intercountry Adoption Should be Modified to Include the Consent Provisions of the Uniform Adoption Act" (2001-2002) 24 *T. Jefferson L. Rev.* 40, 77.

²⁹³ *Ibid.*

²⁹⁴ Croft, G.M., "The Ill Effects of a United States Ratification of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption" (2004-2005) 33 *Ga. J. Int'l & Comp. L.* 621, 635.

²⁹⁵ Stein, J.G., "A Call to End Baby Selling: Why the Hague Convention on Intercountry Adoption Should be Modified to Include the Consent Provisions of the Uniform Adoption Act" (2001-2002) 24 *T. Jefferson L. Rev.* 40, 77.

2. No Enforcement Mechanism

The Hague Convention's failure to adequately deal with baby selling is compounded by the Convention also failing to provide an adequate enforcement mechanism to ensure that participating countries obey its provisions.²⁹⁶ For example, the Hague Convention does not designate any overseeing international body to ensure the provisions of the treaty are being observed.²⁹⁷ Rather, pursuant to Article 6, the Central Authority (ie a local body) of each member country is responsible for discharging such a duty.²⁹⁸ The problem with this self-regulation is that it is unlikely a Central Authority, as its own judge, will admit to its own faults and failures with regard to adoption procedures.²⁹⁹ It has been suggested that a "non-partisan governmental organization monitoring compliance" is needed to make sure corrupt adoption practices are adequately penalised.³⁰⁰ The Hague Convention is also in need of a measure to evaluate whether the regulations designed by a prospective Central Authority are in compliance with the overall safeguarding purposes of the Hague Convention.³⁰¹ Further, the Hague Convention should provide guidelines for countries to review and evaluate the success of the Convention.³⁰²

The Hague Convention could perhaps benefit from employing a similar implementation mechanism to that of the UN human rights treaties, including the CRC. The Committee on the Rights of the Child is the monitoring body for the CRC. State parties are required to submit reports to the Committee detailing the measures they have taken to implement the treaty.³⁰³ The Committee then writes a report detailing the progress of each member State and makes recommendations.³⁰⁴ Article 45 of the CRC gives the Committee the power to obtain further information from sources outside of the State party itself, which broadens the information acquired by the Committee and reduces the potential for member States to "paint a falsely positive implementation picture in their periodic report".³⁰⁵ The CRC has long been praised for having the most "teeth" of any human rights treaty, yet as we have seen it fails in the area of intercountry adoption. This failure is not, however, due to the implementation mechanism but rather due to its textual limitations and omissions as outlined previously. The enforcement mechanism the CRC employs seems to encourage compliance among reporting States, and could therefore be a useful method for the Hague Convention.

As an alternative to a CRC style Committee, the Hague Convention could benefit from the addition of an enforcement mechanism similar in structure to that of the First Optional Protocol ("FOP") to the International Covenant on Civil and Political

²⁹⁶ Thompson, N.S., "Hague is Enough? A Call for More Protective, Uniform law Guiding International Adoptions" (2004) 22 *Wis.Int'l L.J.* 441, 466.

²⁹⁷ *Id.*, 467.

²⁹⁸ *Id.*, 466.

²⁹⁹ *Ibid.*

³⁰⁰ Kimball, C.E., "Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption" (2004-2005) 33 *Denv. J. Int'l L. & Pol'y* 561, 572.

³⁰¹ Thompson, N.S., "Hague is Enough? A Call for More Protective, Uniform law Guiding International Adoptions" (2004) 22 *Wis.Int'l L.J.* 441, 467.

³⁰² *Id.*, 462.

³⁰³ Graff, N., "Intercountry Adoption and the Convention on the Rights of the Child: Can the free Market in Children be Controlled?" (2000) 27 *Syracuse J. Int'l L. & Com.* 405, 417-418

³⁰⁴ *Id.*, 418.

³⁰⁵ *Ibid.*

Rights (“ICCPR”).³⁰⁶ Under the FOP, the Human Rights Committee is given the power to receive and consider communications (complaints) from individuals from signatory countries who allege that their human rights, as stated in the ICCPR, have been violated.³⁰⁷ The FOP is an optional instrument which means States that are party to the ICCPR do not automatically become members to the FOP. Instead, they must act separately to assume obligations under it.³⁰⁸ The FOP outlines the “conditions of admissibility of individual communications, as well as the procedures for the examination of communications”.³⁰⁹ Notwithstanding that the “views” of the Committee are not legally binding, countries have “commuted death sentences, released prisoners, compensated victims and changed legislation”³¹⁰ as a direct result of such views. Additionally, the Committee’s case law under the FOP is often quoted by international and national tribunals and has aroused much interest in the academic community.³¹¹

Although the addition of one or both of the abovementioned mechanisms would not necessarily ensure the provisions of the Hague Convention are enforced, nor would they necessarily guarantee State compliance, they do provide a means by which the procedures and implementation measures of participating countries can be subject to surveillance. The benefits of public exposure is that participating countries will be encouraged to comply with the terms of the Convention, or face increased criticism and public pressure if they fail to do so. Further, the parties involved in intercountry adoptions would be better protected if the adoption procedures of countries are regularly monitored to ensure they are consistent with the safeguarding purposes of the Convention. The lack of any type of implementation or enforcement mechanism is perhaps one the severest criticisms of the Hague Convention and although the addition of such mechanisms will not guarantee its successful implementation, it is arguably preferable to have some mechanism in place than to have none at all.

3. Ambiguous Language

Although the Hague Convention specifies the general requirements that a contracting State must discharge in order to carry out its goals,³¹² parts of the Convention contain language that is vague and susceptible to inconsistent interpretation. “Adoption”, “orphan” and “best interests” are not defined anywhere in the Hague Convention, thereby leading to arbitrary and unpredictable definitions internationally.³¹³ Additionally, although the Convention provides for recognition of adoptions in Hague countries in Article 24, the same article provides that States can

³⁰⁶ (First) Optional Protocol to the International Covenant on Civil and Political Rights, 16 Dec 1966, 999 U.N.T.S 171. (Entered into force 23 March 1976, in accordance with art. 9.) [hereinafter First Optional Protocol]

³⁰⁷ *Id.*, art. 1.

³⁰⁸ Communicating with the Human Rights Committee: A Guide to the Optional Protocol to the International Covenant on Civil and Political Rights, Part 3.3 at <<http://beta.austlii.edu.au/au/other/ahric/booklet/part3.html>> (23 May 2006).

³⁰⁹ *Ibid.*

³¹⁰ United Nations Cyber School Bus (Global Teaching and Learning Project) - Human Rights: Optional Protocol to the International Covenant on Civil and Political Rights (1966) at <http://www.un.org/cyberschoolbus/treaties/pro_civil.asp> (24 May 2006).

³¹¹ *Ibid.*

³¹² Croft, G.M., “The Ill Effects of a United States Ratification of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption” (2004-2005) 33 *Ga. J. Int’l & Comp. L.* 621, 635.

³¹³ Thompson, N.S., “Hague is Enough? A Call for More Protective, Uniform law Guiding International Adoptions” (2004) 22 *Wis.Int’l L.J.* 441, 460.

refuse to recognise an adoption if they consider it contrary to their country's "public policy". The Hague Convention fails, however, to set guidelines for what may or may not constitute "public policy" in such circumstances,³¹⁴ and States are allowed to freely determine their own boundaries on the matter. While flexibility is essential to any multilateral treaty, it has been suggested that the Hague Convention should at least provide "some type of standard for this individual control".³¹⁵ Without some guidelines, States would be free to reject recognition of adoptions for various, and perhaps unreasonable, grounds.

The problem with such lack of clarity of terms is that countries will interpret the terms differently, resulting in varied laws and procedures on intercountry adoption. This would in effect defeat the Hague Convention's purpose of bringing uniformity to intercountry adoption procedures.³¹⁶ Absence of uniformity ultimately "lends vulnerable children, birth parents and families to the dangers associated with international adoption that the Convention is set out to safeguard against".³¹⁷

Therefore, as argued by a number of critics, the Hague Convention contains various fundamental flaws that despite universal ratification could prevent its overall success. At this point, commentators are mooting a number of options as to the future of intercountry adoption. While some options are perhaps more plausible than others, all deserve consideration.

³¹⁴ Thompson, N.S., "Hague is Enough? A Call for More Protective, Uniform law Guiding International Adoptions" (2004) 22 *Wis.Int'l L.J.* 441, 460.

³¹⁵ Katz, L.M., "A Modest Proposal? The Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption" (1995) 9 *Emory Int'l L. Rev.* 283, 325.

³¹⁶ Thompson, N.S., "Hague is Enough? A Call for More Protective, Uniform law Guiding International Adoptions" (2004) 22 *Wis.Int'l L.J.* 441, 460-461.

³¹⁷ *Id.*, 461.

VII. INTERCOUNTRY ADOPTION: WHERE TO FROM HERE?

Looking to the future of intercountry adoption, a number of potential options present themselves. Firstly, the Hague Convention could be amended so as to remedy some of the existing textual flaws identified above. Secondly, the international community could start again – that is draft an entirely new Convention on the topic. Thirdly, the international community could cease trying to reform and regulate the practice, conceding that the free market in children cannot be controlled. Finally, the practice of intercountry adoption could be universally banned negating the need for any regulation.

A. Option #1 – Tweaking the Hague Convention

As we have seen, the Hague Convention is to date, the most comprehensive and successful international instrument on intercountry adoption. Although it is not free from criticism, it has been widely praised for its efforts at revolutionising the practice. By setting bare standards and encouraging countries to work together during the process, the risk of baby selling schemes occurring has been greatly diminished. The bottom line is that the Hague Convention, despite its flaws, is workable.

The structural flaws identified earlier in the paper, such as weak baby selling guidelines, vague definitions and lack of enforcement, are fixable. Amending these flaws would make the Hague Convention stronger, ultimately leading to increased protective measures for intercountry adoption players. The first of the abovementioned flaws, weak baby selling guidelines, could be corrected by inserting a provision in the Hague Convention that expressly bans the practice of baby selling/trafficking. Further, a provision requiring member States to ban the practice in their domestic laws could also be added. The second identified flaw, vague definitions, could be corrected by amending the Hague Convention to include a “definitions” section,³¹⁸ including direct definitions of key adoption terms like “orphan” and “adoption” “public policy” and “the best interests of the child”. Further, existing language should be clarified to ensure uniformity and understanding between sending and receiving countries. Such amendments would help to further streamline the uniform purposes of the Hague Convention and reduce inconsistency and confusion, leading to greater protection for all.³¹⁹ In regard to the third flaw, lack of enforcement, the Hague Convention could be amended to include an implementation mechanism similar to the one in either the CRC, or the FOP of the ICCPCR, so that the effectiveness of purported international adoption laws can be determined. Further, the Hague Convention could be amended to provide sanctions where a violation concerning an international adoption occurs.³²⁰

The potential problem with amending the Hague Convention links back to the inherent voluntary nature of international law.³²¹ To work effectively, a multi-lateral Convention must be flexible enough to encompass a wide range of divergent views.

³¹⁸ Thompson, N.S., “Hague is Enough? A Call for More Protective, Uniform law Guiding International Adoptions” (2004) 22 *Wis.Int’l L.J.* 441, 465.

³¹⁹ *Ibid*

³²⁰ *Id.*, 468.

³²¹ The idea that international law operates on the concept of *jus genitum voluntarium* (the consent and practice of States) was originally derived from Hugo Grotius (1583–1645) in his major work *De Jure Belli ac Pacis* (translated as “Concerning the Law of War and Peace”) (1625).

Amendments would require the consent of all the participating nations, which would likely be difficult to achieve. Adding an express prohibition on baby selling would unlikely be problematic because one of the stated goals of the Hague Convention is to establish a system that would prevent the sale, abduction and trafficking of children. Clearly, upon signing, the States agreed that the practice needed to be eliminated so adding an express provision would be a mere formality, adding clarity and strength to the stated goal. Adding an implementation mechanism similar to that in the CRC would also be unlikely to be problematic. This is because most States that have signed the Hague Convention have also signed the CRC. If the same States have already agreed to the mechanism laid down in the CRC there is no reason why they should not agree to a similar mechanism being added to the Hague Convention. Additionally, it is hard to imagine that States would be opposed to the establishment of a mechanism like the FOP, especially considering it would be optional. Such an amendment would ensure States comply with the treaty and would therefore add further protection to the people involved in the adoption process. The only amendment that the writer foresees could potentially present a problem would be the addition of a definitions section. This is because it would be extremely difficult to get the large number of contracting States to agree on a single definition for each term, given the varying cultural, economic and social differences between them. Nevertheless, it would certainly be worth attempting if it could potentially bring further uniformity and clarity. Even a basic definition for each would surely be better than no definition at all.

Amendment of the already-successful Hague Convention seems to be a sensible and logical next step for intercountry adoption. The practice would benefit from the proposed improvements because they would strengthen the framework of the Convention itself, in turn providing a heightened level of protection.

B. Option #2 - Let's Start Again

Instead of fixing the Hague Convention, or any of the other Conventions on intercountry adoptions, a potential option would be to start from scratch. This would entail drafting a new Convention on the topic, taking what has been learnt from previous attempts and applying it to the creation of a new international instrument. As we have seen, the international community has improved on each new attempt at regulating intercountry adoption, and could possibly improve again with a new instrument.

The problem with this option is that it is expensive and time consuming, with no guarantees that a better formula would be reached. Of course, if it were necessary to start again in order to provide a Convention that would properly protect the parties involved in intercountry adoption, then the time and expense would be worthwhile. It would appear, however, that it is not necessary. While the critics have expressed disapproval of particular aspects of the Hague Convention, they have not criticised the Convention's fundamental adoption scheme. On the contrary, the adoption scheme set out in the Hague Convention has been widely praised for its level of detail, and for ensuring that proper safeguards are in place to protect the parties involved. Additionally, despite suggestions the Hague Convention could be improved and strengthened, its fundamental goals and procedures have received consensus among a large number of divergent countries, a noteworthy accomplishment for an international instrument, given the nature of international law.

For the above reasons, starting again and creating a new Convention, is unnecessary. The Hague Convention has not officially “failed” on the international stage by any accounts, and has in fact succeeded where many others have failed. Working with what we have and improving upon it is therefore a better option at this stage than foregoing the entire instrument, which is largely successful, just because it is not “perfect” according to some critics.

C. Option # 3 – To Regulate or Not to Regulate?

An alternative to regulating intercountry adoption is to allow the practice to continue without regulation. This option is derived from the comments of some critics that domestic and private international law are inefficient in dealing with situations that “concern the human rights of people from a variety of States ... that are subject to the sometimes overriding forces of a market economy”.³²² Instead of trying to improve past regulations or create new and better laws, they argue a better solution would be to let the market of children be free of such controls.

The problem with this option is that allowing the market in children to be free means there are no safeguards in place during any stage of the adoption process. The adoptability of the prospective parents is not verified, the adoptability of the child is not confirmed, and the method by which the child is transferred from its country of origin to the adoptive parents country of residence, is not subject to any kind of safeguarding procedure. The potential effect of this is that unsavoury activities including baby abduction and selling, blackmail and coercion are free to take place and likely to reach significantly high proportions in order to meet the demand for children in Western countries. As we have seen, ineffective, poor regulation of intercountry adoption has a similar negative effect, leading to baby kidnapping and selling. The effect of limited regulation, however, is arguably not nearly as severe as the potential effect of absolutely no regulation at all. Reducing children to mere commodities in a market place also ignores the fact that children are vulnerable human beings in need of protection and care, not commodities that should be subjected to manipulation by market forces. Placing them in a free market with no controls or protections means they are not being afforded the status they deserve or the protection and care they require.

D. Option #4 - Intercountry Adoption? Let’s Get Rid of It.

The final option regarding the future of intercountry adoption is to ban the practice altogether. Critics that suggest this option are generally those who argue that intercountry adoption causes more problems than it solves. They assert that it is in the best interests of all concerned, that the practice be eliminated.³²³

If intercountry adoption were prohibited: children would no longer be victims of child trafficking schemes; poor countries would be forced to re-evaluate their social situations and policies; and birth mothers would not have to worry about having

³²² See Graff, N, “Intercountry Adoption and the Convention on the Rights of the Child: Can the free Market in Children be Controlled?” (2000) 27 *Syracuse J. Int’l L. & Com.* 405, 428.

³²³ For example - see arguments made by Liu, M, “International Adoption: An Overview” (1994) 8 *Temp. Int’l & Comp. L.J.* 187, at 195. Or for a general discussion on the arguments against intercountry adoption see above Chapter III of this paper: “Regulation or Abolition – the Moral Debate”.

their children stolen. Demand for children in Western countries would subsequently subside if the transfer of children across borders was illegal. All these problems arising from the practice would be solved. Right? Wrong.

Unfortunately, the practice of intercountry adoption is so entrenched that it would be near impossible to place a universal ban on the practice. In addition, it is highly unlikely the majority of countries would agree to a ban in the first place, especially countries of influence like America and China. Even if it were possible to place a global ban on the practice, one of the greatest potential effects would be to drive the entire practice underground, resulting in a massive black market in baby selling – the very thing that a ban is supposed to stop. It is highly unlikely that the demand for babies in Western countries would cease following a ban. Instead, desperate people would likely turn to desperate measures, offering unthinkable amounts of money for a child, fuelling the operation of the black markets.

The option to ban intercountry adoption could indeed have dire consequences for children, birth parents, adoptive parents and society at large. While, in an ideal world there would be no need for intercountry adoption, in reality, the need exists and the practice will undoubtedly continue until that need disappears. Therefore, whether the practice is legally allowed or occurs under a prohibition, it will continue regardless. The difference between allowing intercountry adoption, with little or no regulation, and banning it altogether, is that if intercountry adoption occurs under a ban, it happens without any scrutiny whatsoever. On this note, it seems that allowing the practice is a far better option than banning it. While it is important that efforts are made toward improving the underlying societal problems in the poor countries of the world that create the need for intercountry adoption in the first place, it is equally important in the meantime to ensure that the system protects those involved, particularly the children. To ensure protection and to prevent baby selling and abduction, the practice, while it occurs, must remain subject to scrutiny.

Of all the above options the most persuasive, at least in the writer's opinion, is the first option - the amendment of the Hague Convention. The other three options are clearly not preferable to the first particularly since amending the Hague Convention would be the easiest option, the most affordable and most logical. The Hague Convention is not perfect and admittedly does not completely prevent incidences of baby selling and kidnapping. What it does, however, is encourage participating nations to take all possible steps to work together in creating and maintaining a system that would ensure basic protections are in place so as to control at least the worst excesses of such activities. The structure and provisions of the Hague Convention will probably never be completely free from criticism, even if the suggested amendments are made. This is due to the many divergent opinions that exist on the matter, which is typical of law originating in the international realm. It is unlikely that any one international instrument will gain unanimous consensus. It should be kept in mind, however, that this does not, in itself, signify failure. Using resources to continually improve and strengthen existing successful Conventions is a far more productive activity than the elusive quest for a "perfect" Convention or a "perfect" world where there is no demand for the practice.

VIII. CONCLUSION

In conclusion, intercountry adoption is not just a passing phase. In the last 50 years, the world has seen the practice climb from modest beginnings to becoming an

immensely popular practice, showing no signs of slowing down anytime soon. Of greatest concern is the protection of the thousands of children involved in the process. Unfortunately, the practice of intercountry adoption has always been tainted by baby selling, kidnapping and other underhanded practices. Several international instruments attempted early on to solve the problems associated with the practice, to no avail. The ineffectiveness of such instruments prompted the creation of the Hague Convention, which has since been commended for its strong commitment to children. In particular, the Hague Convention has been praised for establishing safeguards to protect children against abduction and kidnapping; creating a system of cooperation to ensure such safeguards are respected; and securing universal legal recognition of certified adoptions. The Hague Convention has revolutionised the practice of intercountry adoption, breaking down national barriers in a bid to bring uniformity to the practice and to achieve a common goal. Despite receiving many positive reviews, the Hague Convention has also been criticised, among other things, for its weak structure and for failing to aid implementation by participating countries. Today, commentators continue to consider the future direction of intercountry adoption – whether amendment of the Hague Convention would be sufficient, or whether more drastic action is needed, such as outlawing intercountry adoption. Despite its flaws, the Hague Convention has been largely successful in bringing uniformity and control to the practice. Its ratification by a large number of participating countries represents a substantial step towards protecting the best interests of the world’s children. This step is indeed significant because, as in the words of John Fitzgerald Kennedy, “Children are the world’s most valuable resource and its best hope for the future”.³²⁴

³²⁴ John Fitzgerald Kennedy (35th U.S. President - 1961-63) at UNICEF appeal, 25 July 1963.

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