

WHY THE UNITED STATES SHOULD DEFINE ILLEGAL ADOPTION PRACTICES AS HUMAN TRAFFICKING

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I.	INTRODUCTION	716
II.	INTERCOUNTRY ADOPTION PROCESS.....	717
III.	PROBLEMS WITH THE PROCESS	719
	A. <i>Common Abuses</i>	720
	B. <i>Non-Hague Process as Distinct Problem</i>	724
IV.	CURRENT UNITED STATES RESPONSE.....	724
	A. <i>Intercountry Adoption Act</i>	725
	B. <i>Denial of Visas</i>	727
	C. <i>Criminal Enforcement</i>	731
V.	ADOPTION AS TRAFFICKING.....	732
	A. <i>Definition of Human Trafficking</i>	733
	B. <i>Exploitation</i>	735
	C. <i>Exploitation by Violation of International Treaty</i>	737
VI.	RESULT OF USING THE HUMAN TRAFFICKING LABEL.....	740
	A. <i>Weakness of Convention Obligations</i>	740
	B. <i>Use of Trafficking Victims Protection Act</i>	743
VII.	CONCLUSION.....	747

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I. INTRODUCTION

Every year, approximately 40,000 “intercountry” adoptions take place.¹ An intercountry adoption entails “a change of the adopted child’s habitual country of residence but not necessarily of the child’s citizenship.”² Intercountry adoptions represent fifteen percent of the total number of worldwide adoptions.³ The United States is the leading country for adoptions, both domestic and intercountry, with intercountry adoptions accounting for roughly fifteen percent of all U.S. adoptions.⁴ Every year, a number of children are offered for adoption through illegal means or are adopted by those who should not be adopting children.⁵ While these practices are not limited to intercountry adoptions, the instances of wrongdoing are difficult enough to uncover in adoptions that one knows about, and virtually impossible to discover when an adoption occurs overseas, outside of the knowledge of the United States. Because of this difficulty, this Comment will talk about intercountry adoptions alone, but the principles discussed can be applied to domestic adoptions.

In Part II, this Comment will discuss the typical intercountry adoption process from the perspective of a parent in the United States. In Part III, it will discuss the various problems inherent in the current adoption procedures. In Part IV, it will address the issues the United States faces in regulating the process, particularly the difficulty of addressing

1. U.N. DEP’T OF ECON. & SOC. AFFAIRS, CHILD ADOPTION: TRENDS AND POLICIES, at 74, U.N. Doc. ST/ESA/SER.A/292, U.N. Sales No. E.10.XIII.4 (2009) [hereinafter CHILD ADOPTION: TRENDS AND POLICIES], available at http://www.un.org/esa/population/publications/adoption2010/child_adoption.pdf.

2. *Id.* An intercountry adoption differs from an international adoption, which is simply an adoption where the parents and the child have different citizenships, regardless of where they in fact reside. *Id.*

3. *Id.*

4. *Id.* at 69, 74 (“Citizens of the United States adopt more foreign children than the citizens of the next 13 major receiving countries combined.”).

5. David M. Smolin, *Child Laundering As Exploitation: Applying Anti-Trafficking Norms to Intercountry Adoption Under the Coming Hague Regime*, 32 VT. L. REV. 1, 29 (2007).

illegal practices that occur wholly in another country. Finally, in Part V this Comment suggests that one option for addressing these issues is to classify illegal adoption practices as human trafficking, a definition that is workable and appropriate for the situations that occur. This definition will thereby increase the number of options that the United States has to increase regulation and control of intercountry adoptions.

II. INTERCOUNTRY ADOPTION PROCESS⁶

For an average person or couple in the United States interested in adopting, the process begins by contacting an accredited adoption service provider (sometimes called an agency).⁷ The person applies to adopt through the agency, a process that typically involves a lengthy background check, home studies, and a large amount of paperwork.⁸ The agency conducts these required steps and makes an initial determination of whether or not the person is eligible to adopt,

6. The process outlined in this section is for adoptions taking place in a country that has signed on to the Hague Adoption Convention. See United Nations Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, May 29, 1993, 1870 U.N.T.S. 167 [hereinafter Hague Adoption Convention]. The United States formally implemented the Hague Adoption Convention with the Intercountry Adoption Act of 2000, thereby enforcing a much stricter adoption process than non-Hague Adoption Convention countries. See Intercountry Adoption Act of 2000, Pub. L. No. 106-279, § 2, 114 Stat. 825, 826 (2000) [hereinafter IAA].

7. See Bureau of Consular Affairs, *Hague Adoption Process*, U.S. DEP'T OF STATE, http://adoption.state.gov/adoption_process/how_to_adopt/hague.php (last updated Oct. 2013); Bureau of Consular Affairs, *Agency Accreditation*, U.S. DEP'T OF STATE, http://adoption.state.gov/hague_convention/accreditation.php (last visited Jan. 13, 2014) (explaining how the U.S. Department of State has named two U.S. accrediting entities with the power to give final accreditation to agencies: the Council on Accreditation and the State of Colorado Department of Human Services); Memorandum of Agreement Between the U.S. Dep't of State and the Colorado Dep't of Human Services Regarding Performance of Duties as an Accrediting Entity Under the Intercountry Adoption Act of 2000, 71 Fed. Reg. 129 (July 6, 2006); Memorandum of Agreement Between the U.S. Dep't of State and the Council on Accreditation Regarding Performance of Duties as an Accrediting Entity Under the Intercountry Adoption Act of 2000, 71 Fed. Reg. 137 (July 18, 2006).

8. *Hague Adoption Process*, *supra* note 7 (explaining that during this phase of the process, if not even earlier, the prospective parent normally identifies the country from which he or she wishes to adopt, usually with guidance by the agency).

according to current federal and state statutes.⁹ If found eligible by an agency, the person applies to be found eligible to adopt by the U.S. government.¹⁰ Assuming the person or couple receives approval from the government, the agency will then “refer” the prospective adoptive parent to the home country of a child up for adoption.¹¹ In the referral, the agency notifies the child’s home country that a person is eligible to adopt under U.S. law and wishes to be matched to a child.¹² That country will then evaluate the file under its own laws and determine whether or not the person is eligible to adopt.¹³ If the person is again found eligible, the country’s central adoption authority (required under the Hague Adoption Convention)¹⁴ will match the person to a child and send them an official report, called an Article 16 report.¹⁵ The Article 16 report, named after the article of the Hague Adoption Convention that sets out its requirements, shows that the “Central Authority of the State of origin is satisfied that the child is adoptable” by offering evidence as to the child’s identity, family history, medical history, cultural

9. *Id.* The additional eligibility requirements vary from state to state. Many states have little in the way of additional guidelines. In Texas, for instance, there is no requirement other than that the person be “an adult.” TEX. FAM. CODE ANN. § 162.001 (West 2013). While most states do not address the issue of sexual orientation as it pertains to adoption, Mississippi explicitly prohibits couples of the same gender from adopting. MISS. CODE ANN. § 93-17-3(5) (West 2013).

10. *Hague Adoption Process*, *supra* note 7. If a person is using an accredited adoption service provider and has successfully completed all stages of the provider’s process, they typically will be found eligible by the United States government after submitting the required documentation (and paying the fee). *Id.* This application is submitted on an I-800A form. *Id.*

11. *Id.*

12. *Id.* The agency includes a copy of the person’s approved I-800A form with the referral. *Id.* The information required in the referral is outlined in Article 15 of the Hague Adoption Convention. Hague Adoption Convention, *supra* note 6, art. 15. The primary role of the referral is to give notice of the person’s eligibility to adopt, but the referral must give other information, including the reasons for the adoption, the person’s background, and the characteristics of the children that they are seeking to adopt. *Id.*

13. *Hague Adoption Process*, *supra* note 7. Whether or not a person is eligible to adopt will vary from country to country. *Id.*

14. Hague Adoption Convention, *supra* note 6, art. 6 (stating “a Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities”).

15. *Id.* art. 16.

background and other required elements.¹⁶ The report must also give assurance that any consent required for the termination of parental or custodial rights has been given in accordance with Article 4 of the Convention.¹⁷ Specifically, Article 4 requires that consent be given freely, that the consent not have been induced by payment or coerced by any other means, and that the parent or guardian have been informed and understand the effects of their consent, “in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin.”¹⁸ After the prospective parent accepts the proposed referral (assuming they wish to do so), they may then apply to the U.S. government for provisional approval of the adoption.¹⁹ After provision approval is obtained, a visa application may be submitted at the U.S. embassy or consulate of the sending country.²⁰ The embassy will make a final determination of the child’s adoptability and will determine whether or not a visa can be issued.²¹ If a visa is approved, the consular office will notify the adoption authority by issuing an Article 5/17 letter.²² This letter notifies the sending country that the prospective parents are eligible to adopt, and that the child “is or will be authorized to enter and reside permanently” in the United States.²³ Only after following these steps can an American legally adopt the child in question.²⁴

III. PROBLEMS WITH THE PROCESS

The process is lengthy²⁵ and clearly defined, so a natural question is how illegal adoption practices can still take place.

16. *Id.* art. 15; *Hague Adoption Process*, *supra* note 7.

17. Hague Adoption Convention, *supra* note 6, art. 16(1)(c).

18. *Id.* art. 4.

19. *Hague Adoption Process*, *supra* note 7. This provisional approval is given by the U.S. Citizenship and Immigration Services. *Id.*

20. *Id.* There are a variety of visas that are available and approved in cases of adoption. See Bureau of Consular Affairs, *U.S. Visa For Your Child*, U.S. DEP’T OF STATE, http://adoption.state.gov/us_visa_for_your_child.php (last visited Jan. 13, 2014).

21. *Hague Adoption Process*, *supra* note 7.

22. *Id.*

23. Hague Adoption Convention, *supra* note 6, art. 5(c).

24. *Hague Adoption Process*, *supra* note 7.

25. CHILD ADOPTION: TRENDS AND POLICIES, *supra* note 1, at 108 (noting the

The answer is that many of these illegal acts take place overseas in the child's home country, and not in the United States. While there have been instances of egregious illegal adoption practices within the United States, these practices can usually be dealt with using U.S. federal and individual state laws.²⁶

A. *Common Abuses*

1. *Article 4 Violations*²⁷

As discussed above, Article 4 of the Hague Adoption Convention requires that consent for adoption be "given freely" and that it must not be induced by payment or compensation of any kind.²⁸ It also requires that the person giving consent be properly informed of their rights and the fact that their rights may be terminated as result of that consent.²⁹ If consent is

average adoption takes more than one year to process); *see also id.* at 133 n.8 ("While in some countries, the waiting time for an adoption is relatively short—in Finland, for instance, 99 per cent of the 343 applications for an intercountry adoption submitted in 2003 were either approved or refused within three months of application (Finland, Finnish Adoption Board, 2004)—in many countries waiting times are much longer. In Ireland, for example, in 2003 the average time for processing an adoption application surpassed 15 months (Ireland, The Adoption Board, 2004).").

26. However, because many of these illegal practices involve agencies wrongly approving a prospective parent as eligible, they are all too often uncovered only after a child has suffered harm. *See, e.g.,* Smolin, *supra* note 5, at 18–29 (detailing the story of Masha Allen, an orphan from Russia who was "legally" adopted by a pedophile in the United States after an adoption agency failed to properly conduct a background check who subjected her to years of sexual abuse as well as making her a victim of child pornography). Agencies acting outside the legal process can be shut down and decertified by the U.S. government, while U.S. citizens can (and have been) prosecuted under U.S. law. *See* Bureau of Consular Affairs, *FAQ: The Universal Accreditation Act of 2012*, U.S. DEPT OF STATE, http://adoption.state.gov/adoption_process/faqs/uaa_2012.php (stating the civil and criminal penalties for illegal adoptions by both agencies and persons).

27. This Comment uses the Hague Adoption Convention articles because the Convention states that it applies in all cases where a child resides in a Contracting State. Hague Adoption Convention, *supra* note 6, art. 2. The articles do not precisely line up in each country due to the manner in which each country adopts and ratifies the Convention. *See, e.g.,* IAA, *supra* note 6.

28. Hague Adoption Convention, *supra* note 6, art. 4(c)(3). This consent is typically given by the parent. *Id.* If occurring just after birth, the mother's consent is required. *Id.* art. 4(c)(4). Consent is forbidden from being given prior to birth. *Id.*

29. *Id.* art. 4(c)(1).

improperly given, the child is not adoptable according to Article 16 of the Hague Adoption Convention.³⁰

A common Article 4 violation is where the birth parents are coerced into selling their children into orphanages.³¹ In Cambodia, one witness spoke of a clinic where women brought their children to be sold.³² The witness said that the parents were told they would get additional money from abroad, money that never arrived.³³ One mother was approached by a “facilitator” and offered \$700 for her child, a clear violation of Article 4.³⁴

A second common violation occurs when parents are not properly informed of the consequences of giving up their child. In one case in Goa, India, a mother took her child to a children’s home on the understanding that she would retain visitation rights.³⁵ Instead, the home had her sign a document that relinquished her rights to the child and authorized the home to give the child up for adoption.³⁶ The child was eventually returned to her after local non-governmental organizations became involved and applied pressure on those in charge of the home.³⁷

In Guatemala, one attorney was accused of tricking at least two mothers into signing relinquishment papers by telling them that their signatures were required to get their children medical treatment.³⁸ After the children were taken to the “clinic” for

30. *Id.* art. 16 (requiring that the Central Authority of a state ensure that “consents have been obtained in accordance with Article 4”).

31. *Id.* art. 4.

32. See Sara Corbett, Where Do Babies Come From?, N.Y. TIMES (June 16, 2002), <http://www.nytimes.com/2002/06/16/magazine/where-do-babies-come-from.html?pagewanted=all> (detailing the author’s conversations with villagers who discussed their adoption experiences).

33. *Id.*

34. *Id.* A facilitator works to arrange adoptions by finding children. *Id.* These facilitators are often the ones committing the violations. *Id.*

35. See Preetu Nair, *Cradle Snatchers*, GOMANTAK TIMES (Oct. 23, 2005), available at <http://www.nowpublic.com/life/cradle-snatchers>, cited in Arun Dohle, *Inside Story of an Adoption Scandal*, 39 CUMB. L. REV. 131, 153 (2009) (detailing the story of a mother who was fraudulently induced into signing relinquishing papers).

36. *Id.*

37. *Id.*

38. Laura McKinney, *International Adoption and the Hague Convention: Does*

treatment, the attorney then informed the mothers that they had signed away their rights and could not see their children again.³⁹

A similar case occurred in Samoa, where four Americans working for a Wyoming adoption agency tricked parents into releasing their rights as parents.⁴⁰ The Americans told the parents their children were being sent to an education program in the United States and would one day return.⁴¹ The parents were not informed that the documents they signed gave up their rights to the children forever.⁴²

It is clear from the language of Article 4 that consent is required under the Hague Adoption Convention.⁴³ It follows then that, in situations where no consent is given, for instance when a child is abducted, any subsequent adoption of that child also violates Article 4 of the Convention. In China, six identified orphanages were alleged to have purchased up to one thousand children from traffickers who acquired the children through abduction.⁴⁴ The traffickers specifically targeted migrant workers who they felt police would not take seriously and therefore would be less able to protect their children.⁴⁵

2. Article 16 Violations

Article 16 requires each country of origin to prepare a report that includes information about the child's identity, adoptability, family history and other information.⁴⁶ If the report is not

Implementation of the Convention Protect the Best Interests of Children?, 6 WHITTIER J. CHILD & FAM. ADVOC. 361, 362 (2007).

39. *Id.*

40. Beth Tribolet, Teri Whitcraft & Scott Michels, *Four Sentenced in Scheme to "Adopt" Samoan Kids*, ABC NEWS (Feb. 26, 2009), <http://abcnews.go.com/TheLaw/story?id=6958072&page=1&singlePage=true>.

41. *Id.*

42. *Id.*

43. Hague Adoption Convention, *supra* note 6, art. 16.

44. Patricia J. Meier & Xiaole Zhang, *Sold into Adoption: The Hunan Baby Trafficking Scandal Exposes Vulnerabilities in Chinese Adoptions to the United States*, 39 CUMB. L. REV. 87, 88–89 (2009) (noting that at least one director "was cognizant of the fact that he had purchased babies that had been abducted.").

45. *Id.* at 88.

46. Hague Adoption Convention, *supra* note 6, art. 16.

provided, an Article 16 violation occurs. More importantly, a violation of Article 16 can be found when any of the information is falsified because each state of origin is charged with ensuring that all information is correct and that all children are adoptable.⁴⁷ There are a variety of ways in which the information can be falsified, all of which are used to hide the fact that the child is not in fact adoptable.

In Cambodia, for example, government officials were found to have issued documentation that indicated the parents of a child were “unknown” in exchange for a large fee.⁴⁸ The documentation in question was normally released without the collection of a fee.⁴⁹ One facilitator claimed that even when the birth parents were provided, the officials themselves declined to include that information in the documents.⁵⁰ The apparent willingness of government officials to falsify this information raises concerns of whether or not the governmental verification process is sufficient.⁵¹

In India, national law requires that Indian adopters be given preference.⁵² Instead, in some cases documents have been forged to show that no Indian adoptive parents wanted the child.⁵³ This forgery would necessarily render the child un-adoptable under the requirements of the Hague Adoption Convention.

In Ethiopia, children were declared as orphans when their birth families were still alive.⁵⁴ In one instance, the mother had

47. *Id.* In addition to Hague Adoption Convention requirements, whether or not a child is adoptable depends on the laws of the country of origin. *See American Adoptions, Domestic vs. International Adoptions*, http://www.americanadoptions.com/adopt/domestic_international (last visited Feb. 17, 2014).

48. D. Marianne Blair, *Safeguarding the Interests of Children in Intercountry Adoption: Assessing the Gatekeepers*, 34 CAP. U. L. REV. 349, 386 (2005).

49. *Id.* at 386–87.

50. *Id.* at 386.

51. *Id.* at 387.

52. *See* Gita Ramaswamy, *The Baby Harvest: Scandal over Westerners ‘Shopping’ for Children in India*, NEW INTERNATIONALIST (Aug. 2003), <http://www.newint.org/features/2003/08/05/currents/> (noting that the global rate discourages most Indians from actually adopting, but that the process itself is completely bypassed).

53. *See id.*

54. John Nicol, *Canadian Parents Raise Concerns*, CBC NEWS (Mar. 19, 2009, 6:03 PM), <http://www.cbc.ca/news/canada/story/2009/03/19/f-ethiopia-adoption.html>.

willingly given her daughter up for adoption.⁵⁵ However, the fact that the child's documentation instead indicated that she was an orphan raises serious concerns about the validity of any Ethiopian adoption.⁵⁶

B. Non-Hague Process as Distinct Problem

In addition to various problems with the process, there exists the issue of intercountry adoptions from non-Hague Adoption Convention countries that are not required to follow the same rigorous process. The adoption service provider only needs to be accredited by the U.S. state where the adoptive parent resides.⁵⁷ The adoptive parent must still be found eligible to adopt by the U.S. government,⁵⁸ but because the agency is not accredited by the appointed accrediting entities,⁵⁹ there is less guarantee that the adoption service provider is following any sort of regulated guidelines. The biggest problem with the non-Hague process is that the countries "sending" the children are not necessarily in compliance with Hague Adoption Convention standards, nor is there any requirement that they be in compliance.⁶⁰ The Convention applies only to adoptions between two "Contracting States" (states that have signed the Convention); therefore, even if one country has signed the Convention, it does not apply as long as the other country has not signed.⁶¹

IV. CURRENT UNITED STATES RESPONSE

The United States currently regulates intercountry adoption in three main ways. First, it handles intercountry adoptions by

55. *Id.*

56. *See id.*

57. Bureau of Consular Affairs, *Hague vs Non-Hague Adoption Process*, U.S. DEP'T OF STATE, http://adoption.state.gov/hague_convention/hague_vs_nonhague.php.

58. Bureau of Consular Affairs, *Understanding the Hague Convention*, U.S. DEP'T OF STATE, http://adoption.state.gov/hague_convention/overview.php.

59. *Hague vs Non-Hague Adoption Process*, *supra* note 57.

60. Hague Adoption Convention, *supra* note 6, art. 2 (stating "the convention shall apply where a child habitually resident in one Contracting State . . . is to be moved to another Contracting State . . .").

61. *Id.*

conforming to the Hague Adoption Convention.⁶² Second, in keeping with Convention standards, the United States allows immigration officers to deny orphan visas.⁶³ Third, the United States prosecutes those who commit illegal adoption acts.⁶⁴

A. *Intercountry Adoption Act*

Compliance with the Hague Adoption Convention from the U.S. standpoint is heavily based on ensuring that prospective parents are properly screened.⁶⁵ The United States formally ratified the Convention in the Intercountry Adoption Act of 2000 (“IAA”).⁶⁶ The IAA designates the Department of State as the “Central Authority” for adoption, a designation required under the Convention.⁶⁷ The Department of State, in turn, named two accrediting entities with the authority to approve or deny accreditation of adoption service providers.⁶⁸ These two entities play the primary role in U.S. enforcement of Convention standards by ensuring that all adoption service providers conform to the rules established by Department of State regulations.⁶⁹ The accrediting entities evaluate prospective adoption service providers to ensure that they operate in compliance with federal regulations that largely implement Convention standards.⁷⁰ Accreditation must be renewed, and the accrediting entities do cancel accreditation for those agencies that are not in full compliance with standards.⁷¹

62. IAA, *supra* note 6.

63. Meier & Zhang, *supra* note 44, at 92.

64. 42 U.S.C. § 14944 (2014).

65. Consider that compared to the 19,056 intercountry adoptions in which a child was received in the United States in 2001, there were less than 50 intercountry adoptions in which a child was sent from the United States as the country of origin. CHILD ADOPTION: TRENDS AND POLICIES, *supra* note 1, at 75; Bureau of Consular Affairs, *FY 2009 Annual Report on Intercountry Adoptions*, U.S. DEP’T OF STATE, http://adoption.state.gov/content/pdf/fy2009_annual_report.pdf.

66. IAA, *supra* note 6, § 2(b) (stating the purpose of the IAA).

67. 42 U.S.C. § 14911 (2012).

68. *See Agency Accreditation*, *supra* note 7.

69. *See* 22 C.F.R. §§ 96.1 to 96.111 (2006).

70. *Id.* § 96.27.

71. *See, e.g.,* Bureau of Consular Affairs, *Children of Africa Enterprises/Hope Adoption Agency loses Hague Accreditation*, U.S. DEP’T OF STATE (Nov. 20, 2012), <http://>

As previously discussed, the main weakness with this method of enforcement is that it applies only to adoptions taking place in countries that have also ratified the Hague Adoption Convention.⁷² When a child is coming from a non-Hague county, such as Russia,⁷³ agencies facilitating adoptions are not required to conform to the more rigorous standards. Further, this type of enforcement is front-end enforcement in that it prevents (presumably) unfit parents from adopting in the first place.⁷⁴ It does little to ensure that adoption processes occurring overseas are happening in a legal manner.

Another weakness with the system is that, despite the Hague Adoption Convention dictating that the “Central Authority” of each state determine a person’s eligibility to adopt,⁷⁵ this job has essentially been outsourced to adoption service providers. An important role of adoption agencies in the United States is to perform background checks on prospective parents and to report their findings to the Department of State.⁷⁶ The Department of State then reviews the file and nominally determines eligibility. However, absent overwhelming evidence to the contrary, if an agency gives prospective parents a favorable review, it is unlikely the government will find those parents ineligible to adopt.⁷⁷ The consequence of an agency failure in this area can be quite severe for children who find themselves with unfit parents.⁷⁸ Only continuous, rigorous oversight will ensure that agencies are doing this job properly.

adoption.state.gov/about_us/children_of_africa_loses_accreditation.php (noting that accreditation was cancelled because the agency failed to maintain “substantial compliance” with accreditation standards); Bureau of Consular Affairs, *Maintaining and Renewing Accreditation*, U.S. DEPT OF STATE, http://adoption.state.gov/adoption_community/agencies/renewal.php.

72. See discussion *supra* Part III.B.

73. Russia has signed the Hague Adoption Convention, but has not ratified it. See Hague Conference on Private International Law, *Status Table*, at http://www.hcch.net/index_en.php?act=conventions.status&cid=69.

74. Note again that much of the focus on Hague Adoption Convention conformance is focused on ensuring the parents are eligible to adopt. See Hague Adoption Convention, *supra* note 6, arts. 5, 15, 17.

75. *Id.* arts. 14–15; *Hague Adoption Process*, *supra* note 7.

76. 42 U.S.C. §§ 14902, 14911 (2006).

77. See *supra* note 10 and accompanying text.

78. See, e.g., Smolin, *supra* note 5, at 18–29 (noting that in the Masha Allen case,

B. Denial of Visas

The second major mechanism for U.S. enforcement of adoption practices is the denial of visas. Denial happens in two primary ways: on a case-by-case basis and as part of a country-wide determination.

1. Individual Determination

The first method of visa denial occurs when an immigration official determines that a specific adoption should not proceed. This can occur because there is evidence that the child was purchased, in which case the visa is outright denied.⁷⁹ It can also occur if the consular officer believes that original approval occurred based on fraud or misrepresentation, or that there is some other reason that the visa should not be processed.⁸⁰ In that case, the consular officer refers the case up the chain so that a final decision may be made.⁸¹

The main issue with this mechanism for enforcement is the difficulty in finding sufficient evidence to justify denial of a visa.⁸² Finding witnesses willing to testify to the adoptability of a child or finding solid evidence that the child should not be adopted can be extremely difficult.⁸³ There is the added difficulty in justifying the denial of a visa when it means that a parent cannot take their new child home with them without experiencing further delays or costs.⁸⁴

Further complicating a decision to deny a visa is the Hague Adoption Convention's statement that "the recognition of an adoption may be refused . . . only if the adoption is manifestly contrary to its public policy, taking into account the best

the agency failed to interview the prospective father's adult daughter who authorities later discovered had been abused as a child).

79. 8 C.F.R. § 204.3(i) (2011) (stating that "an orphan petition must be denied" if payment was induced in order to receive the child, not including "reasonable" payments for costs associated with the adoption).

80. *Id.* § 204.3(k)(2).

81. *Id.*

82. Meier & Zhang, *supra* note 44, at 92.

83. *Child Trafficking: Why Can't the Immigration Service Prove It?*, Ethica (June 6, 2003), available at <http://www.ethicanet.org/INSEvidence.pdf>.

84. *Id.*

interests of the child.”⁸⁵ In so much as a denial of a visa amounts to a lack of recognition of an adoption, at least on a short-term basis, the decision can only be made if the United States can wholly determine that the adoption would not be in the best interests of the child.⁸⁶ In the vast majority of cases, it would be difficult to argue that allowing the adoption to proceed would not be in the interests of the child, as the child will (presumably) have more opportunities than in their native country and will be going to good homes.⁸⁷

2. *Country-Wide Determination*

The second method that the U.S. government uses where visas are concerned is to issue a blanket denial for specific countries. The U.S. Department of State will not process new adoptions from those countries.⁸⁸ Rather than look at each adoption on a case-by-case basis, the Department of State typically makes the determination that a country is in such gross violation of the Hague Adoption Convention that the United States cannot certify any adoptions from that country.⁸⁹ This typically occurs only after a series of incidents have occurred, as opposed to single incidents.⁹⁰

For instance, the United States has determined that Guatemala could not sufficiently meet its Convention obligations and stopped processing all visas from that country.⁹¹

85. Hague Adoption Convention, *supra* note 6, art. 24.

86. *Id.*

87. Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issues*, 13 *BUFF. HUM. RTS. L. REV.* 151, 187 (2007).

88. Bureau of Consular Affairs, *Convention Countries*, U.S. DEP'T OF STATE, http://adoption.state.gov/hague_convention/countries.php (highlighting in bold the countries to which this ruling currently applies).

89. *See generally id.* (indicating that all adoptions from specific countries are prohibited).

90. *See* Simon Henderson, *Cambodia Not Ready for Inter-Country Adoptions*, *CAMBODIA DAILY* (Nov. 1, 2013), <http://www.cambodiadaily.com/archives/cambodia-not-ready-for-inter-country-adoptions-46465/> (explaining that the Department of State suspended Cambodia adoptions in light of Cambodia's "seriously flawed" screening process").

91. Bureau of Consular Affairs, *Guatemala*, U.S. DEP'T OF STATE, http://adoption.state.gov/country_information/country_specific_info.php?country-select=guatemala.

It is believed that a large number of children were purchased from women in rural areas.⁹² A number of women reported their children being kidnapped.⁹³ Finally, the number of children being adopted far exceeded the number of “adoptable” children in institutions, leading to serious questions about the legitimacy of the process.⁹⁴ Up to that point, Guatemala was responsible for a large number of adoptions, with over 4,000 taking place annually from 2006 to 2008.⁹⁵ The only adoptions with Guatemala currently being processed are those that were already underway at the time of the determination.⁹⁶

The United States made a similar decision to halt adoption proceedings in Vietnam but for a different reason.⁹⁷ Unlike Guatemala, Vietnam was not a party to the Hague Adoption Convention at the time of the decision.⁹⁸ This meant that the adoption process needed only to follow the less restrictive non-Hague process. Still, the United States decision came in the wake of “evidence of significant irregularities, fraud concerns, and the lack of sufficient legal safeguards in Vietnam’s current adoption process.”⁹⁹

This method of enforcement is effective in that it effectively halts adoptions from occurring, presumably preventing illegal adoptions from taking place. It also substantially affects the

92. *Adoption: Guatemala*, Schuster Inst. for Investigative Journalism, <http://www.brandeis.edu/investigate/adoption/guatemala.html> (last updated Mar. 8, 2012).

93. *Id.*

94. *Id.*

95. *Guatemala*, *supra* note 91.

96. *Id.*

97. Bureau of Consular Affairs, *Vietnam*, U.S. DEP’T OF STATE, http://adoption.state.gov/country_information/country_specific_info.php?country-select=vietnam.

98. Bureau of Consular Affairs, *Vietnam, Notice: U.S. Department of State to Delay Resuming Adoptions in Vietnam*, U.S. DEP’T OF STATE, http://adoption.state.gov/country_information/country_specific_alerts_notices.php?alert_notice_type=notices&alert_notice_file=vietnam_4 (last visited Jan. 13, 2014) (stating that the United States will not resume intercountry adoptions in Vietnam on February 1, 2012, when the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption will enter into force there).

99. *Vietnam: Intentions to Introduce New Adoption Legislation Halts Intercountry Adoption*, Joint Council on International Children’s Service (May 1, 2009), <http://www.jointcouncil.org/vietnam-us-citizens-not-able-to-register-a-new-adoption-in-vietnam/>.

adoption market of a country, reducing the profit and income that officials or those involved in the illegal practices receive.¹⁰⁰

However, this enforcement can have potentially negative consequences as well. First, it does nothing to actively ensure that children are returned to their birth parents or whatever extended family has legal custody of them. Put another way, while this option prevents children from being adopted (at least to American families), it does not ensure that they will get the chance to return home to their families.

Second, it could work to encourage offenders in those countries to better falsify their documentation and have stories readily available so that they can “prove” they are complying with the Convention standards. This can be done by simply bribing the correct government officials in those countries.

Third, it can lead to negative effects for the children who are no longer being adopted and instead may be held in institutions for increasing periods of time. In Russia, for instance, the government imposed a six-month waiting period during which time only Russian citizens can adopt a child.¹⁰¹ This was done in the wake of reports that American parents were abusing their adopted children.¹⁰² As a consequence, however, the Russian children were remaining in orphanages for a longer period of time rather than the hoped for outcome of being adopted domestically. While the situation in Russia came about by Russian action, a U.S. decision to halt adoptions from a specific country can lead to a similar outcome. Efforts to limit intercountry adoption, or stop it outright, lead to problems of their own, including lengthy stays in institutions which in turn lead to overcrowding and physical and mental health problems with the children.¹⁰³

100. As the leading “receiving nation” in the world, a decision by the United States to halt adoptions means that some countries will see virtually their entire “adoption business” disappear. See CHILD ADOPTION: TRENDS AND POLICIES, *supra* note 1, at 74.

101. McKinney, *supra* note 38, at 374–75.

102. *Id.*

103. See generally David M. Herszenhorn & Erik Eckholm, *Putin Signs Bill that Bars U.S. Adoptions, Upending Families*, N.Y. TIMES, Dec. 28, 2012, at A1, available at <http://www.nytimes.com/2012/12/28/world/europe/putin-to-sign-ban-on-us-adoptions-of-russian-children.html?pagewanted=all> (stating that critics of the ban claim it would

This concern has been raised again in response to a Russian ban on American adoptions.¹⁰⁴ In late 2012, Russia signed into law a bill that bans United States families from adopting Russian children, putting a halt on an estimated 1,000 adoptions currently being processed.¹⁰⁵ In addition, concern has been raised for the well-being of children who were already in the process of being adopted and had already met their adoptive parents.¹⁰⁶

C. Criminal Enforcement

The third method through which the United States regulates adoption practices is criminal enforcement. The IAA provides for both civil and criminal enforcement against those who operate adoption agencies without proper accreditation.¹⁰⁷ It also allows those penalties to be applied to “any person” who makes a “false or fraudulent statement” intending to influence or affect a decision to relinquish parental rights or a decision performed by an entity with a central authority function.¹⁰⁸ This provision allows for the prosecution of those operating overseas, particularly those who are attempting to coerce parents into giving up their children.¹⁰⁹ It would also allow for the prosecution of prospective parents who provide false information to the agencies in the United States in order to obtain an adoption.¹¹⁰

most hurt orphans already suffering in Russia’s deeply troubled child welfare system).

104. *Russia’s Putin Signs Anti-US Adoption Bill*, CNN (Dec. 28, 2012, 10:03 PM), http://www.cnn.com/2012/12/28/world/europe/russia-us-adoptions/index.html?hpt=hp_t2.

105. *See id.* (noting that the bill could affect American families seeking to adopt Russian children, and reporting that nearly 1,000 Russian children were adopted in 2012).

106. Press Release, U.S. Dep’t of State, Statement on Russia’s Yakovlev Act (Dec. 28, 2012), available at <http://www.state.gov/r/pa/prs/ps/2012/12/202401.htm>.

107. 42 U.S.C. § 14944(a)(1) (2000). Section (c) allows for criminal penalties for the same violation of a fine up to \$250,000 and up to five years in prison. *Id.* § 14944(c).

108. *Id.* § 14944(a)(2).

109. *Id.* While it allows for prosecution of those operating overseas, it is still restricted in its reach by jurisdictional limitations that might prevent successful prosecution of a foreign national.

110. *Id.*

Prosecution, however, is incredibly rare for a number of reasons. First is the difficulty of proving that a violation has occurred, similar to the difficulty that exists in gathering sufficient evidence to deny a visa. Particularly, absent a confession or a witness willing to testify to specifics, it is difficult to prove illicit practices that occurred overseas. Further, it is much easier to prosecute offenders under other offenses that are more easily proved, such as money laundering or visa fraud.¹¹¹ The criminal portion of the statute requires “knowing” or “willful” violations.¹¹² This can be especially difficult to prove in cases involving violations of the accreditation standards.¹¹³ It can also be difficult to prosecute people for false or fraudulent statements, particularly if the individual in question believed them to be true.¹¹⁴

Second, when offenses are occurring overseas by those who are not American citizens, U.S. courts lack effective jurisdiction to enforce U.S. law. Additionally, because this prosecution power comes under the IAA, it applies, technically, only to violations that occur in other countries that have also ratified the Hague Adoption Convention.¹¹⁵ If the violations are occurring elsewhere, prosecution options become much more limited.

V. ADOPTION AS TRAFFICKING

The Hague Adoption Convention refers to trafficking in its preamble.¹¹⁶ The preamble refers to the “necessity to take measures . . . to prevent . . . traffic in children.”¹¹⁷ The

111. See e.g., Maureen O'Hagan, *Guilty Plea in Federal Adoption Fraud Case*, SEATTLE TIMES (June 24, 2004, 12:00 AM), http://seattletimes.com/html/localnews/2001963987_adoptions24m.html (detailing the prosecution of one American adoption worker in Cambodia who bribed officials to falsify documents but was eventually convicted only of visa fraud, money laundering, and currency structuring).

112. 42 U.S.C. § 14944(c) (2002).

113. Katie Rasor, Richard M. Rothblatt, Elizabeth A. Russo & Julie A. Turner, *Imperfect Remedies: The Arsenal of Criminal Statutes Available to Prosecute International Adoption Fraud in the United States*, 55 N.Y.L. SCH. L. REV. 801, 807 (2011).

114. *Id.*

115. 42 U.S.C. § 14921 (2011).

116. Hague Adoption Convention, *supra* note 6.

117. *Id.*

Convention does not, however, define what constitutes trafficking in children, nor does it directly link any of its provisions to trafficking in children.¹¹⁸ In order to use the label of human trafficking, then, the international community must turn elsewhere for a definition and determine whether adoption practices could meet that definition.

A. Definition of Human Trafficking

Labeling an act as human trafficking to achieve specific purposes requires more than simply using the term. In order to call something human trafficking for legal purposes, it must first meet the accepted legal definition of human trafficking. The mere act of moving a child from one country to another is not enough to qualify under the accepted international definition.¹¹⁹ The Trafficking Protocol of 2000 established the international definition for human trafficking.¹²⁰ The definition consists of three elements: action, means, and purpose.¹²¹

First, some action is required.¹²² The protocol lists potential action as the “recruitment, transportation, transfer, harbouring or receipt of persons.”¹²³ There is no question that intercountry adoption meets this first requirement. In an intercountry adoption, a child is always at the very least transported or transferred from the care of one set of adults in one state to adults another in another state.¹²⁴ This is the very basis for the definition of intercountry adoption.¹²⁵

118. *See generally id.* (limiting references to trafficking exclusively to the preamble and article 1, when stating that one of the Convention’s objectives is to reduce trafficking in children).

119. *See* Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 55/25, Annex II, U.N. GAOR, 55th Sess., Supp. No. 49, U.N. Doc. A/RES/55/25 (Vol. I), art 3(a), (Jan. 8, 2001) [hereinafter Trafficking Protocol] (requiring an exploitation purpose in the definition of trafficking of persons).

120. *Id.*

121. *See id.*

122. *Id.*

123. *See id.*

124. CHILD ADOPTION: TRENDS AND POLICIES, *supra* note 1, at 74 (stating that intercountry adoptions entail a change of the adopted child’s habitual country of

The second element applies to the means, generally described as fraud, force, or coercion.¹²⁶ This second element, however, is waived where trafficking of children is concerned.¹²⁷ This means that in any act involving a child, including adoption circumstances, this second element does not need to be proved.¹²⁸ It is enough to satisfy the other two elements.¹²⁹ Despite the lack of necessity in proving this element, as seen in previous sections there are many adoptions that can still satisfy this element.¹³⁰

The third and final element, and the one most at question when considering adoption practices, relates to the purpose of the action.¹³¹ The action must occur with the purpose of exploitation.¹³² “Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”¹³³ Any adoption that occurs with one of these express purposes in mind could probably be considered trafficking.¹³⁴ Few would argue that if a person adopts a child, even through legal processes, with the end goal of using that child for prostitution,¹³⁵ one of the other explicitly listed types of exploitation, or some other clearly exploitative means that trafficking would have occurred. These types of practices are usually considered trafficking,

residence).

125. *See id.* (explaining trends in intercountry adoptions).

126. Trafficking Protocol, *supra* note 119, art. 3(a).

127. *Id.* art. 3(c).

128. *Id.*

129. *Id.*

130. *See supra* Part III.A.1–2.

131. Trafficking Protocol, *supra* note 119, art. 3(a).

132. *Id.*

133. *Id.*

134. *See, e.g.,* Smolin, *supra* note 5, at 18–29 (detailing the story of Masha Allen, an orphan from Russia who was “legally” adopted by a pedophile in the United States, and then suffered years of sexual abuse and is a victim of child pornography).

135. Trafficking Protocol, *supra* note 119, art. 3(a) (listing prostitution specifically as a form of exploitation).

regardless of the adoption element.¹³⁶ Indeed, the adoption aspect is largely ignored.¹³⁷

B. Exploitation

Ignoring the instances of adoption where the end goal is clearly exploitative within the Trafficking Protocol's definition of exploitation, thereby falling within trafficking definitions, one is left almost solely with situations where the "end goal" of the receiving parents is simply to be good parents. Any exploitation that occurs in these remaining instances typically happens earlier in the process, almost exclusively outside of the knowledge of the receiving parents.¹³⁸ In most cases where the child is successfully adopted, it is difficult to argue that the child is being exploited.¹³⁹ After all, they generally end up in nice homes with loving families (or so adoption advocates argue at least).¹⁴⁰ As one of these advocates notes, "[a]ny fair minded observer of international adoption would have to admit that the children overwhelmingly end up in adoptive families where they are loved and nurtured, and that they grow up doing as well as most children raised in those same receiving countries"¹⁴¹ One could indeed argue in these situations that the child is benefiting from the process.

The definition of exploitation given within the Trafficking Protocol is open-ended,¹⁴² giving only what it includes "at a minimum."¹⁴³ This open-endedness means that, while illegal adoption practices are not included in the examples given within

136. *Id.* (listing other forms of exploitation).

137. Other exploitative uses would probably include sexual abuse of the child on the part of the adoptive parent. *See, e.g.,* Smolin, *supra* note 5, at 18–29 (detailing the sexual abuse of one child by her adoptive father).

138. *See* discussion *supra* Part III.A.

139. *See, e.g.,* Bartholet, *supra* note 87, at 187 (arguing "there is no evidence that even when international adoption involves some illegality it results in the kind of exploitation of children that these other 'trafficking' practices systematically do.").

140. *Id.*

141. *Id.*

142. ANNE T. GALLAGHER, *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING* 34 (Cambridge University Press 2010).

143. Trafficking Protocol, *supra* note 119, art. 3(a).

the Trafficking Protocol, neither are they excluded.¹⁴⁴ “[T]he open-ended nature of the list means that the omission is not conclusive.”¹⁴⁵ At least one report produced by the United Nations indicates that “illicit adoption practices . . . can be prosecuted under the umbrella of trafficking crimes.”¹⁴⁶ The report expressly refers to the action and means portions of the trafficking document, but does not use the word exploitation.¹⁴⁷ It does however refer to the act of children “being forcibly separated from mothers,” leading to the implication that the act of separation itself is exploitation.¹⁴⁸

The Protocol, in addition to not giving definitive answers on what constitutes exploitation, does not expressly state who must be exploited.¹⁴⁹ One can assume that the exploitation need be of the person actively being trafficked, or “transport[ed], transfer[red], harbor[ed] or recei[ved].”¹⁵⁰ If the separation itself is all that is needed to implicate exploitation,¹⁵¹ then this exploitation would necessarily apply to both the child who is being removed from his or her parent and the parent who is having his or her child removed. The very act of separation, then, becomes exploitation of both parent and child. If exploitation of the parents is considered valid for the purposes of the Protocol definition, then there are indeed instances where exploitation in the adoption process has occurred, bringing the action within the definition of human trafficking.¹⁵²

When a parent is forced or coerced into signing away their parental rights, the parent is being exploited.¹⁵³ When a parent

144. GALLAGHER, *supra* note 142, at 40.

145. *Id.*

146. U.N. OFFICE ON DRUGS & CRIME, ANTI-HUMAN TRAFFICKING MANUAL FOR CRIMINAL JUSTICE PRACTITIONERS: MODULE 1, at 7 (2009), available at http://www.unodc.org/documents/human-trafficking/TIP_module1_Ebook.pdf.

147. *Id.*

148. *Id.*

149. Trafficking Protocol, *supra* note 119, art. 3(a).

150. *Id.*

151. See U.N. OFFICE ON DRUGS & CRIME, *supra* note 146, at 7 (noting the portions of an illicit adoption that constitute acts and means, as well as referring to the separation of child from parent without the use of the term exploitation).

152. See *supra* Part III.

153. See, e.g., Nair, *supra* note 35 (describing a case in India where a mother

hands over control of their child for the presumed purpose of getting the child medical treatment, their desire for the child's health is exploited by those who then give the child up for adoption.¹⁵⁴

C. Exploitation by Violation of International Treaty

Due to the open-ended definition of exploitation given by the Trafficking Protocol,¹⁵⁵ anything that can be defined as exploitation would qualify under the terms of the definition. Exploitation is "the act of taking unjust advantage of another for one's own benefit."¹⁵⁶ Unjust means "not just,"¹⁵⁷ where just is defined as "legally right; lawful; equitable."¹⁵⁸ Therefore, anything that is legally wrong would be unjust, and acting in a legally wrong manner towards someone else for benefit would therefore be exploitation. Adoptions that occur outside of the bounds of law, therefore, could be considered as forms of exploitation.

Virtually all of the illegal adoptions that occur are illegal because they are in violation of the Hague Adoption Convention.¹⁵⁹ The Convention requires that those whose consent for adoption is necessary "have given their consent freely" and "the consents have not been induced by payment or compensation of any kind."¹⁶⁰ The adoption of children who are not eligible for adoption is likewise a violation of the Convention.¹⁶¹ Children are typically not adoptable due to the nature by which the guardian's consent was given.¹⁶²

relinquished her rights to her child in opposition to her understanding that she would retain visitation rights).

154. See, e.g., McKinney, *supra* note 38, at 362 (describing a situation in Guatemala where parents understood they were signing an authorization for medical treatment and instead signed relinquishing papers).

155. GALLAGHER, *supra* note 142, at 34.

156. BLACK'S LAW DICTIONARY 660 (9th ed. 2009).

157. *Id.* at 1678.

158. *Id.* at 942.

159. Hague Adoption Convention, *supra* note 6, arts. 4–5 (stating the requirements for a legal intercountry adoption).

160. *Id.* art. 4(c)(2)–(3).

161. *Id.* art. 4(a).

162. *Id.* art. 4(b) (noting that consent must be freely given and not induced by

The abduction of children for the purpose of adoption is also in violation of an international convention on child abduction, the Hague Convention on the Civil Aspects of International Child Abduction.¹⁶³ Abduction occurs where a child is wrongfully removed or retained “in breach of rights of custody attributed to a person . . . under the law of the State in which the child was habitually resident immediately before the removal or retention.”¹⁶⁴ The rights of custody include “rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence.”¹⁶⁵ Children who are abducted are therefore being exploited because of the wrongful, or unjust, nature of the removal. In addition, because abduction by definition occurs in breach of custodial rights, consent has not been properly obtained for the adoption of these children, leaving these adoptions in breach of the Hague Adoption Convention as well.¹⁶⁶

In these particular cases, where a child is abducted and then adopted out to parents in another country, the situation is further complicated by the requirements of the Convention that the child be returned to the state in which the child was habitually resident.¹⁶⁷ The Convention further states “[t]he sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention,” but that it may be considered in decisions.¹⁶⁸ The fact that a set of parents has “legally” adopted a child does not release them from the requirements of the Convention, nor does it release the receiving country in question of its duties under the Convention.¹⁶⁹ Adoptive parents cannot, therefore, refuse to

payment).

163. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 U.N.T.S. 89 [hereinafter Hague Child Abduction Convention].

164. *Id.* art. 3.

165. *Id.* art. 5.

166. Hague Adoption Convention, *supra* note 6, art. 4(b).

167. Hague Child Abduction Convention, *supra* note 163, arts. 8–20.

168. *Id.* art. 17.

169. *Id.*

return these abducted children solely on the grounds that they have been given custody through adoption.¹⁷⁰

Illegal adoption practices also implicate the Convention on the Rights of the Child.¹⁷¹ The Convention calls on State Parties to “prevent the abduction of, the sale of or traffic in children.”¹⁷² An Optional Protocol provides further guidance on specific provisions of the Convention.¹⁷³ The Protocol defines sale of children as “any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.”¹⁷⁴ Any instance, therefore, where a child is outright sold from one person is, at least in the eyes of the Convention on the Rights of the Child, unlawful and therefore could be considered exploitation.¹⁷⁵ The definition says “by any person or group of person” requiring no specific person’s involvement, meaning it would apply in all instances where a child is sold.¹⁷⁶ This would include a parent selling a child to the adoption agency directly,¹⁷⁷ a parent selling a child to a trafficker or facilitator,¹⁷⁸ or the facilitator selling a child to an agency.¹⁷⁹

The Convention on the Rights of the Child also includes provisions regarding the abduction of a child.¹⁸⁰ The Convention states a child is not to be separate from “his or her guardians

170. *Id.*

171. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

172. *Id.* art. 35.

173. Optional Protocol to the Child Convention on the Sale of Children, Child Prostitution and Child Pornography, May 25, 2000, 2171 U.N.T.S. 227 [hereinafter Optional Protocol].

174. *Id.* art. 2(a).

175. *Id.*

176. *See id.*

177. *See, e.g.,* Corbett, *supra* note 32 (detailing instances of mothers selling their children to an orphanage).

178. *See id.* (noting a situation where facilitators approached parents directly).

179. *Id.* In this situation, the facilitator will have violated the Convention by selling the child, regardless of whether or not the facilitator properly obtained parental consent for adoption. Optional Protocol, *supra* note 173.

180. Convention on the Rights of the Child, *supra* note 171, art. 35.

against their will, except . . . [where] such separation is determined to be in the best interests of the child.”¹⁸¹

VI. RESULT OF USING THE HUMAN TRAFFICKING LABEL

Reliance on treaties already in place that govern adoption practices or the rights of children provides only some assistance in fully combating the illegal adoption practices that exist. The United States obligations under these treaties are too weak to sufficiently deal with the problem that exists. Application of the human trafficking label would increase the number of enforcement and remedial options available in combating the problem. The number of laws under which violators can be prosecuted, the laws available for civil enforcement and civil reparations, and the mechanisms for providing victim assistance enlarge.

A. *Weakness of Convention Obligations*

The United States has ratified both the Hague Adoption Convention and the Hague Convention on International Child Abduction.¹⁸² The United States has not ratified the Convention on the Rights of the Child,¹⁸³ but has ratified the Optional Protocol.¹⁸⁴ The obligations of the United States under each of the treaties differ but offer only minimal assistance in completely dealing with the problem of illegal adoption.

The extent to which the United States is obligated under any specific treaty or convention is the subject of other, far lengthier comments. Generally, the United States Supreme Court defined a treaty as “primarily a compact between independent nations.”¹⁸⁵ The Court held that a treaty “depends for the enforcement of its provisions on the interest and the

181. *Id.* art. 9.

182. U.S. DEPT OF STATE, TREATIES IN FORCE 398–99 (2012), available at <http://www.state.gov/s/l/treaty/tif/index.htm>.

183. *Id.* at 337–38; see also U.N. TREATY COLLECTION, STATUS OF TREATIES, CONVENTION ON THE RIGHTS OF THE CHILD, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.

184. TREATIES IN FORCE, *supra* note 182, at 338.

185. *Edye v. Robertson*, 112 U.S. 580, 598 (1884).

honor of the governments which are parties to it.”¹⁸⁶ The enforcement of any specific treaty, at least in the eyes of the United States, is up to the parties involved. While treaties themselves are not necessarily laws, the Court went on to say that “[a] treaty, then, is a law of the land . . . whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.”¹⁸⁷ Enforcement of any treaties concerning adoption relies on the United States’ willingness to do so.

The United States has shown willingness to enforce the Hague Adoption Convention.¹⁸⁸ At the same time, the extent of the U.S. obligation under this Convention in particular is fairly limited.¹⁸⁹ The requirements of this Convention are primarily one-sided. That is, in the case of an adoptive parent that resides in the United States, the United States is only obligated to ensure that the adoptive parent is properly eligible to adopt under U.S. laws¹⁹⁰ and to ensure that all documentation to that effect is properly given to the country of origin of the child.¹⁹¹ The state of origin is the party obligated to ensure that a child is adoptable under the terms of the Convention, not the receiving party.¹⁹² While the United States will deny a visa for a child that it determines is not adoptable¹⁹³ there is no specific requirement in this Convention that it make that determination

186. *Id.*

187. *Id.* at 598–99.

188. *See supra* Part IV.A on enactment of Intercountry Adoption Act; *see also supra* Part IV.B on the United States’ practice on denying visas.

189. *See* Hague Adoption Convention, *supra* note 6, art. 15 (stating that the Central Authority of the receiving state must only prove that the adoptive parent is eligible).

190. *Id.*

191. *Id.*

192. *Id.* art. 4 (stating that “[a]n adoption . . . shall take place only if the competent authorities of the State of origin . . . have established that the child is adoptable.”).

193. 8 C.F.R. § 204.3(i) (2011) (stating that “an orphan petition must be denied” if payment was induced in order to receive the child, not including “reasonable” payments for costs associated with the adoption).

for itself.¹⁹⁴ Further, the ability of the United States to make such a determination is incredibly limited. This determination is entirely dependent on two factors: the willingness of the sending country to allow a U.S. investigation in the first place and the ability of any investigators to gather evidence to support an allegation that the child is not adoptable.¹⁹⁵ The evidentiary issues are of paramount concern in light of the diplomatic considerations of essentially declaring that a sending country is not properly carrying out its obligations under the Hague Adoption Convention.¹⁹⁶

The U.S. obligations under the Option Protocol are more demanding and specific, but still limited in scope.¹⁹⁷ Parties to the Protocol are obligated to “ensure that, as a minimum, the . . . acts and activities . . . are fully covered under its criminal or penal law, whether these offences are committed domestically or transnationally”¹⁹⁸ Included in this is the obligation to ensure that the sale of children is criminalized.¹⁹⁹ The United States is therefore obligated to create (and presumably enforce) criminal laws that cover the various actions that are deemed unacceptable and in contravention of the rights of the child listed in the Protocol, such as child abduction or sale of a child.²⁰⁰ Despite the U.S. obligations, because this Protocol applies only to the fairly limited instances where actual sale or abduction of the child could be proven, use of these specific

194. See generally Hague Adoption Convention, *supra* note 6, art. 4 (stating that it is the responsibility of the state of origin to determine that a child is adoptable). Indeed, many of the cases that have been discovered were discovered not by the United States government, but by individual adopting parents and non-governmental organizations. See, e.g., Corbett, *supra* note 32 (detailing the story of Dale Edmonds, who, after learning the native language of her adopted children, discovered that the children were not only older than the agency had informed her, but also had a living birth mother in contradiction to their status as orphans).

195. For discussion on the difficulty of determining an illegal adoption took place, see *supra* Parts IV.B, IV.C.

196. For a detailed description of the visa denial process and the various issues involved, see generally James A.R. Nafziger, *Review of Visa Denials by Consular Officers*, 66 WASH. L. REV. 1 (1991).

197. See Optional Protocol, *supra* note 173.

198. *Id.* art. 3.

199. *Id.* art. 3(1)(a).

200. *Id.* arts. 2(a), 3.

provisions and the criminalization of the sale of child is only mildly helpful. Due to the many points at which the sale would take place and the various other evidentiary concerns already involved with proving an illicit adoption took place, actual enforcement under the Convention obligations would be difficult, if not outright impossible for the United States.²⁰¹

The Hague Child Abduction Convention offers the least help for enforcement of illegal adoption practices, even with the United States completely honoring its obligations. The primary goal of the Convention is to “secure the prompt return of children wrongfully removed to or retained in any Contracting State; and to ensure that rights of custody and of access under the law . . . are effectively respected.”²⁰² States who are party to the Convention are obligated to “take all appropriate measures to secure . . . the implementation of the objections of the Convention.”²⁰³ Again, the obligation of the United States under this Convention is to return children who may have been abducted to their state of origin for a determination of their custody to be made.²⁰⁴

B. Use of Trafficking Victims Protection Act

Defining illicit adoption practices as human trafficking would help close the gap in enforcement that currently exists. If considered human trafficking, illegal adoption practices can also be prosecuted under trafficking-related legislation and civil enforcement and reparations can be sought through trafficking-related acts. Without the use of trafficking-related legislation, penalties for illegal adoption schemes are fairly limited in the United States. Those Americans found guilty of illegal adoption schemes overseas are often only punished for visa fraud or money laundering.²⁰⁵ Due to jurisdictional issues, few foreigners

201. For discussion on the difficulty of determining if an illegal adoption took place, see *supra* Parts IV.B–C.

202. Hague Child Abduction Convention, *supra* note 163, art. 1.

203. *Id.* art. 2.

204. *Id.* arts. 8–20.

205. Smolin, *supra* note 5, at 30–31 (describing how Lauryn Galindo, a defendant in a Cambodian adoption scandal, was charged only with visa fraud and money laundering and would claim she was guilty of only regulatory “violations”); see also

are prosecuted under U.S. law for these actions.²⁰⁶ Use of trafficking laws provides more opportunity to prosecute foreigners, but more importantly, allows the United States to put more pressure on foreign countries to work to solve the problem of illegal adoption practices on their end.

In 2000, President Clinton signed into law the Trafficking Victims Protection Act of 2000 (“TVPA”).²⁰⁷ Prior to its passage, existing law was inadequate to properly combat modern-day trafficking.²⁰⁸ The Mann Act of 1910²⁰⁹ was used to prosecute trafficking crimes, but it was severely limited in its scope because it applied only to trafficking that occurred with the “purpose of prostitution.”²¹⁰ Other statutes were similarly weak.²¹¹

1. Increased Prosecution Options

The TVPA recognizes trafficking as a specific offense.²¹² It sets forth specific forms of trafficking that are considered crimes.²¹³ The reauthorization acts that followed likewise added various forms of trafficking to the list of criminal activities.²¹⁴

United States v. Galindo, 161 Fed. App'x 735 (9th Cir. 2006) (noting Lauryn Galindo's sentence of eighteen months).

206. See Sara A. Solow, *Prosecuting Terrorists As Criminals and the Limits of Extraterritorial Jurisdiction*, 85 ST. JOHN'S L. REV. 1483, 1505 (2011) (describing the historical background of extraterritorial jurisdiction and its application in non-terrorism related cases).

207. 22 U.S.C. § 7101 (2006); see also S. Res. 413, 108th Cong. (2004).

208. Jennifer A.L. Sheldon-Sherman, *The Missing “P”: Prosecution, Prevention, Protection, and Partnership in the Trafficking Victims Protection Act*, 117 PENN ST. L. REV. 443, 451 (2012).

209. 18 U.S.C. §§ 2421–24 (2006).

210. *Id.* § 2421; see, e.g., United States v. Garrett, 521 F.2d 444, 445–46 (8th Cir. 1975).

211. See Sheldon-Sherman, *supra* note 208, at 451 (noting that the statutes largely “applied only to physical or overt forms of coercion, including physical force or restraint, threats of physical force or restraint, or threats of legal coercion amounting to incarceration”).

212. Mohamed Y. Mattar, *Interpreting Judicial Interpretations of the Criminal Statutes of the Trafficking Victims Protection Act: Ten Years Later*, 19 AM. U. J. GENDER SOC. POL'Y & L. 1247, 1250 (2011).

213. *Id.*

214. *Id.*

One of those acts, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008,²¹⁵ included as crimes “benefiting financially from . . . trafficking in persons.”²¹⁶ The TVPA increases criminal penalties for offenses.²¹⁷ The TVPA also amended the federal Racketeering Influenced and Corrupt Organization (RICO) Act to include trafficking as a predicate offense, further increasing the penalties available in the prosecution of trafficking-related crimes.²¹⁸

2. TIP Report and Foreign Aid Considerations

The TVPA also works to ensure that other countries are working to combat trafficking. The TVPA set up a task force charged with measuring and evaluating the progress of the United States and other countries “in the areas of trafficking prevention, protection, and assistance to victims of trafficking, and prosecution and enforcement against traffickers, including the role of public corruption in facilitating trafficking.”²¹⁹

The task force is charged with preparing reports related to this role.²²⁰ One of those reports is the Trafficking in Persons (TIP) Report,²²¹ which is issued yearly to gauge the level of compliance with the minimum standards that the United States has set forth.²²² The report categorizes countries into three tiers based on the level of compliance.²²³ This report is of significant importance for two reasons. One, it is used by the President in

215. See William Wilberforce, Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008).

216. 18 U.S.C. § 1593A (2012).

217. 22 U.S.C. § 7109(b) (2006).

218. 18 U.S.C. §§ 1591, 1961(1)(A) (2006).

219. 22 U.S.C. § 7103(d)(2) (2011).

220. *Id.*

221. 22 U.S.C. § 7107 (2012) (referring to an “Annual Report” that has taken the form of the annual Trafficking in Persons Report); see also U.S. Dep’t of State, Trafficking in Persons Report, <http://www.state.gov/j/tip/rls/tiprpt/index.htm>.

222. 22 U.S.C. § 7106 (2012) (listing “the minimum standards for the elimination of trafficking applicable to the government of a country of origin, transit, or destination” and the criteria that are to be used in judging whether or not a country has met those standards).

223. U.S. Dep’t of State, Trafficking in Persons Report 55 (2013) [hereinafter 2013 TIP Report], available at <http://www.state.gov/j/tip/rls/tiprpt/2013/>.

making determinations as to “withholding of nonhumanitarian, nontrade-related assistance,” a power he is given by the TVPA.²²⁴ Countries, such as the Philippines, respond to the TIP Report in order to decrease the chances of having aid revoked.²²⁵ Second, the TIP Report receives massive public attention in newspapers and magazines across the country, drawing attention not only to the issue of human trafficking in general, but to specific countries who are deemed to be on the “watch list.”²²⁶

While noting the problem of illegal adoptions, the TIP Report currently does not place any weight on their existence in evaluating a country’s compliance with the minimum standards.²²⁷ For instance, the TIP Report’s narrative on China explicitly considers illegal adoption practices (as well as child smuggling) as non-trafficking crimes that made it more difficult to judge the status of human trafficking in that country.²²⁸ The narrative on Cambodia, a country known for its illegal adoption practices,²²⁹ contains no mention of adoption.²³⁰ Inclusion of illegal adoption practices would not only lend more weight to the

224. See 22 U.S.C. § 7107(d) (2012).

225. See *Trafficking in Persons Report*, International Justice Mission (Aug. 8, 2011), <https://www.ijmuk.org/TIPPreport> (last visited Jan 20, 2014).

226. See, e.g., Adeshina Emmanuel, *U.S. Adds Syria to List of Nations Failing to Combat Human Trafficking*, N.Y. TIMES, June 20, 2012, at A9, available at <http://www.nytimes.com/2012/06/20/world/human-trafficking-report-adds-syria-to-failure-list.html> (demonstrating that newspapers and others draw attention to the TIP Report, forcing countries to respond to their status).

227. See, e.g., 2013 TIP Report, *supra* note 223, at 99 (noting that Bolivian law “diverges from the 2000 UN TIP Protocol by penalizing illegal adoption as human trafficking”); see also U.S. Dep’t of State, *Trafficking in Persons Report 90* (2012) [hereinafter 2012 TIP Report], available at <http://www.state.gov/j/tip/rls/tiprpt/2012/> (noting that illegal adoption is “a crime that does not fall within the 2000 UN Tip Protocol,” a statement that is arguable).

228. 2013 TIP Report, *supra* note 223, at 130 (giving one recommendation for China as “separating out crimes . . . such as illegal adoption” in order to “further refine the definitions of trafficking-related crimes” so that proper evaluation can be done for the country); 2012 TIP Report, *supra* note 227, at 120 (noting “due to the government’s continued conflation of human smuggling, child abduction, and fraudulent adoptions with trafficking offenses, it is unclear how many trafficking cases the government investigated and prosecuted during the reporting period.”).

229. See, e.g., Smolin, *supra* note 5, at 30–31.

230. See 2013 TIP Report, *supra* note 223, at 116–19.

seriousness of the problem, but may also negatively affect the rankings of some countries. In turn, these countries would be more likely to address the issues in order to avoid the potential of losing U.S. aid.

3. Remedies for Victims

The TVPA provides remedies for victims, including civil reparations.²³¹ Victims of trafficking have the right to bring action in “an appropriate district court of the United States and may recover damages and reasonable attorney’s fees.”²³² The act allows for causes of action to be brought within ten years.²³³ The conference of this right upon victims allows for “private actors to enforce” the rights that “public enforcement alone is insufficient to address.”²³⁴ Civil remedies allow victims to achieve civil enforcement of the TVPA where prosecution itself may be inadequate.²³⁵ Further, civil remedies allow victims to obtain monetary redress beyond the restitution required under criminal case brought under the TVPA.²³⁶

VII. CONCLUSION

Illegal adoption practices are a pervasive problem in countries that have ratified the Hague Adoption Convention, as well as in those that have not. As seen in Part I, the problems range from fraudulent practices designed to trick parents and guardians into giving up their children for adoption, practices that involve the forging of documents to increase the chances of children being adopted, and, in some cases, outright kidnapping of children for the sole purpose of adopting them out.

231. 18 U.S.C. § 1595 (2008).

232. *Id.*

233. *Id.*

234. Kathleen Kim & Kusia Hreshchysyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN’S L.J. 1, 4 (2004).

235. Jennifer S. Nam, *The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims*, 107 COLUM. L. REV. 1655, 1665 (2007) (noting that because victims do not have to rely on prosecutors, civil remedies allow these victims to combat human trafficking on their own).

236. *Id.* at 1666.

The current U.S. response is limited in both protection and enforcement. The protection the United States primarily can offer is by ensuring that only those parents that are qualified are eligible to adopt. This protection does little to safeguard children overseas who are being illegally obtained for adoption purposes, usually outside of the knowledge of the prospective parents. Current U.S. enforcement is limited primarily to visa denial with little recourse beyond that. Unless the violators involved are U.S. citizens, there is almost no mechanism currently for the United States to punish them.

The use of the “human trafficking” label would help bridge the gap both in protection and enforcement. On the enforcement side, use of the label opens up more legislation under which the United States can properly prosecute violators and others who are involved in illegal adoption practices. The TVPA offers criminal penalties for those involved in human trafficking.²³⁷ In addition, it offers civil remedies for human trafficking victims.²³⁸ These remedies are otherwise unavailable to victims of illegal adoption practices.

Finally, and most importantly, the use of the human trafficking label would affect a country’s standing under the TIP Report. The TIP Report is currently the primary method of assessing a country’s response to human trafficking problems with serious repercussions both in public opinion and in foreign aid. The use of the human trafficking label for illegal adoption practices would surely affect the standing of those countries with serious problems in their adoption processes, particularly those that are currently doing little to address the problem and, in many cases, are actively aiding the problems. By labeling these illegal adoption practices as a form of human trafficking, the United States can increase its ability to respond to the problems that currently afflict countless children and parents.

237. 22 U.S.C. § 7109(b) (2006).

238. See Kim & Hreshchyshyn, *supra* note 234, at 1–3.