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ORIGINAL PAPER¹

An Examination of Trafficking Loopholes in International Adoption: Recommendations for Trafficking Avoidance

Risa Harrison²

Abstract: *The Hague Convention outlines an international agreement to ensure that intercountry adoptions happen in the best interest of the child. Much controversy exists around international adoption because some children have been trafficked into loving homes in a corrupt adoption process. While it is a child's human right to be raised in a loving home, it is required that a child is not trafficked into such an environment. This paper looks at areas where loopholes can be found in the Hague convention such that a child can still be trafficked through a corrupt adoption even between Convention signing countries. It shows how international adoption and trafficking should differ, and will suggest ways adopting NGOs and Central Authorities can ensure that they are only facilitating adoptions for children in need of families, devoid of corruption, and can therefore avoid unknowingly trafficking children. This paper makes systemic and systematic recommendations to help ensure human rights and increase human security.*

Introduction

International adoption serves to provide families to children without families. It exists to help ensure a child's human rights to be raised in a loving home. Unfortunately, there are occasions where fraud, improper financial gain, selling of a child, or exploitation takes place in the adoption process. Even when this takes place and the child ends up in a loving home, the child's rights have been violated, and the child has been trafficked.

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The answer to this problem is not to stop international adoption. According to the Convention on the Rights of a Child (CRC), a child has the right to be raised in a loving home³. When such a home cannot be provided in a child's country of origin, the child has a right to be raised by a family in another place.

Trafficking needs to be prevented to ensure a child's rights are protected. Corrupt adoptions take away a child's rights. Therefore, it is in the best interest of the child for safeguards to be put into place to prevent exploitation. Further education, monitoring and transparency, and accountability will each support law-abiding adoptions that happen in the child's best interests.

Child Trafficking and International Adoption

Any adoption that happens illegally or with exploitation is considered child trafficking, even if the child ends up in a loving home. An illegal adoption is "trafficking of children through adoption for exploitation purposes"⁴. According to the "Trafficking in Persons" report⁵, any recruitment, transportation, transfer, harbor, or receiving of a child for exploitation is trafficking, even if the minor gives consent.

'Exploitation' as defined in the "Trafficking in Persons" report is ambiguous, which is part of the challenge defining it apart from sex, labor, and the removal of organs. "If a child is sold into adoption and raised by a loving family as a son or daughter, the further element beyond that act does not fit into usual understandings of an exploitative purpose"⁶.

The preamble to the Hague Convention states its purpose to "prevent the abduction, the sale of, or traffic in children," yet there is no further definition of what trafficking means. Article 35 of the CRC includes, "States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form."⁷ David Smolin argues the ambiguity of this definition implicitly claims that any selling or buying of a child is trafficking, and that the child has been exploited in that very act⁸. Article eight of the CRC states that a child has the right "to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful

³ Convention on the rights of the child. (2015).

<http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

⁴ Clair, S. (2012, January). Child trafficking and Australia's intercountry adoption system. p. 12. *The University of Queensland Human Trafficking Working Group*. Retrieved from www.law.uq.edu.au/humantrafficking

⁵ Trafficking in persons report. (2007). U.S. Department of State Office of the Under Secretary for Democracy and Global Affairs and Bureau of Public Affairs, (11407) Retrieved from <http://www.state.gov/documents/organization/82902.pdf>

⁶ Clair, S. (2012, January). Child trafficking and Australia's intercountry adoption system. p. 13. *The University of Queensland Human Trafficking Working Group*. Retrieved from www.law.uq.edu.au/humantrafficking

⁷ Convention on the rights of the child. (2015). <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

⁸ Smolin, D. M. (2004). Intercountry adoption as child trafficking. *Valparaiso University Law Review*, 39(2), 281 p. 50.

interference.”⁹ When an illegal adoption takes place, the rights of the child are violated, and therefore exploitation takes place.

It is of note that the United States does not consider purchasing a child in the case of adoption trafficking. The United States claims corrupt adoption is not a movement from freedom to slavery¹⁰, which they say is required for trafficking. However, the United States’ view is the minority viewpoint.

The Hague Convention and International Adoption

Adoption places children without families and homes with people who want to provide for them. In instances when the country of origin cannot provide adequate care for a child’s development, international adoption can be the best solution.

The Hague Convention, signed May 29, 1993, is a response to corrupt adoptions resulting from a lack of legal protection¹¹. The premise of the Hague Convention is to put the interests of the child before the interests of people who want a child¹². Article one of the Hague Convention explains the Convention exists to establish a coordination system between Central Authorities of different States to enforce safeguards to prevent abduction, sale, or trafficking of children. At present 93 States have signed the treaty, which includes most of the receiving countries and many of the sending entities.¹³

While the Hague Convention is set to ensure that children are properly placed and not trafficked, it does lack accountability. It was intended to create Central Authorities for supervision of organizations and persons involved in the adoption process. In spite of the regulations, trafficking still exists in the international adoption system.¹⁴

The receiving countries that sign the treaty are responsible for their entities. However, they are not required to evaluate or be held accountable for the compliance of the sending countries with which they are interacting in an adoption process. Additionally, many of the sending countries have overburdened legal systems and face their own internal challenges with corruption. They do not have the resources needed to enforce the Hague Convention or any discovered violations.

⁹ Convention on the rights of the child. (2015).

<http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

¹⁰ Graff, E. J. (January 3, 2013). Call it trafficking. p. 4. *The American Prospect* Retrieved from <http://prospect.org/article/call-it-trafficking>

¹¹ Soptica, N. (n.d.). Hague convention on protection of children and co-operation in respect of intercountry adoption: A legal framework for stealing, kidnapping and trafficking children.

¹² Graff, E. J. (January 3, 2013). Call it trafficking. p. 4. *The American Prospect* Retrieved from <http://prospect.org/article/call-it-trafficking>

¹³ Soptica, N. (n.d.). p.2. Hague convention on protection of children and co-operation in respect of intercountry adoption: A legal framework for stealing, kidnapping and trafficking children.

¹⁴ Soptica, N. (n.d.). p.3. Hague convention on protection of children and co-operation in respect of intercountry adoption: A legal framework for stealing, kidnapping and trafficking children.

Human Rights and Children Rights

It is the right of a child, and in the best interests of the child's development, to be raised in a loving home.¹⁵ The preambles to both the Hague Convention and the CRC state, "Recognizing that 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." The Hague Convention further includes, "Recognizing that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin." Additionally, psychological studies show that children need parental care to be able to thrive mentally, physically, and emotionally.¹⁶

Bartholet¹⁷ argues that human rights dictates that children have a right to family care, and therefore children who are total orphans have a right to be internationally adopted if a foreign State is where care providers can be found. It is a violation of human rights to prevent a child from such care, or to prolong the process of accessing a family. There are some arguments that a child should remain in institutional care until all in-country options have been exhausted. However, studies show that prolonged time in an institution can have long-term effects on a child's ability to thrive. Therefore, clear guidelines in the case of international adoption are important because adoption is finding a family for a child, not a child for a family.¹⁸

"Estimates indicate that there are 143 million orphaned children¹⁹, over eight million living in orphanages,²⁰ and some 100 million street children with no available caregivers".²¹ There are many children who need homes. International adoption providing homes for children is a child's human right.

Indicators and examples

At present, international adoption is high-risk. Anecdotal evidence shows the challenge for the receiving countries to make sure the children they place into homes are truly in need of adoption and have no family able or willing to care for the child. Case studies have found that financially poor mothers can be paid for their infant by a corrupt orphanage desiring

¹⁵ Bartholet, E. (2010). International adoption: The human rights position. *Global Policy*, 1(1), 91-100.

doi:10.1111/j.1758-5899.2009.00001.x

¹⁶ Bartholet, E. (2010). p. 94. International adoption: The human rights position. *Global Policy*, 1(1), 91-100.

doi:10.1111/j.1758-5899.2009.00001.x

¹⁷ Bartholet, E. (2010). p. 94. International adoption: The human rights position. *Global Policy*, 1(1), 91-100.

doi:10.1111/j.1758-5899.2009.00001.x

¹⁸ Soptica, N. (n.d.). p.2. Hague convention on protection of children and co-operation in respect of intercountry adoption: A legal framework for stealing, kidnapping and trafficking children.

¹⁹ Joint United Nations Programme on HIV/AIDS et. al. (2004). P.7 "Children on the brink 2004: A joint report of new orphan estimates and a framework for action."

²⁰ Secretary-General. (2006). p.16. "Report of the independent expert for the United Nations study on violence against children." Delivered to the General Assembly, UN Doc. A/61/299

²¹ Bartholet, E. (2007). p. 182-183. International adoption: The child's story. *Georgia State University Law Review*, 24(2), 1. See also Mitchell, S. (May 24, 2009). "Adoptions Brutal Barriers." *The Sunday Business Post On-Line*. Retrieved from <http://www.businesspost.ie/#!/purchase>

the fees from an adoptive family.²² Additionally, a mother can be told that their child died at birth, when really he or she was abducted and taken to an orphanage for a reward from the care center.²³ “Call it Trafficking” gives these scenarios:

“And so you tell the woman who just gave birth that her baby died in childbirth. You sell that child for a finder’s fee of \$200 - a month’s income - to the Christian adoption agency in the next town, saying you ‘found’ the child abandoned on the street. Or you go out into the Ethiopian bush, asking illiterate families if they want to send the youngest of their children to get an education in America. You offer each family who hands over a child \$20 – a fortune – to help feed their remaining children, and you promise that the new American guardians will send pictures and money every year.”²⁴

Other research has revealed cases in which children in orphanages were placed there during a parent’s medical treatment and were never reunited.²⁵

Anecdotal evidence also supports the view that many internationally adopted children thrive in their new environments. One such adoptee is Olana Hirsch Khan. Olana serves on the Board of Directors for an adoption agency in California. She has volunteered her adult life to working with orphans, volunteering in orphanages, and staying involved with the adoption community.²⁶

Many children flourish in their new families. While research still needs to be done to prove success in non-corrupt adoptions, we do know that children can thrive:

“Very, very few of the homeless children in the sending countries of the world will be returned to birth families capable of nurturing them or find adoptive homes in their countries of birth. Very few will be released from institutions to foster care, and even if poor countries were to make dramatic progress in developing foster care as an alternative to institutions, it is extremely unlikely that foster care in the poor countries of the world will work better than it does in the privileged U.S. This means that even those children lucky enough to be released to foster care will not be nearly as well off as they would be if adopted.”²⁷

²² Graff, E. J. (January 3, 2013). Call it trafficking. p. 4. *The American Prospect* Retrieved from <http://prospect.org/article/call-it-trafficking>

²³ Graff, E. J. (January 3, 2013). Call it trafficking. p. 4. *The American Prospect* Retrieved from <http://prospect.org/article/call-it-trafficking>

²⁴ Graff, E. J. (January 3, 2013). Call it trafficking. *The American Prospect* Retrieved from <http://prospect.org/article/call-it-trafficking>

²⁵ Graff, E. J. (January 3, 2013). Call it trafficking. *The American Prospect* Retrieved from <http://prospect.org/article/call-it-trafficking>

²⁶ Bay area adoption services (BAAS). (2007). Retrieved from <http://baas.org/index.php>

²⁷ Bartholet, E. (2007). p.17. International adoption: The child's story. *Georgia State University Law Review*, 24(2), 1.

One woman who has thrived through international adoption is Zahara Nakibule. Nakibule was adopted from Uganda at the age of twelve. At present, she is a university graduate, a career woman, and is looking to further her education for the purposes of supporting other orphans like herself. Nakibule remembers her mother's passing, and is most grateful for her adoptive parents' support. They have raised her in the United States with frequent trips to Uganda and have kept Ugandan values in their home. They have helped Nakibule receive her American identity while also maintaining her Ugandan roots.²⁸

Analytical Suggestions for Adoption NGOs

Education About Trafficking as Adoption

In the places where the legal system is already overburdened, enforcing rules around international adoption pales to other concerns. The Hague Convention's measures to prohibit corrupt adoptions have been implemented poorly. "This poor implementation is a result of leaving the countries to enforce its provisions as they wish; that means that the countries that participate in an adoption must find the political will to effectively implement and enforce the Convention."²⁹

Yet, as is proven by the existence of the Hague Convention, international laws for adoption are of importance. Awareness education of corrupt schemes surrounding international adoption needs to be developed and given to adoption agencies in both sending and receiving States. The Hague Convention provides accountability for countries that have signed the treaty to ensure their own practices are clean. As previously stated, the overburdened legal systems in poor countries may prevent investigation into suspicious cases, therefore never bringing certain wrongs to justice. Moreover, there is no requirement or incentive for one country to investigate corrupt practices in the other acting country.

Law enforcement agencies need to be informed about the trafficking of children under the guise of international adoption, and officials need to be incentivized to persecute the perpetrators of trafficking in the case of adoption. It is important to educate rural individuals as a way to prevent a woman from accidentally selling her child all the while thinking her child is receiving a sponsorship to attend school in a foreign country.

Financial Monitoring to Prevent International Adoption as a Business

Adoption is expensive. Fees involved include lawyers, notaries, social workers, medical exams, background checks, and international travel. The financial transactions need to be monitored such that no family is paying more for their child than the fees

²⁸ Children of Grace. (2014). Retrieved from www.childrenofgrace.com.

²⁹ Soptica, N. (n.d.). p.6. Hague convention on protection of children and co-operation in respect of intercountry adoption: A legal framework for stealing, kidnapping and trafficking children.

required for the legal transaction to transpire. Further monitoring could prevent improper financial gain.

Increased Focus on Economic and Human Development

The adoption process has the opportunity to provide for economic and human development needs of the country where a prospective adoption is happening. Adopting families and receiving countries' agencies have the opportunity to support the orphanage and community from where their child came. There is hope families would be interested in supporting the economic and human development of a sending country. Economic and human development leads to poverty alleviation. Poverty alleviation addresses causes of early death and factors that lead to an inability to raise one's biological child. Adoption is a great option to remove a child from situation where they need a home and a family. However, adoption in and of itself does not provide a sustainable solution to the endemic poverty that may be causing a child to need to be adopted in the first place. Economic and human development in countries with high levels of poverty could lead to fewer children needing homes and families due to increased accessibility of basic living standards. It could also provide more opportunities for intracountry adoption where children could be provided for in their country of origin. The ideal and sustainable situation would be a case in which a child's birthparents are equipped and healthy enough to care for their child.

More Accountability for Receiving Agencies

"To a remarkable degree, United States placement agencies seek to avoid accountability for their role in intercountry adoption."³⁰ The United States agencies oftentimes will leave the accountability of practice to a sending country's Central Authority. They will avoid investigation under the assumption that if a country has signed the Hague Convention their practices are clean, and in cases where trafficking or poor practice is revealed, the United States agencies will say it was the responsibility of the sending country and will take no responsibility for the exchange. Agencies in the United States believe it is the sending agency and country's responsibility to determine a child's adoption eligibility.³¹

Adopting families are requested to sign a liability waiver with the receiving adoption agency. These waivers are intended to highlight that international adoption is risky and that the agency cannot guarantee health, age, or a true history of the adopting child. However, they have come to be used as waivers that keep the agency unaccountable for negligence, as they are no longer responsible for what transpired in the process.

³⁰ Smolin, D. M. (2004). p. 193. Intercountry adoption as child trafficking. *Valparaiso University Law Review*, 39(2), 281.

³¹ Smolin, D. M. (2004). p. 193. Intercountry adoption as child trafficking. *Valparaiso University Law Review*, 39(2), 281.

Adopting parents must be able to instill more trust in the agencies they are working with- the agencies that have promised to identify a suitable child for the adopting family. Families need to trust that when they work with a Hague Convention Certified agency their child will indeed be in true need of a family, and will not have been sold or trafficked into their loving home.

Assurance of this nature can only come through requiring receiving adoption agencies to be responsible for a pure and thorough investigation into the child's history. The process for reducing such responsibilities will be laborious and time-consuming. In the interest of human rights for both the child and the child's birth family, it is a must. For example, there was a family who desired to adopt a little boy from Uganda. They sensed he appeared unusually loved considering his time in the institution, thus they took it upon themselves to investigate. They found that the little boy was separated from his father after an automobile accident. The boy was taken to institutional care while his father received medical treatment. The prospective adopting couple researched further to find the child's father and reunited the man and his son.³² It was the father's human right to raise his son, and it was the boy's right to be raised by his capable and loving birth father. This prospective adoptive couple provided this family with their human rights.

Working with foreign governments is a challenge. The rules are different, and the procedures and policies distinct. Yet, there must be accountability for agencies to research a child's story before matching them with a home in a foreign country.

Increased Monitoring and Transparency

In an effort to further avoid illegal adoptions, improper gain, child trafficking, false claims of abandonment or orphaning, and exploitation, increased monitoring and transparency needs to be implemented into the intercountry adoption process. "Transparency is one of the best protections against misuse of a system and exploitation of children as it enables users to see what protections are in place and identify where actual or potential abuse of the system may occur."³³ Fees, laws, details about an orphanage, and a comprehensive history on the child being adopted must be presented up front to both the sending and receiving countries. Both entities ought to be required to share with the other their laws, expenses, process, and requirements. Educating adoptive parents about bribery and corruption and encouraging them to report it when found will help reduce trafficking.³⁴ If NGOs on both the sending and receiving side regularly monitor their foreign partners through the lens of the Hague Convention and the CRC, transparency would increase, and therefore heightened accountability will be the natural result.

³² Riley, K. (June 3, 2012). Rileys in Uganda: Out of here. Retrieved from <http://rileysinuganda.blogspot.com/2012/06/out-of-here.html>

³³ Clair, S. (2012, January). Child trafficking and Australia's intercountry adoption system. p. 25. *The University of Queensland Human Trafficking Working Group*. Retrieved from www.law.uq.edu.au/humantrafficking

³⁴ Clair, S. (2012, January). Child trafficking and Australia's intercountry adoption system. p. 25. *The University of Queensland Human Trafficking Working Group*. Retrieved from www.law.uq.edu.au/humantrafficking

Systematic and Systemic Change to Address Trafficking in Adoption

Both systematic and systemic change is needed to address the challenge of international adoption promoting practices that could be considered trafficking. In response, the US State Department can start requiring adoption participants to take an online Adoption Law, International Development, and Human Security course. The course can be a requirement of the immigration application (I-600a). The fee for the course, which could be similar to the \$400.00 for the required pre-adoption course, could be allotted for United Nations International Children's Emergency Fund (UNICEF) and designated to the country from where the adoption is happening. This contribution would be designated to help address specific systemic initiatives to prevent the need for adoption in the sending country. This change would provide two solutions, one systematic and one systemic, to the challenge with international adoption promoting practices that could be considered trafficking.

The first solution is education. Educating those who are entering the adoption process on the legal, international development, and human security frameworks will significantly reduce the unintended promotion of practices that could be considered trafficking. Having an educated approach to understanding the need for and impact of adoption can start a systematic change to the current environment.

The second solution directs the funds for the online course to UNICEF to fund programs such as basic education and gender equality, innovation in education, and child protection. These programs systemically address the challenges that lead to a child needing a home or a family.

Conclusion

To preserve the human rights of children who are orphaned or abandoned, finding families to care for them, whether in-country or internationally is important. However, this must be done in a way that supports a child's wellbeing and put the child's best interests first. In cases of exploitation, trafficking, improper financial gain, or fraud, a child's rights are violated even if the child is adopted into a loving home.

Education about trafficking in adoption, financial monitoring to prevent international adoption as business, increased focus on economic and human development, more accountability for receiving agencies, increased monitoring and transparency, and systematic and systemic changes to address trafficking in adoption, will each support to ensure adoptions are done in support of a child's human rights, security, and start to address the issues around why adoption is needed in the first place.

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