

AIRPLANE TRIPS AND ORGAN BANKS: RANDOM EVENTS AND THE HAGUE CONVENTION ON INTERCOUNTRY ADOPTIONS

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I. INTRODUCTION

In the summer and fall of 1998, a proposed amendment to China's adoption law was under consideration by the National People's Congress, the law making body of China.¹ Many speculated that the change was intended to reduce the number of Chinese children being adopted by foreigners through international adoption.² The proposal followed a dramatic increase in the number of international adoptions originating in China over the previous five years.³ If this legislation ultimately leads to a reduction in the number of Chinese children available for adoption internationally, China would seem to follow a pattern in the area of international adoption.⁴ Rather than remaining relatively constant, the number of international adoptions from any given country appears to fluctuate significantly over time.⁵ This fluctuation can cause great frustration to both the prospective parents and the adoption professional. More importantly, assuming the number of children suitable for

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¹ See *China: New Adoption Law Proposed*, CHINA DAILY NEWS, Aug. 26, 1998, at Business.

² Cf. *id.* (explaining that proposed changes would place more procedural requirements on foreign adoptions but not further restrict which foreigners could adopt). But see *China's Lawmakers Say No Stricter Adoption Controls for Foreigners*, XINHUA NEWS AGENCY, Aug. 28, 1998, available in WESTLAW, CHNANEWS-A Database (noting that Chinese officials emphasize these are not further restrictions but merely more detailed and standardized procedures).

³ See Daniel Kwan, *Rescuing the Unwanted Waifs*, S. CHINA MORNING POST, Sept. 13, 1998, at 5, available in LEXIS, News Group File.

⁴ Fortunately, it appears that the new law has encouraged domestic adoptions by weakening certain requirements and, at the same time, technically weakening the same requirements for international adoptions.

⁵ Cf. Office of Children's Issues, U.S. State Dep't, *Immigrant Visas Issued to Orphans Coming to the U.S.* (visited Nov. 1, 1998) <http://travel.state.gov/orphan_numbers.html> [hereinafter *Visas*] (listing top twenty-one countries of origin for the years 1989 to 1997). The list shows some dramatic fluctuations, like Romania, where the number of adoptions rose from 121 in 1990 to 2,574 the very next year and then dropped to 97 two years later. The list also includes Peru, where 705 children were adopted in 1991 but less than 51 in 1995. See *id.*

international adoption remains constant, fewer actual adoptions represent missed opportunities, children who could have been adopted but were not.⁶

What is the cause of the fluctuation in the number of international adoptions from different countries? Surely there are localized economic and political reasons for the fluctuation. Wars create orphans who are then available for adoption. A particularly tough winter or severe drought can wreak havoc on a less developed country. But there are other causes that this Note will address. These include negative media attention and other sentiments that accompany a country giving up its children. This Note will study some of these factors, using China as a focus.⁷ These factors can be generalized in such a manner that the Note would apply to countries other than China.

After a brief summary of the history and procedures of international adoptions of Chinese children, this Note will examine the political forces acting on China that may explain why China would want to restrict international adoptions. Further, the Note will consider to what extent the international legal community has sought to address these concerns through the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption ("the Convention").⁸ Finally, some suggestions will be made that, if implemented, may keep international adoption open as an option for Chinese children. This would help ensure that more children in Chinese orphanages have the opportunity to grow up in a home instead of an institution and with a family instead of a staff.

II. OVERVIEW OF CHINESE INTERNATIONAL ADOPTIONS

A. History of Chinese International Adoptions

The history of international adoptions of Chinese children is a short one. Chinese law did not even recognize adoptions until 1981, when it officially

⁶ The author assumes that international adoptions are a positive outcome for children who cannot be placed in a family setting in their own country. When children cannot be reunited with their natural families and there are no available families willing and able to adopt them in their own country, then international adoptions offer children the opportunity to grow up in a family environment. This outcome, the author believes, is much more desirable than the child growing up in an institution.

⁷ China was chosen because China is one of the leading sending countries in international adoptions and because of the possible changes in its adoption policy.

⁸ See Hague Convention of Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134 [hereinafter Hague Convention].

allowed domestic adoptions.⁹ In 1988, China passed regulations allowing foreigners with either Chinese heritage or close ties to China to adopt Chinese children.¹⁰ This resulted in very few international adoptions from China but did encourage foreign interest in Chinese children. Due to this interest, in 1991 the Chinese government passed the Adoption Law of China, which treated foreigners hoping to adopt Chinese children the same as Chinese citizens who wished to adopt.¹¹

The increased willingness to consider international adoption for its orphaned children may have been a result of China's one-child policy. The policy was implemented in 1979 as a population control measure.¹² Combined with the Chinese culture's preference for male children, the policy produced a huge number of abandoned female infants.¹³ There are an estimated 150,000 female infants abandoned each year in China.¹⁴ It is further estimated that millions of Chinese children, a vast majority of whom are girls, live in welfare institutions.¹⁵ These abandoned infants have been the source of the dramatic increase in international adoptions of Chinese children.

The rise of international adoptions of Chinese children following the passage of the 1991 Adoption Law in China is dramatic. The rise can be seen by analyzing United States State Department records on the number of immigration visas issued to orphans coming to this country.¹⁶ Between fiscal years 1989 and 1992, the number of Chinese children coming to the United States each year did not exceed 210.¹⁷ In fiscal year 1993, 330 Chinese children entered the United States. In 1994, 787 Chinese children entered; in 1995, 2,120 entered; in 1996, 3,333 entered; and in 1997, 3,597 Chinese children entered the United States.¹⁸ The most recent data suggests that the

⁹ See Robert S. Gordon, *The New Chinese Export: Orphaned Children—An Overview of Adopting Children from China*, 10 *TRANSNAT'L LAW* 121, 132 (1997).

¹⁰ *See id.*

¹¹ *See id.*; see also Adoption Law of 29 Dec. 1991, art. 20 (China), reprinted in 18 *ANNUAL REVIEW OF POPULATION LAW* 424, 426 (Reed Boland ed., 1991) (providing that foreigners may adopt Chinese children under this general law).

¹² *See* Gordon, *supra* note 9, at 131. In general, the policy allows families to have only one child. *See id.*

¹³ *See id.* The Chinese are said to prefer males because they are able to carry on the family name and care for elderly parents. *See id.*

¹⁴ *See id.*

¹⁵ *See* Kwan, *supra* note 3.

¹⁶ *See* Visas, *supra* note 5.

¹⁷ *See id.*

¹⁸ *See id.*

large number of Chinese children being adopted by United States' citizens is continuing.¹⁹

B. Current Requirements for Adopting Chinese Children

As noted above, the Chinese Adoption Law of 1991 began allowing foreign individuals and couples to adopt Chinese children if they otherwise met the requirements that Chinese individuals and couples were required to meet. Thus, both Chinese and foreigners wishing to adopt a healthy Chinese child must be over thirty-five years of age and childless.²⁰ The lack of a marriage requirement allows Chinese adoption law to stand out internationally. Single women, single men, and homosexuals, precluded from adopting children from most other nations, are allowed to adopt Chinese children.²¹ This may be a factor in the large number of adoptions from China.²² If those wishing to adopt are under age thirty-five or already have a child, they may still adopt a Chinese child with a mild medical condition.²³

C. Procedures for Adopting Chinese Children

The actual process by which potential adoptive parents adopt a Chinese child is quite complex. To facilitate this process, the United States State Department has published a brief summary of the steps involved.²⁴ The first step is to identify an agency in the United States that has been approved by the Child Center for Adoption Affairs (CCAA), the Chinese central agency that oversees adoptions.²⁵ Next, the potential parents must prepare a rather extensive list of documents.²⁶ This list includes birth certificates, marriage

¹⁹ See Office of Children's Issues, U.S. State Dep't, *International Adoption—China*, at Update (visited Nov. 1, 1998) <http://travel.state.gov/adoption_china.html> [hereinafter State Department] (noting that in the first three quarters of fiscal year 1998, 3,042 visas were issued compared to 2,414 in the same period the previous year).

²⁰ See Glenn Schloss, *Americans Queue for Chinese Babies*, S. CHINA MORNING POST, Aug. 10, 1997, at 1, available in 1997 WL 13260137 (noting also that age requirement is often not strictly enforced).

²¹ See *id.* But see State Department, *supra* note 19, at General Summary of Adoptions in China, II (B)(1) (quoting the China Center for Adoption Affairs as advising that “[a]doption applications from homosexual families are not acceptable”).

²² See Schloss, *supra* note 20, 21.

²³ See Adoption Law of 29 Dec. 1991, *supra* note 11, art. 8.

²⁴ See State Department, *supra* note 19, at The Adoptive Process.

²⁵ See *id.* at The Adoptive Process, I (A).

²⁶ See *id.* at The Adoptive Process, II (A).

certificates, and proof of termination of any previous marriages. Also needed are notarized medical certificates executed by a physician, a statement that the parents are childless, proof of no criminal record, verification of employment and income, and bank statements. Finally, two letters of reference, a home study prepared by an appropriate social service agency, a letter of intent to adopt, a power of attorney if only one parent is planning to travel to China, and an approval notice from the United States Immigration and Naturalization Service (INS) are required.²⁷

The extensive list of documents must be properly authenticated.²⁸ This often involves having the documents notarized and authenticated by the Office of the Secretary of State in the parents' state of residence.²⁹ Next, the United States State Department's Authentications Office and then the Chinese Embassy or Consulate must authenticate the documents.³⁰ The CCAA also requires a Chinese translation of each document, a service it will complete for two hundred dollars.³¹ In addition, the parents must notify the INS so that they will have the appropriate documents ready when the parents are ready to travel to China.³²

Once this packet of documents is complete, the adoption agency in the United States may apply to CCAA to begin the adoption. The parents may indicate a preference for a healthy child, a particular gender, age, or even for a child from a particular region of China.³³ These preferences, however, may not be met in the final adoption match.³⁴ The CCAA will then notify the agency if and when there is a match identified. The letter will include an introduction, photos, and a health record of the child. Any questions about the child can then be addressed to the CCAA.³⁵

If the adoptive parents wish to proceed with the adoption, then they so inform the CCAA and await formal notice to proceed to China.³⁶ Once this notice is received, the parents proceed to the city where the child is located and have interviews with the local Child Welfare Institute. A contract will then be

²⁷ *See id.*

²⁸ *See id.* at The Adoptive Process, II (B).

²⁹ *See id.* at The Adoptive Process, II (D).

³⁰ *See id.*

³¹ *See id.* at The Adoptive Process, II (A).

³² *See id.* at The Adoptive Process, V (A).

³³ *See id.* at The Adoptive Process, III.

³⁴ *See id.*

³⁵ *See id.* at The Adoptive Process, IV.

³⁶ *See id.* at The Adoptive Process, V (A).

drawn up, signed, and notarized.³⁷ At this point, the parents will be able to see the child. The parents may also request that an American physician check the child while in China.³⁸ If both the parents and the Chinese officials agree to the adoption, the final contract can be finalized. As a part of the adoption, the parents must make a payment to the Child Welfare Institute, usually around three to four thousand dollars.³⁹ The parents must then secure a Chinese passport and exit permit for the child.⁴⁰ At this point, the new family should be able to return to the United States.

D. Recent Changes in Chinese Adoption Law

Three significant changes have been made to the Adoption Law of China. First, for both Chinese and foreigners hoping to adopt, the age requirement has been lowered from thirty-five to thirty years. Second, those parents already with a child are now able to adopt another.⁴¹ Third, foreigners are required to provide additional assurances of good health and lack of a criminal record.⁴²

As noted above, the age requirement is the same for Chinese couples and international couples alike. Thus, because the age restriction has been lowered, more foreign couples and individuals are technically eligible to adopt. This has led to widespread excitement in the United States and other western countries.⁴³ But this excitement might be premature. Lowering the age requirements for those hoping to adopt seems to be a response to Chinese couples who wished to adopt but were excluded by the age limit.⁴⁴ Doje Cering, the Chinese Civil Affairs Minister, was quoted as saying the old rule was too restrictive, considering the large number of Chinese couples who were willing to adopt and the overcrowding in orphanages.⁴⁵ Thus, it seems the motivation behind the new rule is to allow more Chinese parents to adopt, not some sense that international adoptions are something to be encouraged.

³⁷ *See id.*

³⁸ *See id.* at The Adoptive Process, V (C).

³⁹ *See id.* at The Adoptive Process, V (D).

⁴⁰ *See id.* at The Adoptive Process, VI (E).

⁴¹ *See* Kwan, *supra* note 3. The law would also make Chinese parents who already have a child eligible to adopt. *See id.*

⁴² *See id.*

⁴³ *See* Molley Guthrey, *Families Applaud China Adoption Move*, DALLAS MORNING NEWS, Dec. 23, 1998, available in 1998 WL 23044962.

⁴⁴ *See* *China Adoption Laws to be Relaxed Locally, Tightened for Foreigners*, DEUTSCHE PRESSE-AGENTUR, Aug. 24, 1998, available in WESTLAW, Farnews Database.

⁴⁵ *See id.*

III. PRESSURE SURROUNDING INTERNATIONAL ADOPTION

Pressure within China to reduce the number of its children adopted by foreigners may best be seen by considering the pressures other “sending” countries have felt.⁴⁶ These different pressures may be broken down into three groups. First, many sending countries, being generally poorer than receiving countries, feel international adoptions represent the most recent and the most heinous form of imperialism. The idea is that richer countries are now taking not just the poorer countries’ natural resources but human resources as well—the children. Second, there is the related but distinct idea that by allowing many of their children to be adopted away, sending countries are admitting their own economic and social failures. The international adoptions suggest that the country cannot provide for its own children. Related to this idea, and handled together with it in this Note, is the argument that by focusing on international adoptions, the sending country is not dealing with the cause of the source of the children available for adoption. Third, the wide scale practice of international adoptions has normally been accompanied by various practices, such as child selling, kidnaping, and financial exploitation by so-called adoption experts. Media attention on these practices drives public pressure, leading governments to restrict the availability of international adoptions in order to prevent these companion evils.

A. International Adoptions as New Imperialism

The first area of pressure that sending countries may feel is that international adoptions reflect the newest form of imperialism. “[W]hat the West has generally viewed as charitable, humane—even noble—behavior, developing countries have come to define as imperialistic, self-serving, and a return to a form of colonialism in which whites exploit and steal natural resources.”⁴⁷ Under this argument, international adoptions are seen as an “exercise of influence and control by the more powerful nations who are seen as ‘robbing’

⁴⁶ The Hague Convention uses the terms “State of origin” and “receiving State” to refer to countries that primarily send their children out of their countries to be adopted and to countries whose citizens primarily adopt children from other countries, respectively. Hague Convention, *supra* note 8, art. 2. In this note, the terms sending countries and receiving countries will be used to refer to the two types of countries.

⁴⁷ Howard Altstein & Rita J. Simon, *Introduction*, in *INTERCOUNTRY ADOPTION: A MULTINATIONAL PERSPECTIVE* 1, 2 (Howard Altstein & Rita J. Simon eds., 1991).

Third World countries of their children whilst confirming their inferiority and inadequacy. . . ."⁴⁸

A graphic example of the imperialistic attitude surrounding international adoptions was seen in a rather persistent rumor that appeared as early as 1986. The rumor was that western countries, including the United States, participated in international adoptions in order to provide organs for the children of wealthy parents.⁴⁹ The rumor has been published in reputable newspapers all over the globe.⁵⁰ In fact, as recently as December 1996, a man was arrested in Cambodia under suspicion of, among other things, organ trafficking.⁵¹ This rumor has been responsible for a number of nations limiting their international adoption programs, or eliminating them altogether, despite the fact that the United States government has thoroughly investigated the rumors and found them to be baseless.⁵²

This idea that international adoptions are a modern expression of imperialism, if widely held by powerful factions within China, would lead to internal pressure to limit these adoptions. And the inference would seem to be at least susceptible to the Chinese culture, considering the long Chinese history of fearing outsider interference. While the extent of this attitude by powerful factions within China is unknown, the international community should consider this attitude when it attempts to fashion international adoption guidelines. This is especially true when one considers countries that have already limited or ended their international adoptions due to suspected imperialism. The extent to which this attitude has been addressed in the Hague Convention will be considered below.

⁴⁸ John Triseliotis, *Inter-country Adoption: In Whose Best Interest?*, in INTER-COUNTRY ADOPTION: PRACTICAL EXPERIENCES 119, 131 (Michael Humphrey & Heather Humphrey eds., 1993).

⁴⁹ See Lance Laytner, *The Organ Trade*, IRISH TIMES, July 5, 1999, at 10 (tracing rumor to article appearing in Pravda, the former Soviet Union's official newspaper at the time). This suggestion was confirmed in 1999 by Christopher Andrew and Vasili Mitrokhin, a former KGB official. According to Andrew and Mitrokhin, the KGB spread the rumor with no factual basis to support it. See CHRISTOPHER ANDREW & VASILI MITROKHIN, THE SWORD AND THE SHIELD: THE MITROKHIN ARCHIVE AND THE SECRET HISTORY OF THE KGB 245 (1999).

⁵⁰ See Jorge L. Carro, *Regulation of Inter-country Adoption: Can the Abuses Come to a End?*, 18 HASTINGS INT'L & COMP. L. REV. 121, 128 (1994).

⁵¹ See *Cambodia: Child Trafficker with Noble Motives*, BUS. NEWS REV., Feb. 10, 1997, available in 1997 WL 9789926.

⁵² See Carro, *supra* note 50, at 128-30.

B. International Adoptions as an Admission of Social Failures

The second factor that must be considered is the idea that by sending many children from a country through international adoptions, the country is somehow admitting its own failures. The inference is that the country cannot even provide for its own children.⁵³ This idea is nurtured by the history of international adoption itself. Large-scale international adoption situations typically have originated from countries that were decimated by war or other major political upheavals.⁵⁴ This pattern can be seen in international adoption operations in Europe following World Wars I and II, Korea following the Korean War, Vietnam following the Vietnam War, and in Eastern Europe following the fall of the Soviet Union.⁵⁵

The fact that most other large-scale international adoption scenarios have involved countries ravaged by war or political upheaval could be quite embarrassing to the Chinese because their country has not experienced wars or violent political upheaval. The implication that it cannot care for its own children would necessarily reflect negatively on the economic and social system status quo. This reflection could be highly embarrassing. Indeed, comments by Chinese officials may reflect this potential embarrassment. On October 31, 1997, an official Chinese news source, the Xinhua English Newswire, published comments by a Chinese delegate to the United Nations General Assembly. The official argued that China had "attached great importance to the cause of children [sic] protection and made it an integral part of its efforts in promoting economic development and social progress."⁵⁶ The delegate specifically mentioned the Chinese law on adoptions as examples of the Chinese commitment to its children.⁵⁷ Such an explicit statement may easily have come in response to criticism that the large number of Chinese children being adopted by foreigners is a reflection of some social or economic weakness on the part of the Chinese government.

The potential international embarrassment could easily place much pressure on Chinese officials. Similar pressures resulted in a major policy shift in

⁵³ See *id.* (noting that this attitude led South Korea to drastically curtail international adoptions of its children).

⁵⁴ See Altstein & Simon, *supra* note 47, at 1-2 (listing civil or international war as one of three common traits present in large scale international adoption scenarios).

⁵⁵ See Carro, *supra* note 50, at 125-28 (discussing briefly the history of international adoptions from these regions).

⁵⁶ *China Attaches Importance to Protection of Children*, XINHUA ENG. NEWSWIRE, Oct. 31, 1997, available in 1997 WL 11208084.

⁵⁷ See *id.*

South Korea. During the 1998 Seoul Olympics, a media story detailing the large number of Korean children adopted by foreigners aired across the globe.⁵⁸ The story shocked and embarrassed the South Korean public. Resulting political pressure led the government to place restrictions on international adoptions with dramatic results.⁵⁹ International adoptions dropped from 6,188 in 1986 to 1,534 in 1991.⁶⁰ By 1996, only handicapped and bi-racial children were eligible for international adoptions.⁶¹

China has faced similar media scrutiny. In 1995, a television documentary that ran in the West highlighted the horrible conditions in Chinese orphanages.⁶² The documentary hit a nerve. Today, when hopeful adopters meet their adopted child, they do so not in the orphanage where the child has lived but in local hotels.⁶³ Surely, Chinese officials are sensitive to the criticism that they are not taking proper care of the children in their orphanages.

Another aspect of the potential embarrassment that China and other large-scale sending countries may face is the argument that in allowing so many orphans to be adopted internationally, the country is not focusing on the source of the problem.⁶⁴ The international adoptions do nothing to address the real social and economic conditions that lead to the number of orphans in China. While proponents of international adoption recognize that these adoptions fail to address the causes that produce so many orphans, they do argue that to deny willing adoptive parents the opportunity to adopt a Chinese child is illogical. "To wait for improved social conditions before acting to give parents and

⁵⁸ See Carro, *supra* note 50, at 126-27.

⁵⁹ See *id.*

⁶⁰ See *id.*

⁶¹ See *id.* Another example of this attitude can be seen in comments by a high-ranking Nepali official who proposed limiting or ending the international adoption of its children. The official was quoted as asking, "Why don't we abandon our own children if adoption by foreigners is so good?" See *Nepal Against Adoption of Children by Foreigners*, XINHUA NEWS AGENCY, Jan. 12, 1999, available in WESTLAW, CHNANEWS-A Database. International adoption is under fire in Nepal on national dignity and ethical grounds. See *id.*

⁶² See *Adoption: Bringing Home Baby*, FAR E. ECON. REV., Aug. 6, 1998, at 54, available in 1998 WL 13866570 (discussing how this television program encouraged many couples and individuals to look into adopting from China).

⁶³ See Gordon, *supra* note 9, at 141 (suggesting that one of the reasons that adoptive parents do not see the orphanage where their child lived is that the parents may decide against adopting a child that lived in such poor conditions).

⁶⁴ See Triseliotis, *supra* note 48, at 132 (noting the argument that truly concerned westerners should focus their attention and financial resources on the children left in the country).

countries a real choice (the choice of adopting) would be tantamount to sacrificing an existing generation of children who need families now."⁶⁵

C. International Adoptions and Companion Practices

The third factor that may lead China to restrict its international adoptions is the negative activities associated with the practice. These include child selling and abduction, financial exploitation by professionals who work in the field, and other random acts that are reported in the media.

A recent case highlights the very real concern of the Chinese regarding the selling of children and child abduction. In August 1998, a child-smuggling operation was uncovered in Taiwan. Apparently, Chinese children were either bought or stolen from their parents, then smuggled across the Taiwan Strait into Taiwan. They were then issued false birth certificates and adopted by Taiwanese parents.⁶⁶ Records confiscated by Taiwanese police showed that the birth certificates for as many as thirty children had been falsified.⁶⁷ The adoptive parents of eleven of the children claimed that they were told by the clinic used in the operation that the children had been born to local women who placed the children up for adoption.⁶⁸ Further investigation showed that as many as one hundred children had been illegally adopted in Taiwan between 1995 and 1998.⁶⁹ A number of the children had been sold for roughly \$8,700, and others sold for even more.⁷⁰

This specific example is not an isolated incident. Major press outlets in the United States have reported instances of peasants selling children in Romania,⁷¹ and authorities in Ontario are said to have evidence that children have been bought for as much as \$50,000.⁷² These reports, and others like

⁶⁵ *Id.* at 131.

⁶⁶ See *Police Crack Infant Smuggling Ring*, CHINA NEWS, Aug. 5, 1998, available in 1998 WL 14640382.

⁶⁷ See *id.*

⁶⁸ See *id.*

⁶⁹ See *Missing Children Debate Heats Up*, CHINA NEWS, Aug. 8, 1998, available in 1998 WL 14640423.

⁷⁰ See *Police Crack Infant Smuggling Ring*, *supra* note 66 (equating NT\$30,000, the New Taiwan Dollar, with U.S. \$8,721); see also *Missing Children Debate Heats Up*, *supra* note 69 (noting that prices ranged between NT \$30,000 and NT \$50,000).

⁷¹ See Mark Silver et al., *The Volatile World of Foreign Adoption*, U.S. NEWS & WORLD REP., Jan. 20, 1987, at 63.

⁷² See Tom Blackwell, *New Rules Target Foreign Adoptions*, LONDON FREE PRESS, Oct. 27, 1998, at A11; see also Bart Eisenberg, *Road to Foreign Adoption Gets Rockier*, CHRISTIAN SCI. MONITOR, Feb. 28, 1990, at 13 (listing other such instances).

them, have been influential in pushing some countries to restrict their international adoptions.⁷³

China has apparently been concerned with the selling of children before. In the early 1990s, China adopted a number of laws specifically making it a crime to abduct, kidnap, sell, or traffic in women and children.⁷⁴ While the impetus for these laws was to protect women and children from the sex trade, there is evidence that the prevention of the selling and abducting of children for adoption was also a consideration.⁷⁵ In 1991, the Adoption Law of China specifically referred to the prohibition of the sale of children.⁷⁶

Another practice that casts a negative light on international adoption is the perception, either real or imagined, that practitioners in the field financially exploit those parents who wish to adopt.⁷⁷ A recent newspaper article in Ireland discussed an international adoption company's offer to childless Irish couples.⁷⁸ The company charged different rates for children from different countries. Children from China were available at a cost of \$9,000.⁷⁹ Additionally, there was an up-front fee of \$1,250 to cover administrative and correspondence costs.⁸⁰ The article noted that these rates included countries where adoptions were organized free of charge.⁸¹ The local representative of the adoption agency defended the high costs, arguing that the agency has a great reputation. In addition, the agency operates orphanages in Moscow and has personnel in place in foreign countries to help potential adoptive parents during the actual adoption process in their child's country of origin. These services obviously require large amounts of money.⁸² Despite these facts,

⁷³ See Carro, *supra* note 50, at 124.

⁷⁴ See Decision of 4 September 1991 on Strict Punishment for Criminals Who Abduct, Sell, and Kidnap Women and Children (China), *reprinted in* 18 ANNUAL REVIEW OF POPULATION LAW, *supra* note 11, at 438; *Laws Against Human Trafficking*, NATION, Jan. 7, 1998, available in 1998 WL 5445536.

⁷⁵ See *Laws Against Human Trafficking*, *supra* note 74.

⁷⁶ Adoption Law of 29 Dec. 1991, *supra* note 11, arts. 30 and 183.

⁷⁷ This practice is distinguished from selling babies in that international adoption is a legal process. The problem here is that the practitioners are taking advantage of the adopting parents.

⁷⁸ See Lynne Kelleher, *Exposed: From Russia to India, Babies for Sale at a Price to Childless Couples*, MIRROR, Nov. 16, 1998, at 4, available in LEXIS, News Library, News Group A11.

⁷⁹ See *id.* Children from Guatemala cost \$15,000, children from Russia cost \$13,900, and children from Ethiopia cost \$8,000. The article lamented the idea that potential parents would shop around for the cheapest country of origin. See *id.*

⁸⁰ See *id.*

⁸¹ See *id.*

⁸² See *id.*

these types of arrangements, which are apparently legal, paint international adoptions in a suspect light.

China is also under some pressure due to the money its orphanages charge for adoptions. The television program referred to above documenting the condition of Chinese orphanages was prompted by a Chinese exile who used to work in the orphanages.⁸³ She now works to pressure the Chinese government to take better care of the country's orphanages. She considers the large adoption fee charged by the Chinese orphanages to be a method by which the government turns the orphans into commodities.⁸⁴

It is also interesting to consider how random incidents may have an impact on China's willingness to continue its high number of international adoptions. One such incident was the high profile news story about an American couple adopting two Russian girls.⁸⁵ In October 1997, the couple flew to Russia to adopt the children and then flew back to New York with their newly adopted children. Upon arrival in New York, the couple was arrested after other passengers complained that the couple had abused the children during the flight.⁸⁶ The incident was covered in news reports in China and in many other countries.⁸⁷ As could be expected, the incident led Russia to suspend temporarily its international adoptions and to review its policies.⁸⁸ However, it seems that despite this incident, Russia is still willing to allow international adoptions. In June 1998, the Russian legislature passed a bill that would place more regulations on international adoptions but would still allow many adoptions to go forward.⁸⁹ One of the requirements of the new rules is that foreign adoption agencies will be required to show that they are registered as non-profit agencies in their home country.⁹⁰

⁸³ See Erling Hoh, *Afterlife: Exiled Doctor Continues Fight for China's Orphans*, FAR E. ECON. REV., Aug. 6, 1998, at 56, available in 1998 WL 13866602.

⁸⁴ See *id.*

⁸⁵ See *Russia Checks Up on Its Adoptees*, ORANGE COUNTY REG., Nov. 10, 1997, at A49. For another random event, where a Colorado woman killed her adopted Russian child, see *Polreis Guilty in Son's Death*, COLO. SPRINGS GAZETTE TELEGRAPH, July 30, 1997, available in 1997 WL 7460591.

⁸⁶ See *Russia Checks Up on Its Adoptees*, *supra* note 85.

⁸⁷ See Vincent J. Schodolski, *Foreign Adoption a Rough Transition*, CHI. TRIB., June 16, 1997, §1, at 1.

⁸⁸ See *Russia Checks Up on Its Adoptees*, *supra* note 85.

⁸⁹ See Kathy Lally, *Russian Law Would OK More Foreign Adoptions*, BALT. SUN, June 14, 1998, at A1. The law would require Russian adoptees to keep their Russian citizenship until the age of eighteen, allow for Russian consulates to monitor the children, and permit agencies to help parents through the adoptive process. See *id.*

⁹⁰ See *id.*

As has been shown, there are numerous reasons why a country would not want to be known as one that provided a large number of its children for international adoption. Whether the concern is for its international reputation or for the welfare of its children specifically, the concerns must be dealt with in any serious international agreement aimed at facilitating appropriate international adoptions. The extent to which the Hague Convention addresses these concerns is the focus of the rest of this Note.

IV. THE HAGUE CONVENTION

In May of 1993, the 17th Session of the Hague Convention met and signed the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption ("the Hague Convention").⁹¹ Signing countries included both the United States and China.⁹² Currently, the United States has yet to ratify the treaty, but the Clinton administration has sent the convention to the Senate "[w]ith a view to receiving the advice and consent of the Senate to ratification."⁹³ In March, the convention and accompanying legislation were introduced into the Senate by Senator Mary Landrieu and Senator Jesse Helms, the latter of which is Chairman of the Senate Foreign Relations Committee.⁹⁴

The Hague Convention suggests that international adoptions do have an important place in international child welfare policy. The preamble of the Hague Convention states that:

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,

Recalling that each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin,

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 . . .⁹⁵

⁹¹ See Hague Convention, *supra* note 8.

⁹² See *id.*

⁹³ William J. Clinton, *The White House, Letter to the Senate*, June 11, 1998, available in 1998 WL 306339.

⁹⁴ See Joan Oleck, *Wanted for Adoptions: World Wide Standards*, BUS. WK., June 14, 1999, at 71.

⁹⁵ Hague Convention, *supra* note 8, preamble.

By this language, the Hague Convention lays out, as a list of preferences, situations in which children should grow up. First, a child should grow up in his or her family of origin, and states should make it a priority to enable this whenever possible. The next best situation would be for the child to grow up with another family "in his or her State of origin."⁹⁶ This second option includes domestic adoptions. If domestic adoption is not possible, a child should still be able to grow up in a family environment, as opposed to an institution. Thus, international adoptions are the third best alternative. As third on the list, international adoptions are only ahead of the possibility of a child living in a non-family environment, such as an orphanage. International adoptions, therefore, should be considered only in countries where there is a significant number of children without families and a lack of a corresponding demand from domestic families willing to adopt these children. This situation is characteristic of China.

After recognizing the need for international adoptions, the preamble continues by suggesting that there is a "necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children."⁹⁷ Thus, the Hague Convention recognizes the need for international adoptions and aims to protect the practice by eliminating some of the harmful companion practices that seem to accompany the process. The specifics of the Hague Convention will be examined to analyze how well it does this.

Chapter one of the Hague Convention lists the objectives of the convention, which are threefold. The first goal is "to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law."⁹⁸ The second objective of the Hague Convention is "to establish a system of cooperation amongst Contracting States to ensure that [the safeguards] are

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* art. 1. Other agreements in international law include the *Convention of the Rights of the Child*, G.A. Res. 44/25, U.N. GAOR, 44th Sess., 61st plen. mtg., U.N. Doc. A/RES/44/25 (1989) [hereinafter *Rights of the Child*], which recognizes international adoption if it is in the best interest of the child and if the child cannot be placed through adoption or foster care with a family in his or her state of origin, and the *Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Preference to Foster Placement and Adoption Nationally and Internationally*, G.A. Res. 41/85, U.N. GAOR, 41st Sess., 95th plen. mtg., U.N. Doc. A/RES/41/85 (1987) [hereinafter *Protection and Welfare of Children*], which strongly denounces any "improper financial gain" from intercountry adoptions.

respected and thereby prevent the abduction, the sale of, or traffic in children."⁹⁹ Finally, the third objective is "to secure the recognition in Contracting States of adoptions made in accordance with the Convention."¹⁰⁰

Chapter two lists the requirements for international adoptions. Sending countries must determine that the child is eligible for adoption, that the international adoption would be in the child's best interest, and that the biological parents are counseled and freely consent to the adoption, among other things.¹⁰¹ Receiving countries must determine that the adopting parents are "eligible and suitable to adopt," that the parents have received counseling if necessary, and that the child may enter and live in the country.¹⁰²

Chapter three of the Hague Convention concerns the central authorities and accredited bodies that the convention requires. Basically, the convention requires that countries designate some organization to handle the requirements of the convention. This organization is to be called the central authority.¹⁰³ Countries may also designate accredited bodies to work in international adoption. These organizations must be competent to work in the area, be non-profit in nature, be staffed by persons qualified in international adoption, and be subject to supervision by the state.¹⁰⁴ Further, an accredited body may operate in more than one country if each country recognizes the organization.¹⁰⁵

The central authorities are required to cooperate with each other in order to carry out the goals of the convention. This cooperation includes informing the other central authorities of applicable laws in their countries and in providing statistical information and standardized forms.¹⁰⁶ Each central authority is also charged with the responsibility of taking "all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention."¹⁰⁷ Thus, the central authorities are the organizations that are asked to ensure that the convention's goals are met. Further, the central authorities are mandated to coordinate the actual process of individual

⁹⁹ Hague Convention, *supra* note 8, art. 1.

¹⁰⁰ *Id.*

¹⁰¹ *See id.* art. 4.

¹⁰² *Id.* art. 5.

¹⁰³ *See id.* art. 6. The convention allows countries with a federal system and other countries where it would be appropriate to designate more than one central authority. *See id.*

¹⁰⁴ *See id.* arts. 10-11.

¹⁰⁵ *See id.* art. 12.

¹⁰⁶ *See id.* art. 7.

¹⁰⁷ *Id.* art. 8.

adoptions.¹⁰⁸ This means the central authorities must facilitate the exchange of needed information, follow and expedite the adoption process, encourage counseling and post-adoption services, and reply to appropriate requests from other central authorities regarding specific adoptions.¹⁰⁹ Thus, central authorities are vital organizations in seeing that international adoptions, as envisioned by the convention, are carried out efficiently.

The Clinton administration's proposed implementing legislation, along with both pending House and Senate bills, would designate the State Department as the central authority for the United States. However, the State Department's contemplated role has been described as "largely programmatic."¹¹⁰ The State Department would work with the Immigration and Naturalization Service to create a system to track all international adoptions.¹¹¹ But its duties would end there. The administration's proposal, along with the House bill, would place the accreditation functions with the Department of Health and Human Services. The Senate bill would place these functions with the Department of State.¹¹² One might question why the State Department would be designated the central authority at all if it would not be responsible for the accreditation functions, which are major responsibilities of the central authority.¹¹³ Nonetheless, it does seem appropriate to have the Department of Health and Human Services accredit the different adoption agencies and ensure that proper guidelines are being followed.

Chapter four of the convention lays out the procedures that must be followed in order to complete an international adoption. The first step requires persons wishing to adopt to apply with the central authority in their country. If the central authority determines that the individual or couple is appropriate for the international adoption process, then it will complete a comprehensive report and transmit it to the sending country.¹¹⁴ This report should include information on the couple's identity, health, background, reasons for wishing to adopt, and suitability to adopt.¹¹⁵ The central authority in the sending

¹⁰⁸ See *id.* art. 9.

¹⁰⁹ See *id.*

¹¹⁰ See *Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption Implementation: Hearings on H.R. 2909 Before the House of Representative Comm. on Int'l Relations, 107th Cong. (1999)* [hereinafter *Hearings*] (statement of Mary A. Ryan, Assistant Secretary of State for Consular Affairs).

¹¹¹ See *id.*

¹¹² See *id.*

¹¹³ See *Hague Convention, supra* note 8, arts. 8-11.

¹¹⁴ See *id.* art. 15.

¹¹⁵ See *id.*

country is responsible for a similar report concerning any child it has determined is suitable for an international adoption.¹¹⁶ The central authority of the sending country is also responsible for ensuring that proper consent has been given by the child's natural parents or other appropriate individuals.¹¹⁷ Once a child has been matched up with prospective adoptive parents, the central authority in the sending country makes the determination of whether the proposed adoption is in the best interest of the child.¹¹⁸

Before the final decision to proceed with the proposed adoption can be made, a number of things must happen. First, the central authority of the receiving state must ensure that the prospective parents agree to the adoption. Second, both central authorities must agree that the adoption may proceed. Finally, it must be determined that the parents are indeed suitable and that the child is eligible to enter and live permanently in the receiving country.¹¹⁹ Once these conditions are met and the decision is made to proceed with the adoption, then each central authority is required to "take all necessary steps" to see that permission is granted for the child to leave the sending country and then enter the receiving country.¹²⁰

Central authorities are required to monitor the adoption process and early adoption period as required by the laws of each country.¹²¹ If the adoption fails in its early stages, the central authority in the receiving country is responsible for providing protection and alternative care for the child. The central authority in the sending country is to be consulted regarding any new adoptive or alternative placements. Even if the adoption fails completely, the child should be returned to the country of origin only as a last resort.¹²² The convention allows for any of these functions to be carried out by the accredited bodies, as long as they are otherwise acceptable under the earlier terms of the convention.¹²³ The Clinton administration envisions the Department of Health and Human Services fulfilling these functions.¹²⁴ Of course, the actual case work would be handled by private adoption agencies accredited by this department.¹²⁵

¹¹⁶ *See id.* art. 16.

¹¹⁷ *See id.*

¹¹⁸ *See id.*

¹¹⁹ *See id.* art. 17.

¹²⁰ *Id.* art. 18.

¹²¹ *See id.* arts. 19-20.

¹²² *See id.* art. 21.

¹²³ *See id.* art. 22.

¹²⁴ *See Hearings, supra* note 110.

¹²⁵ *See id.*

Chapter five of the convention deals with what recognition is given to the adoption. These rules dictate that the adoption forms a legal parent-child relationship between the child and the adoptive parents.¹²⁶ This necessarily includes a legal responsibility placed on the adoptive parents to care for the child.¹²⁷ Further, whether the adoption terminates the legal relationship between the natural parents and the child is based on the law of the country where the adoption takes place.¹²⁸ Finally, the convention stipulates that these provisions should not jeopardize any rights that are given to adopted children in contracting states that recognize the adoption.¹²⁹

Chapter six of the convention contains a number of general provisions. One limits the biological parents' right to have first contact with the prospective adoptive parents.¹³⁰ Articles thirty and thirty-one deal with the proper use and protection of the information collected by the central authorities.¹³¹

Article thirty-two deals with the important topic of improper financial gain by adoption professions.¹³² The elimination of this improper gain is a major goal of the convention.¹³³ The language states: "No one shall derive improper financial or other gain from an activity related to an intercountry adoption."¹³⁴ The article goes on to limit acceptable charges to "costs and expenses, including reasonable professional fees of persons involved in the adoption."¹³⁵ The article specifically states that "directors, administrators and employees of bodies involved in an adoption" should receive compensation that is not unreasonable for the services provided.¹³⁶

The rest of chapter five deals with procedural matters of the convention. One article designates the central authority of each country as the body responsible for investigating possible violations of the convention.¹³⁷ Another requires competent authorities to "act expeditiously in the process of

¹²⁶ See Hague Convention, *supra* note 8, art. 26.

¹²⁷ See *id.*

¹²⁸ See *id.* arts. 26-27.

¹²⁹ See *id.* art. 26. This could become important if Russia does pass regulations mandating that internationally adopted Russian children maintain Russian citizenship until they are eighteen. See *supra* text accompanying note 89.

¹³⁰ See *id.* art. 29.

¹³¹ See *id.* arts. 30-31.

¹³² See *id.* art. 32.

¹³³ See *id.* art. 8.

¹³⁴ *Id.* art. 32.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ See *id.* art. 33.

adoption."¹³⁸ Another article deals with countries that have two or more systems of laws governing adoption.¹³⁹ This would include a country with national and state or local laws dealing with adoption.¹⁴⁰ Article thirty-nine deals with a country's current or future international agreements with other countries.¹⁴¹ Article forty states that "[n]o reservation to the convention shall be permitted."¹⁴² The final chapter contains articles that deal with how to ratify the treaty, when such ratification become effective, and how to denounce the treaty.¹⁴³

V. ANALYSIS OF THE HAGUE CONVENTION

As discussed earlier in this Note, there seems to be a pattern, perceived or real, that sending countries go through—cycles of allowing international adoptions and then restricting them. This cyclical pattern has been assumed to cause much disappointment among potential adoptive parents and inefficiency among adoption professionals. The Hague Convention, in as much as it sanctions the practice of international adoptions, should operate to reduce the cyclical nature of international adoptions from different countries. This section of the Note will analyze to what extent this is achieved by the convention. The particular areas of focus earlier in the Note will provide a framework for this analysis. First, this section will analyze to what extent the Hague Convention addresses the criticism that international adoptions are the most recent form of imperialism. Next, this section will look to how the convention deals with the concern that by sending their children away in international adoption, sending countries are admitting their own economic and social welfare failures. Lastly, this section will examine to what extent the convention addresses the unsavory acts, such as child selling, kidnaping, and financial exploitation by adoption professionals, that sometimes accompany international adoptions.

A. The Hague Convention and International Adoptions as Imperialism

In one sense, the argument that international adoption is the most recent manifestation of imperialism is an academic argument that is best refuted

¹³⁸ *Id.* art. 35.

¹³⁹ *See id.* art. 36.

¹⁴⁰ *See id.*

¹⁴¹ *See id.* art. 39.

¹⁴² *Id.* art. 40.

¹⁴³ *See id.* arts. 43-48.

academically. The convention may be ill-suited to answer this criticism. However, the words that the convention uses to characterize international adoptions can answer the imperialism criticism. In fact, the very nature of international adoptions as seen in the convention does tend to refute this particular criticism.

In the preamble to the convention, as quoted above, international adoption is seen as a third best alternative in seeking the best interest of the child. Ahead of international adoptions are first, having the child grow up with his biological family and second, having the child grow up with another family in his country of origin.¹⁴⁴ International adoptions are thus only appropriate when there are children who do not live with their biological families for whatever reason and there are no other families in their country of origin that are able or willing to raise them.

This scenario itself defeats the imperialism argument. Imperialism as envisioned in this criticism is that receiving countries exploit the children of the sending countries, children who should be seen as assets to the sending country. International adoption does not fit this pattern because the children adopted could not be seen as assets to the sending nation. Instead, these children must be seen as a liability to the country because the state is required to care for them.¹⁴⁵ Allowing these children to be adopted should at least be viewed as positive in that the state no longer has the short-term financial obligation to provide for them.

The convention helps to defeat the imperialism argument in another way. By focusing on the best interest of the child, the convention places the focus where it should be instead of on any cost-benefit analysis of the sending country and the adoptive parents or their country. The best interest of the child is a well-recognized legal standard, both in the United States and internationally.¹⁴⁶ By focusing on this standard, the convention deflects criticism from

¹⁴⁴ See Hague Convention, *supra* note 8, preamble; see also *supra* text accompanying note 95.

¹⁴⁵ Of course, in the long-term, as children grow into adults, they have the potential to add significantly to a society. International adoptions, however, should not be seen as an imperialistic way to tap into this potential. As the convention illustrates, children are selected for adoption based on their status as orphans and not because of their potential for adding to a society when they mature.

¹⁴⁶ See, e.g., 7 U.S.C. § 2015(i)(2) (1998) (specifically using best interest of child as a standard in federal food stamp program); 25 U.S.C. §1902 (1983) (giving the best interest of Native American children as the main standard in Indian Child Welfare Act); *Rights of the Child*, *supra* note 98, art. 3 ("In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."); *Protection and Welfare*

international adoptions. International adoptions under the convention should meet this standard. The standard is not only inherent in the third-best status international adoptions are given in the preamble of the convention but also is used throughout the convention as a standard for use in other decisions.¹⁴⁷

B. The Hague Convention and International Adoption as an Admission of Economic and Social Failures

Just as the previous criticism was an academic one and thus difficult for the convention to defend against, the idea that international adoptions are an admission of economic and social failures is more of a psychological state of mind. To what extent can the convention approach this very real aspect of having a large number of a country's children adopted internationally?

The text of the Hague Convention seems to actually highlight the concern regarding the sending country not being able to provide for its children. The preamble states that "each state should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin" and that international adoptions should only be resorted to if "a suitable family cannot be found in [the child's] State of origin."¹⁴⁸ The convention lists two situations that are better than international adoptions. A child living with his biological parents must be considered the foremost ideal situation. Following this, at least the child can grow up with another family in his own culture. By highlighting these two situations, the convention is articulating the inability of the sending countries to reach these goals.

While the text does highlight the failure of the country to provide a better alternative, it also argues that international adoptions do have their place. It is in the third-best alternative status for international adoptions that the answer to this dilemma is found. The convention declares that international adoptions are an alternative way to provide for children. To the extent that international adoptions provide a family environment for some children, the sending

of Children, *supra* note 98, art. 5 ("In all matters relating to the Placement of a child outside the care of the child's own parents, the best interests of the child, particularly his or her need for affection and right to security and continuing care, should be the paramount consideration."). The standard can also be found in countless state and federal court decisions in the United States. *See, e.g.*, *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (recognizing that "Florida law mandates that custody determinations be made in the best interests of the children involved"); *Skipper v. Smith*, 238 S.E.2d 917, 920 (Ga. 1977) (stating that the court could "deny [an] adoption if [the court] finds that it would not be in the best interests of the child").

¹⁴⁷ *See* Hague Convention, *supra* note 8, arts. 1, 4, 16, and 21.

¹⁴⁸ *Id.* preamble.

country is providing for those children.¹⁴⁹ Thus, the country is not failing those children that it allows to leave the country. It must be remembered that the alternative would be to have the child grow up in an institution, which the convention lists as the least desirable situation.

C. The Hague Convention and the Companion Practices

The final area that must be analyzed is how the convention handles the companion practices that were discussed earlier in this Note. This section will analyze the three main areas discussed. First, to what extent does the convention address child selling and abduction as a practice? Second, how does the convention deal with any possible financial exploitation by those professionals who work in the field of international adoption? Third, in what ways does the convention handle other random acts that might discourage sending countries from continuing their international adoption programs.

1. *Child Selling and Abduction.* First, to what extent does the convention deal with child selling and abduction? It is important to note early on that one of the express goals of the convention is to prevent such practices, including "the abduction, the sale of, or traffic in children."¹⁵⁰ The primary means of prevention that the convention contemplates is cooperation between the contracting states or states that have ratified the convention.¹⁵¹ This is explicitly spelled out early in the convention. Central authorities must be designated by the contracting states.¹⁵² These different central authorities must take "all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the convention."¹⁵³

Further, central authorities must "co-operate with each other and promote co-operation amongst the competent authorities in their States to protect children and to achieve the other objects of the Convention."¹⁵⁴ Thus, central

¹⁴⁹ Of course, international adoptions cannot provide the only solution for countries such as China, which has an enormous orphanage population. China must be encouraged to take other steps to solve the current crisis. International adoptions in China's case can only be seen as a successful solution for a small number of their orphaned children. But to the extent that international adoptions are allowed, Chinese leaders should be given credit for recognizing the need and allowing the option.

¹⁵⁰ Hague Convention, *supra* note 8, preamble.

¹⁵¹ *See id.* art. 1.

¹⁵² *See id.* art. 6.

¹⁵³ *Id.* art. 8.

¹⁵⁴ *Id.* art. 7.

authorities must work within their own country to prevent any improper financial gain and coordinate with central authorities in other countries for the same goal. Finally, all of the accredited bodies are required to report any possible violation of the rules of the convention to the central authority of their country.¹⁵⁵ The central authority is then given the affirmative duty to ensure that "appropriate measures are taken."¹⁵⁶ Thus, the first set of rules for preventing child selling and abduction are that the central authorities are given the responsibility to coordinate among themselves. And while any accredited body must report possible violations of the rules, the central authorities are given the final responsibility to ensure that the rules are followed. This clear delineation of responsibility promotes adherence to the rules of the convention.

2. *Financial Exploitation.* The effectiveness of the central authorities and any accredited bodies in preventing any improper financial gain is enhanced by further rules.¹⁵⁷ The central authorities must be official bodies and must be staffed by persons who "meet the requirements of integrity, professional competence, experience and accountability of" the contracting state.¹⁵⁸ Further, the staff must be "qualified by their ethical standards and by training or experience to work in the field of intercountry adoption."¹⁵⁹

The accredited bodies that contracting states may select must also meet certain requirements to ensure their adherence to the goals of the convention. First, the agency must "pursue only non-profit objectives" according to the contracting state.¹⁶⁰ They must also be "directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of intercountry adoption."¹⁶¹ The agency must also be subject to review by appropriate authorities of the contracting state.¹⁶² By requiring that only professionals with ethical standards work in the central authorities and other agencies, the convention is increasing the chance that the agencies will take their responsibilities seriously.

There are also procedural rules that seem shaped to meet the goal of preventing child selling, abduction, and trafficking. For instance, the

¹⁵⁵ *See id.* art. 33.

¹⁵⁶ *Id.*

¹⁵⁷ The convention provides for the appointment of other agencies to act as accredited bodies. These bodies are allowed to perform some of the functions of the central authorities. *See id.* art 9.

¹⁵⁸ *Id.* art. 22.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* art. 11.

¹⁶¹ *Id.*

¹⁶² *See id.*

competent authorities must ensure that all consent gained from the different parties must “not [be] induced by payment or compensation of any kind.”¹⁶³ Thus, the authorities that are overseeing the adoption must complete at least a brief investigation into the motives of those placing the child up for adoption. An adoption should not be approved if there is strong evidence of the child being sold or the parents receiving money to the extent that it may affect the decision to give consent.

Another procedural protection is that the convention forbids any contact between the adoptive parents and the individual or agency placing the child for adoption until a certain point in the adoption process.¹⁶⁴ This would prevent the parties from making an under-the-table arrangement and then using the formal adoption process to legitimate the adoption. One further procedural rule states that if there is a person living in one of the contracting states who wishes to adopt a child living in another contracting state, then that person must use the system set up by the convention.¹⁶⁵ This rule has the effect of eliminating all other avenues for completing the international adoption. This channels the adoptions through the system set up by the convention, which can then oversee the adoption to ensure the goals of the adoption are being met.

As outlined, the convention provides for three different types of rules to ensure that its provisions regarding child selling and abduction are followed. First, the convention clearly gives responsibilities to each agency to report any possible violations to the central authorities of their country. The central authorities are given the ultimate responsibility to ensure that the rules are followed and to cooperate with other central authorities to ensure adherence to the rules. Next, the convention requires that well-qualified and ethical individuals staff the central authorities and the accredited bodies. This should improve the chances that the goals of the convention will be pursued by these agencies. These two approaches probably will not be enough to protect against all possible child selling and abduction. Requiring ethical standards and oversight is not a complete protection against violations of the sort to be prevented. But these rules do provide an obvious starting point. Together with the procedural rules that the convention also provides, the convention does provide an adequate structure for protecting against these evils.

How does the convention deal with the issue of professionals in the field who financially exploit the process? The convention handles financial gain of professionals in the field similarly to how it handles the threat of child selling

¹⁶³ *Id.* art. 4.

¹⁶⁴ *See id.* art. 29.

¹⁶⁵ *See id.* art. 14.

and abduction. First, the convention explicitly spells out who is responsible for enforcing the rules in this area. Not surprisingly, the central authorities are given the ultimate responsibility in this area.¹⁶⁶ The convention's ethical and competency standards for those working in the different agencies operate in this area as well to increase the chance that the central authorities and other agencies will take their responsibility seriously. Finally, the convention has specific rules in the area of improper financial gain.

First, central authorities are directed to work to prevent "improper financial or other gain in connection with an adoption."¹⁶⁷ This language, while vague, suggests a broad reading in that improper financial and other types of gain are prohibited. Second, to be accredited, agencies should "pursue only non-profit objectives according to such conditions and within such limits as may be established by the competent authorities of the state of accreditation."¹⁶⁸ Thus, the agencies that are working in the area of international adoption should not have profit as a primary incentive to guide their actions.

These rules, which are obviously vague, are supplemented by more specific rules in article thirty-two of the convention. Article thirty-two states that "[n]o one shall derive improper financial or other gain from an activity related to an intercountry adoption."¹⁶⁹ Such language would include biological parents, government officials, and adoption professionals.

The definition of what is improper develops negatively as the convention states what charges can be assessed. "Only costs and expenses, including reasonable professional fees of persons involved in the adoption, may be charged or paid."¹⁷⁰ The convention adds that "directors, administrators and employees of bodies involved in an adoption shall not receive remuneration which is unreasonably high in relation to services rendered."¹⁷¹ Thus, adoption agencies can charge for the expenses they incur through the adoption. They may also charge money so that they can pay a reasonable compensation to their employees. Any charges above this appear to be "improper" and

¹⁶⁶ See *id.* art. 8.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* art. 11.

¹⁶⁹ *Id.* art. 32.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

forbidden by the convention.¹⁷² This standard is enforced by the central authorities in each country, apparently under the laws of each country.¹⁷³

The rules set out in the convention to prevent financial exploitation by adoption professionals are necessarily vague and undefined. Use of the terms "improper" and "reasonable"¹⁷⁴ suggests legal standards that may be applied differently in different countries. Surely, use of such terms is necessary. To define exactly what the convention meant by these standards might have caused considerable disagreement and debate. To leave these standards for each country to decide allows each country to apply them according to their already established notions. More importantly, it does provide a framework for establishing what would be financial exploitation, thus allowing each central authority to spend time eradicating the exploitation instead of defining it.

3. *Random Events*. Third, to what extent does the convention deal with the various random events that tend to cause sending countries to reconsider international adoptions? By their very nature, random acts are difficult to anticipate. The convention, therefore, cannot prepare countries for the different events that could happen. There are clauses of the convention that may tend to influence how the countries respond to such events.

One of the clauses that may influence how countries respond to random events is the denouncing clause. Article forty-seven states that any denouncing of the treaty by a contracting state would take effect the first day of the month following one year after the notification of the denunciation is received by the depository of the convention.¹⁷⁵ How would this clause affect a country that may be responding to some event? At first glance, it might be hypothesized that since it would take a whole year to leave the convention, the country would stay in and try to work through the issue under the terms of the treaty. Thus, this clause would tend to decrease any overreactions to different events. However, a country serious about limiting its role in international adoptions could renounce the treaty and then immediately curtail its involvement before

¹⁷² *See id.*

¹⁷³ *See id.* art. 11. Article 11 of the convention states that the non-profit status of the different agencies should be governed by "conditions and within such limits as may be established by the competent authorities of the State of accreditation." *Id.* This would imply that if a central authority challenged an agency's non-profit status, it would do so under the judicial structure of its country. It may be assumed that any challenge to the reasonableness of fees charged would also be judged under the same judicial structure. *See id.*

¹⁷⁴ *See id.* art. 32.

¹⁷⁵ *See id.* art. 47. Article 43 of the convention lists the Ministry of Foreign Affairs of the Kingdom of the Netherlands as the depository of the convention. *Id.* art. 43.

the renunciation takes effect. Thus, this particular clause does not seem to protect adequately against overreactions to different random events.

Another possible clause that may be helpful in preventing overreactions to certain events would be article forty-two. This article provides that there shall be special commissions, convened at regular intervals, "to review the practical operation of the Convention."¹⁷⁶ These commissions could be used to study issues raised by any events associated with international adoptions. However, the commissions, being convened at regular intervals, may not be able to respond to events in a timely fashion.

One final provision may allow some flexibility for countries influenced by random events. Article thirty-nine allows for agreements between individual contracting states.¹⁷⁷ Such language allows two countries to improve the application of the convention with respect to each other. A country that has been adversely affected by certain events can then make agreements with other countries to limit the negative effects. Obviously, the willingness of countries to enter into such agreements would have an impact on the effectiveness of this provision. Also, the agreements can only alter certain rules of the convention.¹⁷⁸ Generally, the agreements can alter only procedural rules surrounding the adoption process itself. Most of the rules surrounding the eligibility of participants,¹⁷⁹ policy,¹⁸⁰ and requirements for the different agencies may not be adjusted.¹⁸¹

The convention could have included a provision that would have allowed a contracting country to petition for an immediate commission to study a particular proposal. A contracting country would then have some avenue within the convention for addressing any problem that it has encountered in its international adoption program. Such a provision could help prevent overreactions by the countries and thus might limit the reduction of international adoptions from these countries.

The ability of the convention to be flexible in the face of a contracting country's reaction to a significant random event would be important if a goal of the convention was to encourage the continuance of international adoptions.

¹⁷⁶ *Id.* art. 42.

¹⁷⁷ *Id.* art. 39.

¹⁷⁸ *See id.* Specifically, the agreements can adjust the provisions of articles 14-16 and 18-21, all of which are procedural provisions. *See id.*

¹⁷⁹ *See id.* arts. 4-5 (containing numerous requirements, such as the adoption should be in the child's best interest and the consent of the natural parents must not be induced by payment).

¹⁸⁰ *See id.* art. 24 (listing the best interest of the child as a major policy consideration), art. 8 (listing the rule against improper financial gain).

¹⁸¹ *See id.* art. 11 (stating that accredited agencies must be non-profit in nature).

But the very nature of some events would prevent any adequate response from the convention. For instance, earlier in this Note a news story regarding international adoptions from Korea was discussed.¹⁸² The response to the story in Korea was such that tremendous public pressure arose to curtail its international adoptions. The convention, no matter how flexible, may not have been able to protect international adoptions against this significant internal pressure. Ongoing education and the responsible acts of international adoption professionals are more likely to keep international adoption as an alternative in situations like the one confronted by Korea.

All in all, the Hague Convention does provide an adequate means for protecting against reductions in international adoptions. To the extent that an international agreement like this can respond to academic and psychological arguments regarding international adoptions, the convention does so. The specific activities addressed early in this Note, such as child selling, child abduction and trafficking, and financial exploitation by adoption professionals, are addressed in the convention. There are a number of safeguards that would operate to limit or eliminate these practices. The convention could do a better job of allowing a contracting state an avenue in which to respond to specific random acts not contemplated by the convention.

VI. SUGGESTIONS

The goal of keeping international adoptions as an alternative for the orphaned children of China, and for other children of the world as well, cannot be met solely through the Hague Convention. Academics, professionals in the field, and government officials who believe in international adoptions all have a role in protecting this practice. Along these lines, below is a list of suggestions that could keep international adoptions as an option for children living in institutions around the world.

First, the United States should ratify the Hague Convention. The United States receives more children through international adoptions than any other country.¹⁸³ Ratifying the convention would tell the world that the United States is dedicated to the standards and policies of the convention.¹⁸⁴ There

¹⁸² See *supra* text accompanying notes 58-61.

¹⁸³ See *Hearings, supra* note 110.

¹⁸⁴ In fact, the Clinton administration indicated that “[s]everal of the largest [sending] countries have indicated that they are looking to [the United States] to ratify and implement the Convention quickly, and that they plan to model their programs after [the United States plan].” *Hearings, supra* note 110. Further, some of the largest sending countries have decided not to allow international adoptions with countries that are not parties to the convention. See *id.*

should not be too many barriers to implementation. Most adoption agencies in the United States are non-profit agencies under federal law. The best interest of the child is already an accepted and widely used legal standard in United States courts. The use of the Department of Health and Human Services as the central authority would seem to be a good fit, as long as the State Department is available to work, along with the INS, to facilitate important international issues.

Second, international adoption professionals should perform their services in such a way that they encourage international adoptions. The attitude of adoption professionals when interacting with foreign officials could go a long way in influencing those officials. Professionals should treat foreign officials with due respect. Further, if adoption professionals truly believe that these adoptions are in the best interest of the child, this attitude should be expressed to the foreign officials. They should project the belief that by allowing international adoptions, the sending country is providing for its children in a brave and compassionate way. The idea that international adoptions represent some failure on the part of the sending country should never be expressed.

Finally, the international community should amend the Hague Convention to allow countries to petition for immediate review of policies and procedures. This would provide another option for countries that are facing internal pressure to curtail their international adoptions. Instead of having to form agreements with individual countries or renounce the convention altogether, they could seek minor changes in the convention itself. This could prolong the life and usefulness of the convention. Further, it might prevent the fluctuations in international adoptions that have seemed to be the pattern in the past.

Mexico and Brazil have begun to restrict adoptions of their children by United States citizens because the United States has not ratified the convention. *See id.*