

Does the Hague Convention on Intercountry Adoption Adequately Protect Orphaned and Vulnerable Children and Their Families?

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Abstract The Hague Convention on Intercountry Adoption, designed to protect the best interests of the child in intercountry adoption, has been signed by 83 nations. We evaluate both the strengths and the weaknesses of the Convention in achieving this purpose and also in protecting a second vulnerable population, birth families. A case study example of the United States' implementation of the Hague requirements reveals several weaknesses with respect to non-Convention countries as sending nations, financial oversight, and oversight of foreign collaborators. International birth families, especially birth mothers giving consent to an adoption, are often vulnerable because of a lack of power and resources, as well as different cultural understandings of the nature of family and adoption. We conclude that in order to protect vulnerable children and birth families, individual sending and receiving countries need to supplement the Hague Convention with specific, contextually appropriate laws and regulations.

Keywords Intercountry adoption · Orphan · Vulnerable · Children · Birth mother · Hague convention

Introduction

Vulnerable populations require protection from harm in the form of care or special consideration of their needs and

reduction of their exposure to risk. Protection of vulnerable individuals must be balanced to consider the social environment and group and collective needs, as well as individual needs. This is particularly true in the development of interventions to ameliorate serious social problems, including poverty, homelessness, and malnutrition on a global scale. Children, especially unparented or orphaned children, suffer the greatest from these difficult conditions; it is estimated that on a global basis,

... 8.1 million children under five years of age died from preventable causes in 2009, and that in developing countries more than a third of the children under five suffer from stunting and a quarter suffer from underweight and severe malnutrition before they enter primary school, with, in some cases, irreparable damage to their cognitive development and long-term impacts on their physical health and development. (United Nations General Assembly 2010, p. 3)

Women, particularly those living in conditions of poverty, or in environments in which they have limited social power, are also vulnerable to exploitation and harm (Gamble and Weil 2010; Nussbaum 1999).

There are a variety of interventions tailored for unparented or orphaned children, including residential care or other forms of alternative care (i.e., foster care) and some are better for meeting the physical, emotional, and developmental needs of children more than others. Intercountry adoption is one strategy that has been used to build families, bridging global space and cultures in the process.

Nearly a million children have been placed with families as a result of intercountry adoption in contemporary history, dating back to the Second World War (Selman 2009, 2010). Concerns about the vulnerabilities of these children

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and their families of origin have been raised repeatedly over time ([selected examples, in chronological order] Joe 1978; Ryan 1983; Ngabonziza 1991; Vonk et al. 1999; Triseliotis 2000; Roby and Matsumura 2002; Hollingsworth 2003; Gresham et al. 2004; Smolin 2004, 2005, 2006; Roby 2007; Hollingsworth 2008; Rotabi 2008; Rotabi and Bunkers 2008; Bergquist 2009; Bunkers et al. 2009; Dickens 2009; Roby and Ife 2009; Rotabi and Bergquist 2010), challenging our conceptions of “helping” and the age-old ethical imperative of “do no harm” in a global environment (Singer 2002). The following discussion considers these vulnerable populations, the practice of intercountry adoption in the context of policy changes, and the strengths and weaknesses of new global intercountry adoption standards. Particular emphasis is placed on vulnerable children and their families of origin, because they face unique risks that require sensitive attention to their needs, cultures, communities, and contextual economic stressors.

Rapid globalization and market influences also increase pressures and the risk of exploitation; these forces need to be countered by close attention to human rights and ethics (Bartholet 2007; Gamble and Weil 2010; Lyons 2006; Reichert 2003; Roby 2007; Singer 2002; Smolin 2007). These issues warrant macro-level interventions, such as international oversight and standards related to human rights and poverty. Also, micro-level interventions, including implementation and enforcement of aforementioned standards, are important for direct practice with vulnerable populations. This article applies to both micro and macro scales of intervention as they relate to human service practices with these populations.

Intercountry Adoption: A Controversial Intervention

Debates about intercountry adoption as an international child welfare strategy date back to at least the Vietnam Babylift (Bergquist 2009; Joe 1978; Ngabonziza 1991; Ryan 1983; Smolin 2004, 2006; Triseliotis 2000). Both public and academic discourses boast a variety of different perspectives (Dickens 2009; Masson 2001; Rotabi and Gibbons 2009). Ultimately there is agreement about the importance of good intercountry practices, but implementation of such practices in combination with the rights of the most vulnerable children in the world—unparented children living in institutions and/or war and disaster zones—indicates different approaches (Dillon 2009; Bartholet 2007; Bergquist 2009; Rotabi and Bergquist 2010; Roby and Ife 2009; Roby 2007; Smolin 2008). The tension lies in how children might best be protected and provided with loving families, without risk of child theft and trafficking. As differences in opinions become quite

heated (Yemm 2010), the issue often becomes political. As McKinney (2007) points out,

On one hand, [international adoption] makes loving families available to provide homes and care for the neediest of the world’s children. On the other hand, unregulated, international adoption can lead to the ‘commodification’ of children and abusive adoption practices brought about by market behavior. (p. 368)

These two different perspectives come into distinct conflict, especially when impulse and pressure for child rescue peaks during man-made or environmental disasters, such as the Tsunami of 2004 (Bergquist 2009; Roby and Ife 2009; Rotabi and Bergquist 2010).

For example, the recent massive earthquake in Haiti in 2010 was the source of great public and academic debate (see “Room for Debate” in the *New York Times* 2010) in the question of how to protect Haiti’s children (Balsari et al. 2010). When it was learned that illegal attempts to remove children from the nation had been carried out by outsiders (Rotabi and Bergquist 2010), questions about appropriate versus illegal interventions surfaced especially when the press asserted that many of the children were not “orphans” (MSNBC.com News Services 2010). That is, many of them had at least one living parent (making them single orphans) and the evidence of the children being double orphans (such as both parents being deceased or truly unavailable to parent) was not verifiable. These controversial abduction actions, followed aggressively in the international press due to Haiti’s imprisonment for kidnapping and later release of the major actors, coincided with the public pressure to intervene for “orphans” or “orphan care” (Bailey 2009b). When there was international outcry for intercountry adoption of vulnerable children, humanitarian and development organizations responded with an assertive “no” (Rotabi and Bergquist 2010). This was due in part to the difficulty of ascertaining which children truly met international standards or criteria for permanent removal from their community and family groups (i.e., see Degeling 2010; International Social Services, 2010; the International Red Cross 2010).

Part of the problem, as Abebe (2009) points out, is that “orphanhood” is a complicated concept and that although the most common “global definition of ‘orphan’ ...is a child with two deceased biological parents, this is by no means universal. Different societies have different conceptions about orphans, and understanding orphanhood—both biological and social—as a phenomenon and mode of life of children is culture-specific.” The term “orphan” was at one time considered outdated, but it has become more commonly used in contemporary times with the onset of HIV and AIDS (Bunkers 2010; Johnson Butterfield and Alemu 2006; Mezmur 2009; Roby and Shaw 2006). As a

result, the care and support of orphans has become a major priority for international aid agencies (Ennew 2005). Because of the different definitions, there is considerable variation in the reported numbers of orphans in the world, depending on the perspective or goal of the organization. However, estimates range upwards to 140 million children (counting both single and double orphans) and thus the problem of orphan care is a serious and persistent issue (Bailey 2009b; UNAIDS, UNICEF and USAID 2004).

The reality of orphaned and vulnerable children, in combination with the media's portrayal of such children as only needing a loving and stable family to lift them from poverty and fantasized notions of child rescue (Abebe 2009), has resulted in dramatic movements of children into adoptive placements in other nations. Such was the case when there was significant movement of Romanian children for intercountry adoption after the fall of the Iron Curtain in 1989. Thousands of children joined adoptive families in Western Europe and the USA as adoptees after exposé-style news programming highlighted the dire circumstances of children languishing in institutions (Dickens 2009; Groza et al. 1999; Johnson et al. 2003; Yemm 2010). More recent large-scale movement of children from impoverished nations has continued, and Ethiopia, estimated to have one of the largest single country populations of such children with approximately 5 million orphaned and vulnerable children, is predicted to have been the most active sending nation of adoptees in the year 2010 (Bunkers 2010; Ethiopian Ministry of Health 2008; Mezmur 2008; Rotabi 2010).

Ultimately, the pattern of intercountry adoption was called the “quiet migration” (Selman 2002) and in the year 2004 there were 45,000 children relocated from one country to another by means of intercountry adoption (Selman 2006). The practice has been in decline ever since (Selman 2009). The vast majority of these children have migrated from low-resource nations in the “Global South” (Hall and Midgley 2004) to high-resource nations in the North, specifically the USA and Western Europe (Selman 2009).

Hague Convention on Intercountry Adoption

The Hague Convention on the Protection of Children and Co-Operation in Respect of Intercountry Adoption (henceforth the HCIA or the Convention) was developed with the goal to promote the best interests of the child and to prevent abduction, sales, or traffic of children under the guise of intercountry adoption (The Hague Conference on Private International Law 1993; Rotabi 2008; Smolin 2008). Currently this agreement boasts 83 contracting states. It includes the concept of subsidiarity, a principle

that requires signatory nations to provide care for children—assessing their best interests on a case-by-case basis (Liss and McKinley-Pace 1999)—and to provide a continuum of care rather than fast-tracking a child to intercountry adoption as the first and only solution. Ideally this means that the country (a) attempts to keep the child within his or her family and kinship group, including extended family/relative guardianship or adoption. If that is not possible, (b) there should be an attempt to place the child domestically in appropriate and humane alternative care situations, including domestic adoption. Once these options have been explored, the child may be (c) freed for intercountry adoption if this is deemed to be an appropriate option for the child, after weighing a variety of variables based on the particular child's case (i.e., readiness of the child to be adopted internationally, particular special needs, and other relevant factors including family systems).

The HCIA fails to provide clear and precise requirements as to what exact or specific factors should be considered when determining the best interests of the child (such as requiring priority for domestic adoption without absolute requirements for related practices) for the aforementioned continuum of care. However, a *Guide to Good Practices* (The Hague Conference on Private International Law 2008) provides guidance and recommendations. Each Convention signatory nation develops its own practices and self-governs its intercountry adoption activities between Convention-nations (e.g., the USA and China), often developing new laws for HCIA compliance and regulatory oversight of the actors involved in making critical child welfare decisions. For example, Guatemala passed a new adoption law in 2007 (Bunkers et al. 2009; Congreso de la República de Guatemala 2007; Rotabi et al. 2008) and the USA passed the Intercountry Adoption Act (IAA) of (2000) (Pub. L. No. 106–279, 114 Stat. 825) (Rotabi 2008). Each law was developed and passed by lawmakers based on the unique context of their nation, exercising sovereign autonomy while meeting basic Convention requirements and considering the existing or emerging capacity of child welfare service systems.

Both of those domestic laws, in Guatemala and the United States, identify the responsible entities for intercountry adoption processes in the respective nations, including a “Central Authority” for administrative oversight of child welfare activities that may lead to intercountry adoption. As per the Convention, “approved providers” of adoption-related services are identified and ideally are regulated appropriately by each HCIA-nation state. Oversight of regulatory activities and actual child welfare practices are largely internal with opportunity for technical assistance from the Hague Conference on Private International Law.

If and when a nation's implementation of the HCIA is viewed to be insufficient or inadequate in providing "safeguards" for ensuring the best interests of the child, member nations may object to and cease ICA interactions with another Convention-nation. This was true in October of 2010 when the USA announced that it would not participate in Guatemala's pilot intercountry adoption program. The following excerpt from the USA Central Authority illustrates this point:

The U.S. decision to withdraw its letter of interest is based on concerns that adoptions under the pilot program would not meet the requirements of the Hague Intercountry Adoption Convention. Specifically, the United States believes that more safeguards for children should be in place before the CNA could start processing new intercountry adoptions. In addition, the Guatemalan Government has not yet provided specific details for how adoption cases under the pilot program would be processed under Guatemala's new adoption law. (United States Department of State, 2001)

This public statement indicates an oversight process that occurs when one nation such as the USA, in an act of diplomacy and responsibility as an intercountry adoption actor, makes a determination that another nation such as Guatemala has not adequately developed a Convention-appropriate or acceptable ICA system of care for its orphaned and vulnerable children. This determination came after many years of struggle and international pressure, due to concerns about problems in Guatemala's system in combination with poor or unethical practices of some USA adoption agencies, ranging from what has been called irregular adoptions to child sales and theft (Bunkers et al. 2009; Gresham et al. 2004; Rotabi 2008, 2009, 2010; Rotabi and Bunkers 2008; Rotabi and Morris 2007; Rotabi et al. 2008). Because USA-based adoption agencies were, at times, complicit in the problems of Guatemala and other nations (i.e., Vietnam, Cambodia, and India) (Smolin 2004, 2006; Rotabi, 2008, 2010, *in press*), the manner in which this most frequent child-receiving nation oversees its approved adoption service providers provides a case example of how a Convention-nation implements policy, including strengths and weaknesses. In this article, we address whether another vulnerable population, birth families, receives adequate protection through implementation of the Hague Convention. Because information on birth families in international adoption is extremely scarce, we draw examples worldwide rather than focusing on a single sending country as an example.

Case Example: Strengths and Weaknesses of the United States' Implementation of the Hague Convention

One of the strengths of the USA implementation of the HCIA is designation of the U.S. Department of State (USDOS) as the Central Authority and that the activities related to the Convention take place within the Office of Children's Issues. While it was a rather protracted process of implementation, with the USDOS taking almost 8 years to implement, ratify, and fully enforce the Convention after the passage of the year 2000 IAA, ultimately the organization and other collaborators have developed a system of accountability.

As Central Authority, it is clear that the organization has taken a leadership role in intercountry adoption that is far more preventive in nature as compared to the pre-Convention era. Further evidence of DOS's expansive role is a relatively sophisticated website (<http://www.adoption.state.gov/>) that denotes the intercountry adoption patterns of over 150 nations, Convention status of each nation, and other issues such as country alerts and problems that may occur due to issues such as policy changes.

Another critical area for accountability and transparency is the U.S. Department of State's/Central Authority's oversight of approved adoption service providers. This was accomplished during a rather lengthy process in which just over 300 agencies applied for approval to operate in Convention nations. The Council on Accreditation (COA) was the only national organization authorized to carry out agency evaluations (Rotabi 2008; United States Department of State, *n. d.*), using well-defined standards of practice for financial transparency, administrative oversight and procedures, and appropriate human services protocols (i.e., case management requirements) to promote the best interests of the child and prevent child trafficking. COA accredited over 100 USA-based agencies to provide adoption services. Although this process aroused considerable debate among adoption service providers about appropriate regulatory boundaries and feasibility (Bailey 2009a), the accreditation process has been carried out to meet the regulatory obligations as set forth by the Convention and IAA.

Despite these strengths of the USA implementation of the Hague Convention, there remain a number of significant weaknesses in achieving the protection of vulnerable children and birth families (see also Degeling 2010; Graff 2010; Parents for Ethical Adoption Reform, 2010, June), as enumerated below:

1. A major gap is that the Hague Convention applies only to practices or transactions between two Convention nations. This means that while the USA may be a party to

the Convention, adoptions that occur with non-Convention nations fall outside of the regulations of the HCIA. Non-Convention nations are vulnerable to unscrupulous individuals and agencies, in part because they often lack Central Authorities to enforce or regulate standards of practice, including agency accreditation. Nations without both legislation and consistent government oversight of adoption practices through a centralized system often have problems, especially when intercountry adoptions surge (Selman 2009).

This leaves some countries particularly vulnerable, such as Ethiopia and other African nations that have not signed the international agreement (Graff 2010; Rotabi 2010). After the close of adoptions from Guatemala, some adoption agencies shifted strategies to Ethiopia as the next source of babies for intercountry adoption (Rotabi 2010). A shift to non-Convention nations can be an act of desperation for an agency that has been declined Hague Accreditation because the organization does not meet basic standards. One such Florida-based agency has a known history of serious and persistent problems with its state licensing and regulation body, with more than 1,000 pages of complaints and accompanying documentation in recent years (Rotabi 2010). However, the agency is operating in Ethiopia with web-based advertisements of a vibrant program in the African nation (Rotabi 2010). This is further complicated by the fact that when an agency is denied accreditation, there is no public explanation by the USA Central Authority/Department of State or the Council of Accreditation as to why accreditation was denied. Thus, it is impossible for prospective parents/consumers to know the grounds for denial. Reform-oriented advocacy groups such as Parents for Ethical Adoption Reform (PEAR) (2010) have complained about this confidentiality, pointing out that this aspect of agency accreditation process lacks transparency. Furthermore, when consumer groups voice concerns about agencies (i.e., state what is known about poor or unethical practice in public record), they often face legal liability, such as defamation lawsuits or other civil claims (Maskew 2010).

2. Financial transparency at the agency level is lacking with respect to humanitarian giving to child care institutions (orphanages) and other entities (COA 2007, Standard 96.33).

Agency accreditation standards require clear accounting, including a report by a certified public accountant to verify financial solvency, demonstrating adequate operating expenses with at least 2 months' budget reserve. This area of agency transparency is further bolstered by the requirement for appropriate bonding and insurances to further guarantee that the agency is financially stable. Despite those requirements, many agencies have "humanitarian giving" programs that they boast about in

their marketing materials that are less regulated (such as scholarships for children that are not "adoptable" or who are left behind). It is well-known that "humanitarian giving" may also be a leverage with government employees or others working in child care settings to encourage expedient processing of children—especially young children and infants (Freundlich 2000). For example, an orphanage director may benefit from a new vehicle being donated to the institution and if examined closely, it may be learned that the vehicle is used for personal or non-business transportation and ultimately it is a misuse of "humanitarian" giving. Obviously, such an abuse of power may take other forms that would compromise the best interests of the child and even cross the line of selling a child or children in exchange for valued resources (i.e., lavish and unnecessary "business" trips to the USA or Western Europe).

Another troubling dynamic occurs when adoption agencies develop humanitarian giving organizations as separate entities, such as shadow agencies with direct cash transfers being made in foreign nations. In shadow agencies, information about how funds are spent or "given" is closed to scrutiny, and it may be that those humanitarian funds influence adoption activities. Take, for example, Hague-accredited MLJ Adoptions. It appears that this small adoption agency and its employees have set up the "Fatherless Foundation," which is a separate entity for humanitarian activities related to orphaned children (see <http://www.thefatherlessfoundation.org/>). While there is no evidence of wrongdoing of this foundation or adoption agency, this practice is questionable and poses important questions about boundaries, dual relationships, and conflicts of interest between those who receive cash or in-kind assistance and a foundation with clear links to an adoption agency. There are many calls for clearer tracking of humanitarian aid that is linked to intercountry adoption, including those by PEAR (2010, June) and by the Special Commission on the 1993 Hague Intercountry Adoption Convention (Degeling 2010). Maskew (2010) recommends that contributions be made through a large foundation, such as the Ford Foundation, that could oversee donations with transparency and accountability.

3. There is a lack of standards and guidelines for salaries and compensation paid to U.S. agencies and their employees. According to the *Guide to Good Practice* (The Hague Conference on Private International Law 2008) cooperation between states for transparent fees and professional compensation is important for collaborative transparency and mutually defined standards with considerations for economic realities. This relates not only to fees paid in sending nations for transparency, but also to professional fees and compensation for adoption services in receiving nations (COA 2007, Standard 96.34 and 96.40).

Adoption reformists were hopeful that the USA HCIA implementation would start to control fees for adoption services and ultimately the incomes of adoption agency employees. However, agency evaluation teams are not given any guidance on a range of “fees” or professional compensation based on the standards of the industry (COA 2007). As a result, the current guidance to agency evaluators is insufficient, and makes regulation of professional fees difficult. Excessive salaries for those involved in intercountry adoptions are in direct contradiction of the IAA. This could be easily remedied by the Central Authority and COA, using existing data about customary salaries, but there has been a failure to act in this area of potential improvement.

4. Oversight of foreign service providers is limited (COA 2007, Standard 96.44 and 96.46) and lax oversight can lead to questionable practices.

The activities of individuals who act on behalf of adoption agencies in other nations often become significant points of contention and sometimes result in clear legal issues (Smolin 2006). In Cambodia, an adoption facilitator by the name of Lauryn Galindo carried out sales of children in coordination with Seattle Adoptions International (Rotabi *in press*; Smolin 2006, 2008). The U.S. Federal Marshall who arrested Galindo presented compelling evidence for deplorable conditions of care for those children waiting for adoption, falsified documentation of identities of these children (called “child laundering” by Smolin 2004, 2006), and other abuses of the law related to finances or other unethical behaviors. Galindo’s actions occurred largely without the knowledge of the U.S.-based adoption agency where she worked. By the time the adoption agency became aware of Galindo’s poor practices and unethical/illegal behaviors, approximately 700 children had been placed by the organization, and some devastated adoptive parents learned that their children were not truly “orphaned” but were in fact victims of unethical child relinquishments. Under new standards, the same problem could easily occur because the conception of “supervision” is not outlined explicitly. For example, the amount of face-to-face supervision is not defined and even documentation of the amount, quality, and outputs and outcomes is not indicated. The only documentation required during agency evaluation, at this time, is a supervisory contract, which generally requires that the foreign service provider will not engage in child buying or other unethical practices. Holding U.S. adoption agencies responsible for the activities of their foreign service providers would be one step towards preventing those illicit practices (Graff 2010; PEAR 2010, June).

5. Under current standards and procedures, there is no way to prevent unscrupulous people from moving from agency to agency, even when they have been determined to

be unethical. Due to confidentiality and legal liabilities, tracking is currently impossible.

When an adoption agency realizes that they are interacting with and even supervising a foreign provider who is unethical or operating illegally, that agency would, in good practice, cease further relationship (i.e., terminate the contract). However, this same questionable provider may have very good access to children and, as a result, could easily begin an employment relationship with another adoption agency—without any trace of past wrongdoings, including ethical or legal violations. Given the legal liability environment of the USA, it is difficult to disclose such explosive information among agencies. However, the USA Central Authority could take on this role, developing a list of problematic and unethical providers, and making such information clear to its accredited providers within a communication network designed for system integrity.

6. The training of prospective families for adoption readiness (COA 2007, Standard 96.48) and agency employees (COA 2007, Standard 96.38) for best practices is not based on evidence or outcomes.

Under new guidelines, prospective adoptive families are required to receive 10 h of adoption training to prepare them for intercountry adoption. While agencies are required to provide general topic areas (i.e., institutionalized child, medical issues, or country-specific information), no meaningful evidence is required during agency evaluation as to quality of training, based on measureable outcomes in the area of knowledge and skills development. This is also the case for training for agency employees. At this point, evaluators review certificates of training and make sure that those materials meet basic criteria without verification of quality of training or other indicators that individuals have actually learned critical information.

7. Agency operation without full-time clinical supervision is possible under current standards based on the idea that an incumbent with experience can manage adequately (COA 2007, Standard 96.37).

This particular concern is based on the fact that individuals who have previous intercountry adoption experience may serve in leadership positions in agencies without explicit training or education in human services and adoption. Incumbents may meet basic agency leadership criteria without appropriate university education. They may qualify simply by being adoptive parents themselves with some work experience in the field. Without educated leaders, supervision is difficult, especially clinical supervision required for those providing direct services. Some agencies have been accredited with this limitation and thus must hire appropriate individuals for clinical supervision. As per standards, such an individual could be contracted and only have a limited role in the agency—proscribed to narrow boundaries of supervision (i.e., limited agency

presence day to day)—under the leadership of an incumbent. This is problematic and meets the lowest possible standards for professional involvement in an ethically challenging environment.

8. Requirements for membership in the board of directors of agencies (COA 2007, Standard 96.32) allow members who are not truly qualified for the responsibilities of preventing child sales and theft or promoting the best interests of the child, especially in a regulatory environment.

Unfortunately, under Hague Convention standards, a board of directors can be composed of anyone with some association with the agency or familiarity with the practice of adoption. As a result, there are multiple accredited agencies in which the boards of directors are agency employees, spouses and other family members (i.e., adult children, siblings) of the executive director, and others having dual relationships. Because the board has direct oversight and supervision of the executive director, including salary, this is an ethical dilemma that has obvious implications for the health and functioning of an adoption agency.

9. The current agency complaint system is inadequate and underfunded.

This is an area of concern for those who have made complaints to the Central Authority and COA. At this time, COA carries out investigatory processes when complaints are made against an agency within the convention system. However, outcomes of those investigations are kept in confidence. Also, the staffing of the investigatory process and analysis is somewhat unclear; some staff charged with investigation have this responsibility as one of many, and COA appears to be staffing the position with individuals without previous experience or targeted training for such sensitive inquiry. Finally, these investigations are carried out without budgeting for field investigations, as would be necessary in egregious cases of abuse. As a result, there is concern that serious complaints are not being fully investigated (i.e., lacking in-person on-site interviews) and opportunities are lost in terms of truly curbing abuses and responding to the regulatory requirements of the IAA. To be effective in enforcing regulations, the COA investigations need to be transparent and adequately funded (PEAR 2010, June).

10. Illegal practices in non-Convention nations are not covered under the IAA and thus birth family coercion and child purchase are not criminalized. *The Guide to Good Practice* directly addresses this issue stating that

...penalties for improper financial gain must be included in the implementing legislation if they are to be effective. Contracting States should also ensure that the penalties are enforced against those individuals who seek improper financial gains from

intercountry adoption. (The Hague Conference on Private International Law 2008, p. 132)

PEAR (2010, June) takes the same position and points out that “practices of soliciting children for adoption and tricking or coercing birth families into relinquishment should be criminalized.”

All of these areas of concern and gaps in the USA implementation of the Convention at the agency level raise critical questions about whether vulnerable populations are being adequately protected by USA implementation of the Convention.

Birth Families in Sending Countries

Another vulnerable population in intercountry adoption consists of birth families, particularly birth mothers. Almost all intercountry adoptions are from low-resource (developing) countries to countries that are more industrialized and wealthier (Selman 2009). Individual families of origin often have few material resources and may be living in poverty or in difficult circumstances due to disasters or ill health. Birth mothers may be further vulnerable because of less power due to their female gender, young age, or minority status. Yet, in terms of research and reliable information, birth parents remain the most neglected members of the adoption triad, and international birth parents even more so (Wiley and Baden 2005). We will address two time periods in which birth families are particularly vulnerable, during relinquishment and post-relinquishment.

While the purpose of the Hague Convention is to ensure that intercountry adoptions take place in the best interests of the child, there are provisions that pertain to and protect the rights of birth parents, particularly birth mothers. Chapter 2, Article 4 of the Hague Convention requires that, “the persons ... whose consent is necessary for adoption, have been counseled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin,” and that “such persons.... have given their consent freely, in the required legal form, and expressed or evidenced in writing.”

Moreover, the preamble of the Convention requires that each country give priority to family preservation and reunification in the statement, “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.” *The Guide to Good Practice* specifies strategies that nations can use to keep families intact (The Hague Conference on Private International Law 2008).

A third clause that protects extended birth families is often referred to as the subsidiarity clause, described above. It states that [an adoption shall take place only if the competent authorities of the state of origin] “have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child’s best interests.” The subsidiarity clause gives preference to a placement within the extended family and secondarily within the country of origin; it should have prevented (had the Hague Convention been in force) the following outcome: A young Guatemalan mother left her son with her own parents who loved and cared for him until he was 5 years old. At that time the mother made an adoption plan with a North American couple. The grandparents fought unsuccessfully through the courts to have the adoption annulled (Comisión Pro-convención sobre los Derechos del Niño 1996). The subsidiarity clause has become a controversial requirement of the Hague, as some argue that children deserve a permanent family as early as possible, and thus, time should not be wasted in seeking extended family members or other local options for children (Kunz and Reese 2010).

Because research about birth families in countries of origin is scarce, we need to draw upon the few research studies of intercountry birth parents, from birth parent narratives and documentary films, and from the literature on domestic adoption to understand how and to what extent the Hague Convention protects, or could protect, birth families during the adoption process. Most of the extant information focuses on birth mothers and they will be emphasized here, because information on intercountry birth fathers is almost nonexistent.

The scarcity of birth parent perspectives may stem partly from the fact that birth parents may be stigmatized, hidden, and inaccessible. In countries such as China, Korea, Cambodia, Romania, and Guatemala, birth parents may fear community reprisals, social stigma, or physical punishment if their relinquishment is revealed. For example, in Guatemala, there are reports that birth mothers who have relinquished for intercountry adoption have been punished by their communities by having their hair cut and their houses burned (e.g., Morales and Rodas 2006). In China, child abandonment is against the law (Johnson 2004; Johnson et al. 1998). Therefore, finding birthmothers and birthfathers is difficult.

A second reason for the absence of birth parents in the literature may be the focus on the “best interests of the child.” The construction of a story that privileges the child’s interests and sees intercountry adoption as the best solution for a child often casts the birth parents, particularly the mother, in a negative light. See, for example, Gibbons et al. (2009). The mother’s perspective may remain undervalued and unexplored.

A primary issue in protecting birth mothers’ vulnerability is the issue of culture and culturally appropriate counseling. Although access to counseling is required by the Hague Convention, it may be unavailable, biased, or culturally inappropriate. A birth mother in India criticized the counseling she had received as “one-way counseling,” that promoted only relinquishment as a possibility (Bos 2007).

One of the prominent ways in which cultures differ is on the dimension individualism-collectivism. In a collectivist culture the needs of the individual are subordinated to the needs of the in-group, usually the extended family. The collectivist perspective is characterized by a desire to maintain group harmony and to fulfill one’s obligations and duties (Oyserman et al. 2002). For example, in south India, the extended family assumes importance in child rearing, and the assumption is that a child belongs to the family, not to an individual person or couple (Bos 2007). But consent for an adoption is typically obtained solely from the birth mother. One might question whether this is appropriate in collectivist societies.

Cultural values might also play out in increasing birth mothers’ vulnerability. Many birthmothers in India and Guatemala are migrants from rural to urban areas (Bos 2007; Bunkers et al. 2009). In a collectivistic society, in which people are accustomed to living surrounded by the extended family, young women migrants who have left family behind may be especially vulnerable to exploitation.

Cultural values may also include conceptions of the family and adoption that can lead to misunderstandings of what intercountry adoption involves. Many non-industrialized societies have indigenous traditions of child-sharing or kinship raising that influence perceptions and interpretations of intercountry adoption (Fonseca 2004; Leinaweaver 2008). Those traditions may be inconsistent with the intercountry adoption practice of relinquishment as a permanent and irreversible separation. While the Western model sees adoption as substituting one set of parents for another, a non-Western model sees parenthood as additive (Bowie 2004). While the Western model privileges nuclear families with clear-cut boundaries, a non-Western model privileges extended families with permeable boundaries. Those different conceptions of family lead to distinct adoption metaphors, the Western model emphasizing the transfer of parental rights between unknown parties, and the non-Western model seeing adoption as a gift, involving reciprocity and creating links among community members.

Traditional practices may also include temporary care in institutions. For a family that doesn’t have enough food, an “orphanage” may serve as a temporary placement for a child until their economic condition improves (The Hague Conference on Private International Law 2008). However, that child might be declared “abandoned” by authorities

and fall subject to intercountry adoption without the express wishes of the birth parents.

A powerful example of how traditional practices may lead to misunderstandings stems from a study in the Marshall Islands (Roby and Matsumura 2002). More than 80% of the birth mothers interviewed had a misunderstanding of legal relinquishment. At the time of the adoption, they thought that their children would come back to them at age 18, with material wealth and a good education. The authors reported traditional practices of child sharing that were based on the idea that adoption creates links between families and that children can return home to their original families. In addition, it is an insult in Marshallese culture to refuse to share something that has been requested by another person. Those beliefs may have influenced birth mothers' willingness to relinquish.

A recent study of birth mothers in South Africa revealed similar misconceptions (Högbacka 2010). Many birth mothers expected their children to return to them, despite having permanently signed away parental rights. Decisions were rooted in poverty and birth mothers' desire to have an on-going relationship with their child was clear.

Birth mothers may be either intentionally or unintentionally misled during the process of relinquishment or making an adoption plan. One example:

One day [someone from the adoption agency] came to me and asked me to sign an adoption agreement and give a written promise to give up my parental rights. It felt horrible to do it. I almost panicked because I was so afraid of what I was doing. Give up my parental rights? I was stunned that the concept even existed. Adoption turned into reality when I faced the adoption papers. It felt strange that my baby was no longer going to be mine. (Anonymous Korean birth mother, in Han 2010, p. 165)

Birth parents' decisions to relinquish may vary along a continuum from an informed decision freely made to a coerced relinquishment (Wiley and Baden 2005). There is substantial evidence that in past years with respect to domestic adoptions within the USA, many women felt that they were given no choice about relinquishing (Fessler 2006). In intercountry adoption, birth mothers may be intentionally misinformed about the adoption process or they may misunderstand the nature of formal adoption. The misunderstanding by birthmothers is sometimes that their child will return to them, as revealed in the Marshall Islands (Roby and Matsumura 2002), in South Africa (Högbacka 2010) and in a case in India (Bos 2007). An Indian birthmother said, "I did not realize what the word 'adoption' implied. I thought he was going to study abroad. I thought that there would be big schools, and that someone would make him study and send him back. Just like how

we have hostels here, something similar. I also did not read the document. I even still don't know whether it was in Tamil or English. I blindly signed" (Bos 2007, p.107).

Sometimes, birth mothers are intentionally deceived. Agency representatives sometimes lie to birth mothers, as in the film *First Person Plural* (Borshay Liem 2000). After reluctantly agreeing to relinquish, the Korean birth mother of Deann Borshay Liem was promised a last visit with her daughter, but the girl was taken away early, in the fear that her mother would change her mind. In the documentary film, *Paper Orphans* (Terre des Hommes and UNICEF 2010), a Nepalese birth mother was told that her son would be taken to Kathmandu to be educated; instead, he was sent for intercountry adoption.

The adequacy of current processes for obtaining the free and informed consent of birth families is unknown, and there are few established guidelines for ensuring that consent is freely given. The *Guide to Good Practice* (The Hague Conference on Private International Law 2008) emphasizes the absence of financial inducements, and suggests that counseling and independent interviewing would be useful.

However, an analogous process, obtaining informed consent for participation in research, has been studied extensively. Those studies suggest that achieving informed consent, a notion based on Western concepts of autonomy and individual rights, is difficult if not impossible to achieve in some other cultural settings. Impediments to informed consent include high levels of illiteracy, lack of familiarity with procedures based on individual autonomy, and other cultural misunderstandings (Krogstad et al. 2010; Nakkash et al. 2009). For example, in a study with Guatemalan women, Lykes (1989) found that the women participants understood their relationship with the researcher to be one of mutual trust, and that requiring them to sign papers was both unnecessary in their opinion and destructive of that trust.

Even when participants think that they comprehend the consequences of participation in research studies, they may not fully understand their roles, and may not feel free to decline participation (e.g., Pace et al. 2005). It is likely that birth mothers, in the midst of an emotional decision, may be prone to misunderstanding information provided to them, even when the intention of the person obtaining consent is to fully inform them. In addition they may not feel free to decline. A birth mother in India said, "Every night I am staring at my child and cry about losing her. When I entered this place, they gave me the rules. One such rule was that I had to surrender the child. I had to agree since I could not go anywhere else. So now I have to surrender her" (Bos 2007, p. 99).

In addition, one must consider the role of the extended family and community in relinquishment, particularly in collectivist countries. If the entire family or community is

responsible for a child's well-being, where does/should responsibility for relinquishment lie? Although it has not been studied extensively, birth mothers may feel pressure from families or communities either to raise the child or to relinquish (Bos 2007; Morales and Rodas 2006; Roby and Matsumura 2002). The dilemma is one of weighing individual rights against collective community interests (Braune et al. 2006).

Community involvement, in the analogous situation of consent for research participation, has been recommended as the best practice in studies with indigenous communities (Jacobs et al. 2010, Fall) and is legally required in Nigeria. Nigeria's National Health Research Ethics code establishes a Community Advisory Committee to facilitate cooperation between researchers and the community (Fadare and Porter 2010). To our knowledge there are no requirements by any country for community participation in the decision to relinquish for intercountry adoption.

In addition, do birth mothers have adequate opportunity to retract their decisions? Although the Hague regulations require that the birth occur before legal relinquishment, that requirement may not be realized in practice. In the case of Guatemala, birth mothers were often given subsidies or payments during pregnancy (Bunkers et al. 2009). Because they would have to return the money were they to change their minds, they found themselves in a financial trap that resulted inevitably in relinquishment (Bunkers et al. 2009). Although payment to birth mothers for reasonable expenses is permitted under the Hague Convention, the extreme poverty among Guatemalans made them particularly vulnerable to exploitation.

Relinquishment is also subject to coercive influences at the broadest social level. K. Johnson (2004) has outlined the political and governmental strictures that oblige Chinese couples to abandon infant daughters despite their wishes to keep them. Not only the one-child policy, but the extreme penalties for violation, as well as the illegality of most domestic adoptions, necessitates abandonment by loving parents.

In sum, it seems that birth parents making an adoption plan are vulnerable to subtle influence or direct coercion. While the Hague Convention is designed to protect birth families through its requirement for freely given consent, there are no safeguards to ensure that consent is informed and given freely, that relinquishment is understood in relation to birth families' cultural values, and that the Western notions of individual rights are consistent with the process of obtaining informed consent. Among the recommendations by PEAR (2010, June) is that tricking or coercion of birth families be criminalized.

The vulnerability of birth mothers does not end with relinquishment. Limited research and anecdotal data from international birth mothers suggest that a majority of them

would like some degree of openness or a reunion with their birth children (e.g., Dolgin 2002). When asked, most birth mothers in India expressed a wish to see their children again, one saying, "I love to see my child at any point of time" (Bos 2007, p. 239). However, agency representatives were not supportive of reunions, claiming that there were inadequate resources to counsel the birth mothers and adoptees with respect to reunions (Bos 2007). There are no provisions in the Hague Convention to provide reunions or to enforce agreements about openness.

Although open adoptions are currently very rare in intercountry adoption, reports suggest that they may confer emotional advantages to birth parents:

[After exchanging letters and photos with the adoptive family] two years ago... I was able to meet my boy and his adopted parents. It took great courage to actually meet him, but facing my painful past allowed me the chance to move on. The fact that he was growing up so well encouraged me to go on with my life. It was not just pain, but it was hope at the same time. Although I cannot live with my boy, I always see him from a distance and try to do my best not to be a shameful mother. (Anonymous Korean birth mother, in Han 2010, p. 64)

The research on domestic adoption suggests that birth mothers are more satisfied with and derive long-term psychological benefits from open adoption (Christian et al. 1997; Cushman et al. 1997).

There is a small but growing trend toward openness in intercountry adoption (Roby et al. 2005). An open Ethiopian adoption between the adoptive family and the family of the deceased birth mother is documented in the film *One Family: An Ethiopian Adoption* (Ritvo et al. 2008). It remains to be seen whether open adoption will yield benefits for the birth mothers in intercountry adoption.

What steps might be taken to empower birth families and birth communities? There are no widely established models from intercountry adoption for birth family empowerment. However, there are social interventions that may be transferable and have shown some promise, such as Family Group Conferencing (Harper et al. 2002; Roby and Ife 2009). This group intervention, designed to involve immediate and extended family as well as others who consider themselves kin into critical child welfare decisions, often results in a care plan for a minor child. A second model that has been used for AIDS orphans is the Family Care Model (Pardasani et al. 2010). This program provides emotional and physical support for caregivers of AIDS orphans in Tanzania. These models need further examination, as Cheney (2011) has argued that providing incentives for orphan care may make children even more vulnerable to exploitation by adults.

From a macro perspective, the most straightforward step to empowering birth families would be to eliminate the conditions that compel relinquishment. Those conditions often include extreme poverty and lack of social support, especially following natural disasters and/or ill health. Roby (2004) gives examples of birth parents who reported that had they received adequate funds, they would have tried to reclaim children given in adoption. However, global poverty remains endemic and the resulting inequalities (Singer 2002) have not been addressed with broad solutions, and in fact resolving poverty and oppression is elusive at this point in human history. As such, country-specific and micro-level interventions are necessary for protection of vulnerable peoples.

At the micro or individual level, birth parents might be empowered by access to nonbiased, culturally sensitive counseling. The province of Ontario in Canada has been on the forefront of birth mother empowerment. The recently released Memorandum for Informing Birth Parents specifies that a birth parent is entitled to free counseling from a counselor of their choosing or from a list provided by the Ministry of Children and Youth Services (Giesbrecht 2011).

A second step would be to provide the opportunity to retract consent within a reasonable time frame after relinquishment. For example, in the Ontario context, this option is available to birth mothers for 21 days (Giesbrecht 2011).

Another step forward would be to grant some authority to birth parents in choosing the adoptive parents. This is a routine procedure for domestic adoptions within the USA and Canada and could be extended to intercountry adoptions. Birth mothers (and fathers) might examine lists of approved adoptive families to select those who they would like to parent their children.

Finally, it is likely that many birth parents would like some form of openness in adoptions. They might reach agreements with the adoptive parents about the preferred degree of openness in the adoption. Agencies could be involved in mediating that openness.

Finally, the Ontario model also requires that birth mothers reveal as much information as possible about their own health and the conditions under which they relinquished (Giesbrecht 2011). This information exchange is also in the best interests of the child as it can promote well-being and preventative health measures in adoptive families. Under Ontario law, birth mothers have responsibilities, as well as rights.

In sum, birth parents remain among the persons who are vulnerable and at risk in intercountry adoption. While the Hague Convention does not protect them adequately from misunderstandings and exploitation, regulations based on the Hague and on models of domestic adoption might be implemented by sending and/or receiving countries to

serve and protect birth parents while still fostering the best interests of their children.

Conclusion

We began with the following question: Does the Hague Convention on Intercountry Adoption adequately protect orphaned and vulnerable children and their families?

Unfortunately, the answer is complicated and varies by country and local context. In the case of the USA, the most active child-receiving country in the world, there are problems in protecting the best interests of the child, as outlined in the case example. Because of USA consumer patterns and the profound influence of the USA over global practices in intercountry adoption, those problems should be addressed. That will probably require amending the USA IAA and strengthening agency accreditation standards. Those changes should be an immediate priority.

There are also sending nations in which policy, practices, and procedures must be strengthened in order to protect children. Some nations have serious and persistent problems even after the implementation of the HCIA and new and improved laws (e.g., see Smolin 2005). Receiving countries can effect change in sending countries as well; Smolin points out that “the United States government is well positioned to alter the system and bring about significant reform. If the political will can be found, the U.S. government could use the implementation of the Hague Convention on Intercountry Adoption to create an accountability structure for intercountry adoption” (p. 405).

To curb abuses of power and exploitation of vulnerable people, the Hague Convention on Intercountry Adoption should be viewed as a starting place that must be followed up by each signatory nation. This includes sound and strong domestic laws with congruent practices and procedures to actually implement the international agreement to its fullest potential. This requires each nation to look inward and survey its risks and opportunities for such implementation and ultimately prevention of child sales and theft. A historical lens is essential, reflecting on how intercountry adoption fraud has been carried out in the past in combination with what we know about vulnerable populations, especially women and birth families (including children) living in impoverished nations and traditional societies (Degeling 2010). Countries need to develop and implement laws and policies that are consistent with local traditional practices, understandings, and cultural values. While it is imperative that the USA take leadership as a powerful receiving nation, sending countries must be perceived as equal partners in protecting the rights, not only of children, but of the families that gave birth to them.

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