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Immigration, Adoption and Our National Identity

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Immigration, Adoption and Our National Identity

SHANI M. KING*

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I. INTRODUCTION

Intercountry adoption (ICA) involves tens of thousands of children moving from family to family among more than 100 countries annually. But what is its history? And how is this history relevant – if at all – to the way we in the West conceptualize ICA today? Is ICA primarily a humanitarian endeavor, an altruistic response to political turmoil, civil wars, and natural disasters in other parts of the world? Or alternatively, is it just the commodification of vulnerable children in Global South countries to meet the needs of wealthy families in the Global North? What are the legal, moral, and ethical dimensions involved in the removal of children from their birth cultures? Ultimately, is ICA rooted in compassion and love for vulnerable children and children in need, or is it just the latest form of colonialism and cultural oppression? What is the right story to tell here?

When we think of ICA, we often think of the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. But this is a recent chapter in a very long history that finds its roots in the immediate aftermath of World War II. What is the history of the legal regulation of

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intercountry adoption and the story behind this legal regulation? Why is this so underexplored and undertheorized? And, furthermore, how, if at all, is it related to our regulation of immigration in, say, the United States? Are these two bodies of law related and part of the same story? And why is this a question that seems odd, as if there is no connection when both bodies of law were born of the same social, economic, and historical context?

In this Article, I tell the story of intercountry adoption. Our starting point is the beginning of the adoption process, with so-called “sending countries,” in which I explore the reasons that countries enter their children into the intercountry adoption market. We begin in the aftermath of World War II and continue until the present day. The story starts in Europe (specifically, in Germany, Greece, and Italy) and Japan. It then continues throughout the Korean War and the communist regime of Nicolae Ceauseacu, until present-day Russia and China. Next, I tell the story of receiving countries; I discuss the social, political, and economic conditions over recent decades that have caused countries to become receiving countries of international adoptees. In the third section of this Article, I explore why intercountry adoption policy and immigration policy should not be thought of as discrete and separate issues, but, instead, as different sides of the same coin, the development of which has and continues to stress the welfare of the nation and society as a whole. And, finally, I turn to the Hague Convention and explore where we are today in the context of the complicated and nuanced history of intercountry adoption.

II. INTERCOUNTRY ADOPTION: A BRIEF HISTORY

Currently, ICA involves the transfer of roughly 20,000 to 30,000 children from more than 100 countries annually, with the United States receiving the largest number of the world’s children.¹ ICA has become increasingly more visible over the years due to the trend among high-profile celebrities of adopting children from Global South countries.² But it was not until the 1950s that ICA became an established practice. Since then, ICA has evolved considerably in response to political turmoil, civil wars, natural disasters, and domestic family policies in low

1. See Peter Selman, *Global Trends in Intercountry Adoption: 2001-2010*, NATIONAL COUNCIL FOR ADOPTION, Table 2 (Feb. 2012), https://www.adoptioncouncil.org/images/stories/documents/NCF_ADOPTION_ADVOCATE_NO44.pdf; Peter Selman, *The Rise and Fall of Intercountry Adoption in the 21st Century: Global Trends from 2001 to 2010*, in INTERCOUNTRY ADOPTION POLICIES, PRACTICES, AND OUTCOMES 7–27 (Judith L. Gibbons & Karen Smith Rotabi eds., 2012) [hereinafter Selman, *The Rise and Fall of Intercountry Adoption*]. In the United States, the number of international adoptions has declined rapidly since reaching a peak of 22,884 adoptions in 2004. See Selman, *Global Trends in Intercountry Adoption*, *supra*. In FY 2016, the total number of ICAs was 5,372, with the vast majority, 2,321, coming from China. See U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFF., ANN. REP. ON INTERCOUNTRY ADOPTIONS NARRATIVE (2016), https://travel.state.gov/content/dam/NEW_adoptionassets/pdfs/AnnualReportonIntercountryAdoptions6.8.17.pdf (showing figures for the total number ICAs).

2. See Vicki Peterson, *International Adoptions: Celebrities vs. Real People*, WASH. POST, Oct. 26 2006, <http://www.washingtonpost.com/wp-dyn/content/discussion/2006/10/26/DI2006102600640.html?noredirect=on> (discussing how well-publicized celebrity adoptions have affected the image of intercountry adoptions).

and middle income nations on the one hand, and changing cultural attitudes and demographics in middle and higher income countries on the other.

A. Sending Countries

ICA is generally viewed as having occurred in two different waves. The first, from the end of World War II to the 1970s, began as a humanitarian response to the devastation of Europe that resulted in thousands of orphaned children.³ This first wave took the form of adopters extending their parental duties beyond their own children to care for children orphaned by war, famine, and other disasters. The second, from the 1970s to the present, although shaped by humanitarian concerns for children living in war zones and poverty, has also been driven by falling fertility rates in the West and a decrease in the number of healthy white infants⁴ available for adoption domestically, thus reflecting a shift to a greater explicit emphasis on the needs of the adopters than on humanitarian concerns.⁵

In the immediate aftermath of World War II, the dire refugee situation in Europe prompted the passage of the Displaced Persons Act,⁶ allowing for the entry of European orphans into the United States for adoption. Germany, Greece, Italy, and Japan sent the highest number of adoptive children abroad. In successive years, different countries made their children available for adoption abroad in response to political crises and cultural changes. The Korean War (1950-1953) led to the globalization of the adoption market in South Korea, and from the mid-1950s, South Korea became the single largest contributor to ICAs globally, and in the United States.⁷ Between 1963 and 1975, South Korea became even more dominant, accounting for nearly 15,000 out of a total of 34,568 children going to the United States.⁸ In the next six years (1976-1981), 19,283 children were adopted from South Korea; accounting for over half the 35,229 total international adoptees during this period.⁹ While initially the flow of children was stimulated by the

3. See INTERCOUNTRY ADOPTION: A MULTINATIONAL PERSPECTIVE 3 (Howard Altstein & Rita J. Simon eds., 1991); Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issues*, 13 BUFFALO HUM. RTS. L. REV. 151, 159 (2007).

4. Healthy white infants are often thought of as the most desirable kind of child for prospective parents who are mainly white themselves.

5. Altstein & Simon, *supra* note 3, at 8-11; Kristen Lovelock, *Intercountry Adoption as a Migratory Practice: A Comparative Analysis of Intercountry Adoption and Immigration Policy and Practice in the United States, Canada and New Zealand in the Post W.W. II Period*, 34 INT'L MIGRATION REV. 907, 943 (2000). The focus here is ICA in the United States. For scholarship on the general phenomenon of ICA with statistics for both sending and receiving countries worldwide, see generally Selman, *The Rise and Fall of Intercountry Adoption*, *supra* note 1.

6. Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009, amended by Act of June 16, 1950, Pub. L. No. 81-555, 64 Stat. 219 (codified as amended at 50 U.S.C.A. app. §§ 1951-65 (1951)) (no longer in force).

7. See Peter Selman, *Intercountry Adoption in the New Millennium; The "Quiet Migration" Revisited*, 21 POPULATION RES. & POLICY REV. 205, 212 (2002). See generally Kenneth Kang & Vijaya Ramachandran, *Economic Transformation in Korea: Rapid Growth without an Agricultural Revolution?*, 47 ECON. DEV. & CULTURAL CHANGE 783 (1999) (discussing the industrialization efforts of the South Korean government during this time).

8. See Selman, *supra* note 7.

9. See *id.*

consequences of war, this changed in the 1960s, as government policy prioritized the use of scarce national resources to support industrialization efforts rather than to develop social programs and institutions to remedy the plight of orphaned children.¹⁰ Beginning in 1976, in an effort to shed its reputation as an orphan exporter, South Korea instituted a policy to phase out international adoptions by limiting the number of children available for ICA (excluding children with special needs or of mixed race), while at the same time increasing the number of domestic adoptions.¹¹ However, both of these plans were discontinued when domestic adoptions did not increase sufficiently to meet the supply of children in need.¹²

Despite decades of political stability and strong economic growth, South Korea remains a major supplier of children¹³ to adoptive parents in the United States and elsewhere. In FY 2016 alone,¹⁴ South Korea sent 260 children to the United States.¹⁵ One reason that Korea continues to be a significant sending country is culture, and specifically, the legacy and vestiges of Confucianism.¹⁶ While the prominence of Confucianism has surely faded in South Korea, Confucian ideals still saturate South Korean culture and daily life, and have contributed to the continuing issue of child abandonment.¹⁷ Under such circumstances, the promotion of domestic adoption as a viable alternative to international adoption has proven very difficult, despite the Korean government's efforts to do so over the past fifteen to twenty years.¹⁸

Just as cultural attitudes have a role to play in the shaping of international adoption trends, so, too, does political ideology. Under the communist regime of

10. See generally Kang & Ramachandran, *supra* note 7.

11. Sook K. Kim, *Abandoned Babies: The Backlash of South Korea's Special Adoption Act*, 24 WASH. INT'L L. J. 709, 713 (2015).

12. Rebecca Worthington, *The Road to Parentless Children is Paved with Good Intentions: How the Hague Convention and Recent Intercountry Adoption Rules are Affecting Potential Parents and the Best Interests of Children*, 19 Duke J. Comp. & Int'l L. 559, 572–73 (2009).

13. It is worth noting that the terms used to discuss international adoption, such as markets, suppliers, senders and receivers, do themselves suggest commercial transactions. In fact, the difficulty of discussing international adoption without them underscores the extent to which the world of international adoption is intertwined with the world of commercial transactions.

14. As is the case with statistics in many areas, the U.S. Government tracks adoptions in fiscal – as opposed to calendar – years.

15. The total number for all ICAs in FY 2016 was 5,372. ANN. REP. ON INTERCOUNTRY ADOPTIONS, *supra* note 1.

16. As discussed herein, tens of thousands of Korean children have been placed abroad in adoptive families. While this number has declined in the 1980s and 1990s, South Korea has continued to be the largest supplier of adoptive children worldwide. See Selman, *supra* note 7, at 222. While poverty and the Korean War have been cited as reasons for this, this trend has continued well beyond the Korean economic recovery. Despite no longer being a poor country, for example, South Korea still sends between 1,500 and 2,000 children annually to the United States alone. See Kay Johnson, *Politics of International And Domestic Adoption in China*, 36 LAW & SOC'Y REV. 379, 380 (2002). Thus, despite political stability and increasing wealth, it has been argued that the heavy grip of Confucianism on South Korean culture, with its emphasis on maintaining bloodlines and with a strong preference for sons, has both contributed to child abandonment and made it difficult to promote domestic adoption in South Korea. See *id.*

17. See Johnson, *supra* note 16.

18. See *id.*

Nicolae Ceauseacu, for example, birth control and abortion were banned in Romania from 1966 to 1989, and married women were required to produce “five children for the nation.”¹⁹ If they failed to do so, their families were punished by the denial of “jobs, housing, and medical coverage.”²⁰ These laws coincided with staggering national poverty in the country, and the result was thousands of children abandoned at state-run institutions.²¹ After the removal of Ceausescu from power on December 25, 1989 and the resulting global media exposure of the deplorable conditions of its orphanages, Romania opened up its adoption market and became the largest single source of children for ICA in the early 1990s.²² Over 30,000 foreign families adopted Romanian children in 1990 alone.²³ And by 1991, the country supplied one-third of children for all ICAs throughout the world.²⁴

Politics also played a role in the ending of ICA in Romania. Fueled in large part by a demand for healthy white children in western countries and the relative wealth of adoptive parents, the rapid rise in ICA in Romania created a black market trade in young children, which embarrassed the government and hampered its efforts at recognition within the international community, specifically, the European Union.²⁵ In 1991, amidst rumors of child-abduction and baby-selling, the Romanian government issued a moratorium on all ICAs, which was extended and then incorporated into a permanent ban effective January 2005.²⁶

Since the mid-1990s, Russia and China have accounted for the largest number of ICAs worldwide. Indeed, between 2000 and 2010, 410,000 Russian and Chinese children were adopted by individuals from twenty-seven different countries.²⁷ For Russia, the primary push factor for the rise in ICAs has been economics. With the end of the Cold War, market-driven economics were ushered into the country, causing the collapse of communist-era welfare systems and the abandonment of

19. Ceausescu’s laws were motivated by the belief that children were a symbol of strength and national pride and were part of an effort to halt “a declining birth rate and ensure future labor supplies.” See Molly S. Marx, *Whose Best Interests Does It Really Serve? A Critical Examination of Romania’s Recent Self-Serving International Adoption Policies*, 21 EMORY INT’L L. REV. 373, 381 (2007).

20. Laura McKinney, *International Adoption and the Hague Convention: Does Implementation of the Convention Protect the Best Interests of Children?*, 6 WHITTIER J. OF CHILD & FAM. ADVOC. 361, 373 (2007).

21. Carrie Rankin, *Romania’s New Child Protection Legislation: Change in Inter-country Adoption Law Results in a Human Rights Violation*, 24 SYRACUSE J. INT’L L. & COM. 259, 261–62 (2006).

22. See *id.*

23. *Id.*

24. Marx, *supra* note 19, at 383; see Peter Selman, *Trends in Inter-country Adoption: Analysis of Data from 20 Receiving Countries, 1998-2004*, 23 J. POPULATION RES. 183, 190 (2006) (noting that by the early 1990s, “Romania became the largest single source” of ICA adoptions) [hereinafter Selman, *Trends in Inter-country Adoption*].

25. Yves Denechere & Béatrice Scutaru, *International Adoption of Romanian Children and Romania’s Admission to the European Union (1990-2007)*, 1 EASTERN J. OF EUR. STUD. 135, 141–43 (2010).

26. *In the Best Interest of the Children? Romania’s Ban on Inter-country Adoption: Hearing Before the Comm’n on Security and Cooperation in Europe*, 109th Cong. 11 (2005).

27. See Kevin Voight & Sophie Brown, *International Adoptions in Decline as Number of Orphans Grows*, CNN, Sept. 17, 2013, <http://www.cnn.com/2013/09/16/world/international-adoption-main-story-decline/index.html?iref=allsearch>.

thousands of children in state-run facilities.²⁸ Since 1992, 60,000 of these children have found new homes in the United States.²⁹ In late 2012, however, President Putin signed the Dima Yakovlev Act, a law that barred American families from adopting Russian children.³⁰ Russian policymakers claimed that the embargo was essential for curbing alleged abuse of Russian children at the hands of their adoptive American families, as illustrated by several high-profile cases like that of the bill's namesake – a Russian toddler who died of heatstroke after his adoptive father left him in a car in Purcellville, Virginia for nine hours.³¹ Critics dismissed the ban as a purely political maneuver – a diplomatic retaliation for the recently enacted Magnitsky Act, in which U.S. lawmakers imposed sanctions on a number of Russian officials for alleged human rights abuses.³² Whatever the cause, the outcome is clear: ICAs from Russia to the United States have come to a stop, leaving hundreds of thousands of Russian children in desperate need of permanent homes – potential victims of a diplomatic tit-for-tat game in which the players all claim to be acting in the best interests of the children, but which the children seem invariably to lose.³³

In China, the clash between an ancient patriarchal culture and the government's effort to control runaway population growth through a set of policies commonly referred to as the "one-child policy" resulted in the

28. As of 2011, numbers presented from Russia to the UN state that Russia has over 650,000 children who are registered orphans, seventy percent of whom arrived in orphanages in the 1990s. See Alexandra Odyanova, *State of the Wards*, 56 *RUSSIAN LIFE* 28, 30 (2013). Of these children, 370,000 are in state-run institutions while the others are either in foster care or have been adopted. *Id.* Reports have ranged saying that between sixty-six and ninety-five percent of all of these children are considered social orphans, meaning that one or more of their birth parents are still alive. See *id.*

29. See Sergei L. Loiko, *Russia Bans Adoption of Orphans by U.S. Couples*, *L.A. TIMES*, Dec. 28, 2012, <https://www.latimes.com/world/la-xpm-2012-dec-28-la-fg-russia-adoption-20121229-story.html>.

30. Федеральный закон от 28 декабря 2012 г. N 272-ФЗ "О мерах воздействия на лиц, причастных к нарушениям основополагающих прав и свобод человека, прав и свобод граждан Российской Федерации" [Federal Law of the Russian Federation on "Measures Against Persons, Involved in Violations of Fundamental Rights and Freedoms, Rights and Freedoms of Citizens of the Russian Federation"], art. 1, Dec. 29, 2012 (Rus.). President Putin signed the bill into law on December 28, 2012; it entered into force on January 1, 2013. *Id.*

31. Will Englund, *Russians Say They'll Name Magnitsky-retaliation Law After Baby Who Died in a Hot Car In Va.*, *WASH. POST*, Dec. 11, 2012, https://www.washingtonpost.com/news/worldviews/wp/2012/12/11/magnitsky-retaliation-man-baby/?utm_term=.f9c2505f94f3. Another high profile case came in 2009, when Nancy Hansen, an American adoptive grandmother from Tennessee, pinned a note on her daughter's adopted seven-year-old Russian boy, Artom Savelyev, and booked him on a one-way flight back to Moscow. David Batty, *US Mother Sparks Outrage After Sending Adopted Child Back to Russia Alone*, *THE GUARDIAN*, Apr. 10, 2010, <https://www.theguardian.com/world/2010/apr/10/torry-hansen-artyom-savelyev-adoption>. In the note, Hansen alleged that the boy suffered from "severe psychopathic issues" and that the family, fearful for its safety, "no longer wish[ed] to parent [him]." *Id.*

32. Kathryn Joyce, *Why Adoption Plays such a Big, Contentious Role in US-Russia Relations*, *VOX* (July 22, 2017), <https://www.vox.com/the-big-idea/2017/7/21/16005500/adoption-russia-us-orphans-abuse-trump>.

33. Intercountry adoption has long been a contentious issue between the two countries, and has recently become a political one, with members of the current White House administration using it as the reason for Donald Trump Jr.'s 2016 meeting with a Russian lawyer and a former soviet spy. *Id.*

abandonment of thousands of baby girls in overcrowded orphanages.³⁴ The urgency of this situation was brought to public attention in the West by a shocking British documentary called *The Dying Rooms: China's Darkest Secret*, which portrayed the horrifying conditions of these discarded girls living in overcrowded, underfunded, poorly-staffed orphanages where care ranged from indifferent, to cruel and intentionally fatal.³⁵ Under these circumstances, ICA was widely viewed as the perfect solution for these abandoned girls.³⁶ International adoptions from China began in 1992, and grew rapidly over the next twelve years; from 2003 to 2011, in fact, it has been the world's largest source of ICA every year.³⁷

In recent years, with the easing of the country's one-child policy and greater efforts by government officials to promote child welfare programs and improve the domestic adoption process,³⁸ the number of ICAs from China has dropped considerably. In 2005, the peak year for ICAs from the country, China provided 14,000 of the 44,000 children adopted internationally, and 8,000 of the roughly 22,700 ICAs to the United States.³⁹ In 2009, the number of children sent for adoption had fallen to 4,400 and about fifty percent of these children had special needs.⁴⁰ In 2010, the figure fell further to below 4,000.⁴¹ And in 2016, the total number of ICAs dropped to 2,231, suggesting that ICAs from China may cease in the next decade or be restricted to children with special needs.⁴²

A driving force in the globalization of the adoption market historically has been U.S. service personnel stationed in Europe and around the world. Soldiers and sailors sent to Europe during World War II, Germany and Japan after 1945, and eventually Korea, Vietnam, and elsewhere in Asia, witnessed firsthand the plight of children orphaned by war and brought their stories home to an anxious public eager to help. Arguably the most famous – and controversial – of such humanitarian efforts was “Operation Babylift.” Launched by the U.S. government just before the fall of Saigon in April 1975, the highly publicized plan sought to evacuate nearly three thousand displaced Vietnamese children and place them

34. Nili Luo & David M. Smolin, *Intercountry Adoption and China: Emerging Questions and Developing Chinese Perspectives*, 35 CUMB. L. REV. 597, 600–01 (2004–2005); Michelle Van Leeuwen, *The Politics of Adoptions Across Borders: Whose Interests Are Served? (A Look at the Emerging Markets of Infants from China)*, 8 PAC. RIM L. AND POL'Y J. 189, 192–94 (1999).

35. THE DYING ROOMS: CHINA'S DARKEST SECRET (Lauderdale Productions 1995).

36. See, e.g., Luo & Smolin, *supra* note 34, at 600–01; Van Leeuwen, *supra* note 34, at 192–94.

37. Peter Selman, *Global Trends in Intercountry Adoption, 2003–2013*, in THE INTERCOUNTRY ADOPTION DEBATE: DIALOGUES ACROSS DISCIPLINES, 6–7 (Robert L. Ballard et al. eds., 2015).

38. Rachel A. Bouman, *China's Attempt to Promote Domestic Adoptions: How Does China's One-Child Policy Affect Recent Revisions in China's Adoption Law and Measure Up to the Hague Convention*, 13 TRANSNAT'L L. 91, 115–17 (2000).

39. See Selman, *The Rise and Fall of Intercountry Adoption*, *supra* note 1, at 11 (noting that China provided 14,000 children of ICAs in 2005); Kay Johnson, *Challenging the Discourse of Intercountry Adoption: Perspectives from Rural China*, in INTERCOUNTRY ADOPTION POLICIES, PRACTICES, AND OUTCOMES 103–04 (Judith L. Gibbons & Karen Smith Rotabi eds., 2012).

40. See Johnson, *supra* note 39, at 117.

41. *Id.*

42. See *id.* (noting that about fifty percent of children adopted in 2009 had special needs). See ANN. REP. ON INTERCOUNTRY ADOPTIONS, *supra* note 1 (reporting that adoptions in China totaled 2,231 in 2016).

with adoptive families around the world.⁴³ Chaotic from beginning to end, Operation Babylift enthralled the world with a traumatic plane crash, international media capturing images of bewildered children travelling to their new homes, and families clamouring to adopt them.⁴⁴

At the same time, U.S. servicemen themselves fathered significant numbers of children in those places.⁴⁵ The story of these children, many of mixed race and oftentimes stigmatized in their countries of origin, attracted widespread attention in the United States and inspired many American couples to consider adoption for the first time.⁴⁶ Perhaps the most famous example of international adoption in the aftermath of World War II was the adoption of eight mixed-race Korean children by Oregon farmer and Christian Evangelist Harry Holt and his wife Bertha in 1955.⁴⁷ The Holts went on to organize mass adoptions of Korean children by American families through their Holt Adoption Program.⁴⁸ Pearl Buck, Pulitzer Prize and Nobel Prize winning American author and philanthropist, adopted seven children between the 1920s and the late 1950s, including the child of a Japanese woman and an African-American soldier.⁴⁹ The effort to adopt mixed-race children born to US servicemen and Vietnamese mothers would be echoed in the aftermath of the Vietnam War.⁵⁰

B. Receiving Countries

Just as sending countries have undergone significant social, political, and economic changes over recent decades that have led generally to an increased willingness to send their children abroad for adoption, so, too, have receiving countries experienced their own significant cultural changes that have resulted in an increased willingness on the part of parentless adults to look abroad for children to adopt. In modern western societies, as the use of birth control and access to abortion expanded, the number of children available domestically for adoption, particularly healthy white babies, rapidly declined.⁵¹ As these events

43. See Kevin Minh Allen, *Operation Babylift: An Adoptee's Perspective*, THE HUMANIST (Apr. 15, 2009), <https://thehumanist.com/magazine/may-june-2009/features/operation-baby-lift-an-adoptees-perspective>.

44. *Id.*

45. Estimates suggest as many as 400,000 children were fathered by American service personnel after World War II, especially in England, Germany, and Japan. ELLEN HERMAN, KINSHIP BY DESIGN: A HISTORY OF ADOPTION IN THE MODERN UNITED STATES 216 (2008).

46. See ELEANA KIM, U.S.-KOREA INSTITUTE AT SAIS, THE ORIGINS OF KOREAN ADOPTION: COLD WAR GEOPOLITICS AND INTIMATE DIPLOMACY 6–12 (2015) (discussing political and social forces driving American couples to adopt “mixed-race children who were born to Korean women and fathered by members of the armed forces”).

47. See Arissa Oh, *A New Kind of Missionary Work: Christians, Christian Americanists, and the Adoption of Korean GI Babies, 1955-1961*, 33 WOMEN'S STUDIES Q. 161, 162 (2005).

48. See *id.* at 164–65 (explaining Harry Holt's international adoption work in Korea).

49. See PEARL S. BUCK, A CULTURAL BIOGRAPHY (Peter Conn, 1996).

50. See generally Allison Varzally, *Vietnamese Adoptions and the Politics of Atonement*, 2 ADOPTION & CULTURE 159 (2009).

51. See, e.g., Shani M. King, *Challenging Monohumanism: An Argument for Changing The Way We Think About Intercountry Adoption*, 30 MICH. J. OF INT'L L. 413, 423–24 (2009); See also Eliezer D. Jaffe,

unfolded, adults interested in parenting turned more and more to ICA as a practical solution to meet their desire to parent.⁵²

Some countries have demonstrated a particularly strong and consistent interest in ICA. The United States, for instance, has been a longstanding receiving country that in recent decades has taken in roughly 10,000 children a year – that is, half the total number of children adopted worldwide through ICA annually.⁵³ Canada, with one-third the population of the United States, has a very high rate of intercountry adoption with roughly 2,500 applications processed annually.⁵⁴ Europe in general and Scandinavia in particular have also relied heavily on this form of adoption. Sweden and Holland receive some 2,000 children every year as does Germany, while 600 foreign-born children are adopted in Denmark.⁵⁵ By contrast, the United Kingdom, which boasts a population of 60.7 million, processes only 300 ICA applications annually.⁵⁶

A key explanation for the rise in intercountry adoption is the diminishing availability of healthy, white, young children for domestic adoption. In the United States (and nearly all modern western states) this is largely due to declining fertility rates, evolving social norms regarding contraception, societal acceptance of and increased access to abortion, and declining stigma regarding single parenting.⁵⁷ A consequence of these developments has been a fundamental conceptual transformation of ICA from being societally perceived as a humanitarian effort to find families for children who were in need of them to, what some critics argue,⁵⁸ is just another form of international trade to find children for

Foreign Adoptions In Israel: Private Paths To Parenthood, in INTERCOUNTRY ADOPTION: A MULTINATIONAL PERSPECTIVE 161, 163–65 (Altstein & Simon eds., 2014).

52. Marx, *supra* note 19, at 376 (listing “the legalization of abortion, the rise in infertility rates, the availability of contraceptives, and the increased social acceptance of single-parent homes” as contributing factors to the decrease in the number of children available for domestic adoption and the corresponding increased demand for international adoptions); *see generally* Lovelock, *supra* note 5.

53. KERRY O’HALLORAN, *THE POLITICS OF ADOPTION: INTERNATIONAL PERSPECTIVES ON LAW, POLICY AND PRACTICE*, 178–79 (2015).

54. *Id.*

55. *Id.*

56. O’HALLORAN, *supra* note 53, at 178–79; Selman, *Trends in Intercountry Adoption*, *supra* note 24, at 186–89 (emphasizing that the United States has been the largest recipient for ICAs, and that Canada, France, Italy, Spain, and Scandinavia have received substantial numbers of ICAs as well).

57. Katherine Herrmann, *Reestablishing the Humanitarian Approach to Adoption: The Legal and Social Change Necessary to End the Commodification of Children*, 44 *FAM. L. Q.* 409, 411 (2010). A major reason for the comparative lack of ICAs in Britain is because “there is a specific set of policies favouring domestic over intercountry adoptions.” *See, e.g.*, Henry Wilkins, *What’s Holding Back Britain’s Adoption of Foreign Children?*, *NEW INTERNATIONALIST*, Mar. 20, 2017, <https://newint.org/features/web-exclusive/2017/03/20/inter-country-adoption>. “For example, families choosing the domestic route benefit from free of charge home studies and social support programmes, and often financial support. Moreover, compared to the United States, Britain has far fewer non-profit agencies that organize intercountry adoptions and are recognized by central authorities.” *Id.*

58. Bartholet, *supra* note 3, at 153; *see, e.g.*, John Triseliotis, *Intercountry Adoption: Global Trade or Global Gift?*, 24 *ADOPTION & FOSTERING* 45, 45–46 (2000) (“Adoption is meant to be a service for children first, but part of it is practiced on the premise that every adult, especially those who are wealthy, has the right to get a child from anywhere and almost by any means, in order to be a parent.”); *See* David

(relatively speaking) wealthy families. One way this perspective has been articulated is that in this new ICA paradigm, children are simply goods to be traded.⁵⁹ The buyers are the relatively privileged white people from one of the richer countries of the world who choose to acquire babies as they would any other commodity; the suppliers are the desperately poor mothers belonging to one of the less privileged racial and ethnic groups in one of the developing countries of the world; and profit is secured in fees charged by intermediaries and in the opportunity for wealthy, infertile couples to parent.⁶⁰ And like any business, this international trade is subject to market forces of supply and demand. Of course, this is an oversimplification of a very complicated issue and does little to address the key concerns surrounding ICA, such as whether or not current ICA practices actually serve the best interests of the children.⁶¹

As political stability and economic prosperity have returned to traditional sending countries like Korea, Vietnam, and Romania, thus diminishing their reliance on ICA, the focus of western receiving countries has turned to new markets like the Philippines, Cambodia, and El Salvador to meet their needs.⁶² With seemingly little or no regard for the singular needs of the children involved, this current ICA model is one of the ultimate forms of human exploitation, sharing many of the same characteristics of contemporary trafficking of women and the historic transatlantic slave trade.⁶³ The present trend among high-profile celebrities of adopting children from low to lower-middle income countries⁶⁴ –

M. Smolin, *Intercountry Adoption as Child Trafficking*, 39 VAL. U. L. REV. 281, 283 (2004) (“To some, intercountry adoption in itself is more or less a form of child trafficking, as it involves the transfer of children from poor nations to rich nations in order to meet the demand of those in rich nations for children.”).

59. See e.g., King, *supra* note 51, at 448; Andrew Bainham, *International Adoption from Romania—Why the Moratorium Should Not Be Ended*, 15 CHILD & FAM. L. Q. 223, 226 (2003) (“Under [Romania’s 1990’s international adoption] regime children were treated as commodities in breach of all international obligations.”); Kathleen Ja Sook Bergquist, Symposium, *International Asian Adoption: In the Best Interest of the Child?*, 10 TEX. WESLEYAN L. REV. 343, 346 (2004). (“Motivation for adoption had shifted from the altruistic, finding a home for a parentless child, to the supply and demand economics of finding children for childless couples.”).

60. See e.g., John Triseliotis, *supra* note 58, at 45–49 (discussing how ICA led to the abduction of children and profited adoption intermediaries); Barthelet, *supra* note 3, at 153; Patricia J. Meier, *Small Commodities: How Child Traffickers Exploit Children and Families in Intercountry Adoption and What the United States Must Do to Stop Them*, 12 J. OF GENDER, RACE & JUS. 185, 195–200 (2008) (discussing child laundering and other corrupt practices that emerge from ICA); King, *supra* note 51, at 415 (positing a theory of monohumanism, meaning “that children are not seen in the context of their family, community, and culture, but instead, narrowly as the potential children of Western adults”).

61. This concept is generally undefined in both domestic and international law.

62. O’HALLORAN, *supra* note 53, at 144.

63. Tobias Hübinette, *Adopted Koreans and the Development of Identity in the “Third Space”*, 28 ADOPTION & FOSTERING 16, 19 (2004) (noting that international adoptions can be seen as a symbol of “Western dependency,” colonial thinking, and racial hierarchies); Meier, *supra* note 60, at 215–18 (“The birth family is treated similarly to how slave owners historically treated slave families in the United States when a slave’s capacity to produce and raise more slaves was a part of his or her value.”).

64. See Simon Hooper, *Who Benefits from Celebrity Adoptions?*, CNN, Oct. 16, 2006, <http://www.cnn.com/2006/WORLD/europe/10/13/celebrity.adoptions/index.html> (“Regarded earlier in her career as a trendsetter, on this occasion Madonna, who already has two children with film director husband

including for example Angelina Jolie's adoption of a Cambodian boy, an Ethiopian girl, and a Vietnamese boy⁶⁵ – has only fueled such criticism (whether justified or not), and serves as a vivid illustration of this new manifestation of ICA as rich, wealthy, white people exploiting the suffering of the poor and relatively powerless members of racial and other minority groups.

The growing demand for young, adoptable children in receiving countries, and the change in the conceptualization of adoption from one of a humanitarian effort to one of meeting the needs of the adoptive parents, has led to abuse and corruption.⁶⁶ Adoption intermediaries and child-traffickers look to profit by increasing the supply of these young children through illicit and unethical means.⁶⁷ While these problems can occur in any country where ICA is permitted, they are especially acute in places weakened by political unrest, war, disease, or natural disaster. Critics have called for stricter regulations, and governments in both sending and receiving countries have responded in varying degrees.⁶⁸ The EU, for instance, requires nations to ensure that their laws are in complete harmony with the UN Convention on the Rights of the Child.⁶⁹ In response, Romania enacted a law in 2004 that temporarily suspended ICA while the country worked to get its system in line with the requirements of the Convention.⁷⁰ The extent to which these kinds of government regulations *actually* limit instances of child trafficking and exploitation instead of merely serving as unnecessary bureaucratic hurdles that only harm the very children most in need of adoption is a matter of debate.⁷¹ What advocates on both sides of the ICA equation can agree

Guy Ritchie, could merely be seen as jumping onto the latest celebrity bandwagon.”).

65. See A.J. Wilingham, *How Many Children Do Brad And Angelina Have?*, CNN, Sept. 20, 2016, <https://www.cnn.com/2016/09/20/entertainment/brangelina-angelina-jolie-brad-pitt-children-trnd/index.html>.

66. See Herrmann, *supra* note 57, at 416–17 (discussing how the demand for international adoptions contributes to child trafficking); See Meier, *supra* note 60, at 195–200 (“Sending-country poverty combined with a critical mass of adoption placements with Western parents creates sufficient incentive for traffickers to supply children to intercountry adoptions.”); H.C. Kennard, Comment, *Curtailing the Sale and Trafficking of Children: A Discussion of the Hague Conference Convention in Respect of Intercountry Adoptions*, 14 U. PA. J. INT’L. BUS. L. 623, 627–31 (1994) (“Trafficking and sale of infants are most prominent when independent adoption agents are involved.”).

67. See *supra* note 63.

68. See, e.g., Marie A. Failing, *Moving Toward Human Rights Principles for Intercountry Adoption*, 39 N.C. J. OF INT’L L. & COM. REG. 523, 525 (2014) (“Many in the international community, including UNICEF, the European Union, and the African Child Policy Forum have at times expressed a preference for children staying within their national borders of origin, even if it means living out their childhood in foster care or an institution.”).

69. Sara Dillon, *Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child With the Hague Convention on Intercountry Adoption*, 21 B.U. INT’L L. J. 179, 248–51 (2003).

70. Marx, *supra* note 19, at 387–88 (stating that because an “overhaul of Romania’s adoption laws was a precondition of joining the EU,” Romania halted all international adoptions in 2004).

71. See, e.g., Elizabeth Bartholet, *International Adoption: A Way Forward*, 55 N.Y. L. SCH. REV. 692–93 (2010–2011) (arguing for the rejection of laws such as the draft Families for Orphans Act, “promoted by some who see themselves as supporters of international adoption.”). See also Judith Masson, *Intercountry Adoption: A Global Problem or a Global Solution?*, 55 J. INT’L AFF. 141, 148–50 (comparing abolitionist, promoter, and pragmatist approaches to ICA).

upon, however, is the need for practical reforms that put the best interests of the children first rather than exclusively or even primarily focusing on the needs of prospective parents. This is particularly relevant in the United States, the country creating the highest demand for ICAs worldwide.

III. LEGAL DEVELOPMENTS

ICA policy and immigration policy are often thought of as discrete issues, but ICA policy within the United States has been shaped to a large extent by immigration policy, which is guided by the welfare of the nation as a whole. Framed within the context of national security concerns and a desire to protect and promote American values and society (namely, an Anglo-Saxon homogeneity and hegemony), the politics of exclusion have unquestionably influenced the evolution of immigration law and policy in the United States.

For most of the nineteenth century, the United States had an open-door immigration policy. While a few selective statutes were introduced in the last quarter of the nineteenth century – excluding, for example, prostitutes, persons “likely to become a public charge,” felons, paupers, and persons with mental and physical defects or infectious diseases – these policies had little impact on the flow of immigrants (primarily from Europe) into the country.⁷² Deviating significantly and quite strikingly from this open-door policy was the Chinese Exclusion Act of 1882.⁷³ Passed by Congress in response to growing anti-Chinese sentiment and populist calls for immigration restriction, the act was the first immigration exclusion policy based on race and nationality.⁷⁴ It banned Chinese laborers from entering the country and declared all Chinese immigrants ineligible for U.S. citizenship by naturalization.⁷⁵ Significantly, the Chinese Exclusion Act set in motion new standards of immigration regulation, such as federal immigration officials who inspected and processed newly-arrived foreigners, government-issued identity and residence documents (e.g., passports and green cards), as well as policies for illegal immigration and deportation.⁷⁶

72. SANA LOUE, HANDBOOK OF IMMIGRANT HEALTH 4 (1998); An Act to Regulate Immigration, 47 Cong. ch. 376, § 2, 22 Stat. 214 (1882).

73. Chinese Exclusion Act of 1882, Pub. L. No. 47-126, 22 Stat. 58 (repealed 1943).

74. See ANDREW GYORY, CLOSING THE GATE: RACE, POLITICS, AND THE CHINESE EXCLUSION ACT 3–16 (1998) (describing racist and political driving forces behind the Chinese Exclusion Act of 1882); ERIKA LEE, AT AMERICA’S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882-1943, 24–30 (2003).

75. Chinese Exclusion Act of 1882, Pub. L. No. 47-126, 22 Stat. 58 (repealed 1943). In 1943, Congress passed the Magnuson Act, which finally repealed the discriminatory exclusion laws against the Chinese. The Magnuson Act was wholly grounded in the exigencies of World War II, when the United States needed an alliance with China in its war against Japan. See Chinese Exclusion Repeal Act of 1943, Pub. L. No. 78-199, 57 Stat. 600.

76. JOHN TORPEY, THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP, AND THE STATE 118–26 (2018) (describing how the Chinese Exclusion Act led to a nationalization of documentary requirements, deportation centers, and “remote border control”); See LEE, *supra* note 74, at 30–32 (discussing how the exclusion of Chinese immigrants led to anti-immigration laws against other racial groups).

Once the principle of immigration restriction was codified in law, congressional efforts to construct a “nation by design” that reinforced an Anglo-Saxon homogeneity through exclusionary immigration laws and policies accelerated.⁷⁷ These efforts culminated with the Immigration Act of 1924, also known as the Reed-Johnson Act. The end result of a long legislative process informed by the politics of eugenics and post-WWI nativism, the Reed-Johnson Act introduced into law the national origins quota system – a formulaic calculation that differentiated Europeans according to nationality and ranked them in a hierarchy of desirability.⁷⁸ Specifically, the system favored the “Nordics” of northern and western Europe over the “undesirable races” of eastern and southern Europe, in particular Jews, Italians, Slavs, and Greeks, in an effort to ensure stability in the ethnic composition of the country.⁷⁹

The national origins quota system remained in effect until October 3, 1965, when it was abolished by the Immigration and Nationality Act (INA) – the basis of today’s immigration law.⁸⁰ As President Lyndon B. Johnson signed the bill into law in a ceremony at the base of the Statue of Liberty in the New York harbour, he proclaimed that with the new law, “the lamp of this grand old lady is brighter today – and the golden door that she guards gleams more brilliantly.”⁸¹ Driven in part by the civil rights movement, foreign policy concerns stemming from the rapid decolonization of Africa and Asia, and the ongoing competition with the USSR for the hearts and minds of the developing world, the INA ushered in a new era of mass immigration. In place of quotas, the INA created a new set of preference categories based on family reunification and professional skills, effectively placing people from all cultural, political, and ethnic backgrounds on equal footing for immigration into the country.⁸²

While the INA has resulted in some of the most important changes in post-war American law and society, it did not completely remove all the vestiges of the early gatekeeping system. In place of a system that had been premised largely on racial and ethnic discrimination, the 1965 law created a new system where class

77. See ARISTIDE R. ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* 1 (2006) (stating that “by way of its state and federal governments, the self-constituted American nation not only set conditions for political membership, but also decided quite literally who would inhabit its land”).

78. Immigration Act of 1924, Pub. L. No. 68-139, § 11, 43 Stat. 153, 159.

79. Although it was framed in terms of national quotas rather than explicit outright “racial” exclusion, the Immigration Act of 1924 is properly understood as race legislation. See Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 86 J. AM. HIST. 67, 69 (1999); Mary Fan, *The Case for Crimmigration Reform*, 92 N.C. L. REV. 75, 129 (2013) (“The Immigration Act of 1924, also known as the National Origins Act, elaborated on the use of racial quotas to preserve the Northern European ideal for the nation, particularly impeding Asian (including Japanese) and Eastern European immigration.”).

80. Technically speaking, the statute itself was actually an extensive series of amendments to the Immigration and Nationality Act of 1952, which remains the basic immigration law of the country to this day.

81. Lyndon B. Johnson, Remarks at the Signing of the Immigration and Nationality Act, 2 PUB. PAPERS 1037, 1040 (Oct. 3, 1965).

82. See Immigration and Nationality Act of 1965, Pub. L. 89-236, 79 Stat. 911; DESMOND KING, *MAKING AMERICANS: IMMIGRATION, RACE, AND THE ORIGINS OF THE DIVERSE DEMOCRACY* 243 (2000).

and status – to say nothing of nepotism – have become the primary factors for admission.⁸³ Nor did the law do away with ideologies, politics, and policies of exclusion which espouse a racialized narrative in which immigrants continue to pose a threat to the country.⁸⁴ Groups that had previously been targeted – for example Jews, Italians, and Slavs – face less scrutiny since the abolition of the national quotas system, but others, in particular those from Latin America, the Middle East, and Muslim countries, have taken their place. In place of overtly racist and discriminatory policies are implicitly racist systems ostensibly regulating the entry of potentially dangerous foreigners and controlling those already residing in the country.⁸⁵

83. The express – and oftentimes aggressive – exclusion of the poor is a fundamental function of modern U.S. immigration law, embodied in the provision of the Immigration and Nationality Act of 1952 – the basis of today’s immigration law. Unlike domestic laws, which generally do not explicitly discriminate against the poor, immigration law is decidedly different. This discrimination is most noticeable in three areas: (i) the public-charge exclusion; (ii) the per-country caps on immigration; and (iii) the number of employment visas for low- and moderately-skilled workers. Under longstanding immigration law, an immigrant seeking permanent status or entry to the United States must prove she is not a “public charge,” or dependent on the government. *See, e.g.,* An Act to Regulate Immigration, 47 Cong. ch. 376, § 2, 22 Stat. 214 (1882). In 1996, Congress toughened the public-charge exclusion by significantly tightening the affidavit-of-support provisions to expressly make the affidavits legally enforceable in courts of law. *See* Immigration and Nationality Act of 1965, Pub. L. No. 89-236, § 212(a)(4), 79 Stat. 911. The intent was clear “to make it more difficult for noncitizens of modest means to migrate to the United States.” BILL ONG HING, JENNIFER M. CHACON & KEVIN R. JOHNSON, IMMIGRATION LAW & SOCIAL JUSTICE 1, 29 (2017). That same year, Congress stripped lawful immigrants, even those who had paid taxes, of eligibility for several major public-benefit programs. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105. Now, the Trump administration has proposed a new rule that would expand this test to include programs such as the Supplemental Nutrition Assistance Program and housing subsidies, making it more difficult for those seeking a green card to get food or financial help. *See* Press Release, U.S. DEP’T OF HOMELAND SEC., *DHS Announces Immigration Rule to Enforce Long-Standing Law that Promotes Self-Sufficiency and Protects American Taxpayers* (Aug. 9, 2018), <https://www.dhs.gov/news/2018/09/22/dhs-announces-new-proposed-immigration-rule-enforce-long-standing-law-promotes-self>. The INA’s imposition of across-the-board national quotas has unfairly impacted immigrants from developing nations like Mexico, the Philippines, and India. Currently, the number of immigrants from any one country in a year is limited to approximately 26,000. *See* Immigration and Nationality Act of 1965, Pub. L. No. 89-236, § 203(a)(3), 79 Stat. 911. These limits apply uniformly, however great the demand of the citizens of a particular country to come to the United States. In effect, people from the developing world face a much longer wait time than do similarly situated people seeking certain visas from almost all other nations. At the same time, the INA created a new set of preference categories based on family reunification and professional skills, *see* Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911, in effect putting the world’s poorest populations even further back in the line. *See* Muzaffar Chishti, Faye Hipsman, & Isabell Ball, *Fifty Years On, the 1965 Nationality Act Continues to Reshape the United States*, THE MIGRATION POL’Y INST. (Oct. 15, 2015), <https://www.migrationpolicy.org/article/fifty-years-1965-immigration-and-nationality-act-continues-reshape-united-states>.

84. *See* Roger Daniels, *Two Cheers for Immigration*, in DEBATING AMERICAN IMMIGRATION, 1882–PRESENT, 40–42 (Roger Daniels & Otis Graham eds., 2001) (noting that the INA prioritized “highly skilled immigrants”); *see generally* George Sanchez, *Face the Nation: Race, Immigration, and the Rise of Nativism in Late Twentieth Century America*, 31 INT’L MIGRATION REV. 1009 (1999).

85. At present, immigration enforcement costs an estimated \$18 billion per year, at more than 20,000 the number of Border Patrol Officers is at an all-time high, and deportations occur at the unprecedented rate of 400,000 per year. *See also* DORIS MEISSNER, DONALD M. KERWIN, MUZAFFAR

Though not necessarily incompatible or contradictory with the guiding principles so central to immigration policy formation, the practice of ICA within the United States has often been driven by national interests of self-preservation and societal enhancement rather than the promotion of any kind of humanitarian endeavors abroad. Historically, the needs of a child from a different place of origin have always been secondary to the needs of the country. A modern understanding of ICA would reverse this prioritization and place the needs of the child first, or at least in a way that is mutually beneficial for the child and American society.

A. From Ad Hoc Response to Official Policy

All of the early legislative enactments concerning ICA in the United States were provided under refugee legislation, which tended to be *ad hoc* and reactive to international crises.⁸⁶ Absent any kind of formal policy, the practice of ICA was inconsistent and subject to both external political forces and internal social pressures. The first provision for ICA came in response to growing concerns over Soviet control in Eastern Europe and the large number of refugees and displaced persons in Western Europe as a result of World War II. On December 22, 1945, President Harry Truman signed a directive that addressed the needs of displaced persons in Europe as a result of the conflict, and allowed for the migration of refugees and unaccompanied minors into the United States.⁸⁷ While a humanitarian gesture to be sure, the President's directive did not compromise national interests. Rising anxiety about the possibility of an unchecked migrant flood was appeased by upholding existing quotas, and humanitarian objectives were met by giving refugee applicants priority.⁸⁸ Following the enactment, over 1,200 orphans and displaced children entered the United States, primarily from the war-torn countries of Poland, Czechoslovakia, Hungary and Germany.⁸⁹ Following the President's directive of 1945, Congress enacted the Displaced Persons Act of 1948, which contained a provision for the immigration of 3,000 "displaced orphans" over and above existing quotas.⁹⁰ However, the purpose of the provision was not to facilitate ICA as formalized practice, but rather to address an immediate refugee crisis.⁹¹

By the 1950s, the motivations for adopting children from abroad changed as the demand for children, specifically healthy, white infants, began to exceed the numbers of infants available to adopt domestically. While prospective adoptive parents increasingly began to see ICA as a practical solution to meet their need for children, there was no formal legislative framework in place to facilitate this at the

CHISHTI, & CLAIRE BERGERON, *MIGRATION POL'Y INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY* 1, 9, 28, 140 (2013).

86. Susan S. Forbes & Patricia Weiss Fagen, *Unaccompanied Refugee Children: The Evolution of U.S. Policies 1939-1984*, 3 *MIGRATION NEWS* 1, 33-36 (1985); see generally Lovelock, *supra* note 5.

87. Daniel J. Steinbock, *The Admission of Unaccompanied Children into the United States*, 7 *YALE L. & POL'Y REV.* 137, 140 (1999).

88. Forbes & Fagen, *supra* note 86, at 6-7.

89. See Steinbock, *supra* note 87, at 140.

90. Richard R. Carlson, *Transnational Adoption of Children*, 23 *TULSA L. J.* 317, 325 (1988).

91. *Id.*

time.⁹² The Korean War prompted the development of such a framework. Specifically, special provisions were instituted in 1953 to enable military and government personnel stationed in Korea to adopt Korean orphans.⁹³ Not only did the provisions create a precedent for interracial adoption, but they informed the next legislative step towards the formalization of a coherent ICA policy in the United States.

The Refugee Relief Act of 1953 was the first legislation to explicitly address international adoption and the demands of domestic prospective parents. This act, geared towards individuals fleeing Eastern Bloc countries, granted 4,000 special non-quota visas for orphans to enter the United States for adoption.⁹⁴ For the first time, prospective parents in the United States had a nonrestrictive ICA immigration policy available to them.⁹⁵ In 1957, Congress passed the Orphan Eligibility Clause of the INA, which replaced the Refugee Relief Act and allowed the continuation of the ICA practice.⁹⁶ In 1961, the Orphan Clause was adopted as an amendment to the INA, formally establishing ICA permanently in U.S. law.⁹⁷

Emerging from the context of the emergency mass migration of adults displaced by World War II, ICA was viewed first and foremost as a migratory phenomenon, and ultimately national concerns shaped ICA policy. While there were many children in need during this time, only those that could meet certain immigration criteria were allowed entry for adoption. Incidentally, these national concerns were also central to debates that led to immigration policy formation on the migration of unaccompanied minors in the immediate post-war years: concerns about national security, concerns about how the adoptees might influence (i.e., corrupt) cultural values, concerns for the welfare of indigenous children, race relations policy, in particular attitudes toward migrants from Asia and mixed race children, and potential state dependency.⁹⁸ Ultimately, domestic political concerns were the driving force behind ICA policy instead of concerns for the wellbeing of orphaned and displaced children abroad.

B. The Hague Convention and Its Implications for U.S. Policy

Although ICA had evolved from an *ad hoc* response to global crises into an accepted practice subject to official immigration policy, there was no policy corollary that protected the welfare needs of the child migrating for adoption until

92. *Id.* at 324–27; Lovelock, *supra* note 5, at 912.

93. In response to the pleas of military personnel who had adopted or were seeking to adopt Korean children, Congress enacted emergency legislation in July 1953. *See Act of July 29, 1953, Pub. L. No. 83-162, 67 Stat. 229.* This legislation allotted up to 500 special non-quota visas to be issued for orphans adopted or to be adopted by U.S. citizens stationed abroad as members of the armed services or employees of the federal government. *See id.*

94. Forbes & Fagen, *supra* note 86, at 10; Lovelock, *supra* note 5, at 912.

95. Lovelock, *supra* note 5, at 912–13.

96. *Id.*

97. Carlson, *supra* note 90, at 330.

98. The earliest debates focused on concerns about possible chain migration, backdoor migration, and potential threat of these new arrivals on American values and customs. More extreme discussions addressed the possibility that these children represented a threat to American national security interests. *See Lovelock, supra* note 5, at 913.

1993. In the spring of that year, the Hague Conference on Private International Law introduced the issue of ICA with the goal of formalizing and unifying existing adoption processes in an effort to eliminate the international child trade. On May 29, 1993, the Hague Conference adopted the Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention).⁹⁹ Unlike previous international conventions on the subject, the Hague Convention was the first intergovernmental endorsement of ICA as a practice, elevating it over and above institutional or foster care in the child's country of origin.¹⁰⁰ As a Member State of the Hague Conference, the United States became a signatory on March 31, 1994, and the Convention came into legal effect fourteen years later on April 1, 2008.¹⁰¹ The implementation of an international set of procedures to safeguard the best interests of children was a primary factor behind these developments. As stated in President Clinton's June 1998 letter transmitting the Convention to the Senate for advice and consent to ratify, the Convention sets out norms and procedures to safeguard children involved in intercountry adoptions and to protect the interests of their birth and adoptive parents.¹⁰² These safeguards are designed to discourage trafficking in children and to ensure that intercountry adoptions are made in the best interests of the children involved.¹⁰³ Cooperation between Contracting States should be facilitated by the establishment of a central authority with programmatic and case-specific functions in each Contracting State.¹⁰⁴ The Convention also provides for the recognition of adoptions that fall within its scope in all other Contracting States.¹⁰⁵

The Hague Convention establishes minimum standards for Contracting States (that is, countries that are party to an adoption) and is framed by three main objectives: the first is to establish safeguards to ensure that ICAs take place in the best interests of the child; the second is to establish a system of cooperation among Contracting States to assure that the agreements made by them are respected and thereby prevent the abduction, sale, or trafficking of children; the third is to secure

99. Hans Van Loon, *Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption*, 3 INT'L J. CHILD. RTS. 463, 463 (1995).

100. Vaughan Black, *GATT for Kids: New Rules for Intercountry Adoption of Children*, 11 CANADIAN FAM. L. Q. 253, 313 (1994); see William Duncan, *The Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption*, 17 ADOPTION & FOSTERING 9, 12 (Oct. 1, 1993); Peter H. Pfund, *Intercountry Adoption: The 1993 Hague Convention: Its Purpose, Implementation and Promise*, 28 FAM. L. Q. 53, 56 (1994); see generally Van Loon, *supra* note 99.

101. The extended delay in ratification of the Hague Convention was caused by conflicts between the U.S. Department of State and American adoption experts on how to best implement the Convention's standards. See Laura Beth Daly, Note, *To Regulate or Not to Regulate: The Need for Compliance with International Norms by Guatemala and Cooperation by the United States in Order to Maintain Intercountry Adoptions*, 45 FAM. CT. REV. 620, 623 (2007). Because ICA policies in the United States were regulated by state governments rather than the federal government prior to the Hague Convention, the United States had to restructure its adoption system before it could ratify the treaty. See *id.*

102. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, S. Treat Doc. No. 105-51 (1998).

103. *Id.*

104. *Id.*

105. *Id.*

recognition in Contracting States of adoptions made in accordance with the Convention.¹⁰⁶

To meet these three objectives, the Hague Convention stipulates a number of substantive provisions that must be followed by member countries and committed to by signatories like the United States. Before a child can be adopted, it must be determined through a number of procedural requirements that the adoption is in the best interests of the child. Under Article 4, an adoption can only take place if the country of origin can establish that the child is indeed adoptable, the adoption serves the best interests of the child, the competent authorities facilitating the adoption provide their informed consent, and they have not received any kind of compensation for their efforts.¹⁰⁷ Moreover, to ensure that the procedural rules aimed at protecting the best interests of the child are followed, Article 6 requires that each Contracting State designate a Central Authority to enforce the duties established by the Convention.¹⁰⁸ Among its many obligations, Article 16 requires the Central Authority to prepare a report detailing the identity, adoptability, background, social environment, family and medical history, and any special needs of the child in question.¹⁰⁹ Considering that report, the Central Authority must then determine whether ICA is in the best interests of the child.¹¹⁰ Lastly, as a final safeguard for protecting the best interests of the child, Contracting States must recognize certification of an adoption made in accordance with the guidelines of the Convention, and cooperate with each other to promote the objectives of the treaty to prevent any kind of corruption.¹¹¹

106. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, ch. 1, art. 1, May 29, 1993, S. Treat Doc. No. 105-51 (1998); G. PARRA-ARANGUREN, EXPLANATORY REPORT ON THE CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION 12 (1994), <http://hcch.e-vision.nl/upload/expl33e.pdf>; see also Andrew C. Brown, *International Adoption Law: A Comparative Analysis*, 43 INT'L L. 1337, 1338 (2009).

107. See Lisa Myers, *Current Issues in Public Policy: Preserving the Best Interests of the World's Children: Implementing the Hague Treaty on Intercountry Adoption Through Public-Private Partnerships*, 6 RUTGERS J. L. & PUB. POL'Y 780, 794-95 (2009) (elaborating on the requirements for sending countries' competent authorities within the adoptee's country of origin to determine a child's viability for adoption, as well as the consent of the biological parents).

108. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, ch. 3, art. 6, May 29, 1993, S. Treat Doc. No. 105-51 (1998):

(1) A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

(2) Federal States, States with more than one system of law or States having autonomous territorial units shall be free to appoint more than one Central Authority and to specify the territorial or personal extent of their functions. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State.

109. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, ch. 3, art. 15, May 29, 1993, S. Treat Doc. No. 105-51 (1998).

110. *Id.*

111. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, ch. 3, art. 23, May 29, 1993, S. Treat Doc. No. 105-51 (1998); Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, ch. 1, art. 1, May 29, 1993, S. Treat Doc. No. 105-51 (1998).

The Hague Convention, while certainly addressing the key issues surrounding ICA, in particular children's rights and protection against child-trafficking, does have a number of shortcomings, particularly in areas of prohibition and enforcement: there are no outright provisions against baby-selling and no punishments for violators; the Convention does not regulate independent adoptions conducted by private individuals (the main form of ICA practice within the United States, and which involves the highest incidents of child trafficking);¹¹² there are no mechanisms in place to allow the UN and other government agencies to monitor the problem or provide effective solutions; and the Convention only applies to nations that choose to ratify it, thereby leaving millions of children unprotected wherever the Convention holds no legal authority.¹¹³ In sum, the Convention is merely a framework. After all, like any international treaty, it has to be ambiguous if it is to be adopted worldwide. For its objectives to be realized, there must be a willingness on the part of Contracting States to adopt specific measures and mechanisms to protect the welfare of children migrating for adoption. Since ICA became a formalized process subject to permanent legislation in the aftermath of World War II, political will has generally placed national concerns and societal wellbeing before the needs and welfare of child migrants for adoption. Still, by implementing the Hague Convention, the United States has taken an important step towards reversing this historical trend.

The mechanics for implementing the Hague Adoption Convention in the United States hinge upon the Intercountry Adoption Act of 2000 (IAA),¹¹⁴ which outlines several key steps for regulating and enforcing ICA according to the Convention's guidelines. First, it designated the State Department as the central authority for the administration and oversight of ICAs.¹¹⁵ It also mandated the creation of both an accreditation process for adoption agencies and a certification process that would provide conclusive evidence of the relationship between the

112. See Kennard, *supra* note 66, at 649.

113. According to the United Nations Children's Fund (UNICEF), as many as 1.2 million children are trafficked each year for labor or sexual exploitation. *Child Protection from Violence, Exploitation, and Abuse: Child Trafficking*, UNICEF (Mar. 22, 2011), https://www.unicef.org/protection/57929_58005.html. Additionally, many of these children are being "sold" outside official adoption channels. *Id.* Currently, the Convention has been ratified by a total of ninety-six countries worldwide. See Worthington, *supra* note 12, at 560 (arguing that the Hague Adoption Convention "inadequately protects vulnerable children"). See also Lindsay K. Carlberg, *The Agreement Between the United States and Vietnam Regarding Cooperation on the Adoption of Children: A More Effective and Efficient Solution to the Implementation of the Hague Convention on Intercountry Adoption or Just Another Road to Nowhere Paved With Good Intentions?*, 17 *IND. INT'L & COMP. L. REV.* 119, 123-24 (2007) (arguing that the implementation of the Hague Adoption Convention is "a less promising solution than originally hoped for" because of cost and efficiency issues); Jennifer M. Lippold, *Transnational Adoption from an American Perspective: The Need for Universal Uniformity*, 27 *CASE W. RES. J. INT'L L.* 465, 497-98 (1995) (suggesting additional provisions be included in the Hague Adoption Convention, including *inter alia* an appellate review process for each member country and a monetary cap for each transnational adoption).

114. 42 U.S.C. §§ 14901-14954 (2000).

115. In this role, the Department of State is tasked with numerous duties including an obligation to prevent "improper financial gain" in connection with the adoption and to deter all practices contrary to the objectives of the Convention. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, arts. 6-7, May 29, 1993, S. Treat Doc. No. 105-51 (1998).

adopted child and the adoptive parent(s).¹¹⁶ Furthermore, it amended the definition of a “child” in the Immigration and Nationality Act to include children adopted under the provisions of the Convention, which was necessary to allow for an expedited process of naturalization for these children.¹¹⁷ And, it provided for the enforcement of the Hague Convention requirements.¹¹⁸ Finally, it provided that the IAA and the Hague Convention would preempt any inconsistent state law.¹¹⁹

The mandate for the creation of a centralized accreditation process is especially critical in light of the overarching concern of the international community to address the root causes and prevent child trafficking and attendant forms of exploitation. The standards outlined in Section 96 of Title 22 of the U.S. Code of Federal Regulations include a myriad of provisions, from the structure of agencies seeking accreditation to ethical guidelines that must be followed in order to receive accreditation.¹²⁰ Each guideline and provision revolves around the core objective of the Hague Convention – namely, to ensure that all ICAs are in the best interests of the adopted child. For example, the Code explicitly prohibits “giving money or other consideration, directly or indirectly, to a child’s parent(s), other individual(s), or an entity as payment for the child or as an inducement to release the child.”¹²¹ Under the IAA, any violation of this accreditation requirement is subject to large monetary fines and a maximum of five years imprisonment.¹²²

While the punitive aspect of the law is intended as a deterrent to curb incidents of child trafficking, the overall effectiveness of the law remains in doubt. First, the Convention’s accreditation requirement only applies to agencies facilitating adoptions between the United States and countries that are also signatories to the Convention.¹²³ Second, for criminal prosecution under the IAA to take place, the violations must have been “knowing” and “willful.”¹²⁴ As there is no statutory definition of either of these terms, interpreting exactly what each one means in the context of ICA may prove difficult.

Beyond these limitations and ambiguities, the implementation of the Hague Convention has added further complexity to the already complex international adoption process as signatory nations struggle to bring their adoption laws into alignment with the requirements of the Convention. This situation has led to a significant drop in the number of international adoptions within the United

116. Intercountry Adoption Act, 42 U.S.C. §§ 14921–14924 (2000).

117. *Id.* at §§ 14931–14932.

118. *Id.* at § 14944.

119. *Id.* at § 14953.

120. See Intercountry Adoption Accreditation of Agencies and Approval of Persons, 22 C.F.R. § 96 (2010) (providing for the standards for accrediting agencies and approving persons in Subpart F); *Agency Accreditation*, U.S. DEP’T OF STATE (Dec. 13, 2018), <https://travel.state.gov/content/travel/en/Intercountry-Adoption/about-adoption-service-providers/agency-accreditation.html>.

121. 22 C.F.R. § 96.36(a) (2010).

122. 44 U.S.C. § 14944 (2000).

123. A list of Hague Convention countries is provided by the U.S. State Department. See *Convention Countries*, U.S. DEP’T OF STATE (Nov. 2, 2018), <https://travel.state.gov/content/travel/en/Intercountry-Adoption/Adoption-Process/understanding-the-hague-convention/convention-countries.html>.

124. Intercountry Adoption Act, 42 U.S.C. § 14944 (2000).

States.¹²⁵ A case in point is Guatemala, which in recent years has been a major source of ICAs to the United States, as the country struggles to deal with widespread poverty and civil unrest stemming from a decades-long war between paramilitary guerilla organizations and government officials.¹²⁶ Indeed, in 2007, it had the highest ratio of all sending countries, with one out of every 100 live births leading to an overseas adoption, a level exceeded only by Korea in the 1980s, Romania in 1990-1991, and Bulgaria in 2002-2003.¹²⁷ In September 2008, however, the State Department announced an immediate halt to all adoptions coming from Guatemala until the country could resolve the many flaws in its system that allowed for the emergence of a massive black market of baby selling and child trafficking.¹²⁸ While Guatemala signed on to the Hague Adoption Convention in March 2003 and passed necessary legislation to start bringing its adoption practices into compliance, it does not yet possess the regulations and infrastructure necessary to meet its obligations under the Hague Adoption Convention.¹²⁹ And, many experts insist that this is an unrealistic goal for such an impoverished country as Guatemala.¹³⁰ At any rate, with ICA no longer an option,

125. Elizabeth Bartholet, *The International Adoption Cliff: Do Child Human Rights Matter?*, in *THE INTERNATIONAL ADOPTION DEBATE: DIALOGUES ACROSS DISCIPLINES* 193, 194 (Robert L. Ballard et al. eds., 2015).

126. Selman, *The Rise and Fall of Intercountry Adoption*, *supra* note 1, at 16.

127. *Id.*

128. See Carlberg, *supra* note 113, at 127 (noting that the United States refuses to participate in ICA proceedings with sending countries that mistreat orphaned children, are known for child trafficking, or have otherwise corrupt adoption practices; at the same time, the United States continues to permit adoptions from countries that are not members of the Hague Convention – that is, places where child trafficking is most prevalent – thereby creating a disincentive for developing countries to ratify the Convention).

129. Currently, in order to facilitate adoptions between the United States and any signatory country of the Hague Convention, U.S. law requires that prior to the issuance of an immigrant visa for an adopted child, U.S. consular offices must certify that the adoption was completed according to the Hague Convention. See 22 C.F.R. § 96 (2010).

130. The fact that it took the United States, a country with much greater political and financial resources than Guatemala, more than ten years to implement the Hague Convention is a testament to how difficult it is to comply with its standards. See Daly, *supra* note 101, at 623; Katherine Sohr, Comment, *Difficulties Implementing the Hague Convention on the Protection of Children and Co-Operation in Respect of Intercountry Adoption: A Criticism of the Proposed Ortega's Law and an Advocacy for Moderate Adoption Reform in Guatemala*, 18 *PACE INT'L L. REV.* 559, 565 (2006). Sohr also notes that:

[F]inancial and administrative burdens may create a potentially grave situation for the orphaned Guatemalan children and no solution for birth families who cannot care for their children [T]he Hague Convention's reforms involve[] . . . requiring poverty-stricken sending countries, including Guatemala, to completely revamp their adoption systems without financial means for such reforms.

Id. at 565–66. See also Caeli Elizabeth Kimball, Note, *Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, 33 *DENV. J. INT'L L. & POL'Y* 561, 572 (2005) (explaining that the burdensome costs of complying with the Hague Convention might deter non-parties from joining); Kelly M. Wittner, Comment, *Curbing Child-Trafficking in Intercountry Adoptions: Will International Treaties and Adoption Moratoriums Accomplish the Job in Cambodia?*, 12 *PAC. RIM. L. & POL'Y J.* 595, 625 (2003) (highlighting that many sending countries are developing countries, and therefore lack the financial ability to implement Hague Convention provisions effectively).

there are few alternatives in this poor and violence-plagued country for the tens of thousands of orphaned and abandoned children. In effect, some would argue, U.S. efforts to support a universal ICA framework through the Hague Convention have only served to victimize the very children the Convention is intended to protect.¹³¹

The Hague Adoption Convention is in many ways the culmination of decades-long efforts by government leaders and child rights advocates across the globe to protect vulnerable children by implementing heightened restrictions and in some cases moratoriums. While certainly limiting instances of abuse and exploitation, the net effect of these endeavors has also resulted in a significant drop in the overall number of ICAs worldwide. Since 2004, a year in which Americans adopted nearly 23,000 children from overseas, the number of international adoptions began to fall precipitously.¹³² And it has been falling ever since. According to figures collected by the U.S. State Department, Americans adopted 5,647 children from other countries in 2015, the lowest figure since the early 1980s.¹³³ That is a seventy-five percent decline in just over one decade. Adoption expert Elizabeth Bartholet calls it “the cliff,” and cites the Hague Convention and similar such measures as the primary cause for the decline in ICAs.¹³⁴

An unfortunate but predictable consequence of increased regulation and scrutiny both here and abroad is that adoptive parents, in their search for a healthy infant who has no memory of their home country, no attachment to their birth parents, and who is without disability (precisely the kind of child which heightened regulations aim to protect), have increasingly turned to countries like Ethiopia, Uganda, and the Democratic Republic of the Congo.¹³⁵ These are countries where poverty, limited social services, and a lack of resources and institutions to facilitate domestic adoption, have created a relatively high number of adoptable (i.e. suitable) children. They are also disproportionately “non-Hague” countries (only three countries in Africa have ratified the treaty).¹³⁶ Thus, as Americans and other foreign adoptive parents have turned to Africa – a trend made all the more popular by celebrities like Angelina Jolie and Madonna – incidents of child trafficking and exploitation have increased accordingly. We are entitled to ask, therefore, if such regulations and restrictions truly are in the best interests of the children.

131. See, e.g., Elizabeth Bartholet, *International Adoption: The Child's Story*, 24 GA. STATE U. L. REV. 333 (2007).

132. Bartholet, *supra* note 125, at 194.

133. *Intercountry Adoption Statistics*, U.S. DEP'T OF STATE, https://travel.state.gov/content/travel/en/Intercountry-Adoption/adopt_ref/adooption-statistics.html (last visited Mar. 7, 2019).

134. *Id.*; Bartholet, *supra* note 125, at 194.

135. See Peter Selman, *Global Trends in Intercountry Adoption: 2001-2010*, in ADOPTION ADVOCATE 1, 12, Table 18 (Nicole M. Callahan & Chuck Johnson eds., 2012); see further The African Child Policy Forum, *Africa: The New Frontier for Intercountry Adoption*, 6 (2012), <https://www.childwatch.uio.no/news/2012/africa---the-new-frontier-for-intercountry-adoption-en.pdf>.

136. See *Convention Countries*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/travel/en/Intercountry-Adoption/Adoption-Process/understanding-the-hague-convention/convention-countries.html> (last visited Mar. 7, 2019).

IV. CONCLUSION

The story of intercountry adoption is a complex story of local, national, and international politics, culture, economics, and individual personal stories. It is a story that involves war and famine, poverty and prosperity. It involves power, oppression, ethnicity, race, and gender. The fact that the story is so complex is part of the reason why we still do not have a flawless, comprehensive legal structure to regulate it.

At the end of the day, we should not forget that this is fundamentally a story about people. It is a story about birth mothers who sometimes cannot care for their own children and want a better life for them, but also about birth mothers who are fraudulently induced to give up their children. It is a story about fathers, as well. But, most fundamentally, this is a story about children and the life and family that they will have. Who this child's family is and who should it be. It is our job to protect those who cannot protect themselves. It is our job to wade through this complex social, cultural, economic, legal story to create a system that truly safeguards the best interests of these children.