

SOMETIMES IT IS BETTER NOT TO BE UNIQUE: THE U.S. DEPARTMENT OF STATE VIEW ON INTERCOUNTRY ADOPTION AND CHILD TRAFFICKING AND WHY IT SHOULD CHANGE

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I. INTRODUCTION

Thousands of children are brought to the United States through the intercountry adoption¹ process every year.² Most of these children are orphans with no homes, no families, and no legitimate expectations of a normal life in their home countries. Though adoption seemingly offers a chance at a happier life, some children are victims of nefarious human trafficking schemes, driven by sub-par adoption agencies and unethical individuals. Many illicit intercountry adoptions, which should amount to trafficking, are never prosecuted as human trafficking even when those adoptions are tied to the United States.³

The Intercountry Adoption Act of 2000⁴ and other U.S. laws have already established hurdles high enough to ensure that most adoption agencies employ ethical practices, primarily through regulation of adoption agencies and thorough background checks and home studies for prospective parents.⁵ Still, those who want to engage in illicit behavior are likely to do so despite these high

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1. Intercountry adoption is also often referred to as “international adoption,” however, among experts in the area and legal professionals familiar with the practice, it is more common and appropriate to use the term “intercountry adoption.”

2. U.S. DEP’T OF STATE, FY 2012 ANNUAL REPORT ON INTERCOUNTRY ADOPTION (2013), *available at* http://adoption.state.gov/content/pdf/fy2012_annual_report.pdf.

3. The United States only prosecutes trafficking related to forced sex or labor. Illegal adoptions that contain all the elements relevant international law would recognize as sufficient for a charge of trafficking are not prosecuted as trafficking in the United States, absent forced sex or labor.

4. 42 U.S.C. § 14901 (2006).

5. See STUCK (Globox Media 2013) (following the adoptions of four children in three different countries as they progress through the adoption system and explaining that The Hague Convention has created regulations that, while well intentioned, are overly restrictive and are having a crippling effect on adoptions); Kelly Ensslin, *Fixing the International Adoption Mess*, GLOBALPOST (May 20, 2012), <http://www.globalpost.com/dispatches/globalpost-blogs/commentary/fixing-the-international-adoption-mess> (discussing how regulations may have actually gone too far since some Vietnamese children that were approved for adoption as early as 2008 were not actually brought into the U.S. until 2012).

hurdles. Inadequate prosecution of lawbreakers only exacerbates the potential for misbehavior and does a great disservice to the stringent regulations already in place. Adequate prosecution of unscrupulous individuals and agencies that engage in trafficking, on the other hand, would enhance the credibility of the system and deter unethical behavior.⁶ This note is a call for “a policy solution to a heinous crime”, and a push for prosecution to “free[] the victims and punish[] their tormentors.”⁷

This note looks at the basic international and domestic definitions of trafficking and applies them to intercountry adoptions. It uses definitions found in the UN Trafficking Protocol⁸ and The Hague Convention Guide to Good Practice⁹ to highlight the need for the US government to broaden its current narrow definition of trafficking in accordance with these international guidelines.

Under U.S. government policy, intercountry adoptions do not constitute trafficking unless the adoption contains an element of prostitution or forced labor.¹⁰ Although the U.S. State Department acknowledges it is “unique”¹¹ in taking this position, it maintains this narrow interpretation to the detriment of honest individuals and agencies, and to the benefit of the unethical. Despite ample evidence surrounding persons who promote intercountry adoptions that amount to trafficking, after extensive research an instance of an intercountry adoption related trafficking prosecution could not be identified.¹² When individuals were prosecuted for non-trafficking crimes in connection with illicit intercountry adoptions, they almost uniformly received lighter sentences than the sentences that sex or labor traffickers received. Instead, they received light sentences with little or no jail time and modest or no fines.

This note investigates two nearly unbelievable cases of individuals and

6. See generally, Anthony A. Braga, *Getting Deterrence Right? Evaluation Evidence and Complementary Crime Control Mechanisms*, 11 CRIMINOLOGY & PUBLIC POLICY 201 (explaining that deterrence does work, particularly when focused, and debating how to appropriately focus deterrence efforts so that the population most likely to commit a certain crime is deterred through police investigations, prosecutions, and other enforcement activities).

7. See Luis CdeBaca, Ambassador-at-Large, Office to Monitor and Combat Trafficking in Persons, *Trafficking Victims Protection Act: Progress and Promise* (May 3, 2010)), available at <http://www.state.gov/j/tip/rls/rm/2010/141446.htm> (using the quoted language in reference to the criminalization of human trafficking more generally).

8. See Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime art. 3(a), Dec. 1213, 2000, S. TREATY DOC. NO. 108-16, 2237 U.N.T.S. 319 [hereinafter Protocol to Prevent, Suppress and Punish Trafficking in Persons] (defining trafficking in children).

9. See HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *THE IMPLEMENTATION AND OPERATION OF THE 1993 INTERCOUNTRY ADOPTION CONVENTION: GUIDE TO GOOD PRACTICE* 33 (2008) (expounding on what can be considered exploitation).

10. Cable from the U.S. Dep’t of State to Diplomatic and Consular Posts, *Fraudulent Intercountry Adoption Does Not Constitute Trafficking in Persons* (June 11, year unreported), available at http://www.brandeis.edu/investigate/adoption/docs/DOS-cable-Fraudulent-ICA-Does-Not-Constitute-Trafficking_Jun11.pdf.

11. *Id.*

12. Research was conducted through the Pound Pup Database, Wikipedia lists of adoption scandals, internet searches, U.S. websites and documents, and research of hundreds of newspaper and scholarly articles without finding a single instance of an individual being charged with a trafficking offense, much less prosecuted, in a trafficking via intercountry adoption scenario.

agencies accused of engaging in fraudulent behavior with respect to intercountry adoptions. One case involves a former hula dancer who became one of the largest facilitators of adoptions from Cambodia, most of which were illegal.¹³ The other details the misdeeds of a Utah-based adoption agency operating in Samoa.¹⁴ These two heartbreaking cases highlight the need for prosecution of child traffickers. Unfortunately, neither case led to any charges of, let alone convictions for, human trafficking.

In the U.S., the bulk of the necessary legal framework already exists to prosecute intercountry adoptions that amount to trafficking as human trafficking. But only by recognizing the salience of established international trafficking definitions and prohibitions in the context of illicit intercountry adoptions can the U.S. begin to combat this evil.

II. OVERVIEW

Human trafficking via intercountry adoption occurs at varying rates in many countries throughout the world.¹⁵ Intercountry adoptions that amount to trafficking can occur in either the “receiving state” (where the child will be residing permanently after the adoption) or the “state of origin” (the child’s home state prior to adoption). It is likely that intercountry adoptions that amount to trafficking are more prevalent in states of origin, although states of origin do not have a monopoly on trafficking.¹⁶ Comprehensive and accurate research is scarce due to the illegality of trafficking, but most such trafficking occurs when children are brought from impoverished countries to more affluent Western countries.¹⁷ Intercountry adoptions amounting to trafficking can occur in a variety of ways: a child may be sold by parents, kidnapped from boarding schools or orphanages, taken from the streets, separated from family under false pretenses, or otherwise trafficked into the intercountry adoption system.¹⁸ A nurse may tell a woman who has just given birth that the child died and then the nurse may turn the child over to an orphanage or adoption agency for a finder’s fee.¹⁹ In another instance, a mother may merely believe that she is only “loaning” her child to foreign parents without relinquishing her own rights.²⁰

13. Desiree Smolin & David Kruchkow, *Why the Bad Stories Must be Told*, THE ADOPTION AGENCY CHECKLIST (May 7, 2005), <http://archive.is/u55Z> (The Adoption Agency Checklist website is not currently functional, but this archived copy is accessible).

14. Beth Tribolet, Teri Whitcraft & Scott Michels, *Four Sentenced in Scheme to ‘Adopt’ Samoan Kids*, ABCNEWS (Feb. 26, 2009), <http://abcnews.go.com/TheLaw/story?id=6958072&page=1>.

15. See David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping, and Stealing Children*, 52 WAYNE L. REV. 113, 135–7370 (2006) (looking at “child laundering” in countries ranging from Cambodia to Guatemala).

16. See generally *Co-operation Between Central Authorities*, *supra* note 171. (discussing problems of trafficking and other illicit adoptions with a focus on states of origin, implying that inadequate protections are given to children in states of origin).

17. See *id.*

18. For a detailed description of common child trafficking scenarios see *id.* at 118–24.

19. E.J. Graff, *Call it Trafficking*, THE AMERICAN PROSPECT (Jan 3, 2013), <http://prospect.org/article/call-it-trafficking>. Graff also introduces scenarios of paying families to send their youngest children to the U.S., ostensibly for educational purposes, and simply stealing a child off the streets of a busy developing city.

20. See Jorge L. Carro, *Regulation of Intercountry Adoption: Can the Abuses Come to an End?*, 18

Many parties to the Hague Convention have been trying, through internal and international means, to prevent human trafficking via intercountry adoptions,²¹ but recent reports indicate that there is still work to be done.²² Unfortunately, it is difficult to accurately predict how often trafficking is occurring because of its illicit nature and variances across countries in how their adoption systems operate. Nonetheless, some attempts have been made to chronicle illicit intercountry adoptions.²³ Yet an authoritative and comprehensive analysis of even one country, let alone all countries, is hard to find. Australia, one of the leaders in this area, recently dealt with several incidents of child trafficking from India that were connected to intercountry adoptions.²⁴ However, ultimately the Australian Attorney-General's Department was forced to launch an investigation while Indian officials indicted an Indian regulatory official for his role in the trafficking.²⁵ Nonetheless, "the Australian system is vulnerable to trafficking in children" through illicit intercountry adoptions, despite taking greater measures than the U.S. has taken to prevent trafficking.²⁶ Such measures have included an increase in cooperation between the Commonwealth and the Australian States, revised citizenship legalization for adoptees, the formation of consulting groups, and the development of a strategic plan.²⁷

Sometimes perpetrators of illicit intercountry adoptions, including adoptions that amount to trafficking, may be brought before a competent tribunal, as occurred with an Indian official and his employees who were indicted in India for trafficking in connection with the Australian cases.²⁸ However, not all instances of trafficking are prosecuted, whether as trafficking or otherwise.²⁹

HASTINGS INT'L & COMP. L. REV. 121, 124144 (1994) (discussing this scenario in reference to certain Romanian adoptions).

21. See HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *supra* note 9, at 33 (noting just three of many examples, Belgium, Chile, and Lithuania, where paying money to unlawfully facilitate an adoption is punishable by several years in prison and citing Interpol as stating that "the establishment of strict international civil and administrative procedures would make it much more difficult for people to use intercountry adoption procedures as a means of trafficking in children, or as a cover for moving children from one country to another").

22. See, e.g., Anastasia Moloney, *Baby-snatching for Illegal Adoption Hits the Headlines in Guatemala*, THOMPSON REUTERS FOUNDATION (Oct. 4, 2013), <http://www.trust.org/item/20131004103251-6uga0/> (reporting on a resurgence of infant snatching in Guatemala and laws being put in place to try and prevent the crime).

23. See Child Trafficking Cases, POUND PUP LEGACY., http://poundpuplegacy.org/child_trafficking_cases (last visited Oct. 16, 2013) (attempting to list all occurrences of illicit intercountry adoption worldwide, whether involving trafficking or not).

24. SIOBHAN CLAIR, CHILD TRAFFICKING AND AUSTRALIA'S INTERCOUNTRY ADOPTION SYSTEM 4 (2012) available at <http://www.law.uq.edu.au/documents/humantraffic/child-trafficking/Child-trafficking-and-Australias-intercountry-adoption-System.pdf>. The report does not make clear how many incidents were investigated nor how many instances of trafficking are thought to have occurred, but from 2009-10012 only 12 children were brought into Australia from India through intercountry adoption.

25. *Id.* at 6.

26. *Id.* at 2. Australia was also faced with a scandal revolving around adoptions from Ethiopia, which it tried to contain. *Id.* at 3.

27. *Id.* at 19.

28. *Id.* at 6.

29. See Child Trafficking Cases, POUND PUP LEGACY, http://poundpuplegacy.org/child_

III. CASE STUDIES

Through an investigation into two recent and relevant cases, the inadequacies of current methods for prosecuting intercountry adoptions that should amount to trafficking become apparent. The first case is one of a Hawaii and Seattle based operation that brought hundreds of children out of Cambodia for placement in the U.S.³⁰ The second case involves a Utah-based agency that used a myriad of different tactics to entice Samoan families to relinquish their children for adoption to families in the U.S.³¹ Despite having all the requisite elements of trafficking (recruitment, transportation, transfer, harbouring, or receipt of a child for the purpose of exploitation, including money or other compensation to facilitate illegal adoption³²), neither case was prosecuted as trafficking.

A. Cambodia

In 2002 Hollywood star Angelina Jolie adopted her baby son Maddox from Cambodia.³³ Two years later Lauryn Galindo, a former hula dancer and the woman who helped Jolie with her adoption, was indicted, charged, and pled guilty to visa fraud for her role in illegal adoptions.³⁴ Galindo's guilty plea came on the heels of her sister also pleading guilty to visa fraud and money laundering in connection with illegal adoptions.³⁵ Of the nearly 800 adoptions facilitated by Galindo, it is estimated that most were fraudulent.³⁶ Some of the children may have had forged or fraudulent papers, others may have been purchased from their families for nominal amounts, and others may have been victims of various nefarious schemes to take them away from their families and put them in the arms of adoptive parents with larger pocketbooks.³⁷ No matter the methods used, it appears that many children were transferred or recruited "for the purposes of exploitation."³⁸ They were trafficked.³⁹

trafficking_cases (last visited Oct. 16, 2013) (a database of user inputted data about intercountry adoptions that amount to trafficking instances, including links to relevant articles, court documents, and other information about each specific instance). A brief, but thorough, analysis of data available through this database revealed at least 33 instances of illicit intercountry adoptions that amount to trafficking with a connection to the U.S. in the past 10 years. Approximately 21% of these instances resulted in some form of U.S. prosecution, arrest, or civil action. No instance involved charges of trafficking.

30. Smolin & Kruckow, *supra* note 13.

31. Indictment in *United States v. Focus on Children* at 8, Docket No. 1:07-cr-00019 (D. Utah 2007).

32. This definition of trafficking is not currently accepted by the U.S. State Department, but is a widely accepted and correct view of adoption related trafficking as will be argued forthwith.

33. Michelle Tauber, *And Baby Makes Two*, PEOPLE, Aug. 4, 2003, at 84 & 86, available at <http://www.people.com/people/archive/article/0,,20140693,00.html>.

34. *Guilty Plea in Adoption Fraud Case*, KOMONEWS.COM (June 23, 2004.), <http://www.komonews.com/news/archive/4127656.html>.

35. *Id.*

36. Smolin & Kruckow, *supra* note 13.

37. *Id.*

38. See Protocol to Prevent, Suppress and Punish Trafficking in Persons, *supra* note 8, at art. 3(c) (further defining trafficking in persons). See also HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *supra* note 9 (expounding on the Trafficking Protocol definition to explain that "money or other

Along with her sister, Galindo was indicted for a slew of illegal activities.⁴⁰ Reportedly, court documents allege that Galindo, on several occasions, urged prospective parents to retain documentation for children that had become ill or died and then transfer those documents to a healthy child, thus switching the identities of the adopted child.⁴¹ In one reported instance, Galindo knowingly lied to prospective parents when she said that the child they were to adopt was an orphan.⁴² In fact, the child's birth mother had been encouraged to relinquish her rights to the child at the request of a person affiliated with Galindo.⁴³ Galindo completed the child's visa paperwork and claimed that the child was an orphan and the parents were unknown despite having written down in a medical record that the child's mother was alive.⁴⁴ The parents were asked to pay \$3,500 directly to the orphanage, in addition to the money already paid for adoption service fees, and the adoption was completed.⁴⁵

In another instance, a prospective parent went to Cambodia to pick up a five-month-old.⁴⁶ The parent decided not to go through with the adoption, but at the urging of Galindo completed the paperwork required for the adoption.⁴⁷ Then Galindo took the child to Hawaii and placed him with a different adoptive parent.⁴⁸

In 1999, certain individuals in Cambodia began to suspect that Galindo's adoption practices were not aboveboard.⁴⁹ The Foreign Minister of Cambodia accused her of bribery and demanded an investigation.⁵⁰ But three years later, Galindo, who was well liked by the Cambodian Prime Minister, received a medal for "national reconstruction".⁵¹ Yet, Galindo later admitted that she gave over half of the average adoption service fee paid by prospective parents to Cambodian officials.⁵² She reportedly felt that it was "OK to give tips."⁵³ In her plea agreement, Galindo also admitted that one of the co-conspirators of her

compensation" count as exploitation). Galindo was receiving compensation for her services as an adoption facilitator. This compensation alone, whether or not it was above what would be normal for an adoption service provider, is enough to meet the exploitation portion of the trafficking definition because the adoptions she was facilitating were illegal.

39. *Id.* at art. 3(a). See Protocol to Prevent, Suppress and Punish Trafficking in Persons, *supra* note 8, at art. 3(a) (defining trafficking in persons).

40. Bill Bainbridge, *US Adoption Agent Guilty of Visa Fraud*, THE PHNOM PENH POST, (Cambodia), Dec. 19, 2003, available at <http://www.phnompenhpost.com/national/us-adoption-agent-guilty-visa-fraud>.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. Mark Baker, *Jolie's Adoption Nightmare*, THE AGE, Jan. 9, 2004, available at <http://www.theage.com.au/articles/2004/01/08/1073437411857.html>.

53. *Id.*

criminal enterprises was a Cambodian public official.⁵⁴

Galindo was never charged with trafficking; instead she was allowed to enter a guilty plea to charges of conspiracy to commit visa fraud, conspiracy to commit money laundering, and structuring of financial transactions.⁵⁵ The maximum cumulative penalty for these crimes is 30 years in prison and hundreds of thousands of dollars in fines⁵⁶ Galindo was sentenced to 18 months in jail, three years of supervised release, 300 hours of community service, and a \$300 assessment;⁵⁷ an undoubtedly lenient sentence compared to those sentenced for trafficking.⁵⁸ Some of the staff members at the orphanage Galindo partnered with were charged in Cambodia with trafficking, although the charges were later dropped.⁵⁹

B. Samoa

What's the worst thing that could happen as you walk through a teeming marketplace? A zealous shopper may take the mango you had been eyeing; a shrewd businessman may con you into buying a worthless product; a furtive pickpocket may make off with your wallet. In Samoa before 2007, employees and associates of Focus on Children targeted shoppers in the marketplace with a much darker scheme in mind.⁶⁰ After identifying women as targets, Focus on Children would approach them in their villages to persuade them to give up their children.⁶¹ Some women were referred, by other innocent victims, to Focus on the Children's scheme and gave up their children.⁶² Still others fell victim to presentations or discussions with village leaders designed to influence families to surrender their children to this American adoption agency.⁶³

Seven individuals and the adoption agency were indicted in 2007 for illicit activities in Samoa and the United States relating to illegal adoptions.⁶⁴ The indictment details eight specific instances of criminal behavior.⁶⁵ Each instance contains overt acts—including transfer, transport, or receipt of children—designed

54. Plea Agreement in *United States v. Galindo* at 7, Docket No. 2:04-cr-00270 (W.D. Wash. 2004).

55. *Id.* at 2.

56. *Id.* at 3–4.

57. Judgment in *United States v. Galindo* at 2–5, Docket No. 2:04-cr-00270 (W.D. Wash. 2004).

58. See DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FEDERAL PROSECUTION OF HUMAN TRAFFICKING, 2001–2005 2 (2006)), available at <http://www.bjs.gov/content/pub/pdf/fpht05.pdf> (noting that the median sentence for trafficking was 70 months in prison). See; see, e.g., Associated Press, *Fort Worth Man Gets Jail for Sex Trafficking*, CBS DALLAS, Nov. 13, 2013, available at <http://www.chron.com/news/texas/article/Fort-Worth-man-gets-prison-in-sex-trafficking-case-4979907.php?cmpid=htx> (imposing noting the imposition of six and ten year sentences for traffickers).

59. Bainbridge, *supra* note 40. The reason for Cambodian authorities dropping the charges is unknown; however, the charges were dropped “so quietly that not even the lawyer” for the mothers of the trafficked children knew about it.

60. Indictment in *United States v. Focus on Children*, *supra* note 31, at 8.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 1.

65. *Id.* at 14–24.

to exploit the children for money or other compensation in furtherance of an illegal adoption; in other words, trafficking.⁶⁶

In one occurrence, Focus on Children approached the birth parents of two young Samoan children and persuaded them to place their children in the Focus on Children “program.”⁶⁷ The parents were told that they would see their children when they turned five and that at the age of 18 the children would return to reside permanently with their birth parents.⁶⁸ Focus on Children referred these two young children to prospective adoptive parents and lied about the children’s circumstances.⁶⁹ The prospective family was told that the children were in foster care and that the birth mother was poor and unable to care for these two children, who were the youngest of her seven children.⁷⁰ In fact, the children were still living with their birth parents at the time, were being well cared for, and were the only children the parents had.⁷¹ The prospective parents repeatedly expressed interest in going to Samoa to pick up the two children.⁷² Focus on Children denied their request, citing a recent hurricane as the impetus for advising against travel to Samoa, and instead had the family pick up the children in New Zealand.⁷³ At one point, the family questioned the legality of the adoption and asked if everything was legitimate.⁷⁴ Focus on Children associates told them that everything was legal and the adoptive parents brought children they believed to be orphans to their new home in the U.S.⁷⁵

Focus on Children also ran a “nanny home” in Samoa.⁷⁶ Children were brought there after their parents had been convinced to allow the children to be given up for adoption (mainly through misrepresentations about the permanency of the adoption and false promises).⁷⁷ In 2004, two siblings were placed by their parents in the nanny home, even though their parents had not relinquished them.⁷⁸ The birth parents periodically visited their children in the nanny home, during which visits they discovered that the children were not being fed enough and had sores on their little bodies.⁷⁹ Almost a year after allowing Focus on Children to remove their children to the nanny home, the birth parents took one of the children to the hospital.⁸⁰ The child was “very malnourished, dehydrated, and had a chronic ulcer on her left foot which had not been treated.”⁸¹ Two days after her arrival at the hospital, the child died.⁸²

66. *Id.*

67. *Id.* at 19.

68. *Id.*

69. *Id.* at 20.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 20–21.

76. *Id.* at 21.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

Even after the death of their child, the family was hounded by Focus on Children to relinquish their other child.⁸³ They wisely refused.⁸⁴

Shortly after these events, an American family adopted three other children; more victims of Focus on Children's adoption scheme.⁸⁵ The birth parents of these three children had been approached by Focus on Children and told that the children would be placed in a program run by The Church of Jesus Christ of Latter-day Saints (Mormon Church) designed to educate Samoan children.⁸⁶ Focus on Children deceitfully informed the birth parents that their children would frequently return to Samoa and that they would obtain dual citizenship.⁸⁷ The birth parents eventually signed an agreement relinquishing the children, however, the document was in English and the birth parents were unaware of the blatant falsehoods contained within it.⁸⁸ Two sets of adoptive parents adopted children from this sibling group.⁸⁹ Focus on Children told one adoptive family that travel to Samoa to pick up their two children was ill advised because of recent bad publicity surrounding the death of the child that had been in the nanny home.⁹⁰ The adoptive parents were also encouraged not to mention this death to State Department officials when filing paperwork to complete the adoptions.⁹¹ As the family was preparing to leave New Zealand for the United States, the two children attempted to run away in hopes of returning to their birth family in Samoa.⁹²

One adopted child "cried herself to sleep" for weeks after arriving in the U.S.⁹³ The 4-year-old girl said things that made her adopted father suspect that something was wrong and that the story he had been told about the young girl by Focus on Children was inaccurate, to say the least.⁹⁴

Focus on Children and seven of its employees, or associates, were charged with conspiracy to commit alien smuggling and visa fraud, conspiracy to commit money laundering, bringing in illegal aliens to the U.S., various aiding and abetting charges, and other similar charges.⁹⁵ They were not charged with trafficking.⁹⁶ The agency itself was sentenced to remain inactive until the Samoan case was fully resolved and to pay an assessment of \$400.⁹⁷ The five U.S. employees entered a plea agreement that allowed for many of the charges to be

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 22.

86. *Id.*

87. *Id.*

88. *Id.* at 23.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 23-24.

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

94. *Id.*

95. Indictment in *United States v. Focus on Children*, *supra* note 31, at 1-2.

96. *Id.*

97. Judgment as to Focus on Children in *United States v. Focus on Children* at 3, Docket No. 1:07-cr-00019 (D. Utah 2007).

dismissed and were sentenced to five years probation, ordered to pay assessments ranging from \$10 to \$50, and make contributions to a trust fund to help adoptive families and birth families caught in this scheme maintain communications.⁹⁸ No one received jail time and no fines were imposed.⁹⁹ Two co-conspirators in the scheme are Samoan nationals residing in Samoa and have not, yet, faced charges in the U.S. They cannot be removed without consent of the Samoan government due to the lack of an extradition treaty with the U.S.¹⁰⁰

IV. THE DEFINITION OF TRAFFICKING WITH RESPECT TO INTERCOUNTRY ADOPTIONS

Deciding on a definition of trafficking is extremely difficult, especially in the sphere of intercountry adoptions. U.S. statutes dealing with intercountry adoption offer little guidance on a definition for trafficking.¹⁰¹ The Trafficking Victims Protection Act of 2000 (TVPA) only proffers a definition for “severe” forms of trafficking, implying that there are non-severe forms as well, but without defining them.¹⁰² Furthermore, different international instruments contain different wording establishing the basis for a charge of trafficking.¹⁰³ Also, within intercountry adoption circles, terms such as “illicit adoption” or “wrongful adoption” are often used, which may or may not contain elements of trafficking.

The TVPA contains only a definition for “severe forms of trafficking”, which is limited to “sex trafficking in which a commercial sex act is induced . . . ” by certain means or the individual induced “to perform such act has not attained 18 years of age”, or trafficking “of a person for labor or services . . . ” through listed means.¹⁰⁴ Throughout the TVPA the focus is primarily on sex trafficking and labor trafficking, although in several places it is noted that children may be victims of trafficking.¹⁰⁵ The purpose of the act is “to combat trafficking in persons . . . ensure just and effective punishment of traffickers, and to protect their victims.”¹⁰⁶ The purpose and definitions do not explicitly limit themselves to sex and labor trafficking, despite those being of primary concern in the

98. Judgment as to Scott Banks, Karen Banks, Coleen Bartlett, Karalee Thornock, and Dan Wakefield in *United States v. Focus on Children*, Docket No. 1:07-cr-00019 (D. Utah 2007).

99. *Id.*

100. *Countries with No Extradition Treaty*, WSFA.COM (June 23, 2013.), available at <http://www.wsfa.com/story/22665099/countries-with-no-extradition-treaty-with-us>.

101. See 42 U.S.C. § 14944 (2006) (lacking the word “trafficking,” let alone a definition of what it is).

102. See 22 U.S.C. § 7102 (2006) (defining severe forms of trafficking as certain forms of labor or sex trafficking).

103. Compare Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime art. 3(a), Nov. 15, 2000, S. TREATY DOC. NO. 108-16, 2237 U.N.T.S. 319 [hereinafter UN Trafficking Protocol] (not discussing trafficking in the intercountry adoption context, but not foreclosing its existence) with HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *supra* note 10 (stating that illicit intercountry adoptions should be prevented, but leaving a definition of trafficking to its Guide to Good Practice).

104. *Id.*

105. *Id.*

106. 22 U.S.C. § 7101 (2006).

TVPA.¹⁰⁷

The Intercountry Adoption Act of 2000 (IAA) does not mention trafficking in the context of intercountry adoptions.¹⁰⁸ The act aims to prevent “abuses” of those involved in intercountry adoptions, but fails to specify what those abuses are.¹⁰⁹ Despite not defining or referencing trafficking, the act does impose penalties for those who through fraud or misrepresentation engage in unscrupulous adoption practices.¹¹⁰

The UN Trafficking Protocol, the main international instrument concerning human trafficking, defines trafficking as the “recruitment, transportation, transfer, harbouring or receipt of persons” through a variety of methods, including fraud, “for the purpose of exploitation.”¹¹¹ For children to be victims of trafficking, however, no fraud, deceit, coercion, or other mean needs to be employed as long as there was “recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation.”¹¹² Every intercountry adoption involves either one or, in almost every instance, more of the first required elements: recruitment, transportation, transfer, harbouring, or receipt. The real question then becomes one of whether the purpose of the first element was for exploitation. Thus, it is imperative to understand what “exploitation” is. But, the UN Trafficking Protocol’s definition of “exploitation” is comprised of a non-comprehensive list that does not include illicit intercountry adoptions.¹¹³

V. THE STATE DEPARTMENT’S POSITION

In the United States, intercountry adoptions that amount to trafficking (as defined by The Hague Convention Guide to Good Practice¹¹⁴) are not prosecuted as human trafficking. The official view of the State Department is that “fraudulent intercountry adoptions are sometimes mislabeled as child trafficking.”¹¹⁵ It admits that among the 90 Hague Convention states, the U.S. is

107. *Id.*

108. 42 U.S.C. § 14901 (2006).

109. *See id.*

110. *See* 42 U.S.C. § 14944 (2006). The penalties range from \$50,000 fine for the first civil violation, to \$250,000 fine with a maximum prison sentence of 5 years imprisonment in the case of a criminal penalty. *Id.*

111. UN Trafficking Protocol, *supra* note 103 (“‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”).

112. *Id.* at art. 3(c).

113. *See id.* at art. 3(a).

114. *See* HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, THE IMPLEMENTATION AND OPERATION OF THE 1993 INTERCOUNTRY ADOPTION CONVENTION: GUIDE TO GOOD PRACTICE 33 (2008) (defining exploitation in the context of adoption trafficking).

115. U.S. DEP’T OF STATE, FRAUDULENT INTERCOUNTRY ADOPTION DOES NOT CONSTITUTE TRAFFICKING IN PERSONS 1 (June 27, 2011) [hereinafter FRAUDULENT INTERCOUNTRY ADOPTION], available at http://www.brandeis.edu/investigate/adoption/docs/DOS-cable-Fraudulent-ICA-Does-Not-Constitute-Trafficking_Jun11.pdf.

“unique” in taking this position.¹¹⁶ The State Department holds that, at a general level, trafficking in persons “may” include a profit motive, but that illegal adoptions that do not also have an intention for the child to become subject to forced labor or commercial sexual exploitation are not cases of trafficking.¹¹⁷ The distinction, thus, rests on the definition of exploitation. The State Department has chosen to accept a highly technical definition of exploitation that is restricted to “practice[s] similar to slavery” in the intercountry adoption context.¹¹⁸ For the State Department, absent such practices, trafficking has not occurred.¹¹⁹

The Department claims that experts on intercountry adoption “understand the distinction” between trafficking and mere fraudulent intercountry adoption.¹²⁰ Although the State Department recognizes that The Hague Convention establishes the prevention of trafficking as one of its main goals, it nonetheless does not accept the proposition that “child-buying” or other forms of trafficking for money or compensation in furtherance of an illegal adoption are trafficking because such actions do not comply with the technical definition.¹²¹ If child-buying is combined with forced labor or prostitution then child trafficking has occurred, but the mere fact that a profit motive is present or exploitation, as understood by The Hague Conference on Private International Law,¹²² occurs does not constitute child trafficking.¹²³ Part of the rationale for this contradiction with the Convention is the fact that intercountry adoption normally has a benevolent purpose; providing a loving home for children.¹²⁴

The Trafficking Victims Protection Act of 2000 (TVPA)¹²⁵ also informs the State Department’s conclusion that fraudulent intercountry adoptions are not trafficking absent “compelled service.”¹²⁶ The State Department claims that the definition of trafficking found in the TVPA is confined to conditions of “enslavement.”¹²⁷ The TVPA found that traffickers “buy children” for prostitution or forced labor, traffickers “transport victims from their home communities to unfamiliar destinations”, trafficking “involves violations of other

116. *Id.* at 3–4.

117. *Id.* at 3.

118. U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 8 (2010), available at <http://www.state.gov/documents/organization/142979.pdf> (including a special section, not found in the 2011, 2012, or 2013 reports, stating that illegal adoptions are not trafficking unless the action “amounts to a practice similar to slavery”) (quoting Rep. of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions add. (Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto) at 12, U.N. Doc. A/55/383/Add.1 (Nov. 3, 2000)).

119. *Id.*

120. FRAUDULENT INTERCOUNTRY ADOPTION, *supra* note 115 at 4.

121. *Id.*

122. See HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *supra* note 114 at 33 (asserting that exploitation, the second necessary element of trafficking, occurs if there is a profit motive in furthering an illegal adoption, whether the profit be money or other compensation).

123. FRAUDULENT INTERCOUNTRY ADOPTION, *supra* note 115, at 3.

124. See *id.* at 2–3 (including a section titled “The Intent of Intercountry Adoption is to Place a Child in a Loving Home”).

125. 22 U.S.C. § 7101 (2012).

126. See FRAUDULENT INTERCOUNTRY ADOPTION, *supra* note 115 at 2.

127. *Id.*

laws” including “kidnapping” and “fraud”, and that “trafficking is a serious offense.”¹²⁸ The TVPA also agrees with “the international community . . . that trafficking in persons involves grave violations of human rights and is a matter of pressing international concern.”¹²⁹ But, the TVPA only contains a definition for “severe forms of trafficking” and never explicitly claims that trafficking is only possible when there is compelled service.¹³⁰

No case of an illicit intercountry adoption being prosecuted as a trafficking case has been found.¹³¹ Given the position of the State Department and its role in helping conduct investigations that would lead to prosecutions by the Department of Justice, this should not be surprising.¹³²

VI. INADEQUATE PROSECUTION

Nevertheless, intercountry adoptions that may amount to trafficking do sometimes receive the attention of federal authorities, but are prosecuted as something other than a trafficking offense.¹³³ When they are prosecuted, intercountry adoptions that appear to satisfy the elements of trafficking are often charged as tax violations, fraud, immigration violations, or other similar criminal offenses.¹³⁴ Sometimes federal authorities choose not to prosecute and interested parties go after traffickers—those who recruited, transferred, transported, harboured, or received exploited children—through civil lawsuits.¹³⁵ These civil suits may provide some consequences for an unethical adoption agency,¹³⁶ but a civil suit cannot establish the existence of trafficking any more than a criminal

128. 22 U.S.C. § 7101 (2012).

129. *Id.*

130. 22 U.S.C. § 7102 (2012) (emphasis added).

131. Research was conducted through the Pound Pup Database, Wikipedia lists of adoption scandals, internet searches, U.S. government websites and documents, and research of hundreds of newspaper and scholarly articles without finding a single instance of an individual being charged, with a trafficking offense, much less prosecuted, in an intercountry adoptions scenario that amounted to trafficking.

132. See FRAUDULENT INTERCOUNTRY ADOPTION, *supra* note 115 at 3 (explaining the “unique” position of the U.S. that illicit intercountry adoptions that exploit children are not instances of trafficking unless the purpose of the exploitation is for prostitution or forced labor).

133. See *Child Trafficking Cases*, POUND PUP LEGACY, [http:// poundpuplegacy.org/ child_trafficking_cases](http://poundpuplegacy.org/child_trafficking_cases) (last visited Oct. 16, 2013). An analysis of the resources available revealed that approximately 21% of cases that appeared to have the requisite elements of child trafficking received court attention in the U.S.

134. See *e.g.*, Indictment, United States v. Focus on Children, No. 1:07-cr-00019 (D. Utah Feb. 28, 2007) (charging the defendants with crimes ranging from conspiracy to commit alien smuggling to laundering of monetary instruments).

135. See *e.g.*, Complaint, Boe v. Christian World Adoption, Inc., No. 2:10-cv-00181-FCD-CMK (E.D. Cal. Jan. 22, 2010) (alleging wrongful adoption, breach of contract, and other claims against an adoption agency that allegedly brought children ineligible for adoption from Ethiopia to the U.S. for placement with the plaintiffs, by paying the father to relinquish his parental rights and telling the children they were only coming to the U.S. for an educational exchange).

136. See CHRISTIAN WORLD ADOPTION (Aug. 18, 2013), [http:// web.archive.org/ web/20130818075853/http://www.cwa.org/](http://web.archive.org/web/20130818075853/http://www.cwa.org/) (accessed using the Wayback Machine archive) (telling its visitors that the agency has undergone struggles in recent years and thus has had to file for Chapter 7 bankruptcy. The now-defunct site did not specifically reference the 2010 lawsuit, but it can be inferred from the language of the message that the lawsuit is at least partially responsible for the difficulties of the agency).

indictment that does not include trafficking as a charge. Illegal adoptions may often be punished through mechanisms like the described civil suits and criminal prosecutions; however, without such adoption-related trafficking being labeled and prosecuted as human trafficking myriad undesirable consequences are created.

VII. A BETTER VIEW

The Hague Convention on Intercountry Adoption declares that “no one shall derive improper financial or other gain from an activity related to an intercountry adoption.”¹³⁷ The Preamble and Article 1 condemn trafficking in children and urge for “safeguards” to be enacted to prevent child trafficking.¹³⁸ For children to be victims of trafficking there must be “recruitment, transportation, transfer, harbouring, or receipt of a child for the purposes of exploitation.”¹³⁹ A useful starting point is to read “exploitation” from the Protocol¹⁴⁰ as including “financial or other gain” as described in The Hague Convention.¹⁴¹ Indeed, The Hague Guide to Good Practice defines trafficking as “the payment of money or other compensation to facilitate the illegal movement of children for the purposes of illegal adoption or other forms of exploitation.”¹⁴² Thus, it is feasible to consider “the payment of money or other compensation” in furtherance of an illegal adoption as a form of exploitation.

Reading The Hague Guide to Good Practice in conjunction with the UN Trafficking Protocol to derive a definition that denotes “recruitment, transportation, transfer, harbouring, or receipt of a child for the purposes of exploitation,”¹⁴³ with exploitation including “the payment of money or other compensation to facilitate the illegal movement of children for the purposes of illegal adoption or other forms of exploitation,”¹⁴⁴ is “compatible with a common sense approach and general understanding of the word ‘trafficking.’”¹⁴⁵ This

137. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption art. 32, May 29, 1993, S. TREATY DOC. NO. 105-51.

138. See *id.* at art. 1.

139. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, *supra* note 111 at art. 3(c).

140. *Id.*

141. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, *supra* note 137. at art. 8.

See HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *supra* note 114, at 33 Despite the Hague Conference being a recognized authority on intercountry adoption issues, more restrictive definitions have been posited by other bodies. See, U.N. General Assembly, Rep. of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions: Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, 12, Nov. 3, 2000 U.N. Doc. A/55/383/Add.1 (noting that trafficking only occurs “where illegal adoption amounts to a practice similar to slavery”).

143. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, *supra* note 139 at art. 3(a).

144. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *supra* note 142 at 33.

145. SIOBHAN CLAIR, CHILD TRAFFICKING AND AUSTRALIA’S INTERCOUNTRY ADOPTION SYSTEM 14 (2012) available at <http://www.law.uq.edu.au/documents/humantrafficking/child-trafficking/Child->

definition of trafficking with respect to intercountry adoptions, or something close to it, is widely accepted by other countries.¹⁴⁶ The Australian government, for example, has even gone so far as “to accept that child trafficking may occur through the adoption system, even where no exploitation is present.”¹⁴⁷

The State Department acknowledges that the TVPA is implementing legislation for the UN Trafficking Protocol.¹⁴⁸ Indeed the Department recognizes that the Protocol “mandates the criminalization of human trafficking” and that, although the promises of the Protocol are not yet fulfilled, the U.S. wants to “lead by example” in the areas of human trafficking “protection, prevention, and prosecution.”¹⁴⁹ However, the State Department has become fixated on the “ill-fitting” assumption that trafficking is “predominantly . . . for the purpose of sexual” or labor exploitation.¹⁵⁰ Other, admittedly imperfect, countries trying to improve their own adoption systems have criticized this view as being too narrow.¹⁵¹ In short, the State Department’s willingness to be “unique”, while admirable to a certain extent, is considerably misguided.¹⁵²

As shown, the Trafficking Protocol says relatively little about intercountry adoption, although it does create a lower bar for trafficking when children are victims.¹⁵³ The Hague Convention, to which the U.S. is also a party and strong supporter,¹⁵⁴ through its Guide to Good Practice takes the framework of the Trafficking Protocol and applies it to intercountry adoptions by defining

trafficking-and-Australias-intercountry-adoption-System.pdf.

146. It is because of this definition that the State Department concedes that it is “unique” among its peers when it comes to assessing illegal adoptions and trafficking. See FRAUDULENT INTERCOUNTRY ADOPTION, *supra* note 115.

147. SIOBHAN CLAIR, *supra* note 145, at 14.

148. CdeBaca, *supra* note 7. The speaker refers to the UN Trafficking Protocol by one of its other nicknames, “The Palermo Protocol.” *Id.*

149. *Id.*

150. See SIOBHAN CLAIR, *supra* note 145, at 4 (explaining that Australia has also unfortunately fallen into thinking of trafficking in predetermined ways, mainly revolving around sexual exploitation).

151. See *id.* at 14 (discussing the 2010 Trafficking in Persons Report and the reliance on the Interpretative Notes to the Convention Against Transnational Organized Crime as narrow and insufficient in an era of illegal adoptions that amount to trafficking).

152. FRAUDULENT INTERCOUNTRY ADOPTION, *supra* note 115 at 4. The State Department even recognizes that many African countries officially refer to fraudulent intercountry adoption as child trafficking and that a Minnesota based adoption agency was accused of child trafficking by Ethiopian officials for placing children without parental consent, an action that would not be considered trafficking under the view of the State Department. See also 22 C.F.R. § 96.35, 96.39, 96.45, & 96.46 (2006) (requiring adoption agencies to prevent trafficking and only work with providers, both foreign and domestic, that do not engage in trafficking). Despite federal regulations that specifically say adoption agencies should not engage in trafficking via intercountry adoptions, the State Department has taken a position that trafficking in the intercountry adoption context is a nullity.

153. See Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, *supra* note 139 at art. 3(c).

154. See e.g., 16 Vietnamese kids, US families in adoption limbo, ASSOCIATED PRESS, June 15, 2011, available at <http://www.joplinglobe.com/national/x1625117394/16-Vietnamese-kids-US-families-in-adoption-limbo/print> (reporting on the U.S. government’s push for Vietnam to join the Hague Convention).

exploitation in the adoption context.¹⁵⁵ Hypocritically, the U.S. thinks it can be a leader in combatting human trafficking despite not recognizing the definition of trafficking proffered—and accepted by every Hague member except the U.S.—by The Hague Convention in accordance with the Trafficking Protocol.¹⁵⁶

Likewise, other international instruments call for appropriate punishment of intercountry adoptions that amount to trafficking. The Convention on the Rights of the Child calls for “all appropriate measures” to prevent “improper financial gain” in intercountry adoptions and the same protections for children adopted from overseas as domestic adoptions.¹⁵⁷ Similarly, a 1986 General Assembly Resolution and precursor to the Convention on the Rights of the Child, urges states to enact laws that would prohibit “illicit placement of children.”¹⁵⁸ Admittedly, the Convention on the Rights of the Child is not binding on the U.S., except to the extent it has become customary international law. Yet, the international community has made it clear that the protection of children involved in the intercountry adoption process is paramount and should be met with laws sufficient to deter and prohibit illicit adoptions and related trafficking.¹⁵⁹

In a press release following sentencing in the Focus on Children case, the State Department proudly acknowledged its “tireless” efforts in assisting with the investigation and prosecution of the individuals involved in the incident.¹⁶⁰ Considering the extent of collaboration between the State Department and other agencies and offices involved in the prosecution of intercountry adoption traffickers, it would not be surprising to find that the official view of the State Department has permeated the offices of all involved in these cases and become *de facto* the position of the U.S. government.¹⁶¹ The end result is that intercountry adoption offenses that amount to trafficking are demoted to an immigration or tax offense and often those involved in the nefarious act receive little or no jail time, despite the harm caused to their victims.¹⁶² The lack of harsh

155. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *supra* note 114 at 33.

156. *See id.* (defining exploitation to include paying of money or other compensation in furtherance of an illegal adoption).

157. Convention on the Rights of the Child art. 21, Nov. 20, 1989, 1577 U.N.T.S. 3.

158. G.A. Res. 41/85, art. 19, U.N. Doc. A/RES/41/85 (Dec. 3, 1986).

159. *See id.* (calling for the establishment of policies and laws to prohibit illicit actions in relation to intercountry adoption).

160. Press Statement, U.S. Dep’t of State, Defendants in ‘Focus on Children’ Case Sentenced in Federal Court, (Feb. 25, 2009), *available at* <http://www.state.gov/m/ds/rls/127131.htm>.

161. *See* FRAUDULENT INTERCOUNTRY ADOPTION, *supra* note 115 at 4 (explaining the unique position of the U.S. in not perceiving intercountry adoptions that amount to trafficking as a form of trafficking). The Departments of Justice, Homeland Security, and Health and Human Services all have offices devoted to anti-trafficking efforts, yet no articulation of whether intercountry adoptions could involve trafficking in the absence of sex or labor trafficking was found in the documents of these departments.

162. After the sentencing of individuals involved in the Focus on Children case some adoptive parents wanted to see the individuals responsible put in jail while, supposedly, none of the birth parents wished to see these people behind bars. *See* Press Statement, US Dep’t of State, *supra* note 160 (announcing that some adoptive parents wanted to see the perpetrators incarcerated and others showed no interest in incarceration); News Release, U.S. Immigration and Customs Enforcement, Defendants sentenced in Samoan adoption scam: Government sought “forward looking” resolution for Samoan, U.S. families (Feb. 25, 2009), *available at* <http://www.ice.gov/news/releases/>

punishment, particularly in egregious cases such as those illustrated, does not coincide with the stated goals of “ending, to the extent possible, the rampant fraud taking place in intercountry adoptions, and punishing [perpetrators] for their criminal conduct.”¹⁶³

The most renowned treaty on intercountry adoptions, The Hague Convention, specifically addresses illegal adoptions and calls for their prosecution.¹⁶⁴ Both the preamble and Article 1 speak of the importance of preventing child trafficking.¹⁶⁵ Despite not defining trafficking in its text, the Convention does prohibit “improper financial or other gain” arising from intercountry adoption and activities related to such adoptions.¹⁶⁶ Trafficking is later defined in the Guide to Good Practice to include “the payment of money or other compensation to facilitate the illegal movement of children for the purposes of illegal adoption or other forms of exploitation.”¹⁶⁷ The U.S. implementation of The Hague Convention, theoretically, encompasses this definition by explicitly stating that the U.S. is committed to extending the same protections as the Convention.¹⁶⁸ Yet, the State Department has chosen to follow a much narrower and more technical definition of trafficking in the intercountry adoption context.¹⁶⁹

The Hague Convention further requires that states take “all appropriate measures” to deter intercountry adoptions being exploited for improper gain.¹⁷⁰ Such deterrence is recommended because “criminal sanctions [are] seen as a strong safeguard in preventing” illegal adoptions,¹⁷¹ which would include adoption trafficking. If criminals know that the harsh penalties the U.S. federal courts impose on sex and labor traffickers could also apply to them as intercountry adoption traffickers it is plausible that their behavior may be chilled.¹⁷² According to Bureau of Justice Statistics for 2001-2005, 85% of convicted traffickers (which include traffickers who plead guilty) received prison sentences.¹⁷³ The median prison sentence was nearly six years.¹⁷⁴ Adoption-

0902/090225saltlakecity.htm.

163. News Release, U.S. Immigration and Customs Enforcement, *supra* note 162.

164. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, *supra* note 137.

165. *Id.* at art. 1.

166. *Id.* at art. 32.

167. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *supra* note 114 at 33.

168. 42 U.S.C. § 14901 (2006).

169. FRAUDULENT INTERCOUNTRY ADOPTION, *supra* note 115 at 1, 3.

170. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, *supra* note 137. at art. 8.

171. *Discussion Paper: Co-operation Between Central Authorities to Develop a Common Approach to Preventing and Addressing Illicit Practices in Intercountry Adoption Cases 8* (Oct. 2012) [hereinafter *Co-operation Between Central Authorities*], available at http://www.hcch.net/upload/2012_discpaper33en.pdf.

172. See e.g., *Fort Worth Man Gets Prison in Sex Trafficking Case*, ASSOCIATED PRESS, Nov. 13, 2013, available at <http://www.myfoxdfw.com/story/23957833/fort-worth-man-gets-prison-in-sex-trafficking-case> (sentencing by a federal judge of two individuals who had pled guilty to 10 and 6 years respectively for forcing a 15-year-old into prostitution).

173. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FEDERAL PROSECUTION OF HUMAN TRAFFICKING, 2001-2005 2 (2006) available at <http://www.bjs.gov/content/pub/pdf/fpht05.pdf>.

174. See *id.* (establishing the median prison sentence as 70 months).

related trafficking cases (which are not prosecuted as trafficking) do not seem to involve similarly harsh sentences.

For children to be victims of trafficking there must be “recruitment, transportation, transfer, harbouring or receipt of a child for the purposes of exploitation.”¹⁷⁵ Such exploitation can include the “payment of money or other compensation” in furtherance of an illegal adoption.¹⁷⁶ In the context of the cases illustrated and myriad others, this definition of trafficking is met. Yet, despite being a party to the very convention that defines trafficking in such a way that illegal adoption containing the requisite elements of trafficking (such as the two cases described earlier) would fall under its auspices, the United States refuses in theory and in practice to yield to this definition.¹⁷⁷

However, trafficking is exactly what is occurring. Children are being sold or relinquished to adoption agencies and individuals without the proper consent of the birth parents or sometimes with consent obtained through false means.¹⁷⁸ Unscrupulous agencies often engage in the recruiting of children for adoption programs with the purpose being to exploit the children for, normally financial, gain.¹⁷⁹ At other times children are transported or transferred (from Cambodia to Hawaii, or Samoa to New Zealand, for example), or harboured (in nanny homes or orphanages), or received (such as being bought from birth parents) for monetary gains or other purposes of exploitation. Any one of these activities is sufficient in isolation to constitute a charge of trafficking, as it has been defined in the UN Trafficking Protocol.¹⁸⁰ Nonetheless, often a string of trafficking activities are combined in one larger scheme, which includes multiple discreet instances of trafficking.¹⁸¹ And still, the United States chooses not to prosecute these crimes as trafficking.

Often, adoption-related trafficking is accompanied by other illicit practices such as misrepresentations to biological parents, falsified documents, or

175. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, *supra* note 139 at art. 3(c).

176. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *supra* note 114 at 33.

177. See FRAUDULENT INTERCOUNTRY ADOPTION, *supra* note 115 at 4 (maintaining that fraudulent adoptions do not constitute trafficking, except possibly in cases implicating sex and labor trafficking as well); Indictment at 1, United States v. Focus on Children, No. 1:07-cr-00019 (D. Utah Feb. 28, 2007) (listing several charges, none of which were for trafficking); Bill Bainbridge, *US Adoption Agent Guilty of Visa Fraud*, THE PHNOM PENH POST, Dec. 19, 2003, available at <http://www.phnompenhpost.com/national/us-adoption-agent-guilty-visa-fraud> (reporting on the indictment of Lauryn Galindo, in which there was not a single charge of trafficking).

178. See Armen Keteyian, *Child: U.S. Adoption Agency Bought Me*, CBS, Feb. 15, 2010, available at http://www.cbsnews.com/stories/2010/02/15/cbsnews_investigates/main6210911.shtml (detailing the story of three Ethiopian sisters adopted by an American couple despite having a family capable of providing for them in Ethiopia).

179. See *id.* (reporting that the agency accused of buying Ethiopian children brought in almost \$6 million in 2008).

180. See Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, *supra* note 139 at art. 3(c).

181. See *e.g.*, Indictment, United States v. Focus on Children, No. 1:07-cr-00019 (D. Utah Feb. 28, 2007) (illustrating that every element of trafficking was met in multiple instances in the scheme, although only one instance would have been necessary for a trafficking charge).

abduction.¹⁸² Because of the step-by-step nature of intercountry adoptions, it is possible for the individuals concerned in the receiving state to follow all laws and good practices in the course of an adoption and have the adoptions still be premised on trafficking or another illicit practice.¹⁸³

One rationale for not prosecuting adoption-related trafficking as human trafficking has to do with the view that intercountry adoption is benevolent in its purpose.¹⁸⁴ Yet, many of the pretenses used to traffic individuals into the labor market or prostitution are similar or the same as those used in intercountry adoptions that amount to trafficking and often these pretenses appear to the exploited person as altruistic.¹⁸⁵ Parents or family members of persons trafficked for prostitution, labor, or illegal adoption may all be told that their family member will be visiting a Western country for education, for example. Or, children may be plucked from the street to be sold into sweatshops, brothels, or orphanages.¹⁸⁶ Thus, this State Department rationale should not be an excuse for a failure to prosecute trafficking in whatever forms it might appear.

One of the benefits of prosecuting illegal adoptions containing the elements of trafficking as human trafficking, instead of lesser crimes, is that it provides a firm deterrent to such conduct.¹⁸⁷ The Hague Convention, in particular, seems to favor harsh punishment to deter criminality inasmuch as it is an “appropriate measure” to prevent exploitation and trafficking.¹⁸⁸ No longer should traffickers be able to “escape deserved punishment.”¹⁸⁹ Not only will new adoption agencies be wary of engaging in illicit trafficking activities if they know that jail time and harsh fines are likely, but upright adoption agencies will be the beneficiaries of greater legitimacy for the profession, and corruption will decrease, helping purify the adoption process for all involved.

Other benefits will likely accrue to those involved in the adoption process if intercountry adoptions amounting to trafficking are prosecuted as trafficking. Although most adoptees gain U.S. citizenship through the adoption process, it is conceivable that prosecuting adoption relating trafficking may yield immigration benefits to certain children who were victims of the trafficking; benefits that would be unavailable without such a prosecution including trafficking

182. See *id.* at 1 (explaining that illicit practices can include many things, one among them being trafficking).

183. *Id.*

184. FRAUDULENT INTERCOUNTRY ADOPTION, *supra* note 115, at 2-3.

185. See Herbert B. Dixon, Jr., *Human Trafficking and the Internet* (*and Other Technologies, too)*, 52 THE JUDGE'S JOURNAL 1, (2013), available at http://www.americanbar.org/publications/judges_journal/2013/winter/human_trafficking_and_internet_and_other_technologies_too.html (describing several examples of people who responded to internet ads for employment only to find themselves in trafficking situations).

186. See *e.g.*, SIOBHAN CLAIR, *supra* note 145, at 4 (describing how “pretty children” in India would be taken from the streets by gangs to be sold to orphanages that would then put them up for adoption).

187. See *Co-operation Between Central Authorities*, *supra* note 171, at 8 (stating that being informed of “criminal sanctions is seen as a strong safeguard in preventing” illicit intercountry adoption).

188. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, *supra* note 137, at art. 8.

189. 22 U.S.C. § 7101 (2012).

charges.¹⁹⁰ And, instances of children being trafficked into the U.S. will decrease overall (because of deterrence and an increased awareness among adopting families), helping to eliminate the heartbreaking decisions that adoptive parents face when then find out that their beautiful new child has loving birth parents that are willing and capable of caring for the child.¹⁹¹

Even domestic issues may be positively affected by a change in how intercountry adoptions that amount to trafficking are prosecuted. Although it is not yet clear how the situation will be handled, the recent Reuters exposé on re-homing could be an opportunity to extrapolate from intercountry adoptions and charge re-homers with trafficking.¹⁹² In this way, the instruction to handle domestic and international instances of trafficking in a similar manner would provide for increased deterrence, immigration benefits, and other benefits for victims of adoption trafficking with a U.S. tie.¹⁹³

The Department of State needs to recognize the error of its “unique” position and encourage the prosecution of intercountry adoption as trafficking.¹⁹⁴ The Trafficking Victims Protection Act of 2000 (TVPA) incorporates the UN Trafficking Protocol into domestic law.¹⁹⁵ Unfortunately it contains only a definition for “severe” trafficking, and may not be an adequate instrument for the prosecution of intercountry adoptions that amount to trafficking.¹⁹⁶ The implication, however, is that non-severe forms of trafficking exist and could be prosecuted under the TVPA.¹⁹⁷ Although the TVPA may not be the best vehicle for the prosecution of trafficking, it is a domestic embodiment of the UN Trafficking Protocol and could allow for a broader interpretation of what trafficking is.¹⁹⁸ The Intercountry Adoption Act (IAA) may provide an additional

190. This situation is likely to come up in the context of a child who did not have his adoption finalized before reaching the age of 18 and is not a U.S. citizen and potentially out of status. In the event the child can aid in the prosecution of the traffickers he may become eligible for relief through the T visa program. See *Victims of Human Trafficking: T Nonimmigrant Status*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Oct. 3, 2011), <http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status> (outlining the requirements for obtaining a T visa).

191. See Beth Tribolet, Teri Whitcraft, & Scott Michels, *Four Sentenced in Scheme to ‘Adopt’ Samoan Kids*, ABC NEWS, Feb. 26, 2009, <http://abcnews.go.com/TheLaw/story?id=6958072&page=1> (describing the “excruciating” decision one family made to send their adopted daughter back to Samoa so that she could be with her birth family).

192. See Megan Twohey, *The Child Exchange: Inside America’s Underground Market for Adopted Children*, REUTERS, Sept. 9–11, 2013, <http://www.reuters.com/investigates/adoption> (exposing a system where intercountry adoptees and domestically adopted children are signed over to other “parents”, often for nefarious purposes including child pornography, sexual servitude, and forced labor).

193. See Convention on the Rights of the Child *supra* note 157, at art. 21 (calling for intercountry adoptions to receive “safeguards and standards equivalent to those existing in the case of national adoption”).

194. FRAUDULENT INTERCOUNTRY ADOPTION, *supra* note 115 at 4.

195. 22 U.S.C. § 7101 (2012).

196. 22 U.S.C. § 7102 (2012).

197. *Id.* Judicial interpretation of the statute to include other forms of trafficking is available and could be justifiable with the endorsement of the Department of State and other federal agencies.

198. 22 U.S.C. § 7101 (2012). In reading the purposes and findings section of the law it is apparent that the U.S. is concerned with trafficking and the dearth of laws that criminalized it prior to the Act. Trafficking is often referred to in the sex and labor context, but other more general contexts and

hook for charges of trafficking since it does provide for criminal penalties for those who violate the Act.¹⁹⁹ Administratively, trafficking via intercountry adoption could be addressed in the same way trafficking involving forced labor or prostitution is.²⁰⁰

To allow adoption-related trafficking to continue to be prosecuted as lesser crimes does a great disservice to the “holistic approach” to trafficking that government officials are urged to take.²⁰¹ Ignorance may no longer be an excuse for strip club owners looking the other way or for growers to allow coercion and threats to dictate their use of forced labor,²⁰² but not only is ignorance still an excuse when it comes to intercountry adoptions that amount to trafficking,²⁰³ knowingly engaging in intercountry adoptions that amount to trafficking is still not enough to be prosecuted for trafficking.²⁰⁴

Although a rose by any other name may still smell as sweet,²⁰⁵ trafficking should not be allowed to masquerade behind the masks of lesser crimes. Victims cannot receive justice and perpetrators cannot be fully deterred if trafficking is not called trafficking when it occurs.

VIII. CONCLUSION

Most adoption agencies and individuals are undoubtedly working ethically and diligently to protect children and families and ensure that adoptions are conducted in the best interests of the child.²⁰⁶ Unfortunately, not everyone involved in the intercountry adoption process is willing to adhere to the strict standards that have been put in place. Sometimes, this means that children fall victim to nefarious schemes and the heinous crime of trafficking.²⁰⁷ Currently, the United States does not prosecute illicit intercountry adoptions containing all the requisite elements of trafficking as human trafficking.²⁰⁸ Instead, even when

issues are discussed in this section. Using the language of this section and the definition of the UN Trafficking Protocol it could be possible to punish intercountry adoptions that amount to trafficking as trafficking.

199. 42 U.S.C. § 14944 (2006) (providing criminal penalties ranging from \$50,000 to \$250,000 with a maximum possible prison sentence of 5 years).

200. The charges currently used under the TVPA could also be used for intercountry adoptions that amount to trafficking and the sentencing guidelines used in sex and labor trafficking cases could be applied to the sentencing of intercountry adoption traffickers.

201. CdeBaca, *supra* note 7.

202. *Id.*

203. This paper does not wish to be thought of as advocating for the punishment of adoptive parents who, in good-faith, embark on the long and challenging journey of intercountry adoption. Nor, would one want adoption agencies that are already diligently following burdensome regulations and doing their best to remain true to ethical adoption practices to be prosecuted for being duped by an unscrupulous orphanage.

204. See FRAUDULENT INTERCOUNTRY ADOPTION, *supra* note 115 at 1 (maintaining that fraudulent intercountry adoptions are not trafficking).

205. See WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 2 (“What’s in a name? That which we call a rose [b]y any other name would smell as sweet.”).

206. 42 U.S.C. § 14901 (2006).

207. For detailed examples of instances of intercountry adoptions that amount to trafficking see *Child Trafficking Cases*, POUND PUP LEGACY., http://poundpuplegacy.org/child_trafficking_cases (last visited Oct. 16, 2013).

208. FRAUDULENT INTERCOUNTRY ADOPTION, *supra* note 115 at 4.

all the necessary elements are present, intercountry adoptions that amount to trafficking are prosecuted as a lesser crime. Often, they are prosecuted as an immigration or tax violation.²⁰⁹

Any time a child is “recruit[ed], transport[ed], transfer[ed], harbour[ed], or recei[ved] . . . for the purposes of exploitation” trafficking has occurred.²¹⁰ The United States needs to be willing to recognize that intercountry adoptions containing these elements are cases of human trafficking.

The State Department needs to change its policy and realize that being “unique” when it comes to prosecution of intercountry adoptions that should amount to trafficking is not a good thing.²¹¹ The U.S. Department of State can begin by retracting its cable refusing to recognize trafficking in intercountry adoptions absent forced labor or prostitution and send out a new cable recognizing that the international and American standard is to consider fraudulent intercountry adoptions containing the UN Trafficking Protocol and Hague Convention elements of trafficking as a form of trafficking. Since the Department of State interacts closely with other federal agencies when cases of illegal adoptions arise, it is conceivable that one small policy change at the State Department can have a significant and positive impact on how adoption-related trafficking is perceived and prosecuted.²¹²

When trafficking occurs, including in the context of intercountry adoptions, it needs to be prosecuted as trafficking to “[free] the victims and [punish] their tormentors.”²¹³ The Department of State encouraged feedback from its posts on the cable entitled “Fraudulent Intercountry Adoption Does Not Constitute Trafficking in Persons” and hopefully the Department is willing to also accept this feedback and reconsider the consequences of not prosecuting intercountry adoptions that amount to trafficking as human trafficking.²¹⁴

209. See e.g., Indictment at 1, *United States v. Focus on Children*, No. 1:07-cr-00019 (D. Utah Feb. 28, 2007) (charging the defendants with crimes ranging from conspiracy to commit alien smuggling to laundering of monetary instruments).

210. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, *supra* note 139 at art. 3(c).

211. FRAUDULENT INTERCOUNTRY ADOPTION, *supra* note 115 at 3.

212. See Press Statement, *supra* note 160 (explaining the close relationship of the Department of State, Immigration and Customs Enforcement, and U.S. Citizenship and Immigration Services to resolve this specific case and pointing out that the Department of State conducted “more than 100 interviews and travel[ed] thousands of miles” to help the investigation and prosecution).

213. CdeBaca, *supra* note 7.

214. FRAUDULENT INTERCOUNTRY ADOPTION, *supra* note 115 at 1.