

SOLD INTO ADOPTION:
THE HUNAN BABY TRAFFICKING SCANDAL EXPOSES
VULNERABILITIES IN CHINESE ADOPTIONS TO THE
UNITED STATES

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INTRODUCTION

A. *The Story: Babies Sold Into Adoption*

On Friday, November 11, 2005, at three o'clock in the afternoon, two women carrying three babies emerged from the Hengyang County train station in the southern Chinese province of Hunan.³ The women placed the three infants in a black car parked at the station.⁴ Chinese law enforcement officers – generally on alert for baby traffickers in China, especially at train stations – intervened.⁵ China has a long history of, and continuing problems with, child trafficking.⁶ The police were probably not surprised to learn

¹ Patty Meier is a December 2008 graduate of the University of Iowa College of Law. She thanks Professors Mark Sidel and David M. Smolin for their guidance and feedback, her family for their patience, and her colleague, Xiaole Zhang, without whom the research could not have been done. The work is dedicated to Shu Shu, who one day may want to know.

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³ Deng Fei, *The Hengyang Infant Dealing Case Benevolence or vice? That question has generated far-reaching controversy*, PHOENIX WEEKLY, Apr. 11, 2006, <http://www.phoenixtv.com/phoenixtv/83932384042418176/20060411/776299.shtml>, translation available at <http://research-china.blogspot.com/2006/10/hunan-one-year-after-part-one.html>.

⁴ *Id.*

⁵ *Id.*; see also [HumanTrafficking.org, China](http://www.humantrafficking.org/countries/china), <http://www.humantrafficking.org/countries/china> (last visited Oct. 28, 2008).

⁶ Posting of Brian Stuy to Research-China.org, *Haunting Faces on a Page*, <http://research-china.blogspot.com/2006/05/haunting-faces-on-page.html> (May 23, 2006, 17:26 MDT); see XIN REN, *TRAFFICKING IN CHILDREN: CHINA AND ASIAN PERSPECTIVE*, PRESENTED AT CONFERENCE ON MAKING CHILDREN'S RIGHTS WORK: NATIONAL & INTERNATIONAL PERSPECTIVES, INTERNATIONAL BUREAU FOR CHILDREN'S RIGHTS, MONTREAL, CANADA, (2004), available at http://www.no-trafficking.org/content/web/05reading_rooms/China/trafficking_in_china_china_and_asian_perspective.pdf; *Combating Human Trafficking in China: Domestic & International Efforts: Hearing Before the Congressional-Executive Comm'n on China*, 109th Cong. 2 (2006), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_house_hearings&docid=f:26671.wais; U.S. DEP'T OF STATE, CHINA (INCLUDES TIBET, HONG KONG, AND MACAU), COUNTRY REPORTS ON

the women were professional baby traffickers; however, they *were* likely surprised to learn who planned to buy the babies.⁷ Sitting inside the car were top officials from a local orphanage and a local senior citizens' home, Wang Weihong and Zhang Heyun.⁸

Why would an orphanage director buy babies? The answer lies in the large amounts of money donated to orphanages when foreign parents adopt children. As would later come out at trial, the Hengyang Social Welfare Institute had been buying babies from traffickers since 2002.⁹ Early on, orphanage officials acted as baby brokers, selling the children to other orphanages that placed the children for international adoption and collected \$3,000 per child in mandatory contributions from adoptive parents.¹⁰ In 2004, the Hengyang orphanage obtained permission to participate in China's intercountry adoption program, at which point it began placing the trafficked children directly with Western adoptive parents and collecting the donations.¹¹

Why would the head of the retirement home buy babies? The orphanage director and the senior citizen home director – both county officials – were working together to make money by buying babies for adoption.¹² The *Washington Post* reported that some orphanage directors have used proceeds from foreign adoptions to build for-profit homes for senior citizens.¹³

Six identified orphanages placed hundreds, perhaps even one thousand, trafficked babies with Western adoptive parents between 2002 and 2005.¹⁴ The profit potential is clear. At \$3,000 per baby, even if only one half of the estimated number of children were adopted by foreign families, the orphanages would have collected \$1.5 million. Someone made money each time a baby changed hands. The mother of one trafficker said her son was paid \$36 for each child he procured.¹⁵ The Hengyang orphanage paid between

HUMAN RIGHTS 2006 (2007),
<http://www.state.gov/g/drl/rls/hrrpt/2006/78771.htm>.

⁷ Deng, *supra* note 3.

⁸ *Id.*

⁹ *Id.*

¹⁰ Peter S. Goodman, *Stealing Babies for Adoption: With U.S. Couples Eager to Adopt, Some Infants Are Abducted and Sold in China*, WASH. POST, Mar. 12, 2006, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/11/AR2006031100942.html>.

¹¹ *Id.*

¹² Deng, *supra* note 3.

¹³ Goodman, *supra* note 10.

¹⁴ Deng, *supra* note 3; see Goodman, *supra* note 10.

¹⁵ Goodman, *supra* note 10.

\$400 and \$558 a piece for the babies.¹⁶ Hengyang officials then sold the children to participating foreign adoption orphanages for \$1,000 each.¹⁷

The traffickers brought the children from neighboring Guangdong Province, but it is unclear how the traffickers obtained the children.¹⁸ The lawyer of one defendant insisted all the children were abandoned.¹⁹ He claimed a woman in southwestern Guangdong Province, who “was quite well known locally for being warm-hearted and taking care of abandoned babies,” accepted foundlings and arranged with traffickers to transport them to Hengyang.²⁰ However, when that lawyer’s client, the director of the Hengdong County Social Welfare Institute, was sentenced to a year in prison, the verdict said he “was cognizant of the fact that he had purchased babies that had been abducted.”²¹ Also, a local police chief stated: “The suspects said that they were doing good work to save the abducted children from death. However, we found that they paid more to buy children when there was demand.”²² According to the *Washington Post*, the Guangdong-based traffickers targeted the children of migrant workers because they thought police would not take such workers’ complaints seriously.²³ The paper reported that “sources familiar with the investigation said many children were abducted.”²⁴

Chinese officials arrested 27 suspects in November of 2005.²⁵ The Hengdong SWI director’s one-year sentence was the lightest.²⁶ The court sent three of the traffickers to prison for 15 years and fined them each 50,000 yuan (U.S. \$6,250).²⁷ It sentenced another six traffickers to between three and thirteen years.²⁸ Also, the government fired 23 county officials in Hengyang and prohibited intercountry adoptions from Hunan Province for several months.²⁹

¹⁶ Xinhua, *23 Officials Punished for Child-Trafficking*, GOV.CN, Feb. 26, 2006, http://english.gov.cn/2006-02/26/content_211254.htm; see Goodman, *supra* note 10; Deng, *supra* note 3.

¹⁷ Goodman, *supra* note 10.

¹⁸ *Id.*; see Deng, *supra* note 3.

¹⁹ Goodman, *supra* note 10.

²⁰ *Id.*

²¹ *Id.*

²² Xinhua, *supra* note 16.

²³ Goodman, *supra* note 10.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Xinhua, *supra* note 16.

²⁷ *Id.*; see Goodman, *supra* note 10.

²⁸ Xinhua, *supra* note 16.

²⁹ Goodman, *supra* note 10.

Shortly after the trial, the Chinese government shut down all media reports on the story.³⁰

Many questions remain about the Hunan case, including who the children were, how traffickers obtained them, where they ended up, whether any of them were abducted, and whether birth families are looking for them.³¹ The prohibition on reporting about the case means these questions likely will not be answered. Without complete information or open discussion, it is hard to gauge whether or not the Hunan case is an isolated incident. Common sense says it is not. Indeed, since the Hunan trafficking story was reported, media outlets have reported additional instances of baby buying and abduction for adoption in the Chinese intercountry program.³²

In any case, the trafficking of perhaps one thousand babies from Guangdong to Hunan over three years for intercountry adoption exposes serious vulnerabilities in the process by which thousands of Chinese children immigrate annually to Western Countries through adoption.³³ Neither the receiving countries nor China has made significant changes to the system of intercountry

³⁰ Geoffrey York, *China Shuts Down Reports About Baby Trafficking*, SEATTLE POST-INTELLIGENCER, Dec. 16, 2005, http://seattlepi.nwsourc.com/national/252260_babysmuggle16.html.

³¹ Posting of Brian Stuy to Research-China.Org, *Hunan—One Year After—Part One*, <http://research-china.blogspot.com/2006/10/hunan-one-year-after-part-one.html> (Oct. 9, 2006, 10:15 MDT) [hereinafter Stuy, *One Year After*].

³² Beth Loyd, *China's Lost Children: Of the Thousands of Children Kidnapped in China, Many Are Adopted by Foreigners*, ABC NEWS, May 12, 2008, <http://abcnews.go.com/International/story?id=4774224&page=1> (reporting on several Chinese orphanages paying for children since the Hunan case); Adoption in China, Network TV, <http://www.network.tv/weblog/index.php?itemid=92> (last visited Oct. 28, 2008) (a Dutch TV news organization interviewing key players in the Hunan case as well as other child trafficking for adoption cases in China); Posting of Brian Stuy to Research-China.org, *Do Orphanages Really Want to Find Birth Parents?*, <http://research-china.blogspot.com/search/label/Baby%20Trafficking> (June 25, 2008, 11:39 MDT); Posting of Brian Stuy to Research-China.org, *Hunan in Retrospect*, <http://research-china.blogspot.com/search/label/Baby%20Trafficking> (April 30, 2008, 11:04 MDT) (presenting more recent reports of trafficking for adoption in China, as well as research and data that suggest the prosecution of the Hunan scandal traffickers was primarily face-saving and that the trafficking extended well beyond the six named orphanages).

³³ Nili Luo & David M. Smolin, *Intercountry Adoption and China: Emerging Questions and Developing Chinese Perspectives*, 35 CUMB. L. REV. 597, 597 (2005) ("China has . . . emerged as the most important sending country in the world in terms of numbers of children placed. For the last five years, China has been the top sending country for the United States, which is the most significant recipient nation.").

adoption from China since the Hunan scandal.³⁴ The same incentives to traffic children for intercountry adoption remain. The Hunan case revealed, for the first time, problems that threaten the credibility of what was considered one of the world's most dependable intercountry adoption programs.³⁵ The case serves as a warning: trafficking for intercountry adoption happens in China.

B. *The Roots of the Problem*

How could this happen in an intercountry adoption program as well-respected as that of China? The answer lies in the intersection of three phenomena: the supply and demand forces that drive the market for intercountry adoption, the long and pervasive history of child trafficking in China, and the failure of both China and the United States to close opportunities for traffickers to profit from intercountry adoption.

To prevent child trafficking in China's intercountry adoption program, policymakers in China and the United States must take action to address all three phenomena. First, adoption reforms must put the needs of the child and the birth families above the demand for "adoptable" children. Second, China must continue its nascent efforts to prevent domestic child trafficking. Third, China and the United States must both use all the tools available to them to protect Chinese children from being trafficked for adoption.

Laws exist to address child trafficking for intercountry adoption, which suggests a problem of implementation. At the international level, the Hague Convention on Protection of Children and Respect of Intercountry Adoption articulates a framework for ethical intercountry adoption.³⁶ The Hague Convention puts the interests of the child first and clearly condemns child abduction, purchase, or sale, but it leaves enforcement to each nation.³⁷ China expressly criminalizes trafficking for adoption in its anti-trafficking law.³⁸ China prosecutes human traffickers, including those who sell

³⁴ Stuy, *On Year After*, *supra* note 31.

³⁵ See Luo & Smolin, *supra* note 33.

³⁶ Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption art. 4, May 29, 1993, S. Treaty Doc. No. 105-51.

³⁷ *Id.*

³⁸ See P.R.C. Adoption Laws (adopted at the 23rd meeting of the Standing Comm. of Nat'l People's Cong., Dec. 29, 1991, promulgated by Order No. 54 of the President, Dec. 29, 1991, effective April 1, 1992; amended by the Ninth Nat'l People's Congress, Nov. 4, 1998, effective April 1, 1999); P.R.C. Criminal Law (adopted by the second session of the fifth Nat'l People's Cong., July 1, 1979, amended by the fifth session of the eighth Nat'l People's Cong., Mar. 14, 1997).

children for adoption.³⁹ Although China prosecutes human traffickers, it does not address the forces that propel the illegal activity. There is little indication that China changed any policies or processes in the wake of the Hunan baby trafficking case. Therefore, the same incentives remain to traffic children for adoption.⁴⁰ Experience tells us that where there is incentive and opportunity to profit from baby sales for adoption, trafficking will occur.⁴¹

American laws are similarly ineffective in preventing trafficking for adoption. Until recently, the United States addressed trafficking only through a provision that allows immigration officers to deny an orphan visa when they suspect corruption.⁴² However, the standard of proof for denying a visa is so high that visas seldom are denied.⁴³ Congress enacted the Intercountry Adoption Act of 2000 (IAA) to implement the Hague Convention and “to protect the rights of, and prevent abuses against, children, birth families, and adoptive parents.”⁴⁴ The IAA provides additional enforcement measures,⁴⁵ but it limits the liability of an adoption agency for actions of agents in the sending country.⁴⁶ It also recognizes as final in the United States, any Hague Convention adoptions finalized in another country.⁴⁷ These two provisions essentially put the onus on sending countries to stop trafficking and prevent the IAA from reaching the trafficking in China that supplies children for adoption.

Separate from its adoption-oriented laws, the United States actively targets human trafficking through its Trafficking Victims Protection Act (TVPA).⁴⁸ However, American lawmakers limited the

³⁹ See, e.g., Radio Free Asia, *Chinese Police Rescue Nine Children from Traffickers*, EPOCH TIMES, Nov. 15, 2003, <http://en.epochtimes.com/news/3-11-15/14732.html>; *China executes 3 baby traffickers*, CHINA DAILY, Nov. 12, 2004, http://www.chinadaily.com.cn/english/doc/2004-12/11/content_399387.htm; *More Than 200 Children Missing in Kunming City*, EPOCH TIMES, May 14, 2004, <http://en.epochtimes.com/news/4-5-14/21423.html>; Han Qing, *Human Trafficking an Increasing Problem in China*, EPOCH TIMES, Mar. 16, 2004, <http://en.epochtimes.com/news/4-3-16/20435.html>.

⁴⁰ Stuy, *One Year After*, *supra* note 31.

⁴¹ See generally 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 (2006).

⁴² ETHICA, CHILD TRAFFICKING: WHY CAN'T THE IMMIGRATION SERVICE PROVE IT? (2003), <http://www.ethicanet.org/INSEvidence.pdf> (citing 8 C.F.R. § 240.3).

⁴³ *Id.*

⁴⁴ 42 U.S.C. § 14901(b)(2) (2000).

⁴⁵ 42 U.S.C. § 14944.

⁴⁶ 42 U.S.C. § 14944 (b).

⁴⁷ 42 U.S.C. § 14931.

⁴⁸ See generally 22 U.S.C. § 7101.

reach of the law to “severe forms of trafficking,” which is defined as trafficking for commercial sex or forced labor.⁴⁹ The U.S. State Department has expressly stated that trafficking for adoption does not qualify for the protections afforded by the TVPA.⁵⁰

To prevent baby selling for adoption, China and the United States must enact regulations that effectively enforce international laws, create policies that remove incentives for traffickers, and use all of the laws available to them, including those designed to fight human trafficking. Laws, regulations, and policies must put the child’s interests first in fact rather than in theory, including the child’s interest in growing up with his or her birth family. In China, putting the interests of Chinese children first means addressing the underlying problems that lead to trafficking, abandonment, and intercountry adoption. These issues include birth family poverty and vulnerability, pervasive human trafficking in China, a lack of oversight of local social welfare institutes, and barriers to domestic adoption. Protecting children may well mean limiting the number of intercountry adoptions to control the demand for a certain kind of infant. In the United States, putting the needs of potential adoptees first means providing more oversight of adoption agencies, holding adoption agencies responsible for their foreign colleagues and contractors, closely monitoring the money adoptive parents pay for services, and recognizing trafficking for adoption as a “severe form of trafficking.”

C. *Scope of this Paper*

This article focuses on intercountry adoption from China to the United States. Although the Hunan case involved adoptions to several Western countries, it is likely American parents adopted most of the children involved.⁵¹ China sends more children overseas for adoption by foreigners than any other nation,⁵² and Americans adopt more children internationally than parents from any other country.⁵³ Adoptive American parents prefer China’s program over all others.⁵⁴ American parents have adopted roughly

⁴⁹ 22 U.S.C. § 7101(b)(19).

⁵⁰ U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT (2005), <http://www.state.gov/g/tip/rls/tiprpt/2005/>.

⁵¹ Loyd, *supra* note 32 (pointing out that Americans have adopted 80% of all Chinese adoptees).

⁵² See generally Luo & Smolin, *supra* note 33.

⁵³ *Id.*

⁵⁴ See U.S. Dep’t of State, Statistics: Immigrant Visas Issued to Orphans Coming to U.S., http://travel.state.gov/family/adoption/stats/stats_451.html (last visited

80% of all Chinese adoptees since China started its program in the early 1990s.⁵⁵ Therefore, it is more likely than not that many children trafficked in China for intercountry adoption now live in the United States.

The next section sets the stage for understanding the current state of adoption from China by providing background on China's intercountry adoption program, domestic adoption practices, and child trafficking. Section II discusses the international, Chinese, and U.S. laws that govern American adoptions from China, as well as the U.S. Trafficking Victims Protection Act, which this paper suggests should be employed to fight trafficking for adoption. Section III then makes suggestions.

I. BACKGROUND

The events at the six orphanages in Hunan must be considered within the context of several other phenomena, specifically, China's intercountry adoption program, domestic adoption practices, and experience with child trafficking.

A. *China's Intercountry Adoption Program*

China's program of intercountry adoption grew from the government's need to care for thousands of children abandoned in the wake of the population control measures imposed on a society with a strong preference for sons. The government created the China Center for Adoption Affairs (CCAA) to administer the program. The CCAA sets requirements for participating orphanages, prospective adoptees, and foreign adoptive parents.⁵⁶

Most children in Chinese social welfare institutions are not orphans.⁵⁷ On the contrary, they have been abandoned by parents because they are girls or because they have serious health needs that poor families cannot address.⁵⁸ Healthy children in orphan-

Oct. 21, 2008) (showing that China has been the most popular country for American adoptions since 2000).

⁵⁵ Loyd, *supra* note 32.

⁵⁶ China Center for Adoption Affairs, http://www.china-ccaa.org/zxjj/zxjj_index_en.jsp (last visited Oct. 28, 2008).

⁵⁷ See generally KAY ANN JOHNSON, WANTING A DAUGHTER, NEEDING A SON (Amy Klatzkin ed., 2004) (describing the forces that fill orphanages in China); see also Press Release, UNICEF, Orphans, http://www.unicef.org/media/media_45290.html (clarifying the misuse of the term "orphan" by pointing out that only 10% of the world's children commonly identified as orphans have actually lost both parents).

⁵⁸ JOHNSON, *supra* note 57.

ages overwhelmingly are abandoned girls,⁵⁹ victims of the government's "one-child policy" that has been in effect since 1979.⁶⁰ The "one-child policy" strictly limits urban families to one child.⁶¹ In some rural areas, the policy allows parents to have a second child if their first-born is a girl.⁶² The policy is problematic because for many reasons, Chinese families have traditionally favored boys. Sons carry the family name,⁶³ and parents depend on eldest sons to care for them in their old age.⁶⁴ Custom dictates that daughters, on the other hand, move to their in-laws' homes upon marriage to help care for their husbands' parents.⁶⁵ Once the government restricted families to one child, the need to have a son took on added importance.⁶⁶

Before the one-child policy was enacted, China's long tradition of infant abandonment appeared to be on the wane.⁶⁷ However, when the family restrictions collided with the historical preference for a son, Chinese families again resorted to abandoning daughters.⁶⁸ The number of abandoned girls reached crisis proportions in the 1980s and early 1990s, partly due to more stringent enforcement of the family-planning policy.⁶⁹ "The resulting upsurge of abandoned children increased the burden on the cash-strapped social welfare system in China, where facilities were quite basic; per-child allowances for food, clothing, and medical care were minimal; and caregivers' salaries even in the year 2000 were rarely more than 400 RMB (U.S. \$50) per month."⁷⁰

Estimates of the number of girls abandoned vary widely. The government does not release official figures.⁷¹ "The CCAA provides

⁵⁹ *Id.*

⁶⁰ See generally Luo & Smolin, *supra* note 33.

⁶¹ *Id.*

⁶² *Id.*

⁶³ JOHNSON, *supra* note 57.

⁶⁴ Clare Dwyer Hogg, *Has Anyone Seen Our Child?*, OBSERVER, Sept. 23, 2007, at 50, available at <http://observer.guardian.co.uk/magazine/story/0,,2173231,00.html>.

⁶⁵ JOHNSON, *supra* note 57.

⁶⁶ See *id.* at 1-6, 83-84 (discussing the historically patriarchal and patrilineal nature of Chinese society and the "one-child" policy's effect on normal gender ratios among Chinese children).

⁶⁷ Luo & Smolin, *supra* note 33, at 601 (citing JOHNSON, *supra* note 57, at 53).

⁶⁸ *Id.* at 601 (citing LAURA A. CECERE, *THE CHILDREN CAN'T WAIT, CHINA'S EMERGING MODEL FOR INTERCOUNTRY ADOPTION* 22-23 (3d ed. 2001); JOHNSON, *supra* note 57, at 4-9, 53-62, 216-17, n.14).

⁶⁹ SARA K. DOROW, *TRANSNATIONAL ADOPTION: A CULTURAL ECONOMY OF RACE, GENDER, AND KINSHIP* 57 (2006).

⁷⁰ *Id.*

⁷¹ JOHNSON, *supra* note 57, at 49; see also Kent Ewing, *The Mystery of China's Lost Girls*, ASIA TIMES, Feb. 13, 2007, available at

little reliable information on the number of orphans or orphanages in China.”⁷² Academic sources say “many tens of thousands, perhaps hundreds of thousands, of children are abandoned each year.”⁷³ A medical guide to international adoption estimated that 15 million baby girls have been abandoned since 1980.⁷⁴ The same source said between 1986 and 1990 in Hunan Province, more than 16,000 abandoned children entered government care; 92% were girls, and 25% were handicapped.⁷⁵

Some abandoned girls are first-born daughters, but more often they are second-born girls who are given up to make way for a boy.⁷⁶ Usually babies are abandoned shortly after birth.⁷⁷ In the last several years, in the wake of public awareness campaigns on the value of daughters and social welfare benefits for parents of daughters, less traditional thinking about the value of daughters, and rising rates of domestic adoption, most observers believe the abandonment of girls is decreasing.⁷⁸

The combination of serious health issues and poverty also sends many children to social welfare institutions. Although stories of the new wealthy class in China have filled the news in the last several years, the majority of the population continues to be very poor.⁷⁹ The median annual income in rural areas of provinces such as Hunan is 9,000-14,000 yuan (\$1,250-\$1,600) per household.⁸⁰ Poor families sometimes abandon even healthy infants because of crushing poverty. However, when poor parents in China give birth to a baby with health problems, they may have little choice other

<http://www.atimes.com/atimes/China/IB13Ad01.html>; Calum MacLeod, *Foreign adoptions from China fall*, USA TODAY, Nov. 20, 2007, http://www.usatoday.com/news/world/2007-11-20-chinaadopt_N.htm.

⁷² Ewing, *supra* note 71.

⁷³ JOHNSON, *supra* note 57, at 50.

⁷⁴ LAURIE C. MILLER, *THE HANDBOOK FOR INTERNATIONAL ADOPTION MEDICINE: A GUIDE FOR PHYSICIANS, PARENTS, AND PROVIDERS* 51 (2005).

⁷⁵ *Id.*

⁷⁶ JOHNSON, *supra* note 57, at 83-86.

⁷⁷ Posting of Brian Stuy to Research-China.org, *Trees in the Forest III – Age and Timing*, http://research-china.blogspot.com/2007_10_01_archive.html (Oct. 26, 2007, 14:04 MDT).

⁷⁸ See generally Weiguo Zhang, *Child Adoption in Contemporary Rural China*, 27 J. FAM. ISSUES 301, 332 (2006); Calum MacLeod, *China Shedding Adoption Stigma, May Tighten Rules*, USA TODAY, Nov. 20, 2007, http://www.usatoday.com/news/world/2007-11-20-Chinainside_N.htm; Research-China.org, <http://research-china.blogspot.com/> (June 8, 2006, 05:28).

⁷⁹ Luo & Smolin, *supra* note 33, at 598 (“China is still a developing nation with a per capita income of less than \$1000.”).

⁸⁰ ALLAN RAE & XIAOHUI ZHANG, *SMALLHOLDERS, LIVESTOCK AND HOUSEHOLD INCOME IN RURAL CHINA* 7 (2007), http://econ.massey.ac.nz/caps/WP_1_07.pdf.

than to abandon the infant.⁸¹ China has no comprehensive system of health care insurance.⁸² When a baby needs medical attention, even for a condition that is relatively easily corrected in many parts of the world, the family simply cannot obtain the needed treatment.⁸³ Parents abandon the baby in the hope that the orphanage will procure the care the child needs.⁸⁴ For this reason, many of the children in the social welfare institutions are children with special health needs.

In 1991, faced with a deluge of mostly baby girls in state-supported social welfare institutions, China opened the doors to foreign adoptions.⁸⁵ The country had previously allowed isolated adoptions of Chinese children by foreigners. From 1981 to 1989, foreigners and overseas Chinese citizens, including individuals in Macau, Hong Kong, and Taiwan, adopted about 10,000 children from China.⁸⁶ However, 1992 marked the beginning of a comprehensive program of intercountry adoption.⁸⁷ At first, the number of adoptions was small and the process was unpredictable. Only about 200 babies left China via the adoption program in 1992.⁸⁸

China set out to create a model program of intercountry adoption, and it succeeded.⁸⁹ The number of adoptions grew each year through the 1990s and early 2000s. By 2006, more than 10,000 Chinese children emigrated from China through adoption, with most of them going to the United States.⁹⁰ The program offers exactly what most Western adoptive parents want: relatively young, healthy, female children whose birth parents are unlikely to reap-

⁸¹ JOHNSON, *supra* note 57, at 208 (“Poor rural families may find they are simply unable to take care of a seriously disabled child.”).

⁸² *Id.* at 208 (“Outside a few cities and welfare institutions, there is little government support for families who wish to keep a disabled child at home or in an institution but still part of the family.”).

⁸³ *Id.* at 208 (“If one is relatively poor, abandonment may be the only way to get a child into an institution.”).

⁸⁴ *Id.*

⁸⁵ *Id.* at 29-34 (discussing the passage and implementation of China’s 1991 national adoption law, which opened the possibility of foreign adoption, and its success alleviating some of burden on China’s orphanages).

⁸⁶ Jiang Xinmiao, International Adoption Laws in China: A Brief Analysis, <http://china.findlaw.cn/info/hy/shewaihunyin/shewaishouyang/58722.html> (last visited Oct. 28, 2008).

⁸⁷ U.S. Dep’t of State, *supra* note 54.

⁸⁸ *Id.*

⁸⁹ See generally Luo & Smolin, *supra* note 33, at 603 (describing China’s efforts to establish an intercountry adoption system that serves its national interest).

⁹⁰ U.S. Dep’t of State, *supra* note 54.

pear to complicate the adoption.⁹¹ The process works predictably.⁹² At least until the Hunan scandal, the possibility of corruption seemed remote both because the government maintained tight control and because China had so many abandoned children in its orphanages.⁹³ The number of adoptions peaked in 2005, when Americans adopted 7,906 Chinese children.⁹⁴ The following year, 6,493 Chinese children became Americans through adoption.⁹⁵ And in 2007, the number was 5,453.⁹⁶

The dropping numbers in the last three years do not indicate a drop in demand. To the contrary, the number of applications from prospective American adopters has grown each year.⁹⁷ The drop seems to reflect a deliberate effort by China to restrict demand in the face of diminishing supply.⁹⁸ The number of children available for adoption has decreased.⁹⁹ Observers attribute the decrease to fewer instances of abandonment, possibly because the new wealth in China allows more families to pay the “social compensation fee” associated with having over-quota children and increased domestic adoption within China.¹⁰⁰ “As China becomes wealthier and domestic adoptions rise, the director [of the CCAA] maintains, stricter requirements on foreign adoptions are simply a product of supply and demand.”¹⁰¹

⁹¹ See generally Kay Ann Johnson, *Politics of International and Domestic Adoption in China*, 36 L. & SOC'Y REV. 379, 388-92 (2002).

⁹² *Id.*

⁹³ Luo & Smolin, *supra* note 33, at 605 (“China has minimized the financial corruption associated with adoption and has managed to ensure that adoption fees and donations are generally used to the benefit of its child welfare system rather than being siphoned for the private benefit of individuals.”); see also Stuy, *One Year After*, *supra* note 31 (describing the Hunan scandal and discussing several related magazine articles covering the incident).

⁹⁴ U.S. Dep't of State, *supra* note 54.

⁹⁵ *Id.*

⁹⁶ *For Third Straight Year, Foreign Adoptions in U.S. Decline*, CHI. SUN-TIMES, Dec. 1, 2007, <http://www.suntimes.com/lifestyles/676421,adopt120107.article>.

⁹⁷ Guan Xiaofeng, *New Criteria Spelt Out for Adoption by Foreigners*, CHINA DAILY, Dec. 25, 2006, http://www.chinadaily.com.cn/china/2006-12/25/content_766420.htm; see also Pam Belluck & Jim Yardley, *China Tightens Adoption Rules for Foreigners*, N.Y. TIMES, Dec. 20, 2006, <http://www.nytimes.com/2006/12/20/us/20adopt.html>.

⁹⁸ Ewing, *supra* note 71.

⁹⁹ *Id.*; MacLeod, *supra* note 71; see also Clifford Coonan, *China Tightens Adoption Criteria for Foreigners*, IRISH TIMES, Dec. 27, 2006, at 12. See generally Posting of Brian Stuy to Research-China.org, <http://research-china.blogspot.com>.

¹⁰⁰ Coonan, *supra* note 99.

¹⁰¹ Ewing, *supra* note 71.

1. Intercountry Adoption Means Money for Orphanages

Social welfare institutions that participate in intercountry adoption enjoy larger budgets, better facilities, and public recognition.¹⁰² However, not all social welfare institutions qualify to send children's files to CCAA for intercountry adoption. Most orphanages do not participate.¹⁰³ One researcher estimated that only 292 social welfare institutions participate.¹⁰⁴ He based his estimate on the number of Yahoo Newsgroups established for families that have adopted from individual institutions and on additional social welfare institutions that place "finding ads," which constitute the first step in placing a child for intercountry adoption.¹⁰⁵ The Chinese government reported at the end of 2006 that there were 39,000 SWIs caring for 1.36 million elderly persons, disabled individuals, and abandoned children.¹⁰⁶ The report did not further break down the number of institutions serving each of those populations. Another adoption researcher said that in several provinces she visited, about a quarter of the social welfare institutes participated in intercountry adoption.¹⁰⁷ "[T]o become part of the system, they had to meet requirements of staff-to-child ratios, hygiene, facilities and equipment, and so forth. . . . It is difficult for orphanages to meet these externally imposed standards, since the state funds allocated to them are so limited."¹⁰⁸

Government subsidies to orphaned and abandoned children are meager.¹⁰⁹ "In many places, social security funds only have symbolic meaning. The largest [subsidies cover] less than a quarter of ordinary children's living costs. The amount in many regions is even less than one tenth," said Professor Shang Xiaoyuan.¹¹⁰ Shang, along with the Ministry of Civil Affairs and Save the Children, studied China's orphaned and abandoned children in 2005.¹¹¹ Shang visited many orphanages. "Surprising poverty is always the first im-

¹⁰² Johnson, *supra* note 91, at 388; *see also* DOROW, *supra* note 69, at 73.

¹⁰³ DOROW, *supra* note 69, at 73.

¹⁰⁴ Posting of Brian Stuy to Research-China.org, *The Hague Agreement and China's International Adoption Program*, <http://research-china.blogspot.com/2006/06/hague-agreement-and-chinas.html> (June 8, 2006, 5:28 MDT) [hereinafter Stuy, *Hague Agreement*].

¹⁰⁵ *Id.*

¹⁰⁶ CHINA STATISTICS PRESS, CHINA CIVIL AFFAIRS STATISTICAL YEARBOOK (2006), available at <http://www.stats.gov.cn/tjsj/ndsj/2006/indexee.htm>.

¹⁰⁷ DOROW, *supra* note 69, at 73.

¹⁰⁸ *Id.*

¹⁰⁹ Li Xiaohua, *200,000 Children Need More Support*, CHINA.ORG.CN, Oct. 24, 2005, <http://www.china.org.cn/english/2005/Oct/146340.htm>.

¹¹⁰ *Id.*

¹¹¹ *Id.*

pression,” he said. “This phenomenon is especially obvious in the countryside.”¹¹²

Government subsidies per child vary from one region to another. The 2005 report cited “urban subsistence allowances” of 3,000-4,000 yuan (approximately U.S. \$375-\$500) per year for each orphaned or abandoned child in the cities of Beijing, Tianjin, and Shanghai.¹¹³ The rate dropped to about 1,000 yuan (U.S. \$125) per year in the provinces of Henan, Gansu, and Ningxia. Government support dropped further in the provinces of Guangxi, Guizhou, and Hunan, where payments were less than 600 yuan (U.S. \$75) per year. As low as the urban subsidies are, a second system for rural areas provides even less support. In ten provinces under this system, the “rural poverty support” cited in the report was 300-500 yuan (U.S. \$37.50-\$62.50) per child annually. Seven provinces made payments of 200-300 yuan (U.S. \$25-\$37.50) per child per year. Two provinces supplied less than 200 yuan (U.S. \$25), and one province, Qinghai, paid just 110 yuan (U.S. \$13.75) to support a child for one year.

Participating in intercountry adoption means more money for a social welfare institution. Those that participate retain most of the mandatory U.S. \$3,000-\$5,000 donation from foreign parents who adopt a child.¹¹⁴ Parents pay the fee to the provincial officials, not to the CCAA, usually in cash.¹¹⁵ In the Hengyang area, the orphanages paid the Hunan Province Civil Affairs Office 5% of the fee, or U.S. \$150, and kept the rest.¹¹⁶

Orphanages that participate also receive financial benefits in less direct ways. Adoptive families often take a continuing interest in the social welfare institution.¹¹⁷ Many send regular donations of goods. Others organize and participate in fund-raising drives for the orphanages or travel to China to work in orphanages.¹¹⁸ The families want to express their appreciation for the care their children received, to support the children “left behind,” and to main-

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ DOROW, *supra* note 69, at 73; *see also*, Dep’t of State, Intercountry Adoption, China (2006), http://travel.state.gov/family/adoption/country/country_365.html (listing figures on contribution amounts).

¹¹⁵ DOROW, *supra* note 69, at 76.

¹¹⁶ Deng, *supra* note 3.

¹¹⁷ *See, e.g.*, Love without Boundaries, www.lovewithoutboundaries.org (last visited Oct. 28, 2008); Angel Covers, www.angelcovers.org (last visited Oct. 28, 2008) (two examples of charitable organizations that were started by parents who adopted children from China and that provide benefits to Chinese orphanages).

¹¹⁸ *See, e.g.*, Half the Sky Foundation, www.halfthesky.org (last visited Oct. 28, 2008) (a group that sponsors many programs in China’s orphanages).

tain a connection to the orphanage that cared for their children. Whatever the goals, the bottom line is continuing benefits to the orphanages.

Participating orphanages are supposed to use donations to improve facilities and care.¹¹⁹ Many update or build new facilities, hire more staff, provide better nutrition, and expand programs for children soon after they start to place children for intercountry adoption.¹²⁰ Orphanages that regularly place children for adoption through the intercountry program often are recognized as providing better care for children than those new to the system.¹²¹ “Orphanages can become ‘distinguished’ for international adoption through a kind of historical overdetermination of material and symbolic resources. They gain reputations as having the best conditions and therefore the ‘best children.’”¹²²

Misuse of the funds is common, however. “While there is only limited direct evidence of corruption, a number of adoption practitioners expressed concerns that, as one facilitator put it, ‘some money is stopped in the middle’ by local civil affairs officials. . . . [S]ome people are getting cell phones and nice cars.”¹²³ A Western aid worker told the *Washington Post* that “[p]erhaps 5 to 10 percent of what's given by central, provincial and local governments actually benefits the kids.”¹²⁴ The newspaper further reported that “[a] former worker at an orphanage in central China said she routinely witnessed local staff members carting off goods donated by aid groups – medical equipment, blankets, formula.”¹²⁵ Indeed, the first signs that something was amiss in the Hunan trafficking case were outward displays of wealth by those employed by the Hengyang Country Social Welfare Institute.¹²⁶ “Staffers began erecting new houses. The director navigated the area’s muddy roads in a chauffeured sedan,” the *Washington Post* reported.¹²⁷

Continued foreign revenue for the social welfare institutes, of course, relies on continued participation in intercountry adoption. But, a steady supply of healthy, young children appropriate for

¹¹⁹ PRC Adoption Law (adopted at the 23rd meeting of the Standing Comm. of Nat'l People's Cong., Dec. 29, 1991, promulgated by Order No. 54 of the president, Dec. 29, 1991, effective April 1, 1992), Article 17.

¹²⁰ Johnson, *supra* note 91, at 388.

¹²¹ DOROW, *supra* note 69, at 74.

¹²² *Id.*

¹²³ *Id.* at 95.

¹²⁴ Goodman, *supra* note 10.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

adoption can be difficult to sustain. “[I]n some cases, small rural orphanages are indirectly articulated into the system by sending their healthy infants to larger urban facilities that are ‘running low’ on children – namely, healthy infants – for international adoption.”¹²⁸ There is evidence children were moved from one institution to another in Hunan to keep a steady stream of files going to the CCAA in Beijing.¹²⁹ In other cases, healthy infants are procured in different ways. The Hunan Province orphanages started procuring infants by paying small sums to the people who brought them the children.¹³⁰ “At the beginning it was only 200 yuan [U.S. \$25] given in a traditional red envelop,” according to a Hengyang county insider.¹³¹ Later, the orphanages paid “intermediaries” for children.¹³² They also provided incentives for employees to acquire babies.¹³³ The Hengyang County Welfare Center rewarded employees who brought in three children a year.¹³⁴ Only then could the employees be said “to have completed their work duties for the year and [be] able to receive an extension of their salary and also a bonus at the year’s end.”¹³⁵

2. How a Child Becomes an Adoptee

The intercountry adoption process affects each participant differently. For an abandoned Chinese child, generally, the Chinese process works as follows. An individual finds a child in a public place, most commonly at the gates of orphanages, hospitals, and government offices.¹³⁶ The finding person takes the child to a police station and the police take the child to the social welfare institute.¹³⁷ The social welfare institute decides whether to make the child “paper ready” for intercountry adoption. When the number of abandoned infants was high, the orphanages did not necessarily make all of the children available for intercountry adoption.¹³⁸ The director of Hongqi Orphanage said that “the CCAA had certain *yaoqiu* (requirements): children as healthy and young as possi-

¹²⁸ DOROW, *supra* note 69, at 74.

¹²⁹ Deng, *supra* note 3.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Deng, *supra* note 3.

¹³⁶ Stuy, *supra* note 77.

¹³⁷ *Id.*

¹³⁸ DOROW, *supra* note 69, at 74.

ble.”¹³⁹ More recently, reports indicate that the vast majority of all healthy children are submitted to CCAA for intercountry adoption.¹⁴⁰

If the orphanage decides to submit a child’s file to the CCAA for intercountry adoption, the first step is to publish a “finding ad” in a local newspaper.¹⁴¹ The ad describes the child and the finding location.¹⁴² After 60 days, officials declare the child officially abandoned and available for international adoption.¹⁴³ One researcher considers the term “finding ad” a misnomer.¹⁴⁴ “The ads are not published to locate birth parents, but rather are legal notices transferring legal custody of the child from her birth family to the state, allowing for her adoption.”¹⁴⁵ It is worth noting that finding ads are not published for children adopted domestically in China until the adoption is final.¹⁴⁶ If the true intent of the finding ad was to locate birth parents, it would be published first, regardless of the type of adoption.

This process of turning foundlings into adoptees is easy to corrupt. Orphanages that have illicitly obtained children simply secure fraudulent documents for babies by telling police the baby was found.¹⁴⁷ This is what the orphanages did in Hunan.¹⁴⁸ One participant told *Phoenix Weekly*: “We would just randomly choose some place to say that we had picked up the abandoned infant from, and then we would say that we had been informed about the infant from the public hot-line. The police and the notary office didn’t find anything unusual.”¹⁴⁹

3. Paperwork Marks Adoptive Family’s Process

The U.S. adoptive parents’ road to adoption starts with an application to a CCAA-approved adoption agency.¹⁵⁰ Once approved, the parents pursue state permission to adopt.¹⁵¹ States require a

¹³⁹ *Id.*

¹⁴⁰ Brian Stuy, who has regular contact with Chinese orphanage directors, said they tell him “all but the most unadoptable children are submitted.” E-mail from Brian Stuy to authors (May 4, 2008) (on file with authors).

¹⁴¹ Stuy, *Hague Agreement*, *supra* note 104.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Deng, *supra* note 3.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Dep’t of State, *supra* note 114.

¹⁵¹ *Id.*

successful “home study” with a licensed social worker.¹⁵² The parents also seek U.S. federal government permission to adopt internationally, which comes from the Bureau of Citizenship and Immigration Services in the Department of Homeland Security.¹⁵³ When all the American permissions are in hand, parents send their completed “dossier” to the CCAA in Beijing.¹⁵⁴ The CCAA matches prospective parents with children and sends the child’s “referral” photograph and approximately a page containing basic information to the prospective parents.¹⁵⁵ Parents have the option of turning down the referral, but if they do, CCAA provides no assurance that another referral will follow.¹⁵⁶ Currently, wait times run more than two years from the time prospective parents submit a dossier to referral.¹⁵⁷

Each step of the process involves fees. Total costs vary widely depending on agency fees and travel expenses. Most agencies quote cost estimates of \$15,000-\$20,000 for an adoption from China.¹⁵⁸ The largest fee in China is the orphanage contribution, sometimes called a “child-rearing fee,” of \$3,000-\$5,000.¹⁵⁹

B. *Domestic Adoption is Common but not Formalized*

Contrary to popular thought, domestic adoption is common in China.¹⁶⁰ “[I]t is argued that Chinese attitudes and culture make it harder for abandoned Chinese children to find loving adoptive homes in China than in the United States. . . .”¹⁶¹ However, “historical and anthropological literature on the Chinese family indicates that adoption has been integral to the construction of kinship in China for a very long time.”¹⁶² Kay Johnson, a noted researcher of China, undertook a study in the late 1990s that confirmed the continued popularity of adoption. “What we learned from information gathered from nearly 800 adoptive families between 1996 and 1999 was that adoption, viewed as a permanent and complete transfer of children into the adoptive family, was common in many

¹⁵² Families with Children from China (FCC), Frequently Asked Questions about Adoption from China, <http://www.fwcc.org/FAQ.htm> (last visited Oct. 28, 2008).

¹⁵³ Dep’t of State, *supra* note 114.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ FCC, *supra* note 152.

¹⁵⁸ *Id.*

¹⁵⁹ Dep’t of State, *supra* note 114.

¹⁶⁰ Johnson, *supra* note 91, at 382.

¹⁶¹ *Id.* at 381.

¹⁶² *Id.* at 383.

rural areas, that it involved girls far more than boys, and that only a minority involved relatives or close friends.”¹⁶³

Assessing the extent of domestic adoption is difficult for two reasons: parents almost never adopt children through formal channels, and few researchers study domestic adoption in modern China.¹⁶⁴ The studies that have been published show that a substantial portion of domestic adoptions are informal.¹⁶⁵ “Nearly 50% of the adoptions took place through intermediaries, 26% from kin, and 23% adopted children who were abandoned directly or with the assistance of their friends, kin, or neighbors. Less than 1% of children were adopted from the State orphanages.”¹⁶⁶ Most adoptions involve parents adopting children from strangers.¹⁶⁷ “Many adoptive families indicated that they would like to adopt children from strangers. Adopting the children of strangers, often through intermediaries, could help protect adoptive ties from birth parents and ensure the adopted children not return to their birth families.”¹⁶⁸

In the mid-1980s, the government started regulating adoption as a component of its population control policies. “Official intervention . . . was mainly for preventing reproductive couples from using fake adoption as a strategy to escape from family planning penalties.”¹⁶⁹ Chinese officials imposed limits on adoption to prevent couples who violated the one-child policy from claiming a birth child was an adopted foundling.¹⁷⁰ The limitations came in the same law that allowed intercountry adoption. “The 1991 national adoption law, heralded as paving the way for international adoption, simultaneously codified a highly restrictive adoption policy that limited the adoption of foundlings to childless parents over the age of 35.”¹⁷¹

Even as the state struggled to care for the wave of girls in its orphanages in the late 1980s and early 1990s, it enforced a policy that precluded families who wanted to raise them. “[L]ittle effort was made on a systemwide basis to find adoptive families within China for the increasing number of orphanage foundlings.”¹⁷² In-

¹⁶³ *Id.* at 382.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Weiguo, *supra* note 78, at 318-19.

¹⁶⁷ Johnson, *supra* note 91, at 382.

¹⁶⁸ Weiguo, *supra* note 78, at 318.

¹⁶⁹ *Id.* at 327.

¹⁷⁰ *Id.*

¹⁷¹ Johnson, *supra* note 91, at 389.

¹⁷² *Id.* at 387.

stead the government focused on building its intercountry program. In so doing, the government also created a funding stream for the social welfare institutions that *depended* on intercountry adoption.¹⁷³

The adoption law was revised in 1999 to lower the age of parents to 30 and allow families with children to adopt healthy abandoned infants, but the final regulations required adopting parents to adopt from social welfare institutions.¹⁷⁴ By then, the patterns were set. Chinese families interested in adoption were accustomed to using informal networks to procure infants.¹⁷⁵ For their part, orphanages were reluctant to place children domestically for two reasons. One, they depended on the income from intercountry adoptions to take care of the children who would never be adopted.¹⁷⁶ Two, there was a clear, systematic process for adopting children internationally, but no such program for domestic adoptions.¹⁷⁷

Still, throughout the 1980s and 1990s, domestic adoption grew dramatically.¹⁷⁸ The Ministry of Civil Affairs of China reported 2,900 registered adoptions in 1992 and more than 55,000 in 2001.¹⁷⁹ However, these numbers probably accounted for only a small proportion of all domestic adoptions in China because many adoptions were informal and not officially registered.¹⁸⁰ The demand for healthy infants to adopt continues to grow in China.¹⁸¹ “Researchers in China say local data and anecdotal evidence show what sketchy national statistics don’t: that record numbers of Chinese are adopting.”¹⁸² Adoptive parents continue to use informal networks to locate children and turn now to Internet postings as well as asking friends to “put out word” that they seek a child to adopt.¹⁸³

Many potential adoptive parents in China want the same type of children foreign parents want: healthy infant girls.¹⁸⁴ This desire puts them in direct competition with the social welfare institutions

¹⁷³ *Id.* at 387-88.

¹⁷⁴ *Id.* at 390.

¹⁷⁵ Weiguo, *supra* note 78, at 332; *see also* Calum MacLeod, *Chinese Shedding Adoption stigma, May Tighten Rules*, USA TODAY, Nov. 20, 2007, at 13A, available at http://www.usatoday.com/news/world/2007-11-20-Chinainside_N.htm.

¹⁷⁶ Stuy, *Hague Agreement*, *supra* note 104.

¹⁷⁷ Johnson, *supra* note 91, at 388-89.

¹⁷⁸ Weiguo, *supra* note 78, at 308.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ MacLeod, *supra* note 71.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Weiguo, *supra* note 78, at 332.

supplying babies for intercountry adoption. Those social welfare institutions not only have no incentive to supply children for domestic adoption, but they stand to lose their very livelihood if they do. “[G]iven the realities of managing an orphanage, any conscientious director would likely do what he or she can to obtain as many financial resources as possible to improve the quality of care in his or her institution.”¹⁸⁵ Therefore, orphanages often put up significant barriers to requests for domestic adoptions.¹⁸⁶ In a survey of 259 orphanages participating in intercountry adoption, 88% said they had no healthy infants under two years of age available for domestic adoption even as most of them continued to submit healthy children for intercountry adoption.¹⁸⁷

C. *Child Trafficking Is Firmly Entrenched in China*

Apart from adoption, human trafficking is rampant in China.¹⁸⁸ Traffickers abduct and sell adults and children for forced labor and prostitution.¹⁸⁹ Additionally, organized crime networks trade in children for adoption, domestic service, and to serve as future wives for sons.¹⁹⁰ This section briefly describes human trafficking in China, looks more specifically at the country’s ongoing problem of child trafficking, discusses the attitudes that enable traffickers to continue their activities, and describes grassroots organizations of parents looking for missing children.

1. Trafficking Pervades China

China is a traditional source, transit, and destination country for human trafficking.¹⁹¹ Chinese women and children are trafficked for commercial sex and forced labor to Malaysia, Thailand, the United Kingdom, the United States, Australia, Europe, and other countries.¹⁹² Trafficked victims also move through China to Thailand and Malaysia for commercial sexual exploitation, forced

¹⁸⁵ Stuy, *Hague Agreement*, *supra* note 104.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ DEP’T OF STATE, *supra* note 50.

¹⁸⁹ *Id.*

¹⁹⁰ DEP’T OF STATE, *supra* note 6 (maintaining that “[k]idnapping and the buying and selling of children for adoption continued, particularly in poor rural areas” – the fact was listed under the heading “Human Trafficking,” even though the State Department does not officially recognize trafficking of children for adoption to be human trafficking).

¹⁹¹ U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 91 (2008), *available at* <http://www.state.gov/documents/organization/105501.pdf>.

¹⁹² *Id.* at 91.

marriage, and forced labor.¹⁹³ Victims are brought into China for forced labor, sexual exploitation, marriage, and adoption.¹⁹⁴

The majority of human trafficking in China is internal.¹⁹⁵ Estimates of the number of people trafficked vary widely. The U.S. State Department estimates a minimum of 10,000 to 20,000 victims are trafficked within China each year.¹⁹⁶ China has a significant amount of domestic trafficking of children for sexual and labor exploitation.¹⁹⁷ China's Ministry of Public Security reports police uncovered cases involving a total of 2,500 children and women trafficking victims in 2006.¹⁹⁸ Other estimates put the number as high as 70,000 children trafficked per year.¹⁹⁹

The most prominent anti-trafficking non-governmental organization in China, the All-China Women's Federation, reports that rapid economic development along China's east coast has prompted massive internal migration of unemployed laborers in rural areas.²⁰⁰ This mass movement creates opportunities for traffickers.²⁰¹ Women and girls often migrate at younger ages and with less education than men, which makes them particularly vulnerable to traffickers; international organizations report that 90% of internal trafficking victims are women and children.²⁰² Traffickers take victims primarily from Anhui, Henan, Hunan, Sichuan, Yunnan, and Guizhou Provinces to prosperous provinces along the east coast.²⁰³ The United Nations Inter-Agency Project on Human Trafficking argues that poor rural residents in remote areas lack the legal knowledge and sophistication to protect themselves from victimization.²⁰⁴

¹⁹³ *Id.* at 92.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ HumanTrafficking.Org, China, <http://www.humantrafficking.org/countries/china> (last visited Oct. 28, 2008).

¹⁹⁷ Kate Wedgwood, He Ye, & Sun Tiezheng, *Child Trafficking: Protecting Children in a Society on the Move*, CHINA DEVELOPMENT BRIEF, Apr. 23, 2007, <http://www.chinadevelopmentbrief.com/node/1062>.

¹⁹⁸ *Id.*

¹⁹⁹ Loyd, *supra* note 32.

²⁰⁰ HumanTrafficking.Org, China, <http://www.humantrafficking.org/countries/china> (last visited Oct. 28, 2008).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ United Nations, U.N. Inter-Agency Project on Human Trafficking in the Greater Mekong Sub-region (UNIAP), http://www.no-trafficking.org/content/Country_Pages_China/overview_china.htm (last visited Oct. 28, 2008).

Traffickers sell baby boys to families unable to have a son and sell girls to couples who have a son but want to add a girl.²⁰⁵ Chinese culture's traditional preference for boys bolsters the trafficking business.²⁰⁶ Some families with more than one girl want to give away daughters so they can have a chance to give birth to a boy, and families without boys want to adopt one. Some parents who have trouble conceiving believe that adopting a daughter will "lead in" a pregnancy that produces a son.²⁰⁷ Families who adopt domestically often seek to achieve a harmonious balance in the family: one boy and one girl is considered ideal.²⁰⁸ "While the felt need for at least one son remains prevalent, most people report that their ideal family includes a daughter as well and that the ideal family is a small one, with one boy and one girl."²⁰⁹

2. Traffickers Shift Efforts to Girls

Between the demand for healthy girls to supply intercountry adoption and the demand for healthy girls for domestic adoption, female infants have become a hot commodity among traffickers. "In the past, most babies rescued from traffickers had been boys, but in some areas this year more than 80% have been girls," China Daily reported in 2005.²¹⁰ In one case in Xinxiang, police rescued 33 babies, 29 of which were girls.²¹¹ Officials issued notices urging parents to claim their babies.²¹² They were inundated with calls, but none of the callers were birth parents.²¹³ "They were all keen to adopt the baby girls. . . . Girls have never been so popular."²¹⁴

To meet that demand, child traffickers often target migrant workers' children for purchase or abduction.²¹⁵ These rural workers come to cities to earn money. "China had 113.9 million mi-

²⁰⁵ *Combating Human Trafficking in China: Domestic and International Efforts: Hearing Before the Congressional-Executive Comm'n on China*, 109th Cong. 17-22 (2006) (statement of Wenchi Yu Perkins, Director, Anti-Trafficking and Human Rights Program, Vital Voices), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_house_hearings&docid=f:26671.wais [hereinafter CECC].

²⁰⁶ *Id.*

²⁰⁷ Johnson, *supra* note 91, at 385.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ HumanTrafficking.org, Chinese Baby Traffickers Shift Focus to Girls, <http://www.humantrafficking.org/updates/35> (last visited Oct. 28, 2008).

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ Loyd, *supra* note 32.

grant workers from rural areas in 2003, who accounted for 23.2 per cent of the total rural laborers, according to a survey carried out by China's State Statistical Bureau.²¹⁶ These workers do not have much time to look after their children, often leaving them minimally unattended.²¹⁷ Migrant workers also do not have many connections in the cities in which they work or resources available to search for missing children. Government officials and police find it easy to ignore the rights of these migrant workers, as well as the rights of the workers' children. For all these reasons, traffickers often target children of migrant workers.

3. Grassroots Organizations Help Parents Search for Missing Children

Without the help of police, parents are left to search on their own. While rarely discussed outside of China, parents and volunteers have created many grassroots organizations to find abducted children. *Gu Er Net* (Orphan Net) is one of them.²¹⁸ *Bao Bei Hui Jia* ("Babies Come Back Home") is another example.²¹⁹ These websites were created by non-profit organizations to provide families a place to post information about lost children. Parents hope people might recognize missing children and report the sightings to officials who can rescue them.²²⁰

Recently, a group of 400 fathers looking for missing children uncovered a large human trafficking situation at a brick kiln in Shanxi.²²¹ The case involved hundreds of children and adults forced to work long hours in grueling conditions without pay at brick factories.²²² The well-organized, smoothly run operation shocked the nation.²²³ Many victims were rescued, but according to the fathers, local governments showed little desire to assist parents in sifting through the kilns to find their children. *China Daily* reported that a letter asking for help and "signed by 400 fathers

²¹⁶ *China Had 113.9 Million Migrant Workers in 2003*, CHINA DAILEY, May 15, 2004, http://www.chinadaily.com.cn/english/doc/2004-05/15/content_330991.htm.

²¹⁷ Radio Free Asia, *Chinese Police Rescue Nine Children from Traffickers*, EPOCH TIMES, Nov. 15, 2003, <http://en.epochtimes.com/news/3-11-15/14732.html>.

²¹⁸ Orphan Net, <http://www.guer.org> (last visited Oct. 28, 2008).

²¹⁹ Baby Home, <http://www.baobeihuijia.com> (last visited Oct. 28, 2008).

²²⁰ Baby Home, About, <http://www.baobeihuijia.com/about.asp> (last visited Oct. 28, 2008).

²²¹ Zhu Zhe, *More than 460 rescued from brick kiln slavery*, CHINA DAILY, June 16, 2007, http://www.chinadaily.com.cn/china/2007-06/15/content_894802.htm.

²²² *Id.*

²²³ Christopher Bodeen, *China Arrests 2 Officials in Slave Scam*, WASH. POST, June 22, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/21/AR2007062100487.html>.

whose children went missing” was virtually ignored by local officials.²²⁴ It is certainly possible that China’s size and multitude of provincial and municipal governments could hinder the central government’s ability to monitor daily happenings across the country. It is also possible that the slave trade has aided local economies in China’s poorest rural areas, providing incentive for local governments to look the other way.

4. Government Programs Fight Trafficking

The Chinese government’s anti-trafficking work falls under the jurisdiction of the Ministry of Public Security.²²⁵ Recently, the government implemented several programs to address trafficking. In 2005, the Bureau of Public Security of Dongxing Prefecture, Guangxi Province established a shelter for victims: the Transitional Center for Rescued Foreign Women and Children.²²⁶ The government also is working with UNICEF on a National Plan of Action to fight human trafficking.²²⁷

China has enacted extensive laws that criminalize human trafficking. Recently, the government shifted from solely prosecuting trafficking to implementing programs designed to prevent it.²²⁸ However, China’s prevention work is limited to certain provinces rather than being comprehensive, which has resulted in some affected regions not yet receiving crucial preventative education and thus arguably has left the cycle of trafficking to continue unchecked.²²⁹

5. Attitudes Show Tolerance for Buying Children for Adoption

People in China condemn stealing and selling children, although they generally show more sympathy to buying and selling abandoned or unwanted children for adoption. Perhaps the Chinese think the buyer is helping birth families who cannot support their children, and such adopted children are likely to benefit from more attention, better education, and improved opportunities in an adoptive family. Furthermore, legal restrictions on buying and

²²⁴ Melanie McGanney, *The Brick Kiln Scandal: An In-Depth Look at China’s Slave Trade*, SMALL SWORDS MAGAZINE, <http://smallswordsmagazine.com/articles/life/brickkiln.html> (last visited Oct. 28, 2008).

²²⁵ CECC, *supra* note 205.

²²⁶ *Id.*

²²⁷ DEP’T OF STATE, *supra* note 6.

²²⁸ CECC, *supra* note 205.

²²⁹ *Id.*

selling children for adoption might simply be ignored at the local level: rural families, including village cadres, do not know the specific regulations. Even if local officials know adoption law, they may turn a blind eye to numerous informal adoptions and consider buying a child for adoption to be a personal matter that has nothing to do with the state. Sometimes neighbors even try to protect the buyers when police attempt to rescue such children.²³⁰

II. THE LAWS

With the ease that an infant can become a legal “orphan” and the substantial amount of money involved, intercountry adoption creates opportunities and incentives for traffickers. Set against a backdrop of pervasive child trafficking by established rings of criminals in China and a seemingly insatiable Western demand for healthy infants to adopt, it is easy to understand how the Hunan case developed. The next obvious questions are: what laws should have prevented the situation, and why didn’t they? A bevy of international, Chinese, and American laws exist to regulate intercountry adoption and to prevent and punish human traffickers. This section examines the international and national laws that are designed to prevent child trafficking for intercountry adoption.

A. *International Law*

International law addresses intercountry adoption from a human rights perspective, primarily through the 1989 United Nations Convention on the Rights of the Child (CRC) and the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (the Hague Convention).²³¹ The CRC relies on the “best interests of the child” standard:²³² “Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall . . . [t]ake all appropriate measures to ensure that, in intercountry adoption, the placement does not result in improper financial gain for those involved”²³³ The CRC considers intercountry adoption appropriate only when “the child cannot be

²³⁰ Weiguo, *supra* note 78.

²³¹ See generally Nicole Bartner Graff, *Intercountry Adoption and the Convention on the Rights of the Child: Can the Free Market in Children Be Controlled?*, 27 SYRACUSE J. INT’L L. & COM. 405 (2000).

²³² David M. Smolin, *The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals*, 35 SETON HALL L. REV. 403, 409 (2005).

²³³ Convention on Rights of the Child, G.A. Res. 44/25, at 167, U.N. GAOR, 44th Sess., U.N. Doc. A/44/49 (1989), art. 21(d).

placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin.²³⁴

The Hague Convention reinforces the CRC.²³⁵ The Hague Convention places the best interests of the child above all other considerations in intercountry adoption.²³⁶ It also echoes the CRC's preference for in-country over intercountry adoption.²³⁷ Additionally, "[t]he Hague Convention shares with the CRC a concern for child trafficking and attempts to specifically ensure that adoption is not used as a means of child trafficking."²³⁸

Hague Convention measures are binding only between countries that both have entered into the agreement.²³⁹ China ratified the Hague Convention on September 16, 2005.²⁴⁰ The United States ratified it on December 12, 2007, and agreed to be bound by it as of April 1, 2008.²⁴¹ The Hague Convention requires each ratifying state to establish a Central Authority to oversee intercountry adoptions.²⁴² The Central Authority's responsibilities include cooperating with other countries' Central Authorities and taking "all appropriate measures to prevent improper financial or other gain in connection with an adoption."²⁴³ China's Central Authority is the Ministry of Civil Affairs, which delegates authority to the China Center of Adoption Affairs to perform certain Hague Convention articles.²⁴⁴ The United States' Central Authority is the State Department.²⁴⁵

²³⁴ Smolin, *supra* note 232, at 407-08 (citing Convention on Rights of the Child, *supra* note 233).

²³⁵ Graff, *supra* note 231, at 420.

²³⁶ Elisabeth J. Ryan, *For the Best Interests of the Children: Why the Hague Convention on Intercountry Adoption Needs to Go Farther, As Evidenced by Implementation in Romania and the United States*, 29 B.C. INT'L & COMP. L. REV. 353, 363 (2006); *see also* Hague Convention, *supra* note 36, preamble.

²³⁷ Smolin, *supra* note 232, at 408.

²³⁸ *Id.* at 417.

²³⁹ Hague Convention, *supra* note 36, art. 46.

²⁴⁰ Hague Conference on Private International Law, Status table: Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, http://www.hcch.net/index_en.php?act=conventions.status&cid=69 (last visited Oct. 28, 2008) [hereinafter Status Table].

²⁴¹ *Id.*

²⁴² Hague Convention, *supra* note 36, art. 6(1).

²⁴³ *Id.*

²⁴⁴ Hague Conference on Private International Law, Authorities: Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption, http://www.hcch.net/index_en.php?act=authorities.details&aid=678 (last visited Oct. 28, 2008).

²⁴⁵ Intercountry Adoption Act of 2000, 42 U.S.C. § 14901-45 (2000).

The CRC and the Hague Convention each lack enforcement mechanisms, however. Like many broadly adopted human rights treaties, the CRC and the Hague Convention function primarily as expressions of international ideals and standards rather than effective enforcement mechanisms.²⁴⁶ Each country must enact its own rules and regulations to enforce the standards set forth in the treaties. In other words, individual sending and receiving nations must find the political will to effectively implement and enforce the CRC and the Hague Convention.

B. Chinese Law Criminalizes Trafficking for Adoption

China's Adoption Law clearly precludes trafficking for adoption: "[i]t is strictly forbidden to buy or sell a child or to do so under the cloak of adoption."²⁴⁷ Chapter V provides notice that such activity could lead to criminal charges: "[w]hoever abducts and trafficks in a child under the cloak of adoption shall be investigated for criminal responsibility in accordance with law."²⁴⁸ The Adoption Law lays out many restrictions for adoption, but only one more includes a reference to possible corruption in the process: "[i]f the adopter pays the rearing fee to the social welfare institution, such fee can only be used for the improvement of the welfare institution's facilities and cannot be diverted for other purposes."²⁴⁹

The same article warns that abandoning or selling a baby may lead to criminal sanctions, although these provisions do not state that the sale or abandonment be in connection with an adoption. "Whoever sells his or her own child shall be imposed a fine with his or her illegal proceeds confiscated by the public security organ; if the circumstances constitute a crime, the offender shall be investigated for criminal responsibility in accordance with law."²⁵⁰ On infant abandonment, the law states, "[w]hoever abandons an infant shall be imposed upon a fine by the public security organ; if the

²⁴⁶ Smolin, *supra* note 232, at 407.

²⁴⁷ P.R.C. Adoption Laws, *supra* note 38, art. 20; see also Families With Children from China, http://www.fwcc.org/China_adoption_law_98.htm (last visited Oct. 28, 2008) (providing English translation of P.R.C. Adoption Laws). "The English translation has not been examined and approved by the legislative body and cannot be used as basis for law enforcement and public prosecution. Therefore it is for your reference only." Families with Children from China, http://fwcc.org/China_adoption_law_98.htm (last visited Oct. 3, 2008). We use it here with some confidence because noted China adoption scholar Kay Ann Johnson also cites it. See JOHNSON, *supra* note 57, at 248 n.17.

²⁴⁸ P.R.C. Adoption Laws, *supra* note 38, art. 31.

²⁴⁹ P.R.C. Adoption Laws, *supra* note 38, art. 17.

²⁵⁰ P.R.C. Adoption Laws, *supra* note 38, art. 31.

circumstances constitute a crime, the offender shall be investigated for criminal responsibility in accordance with law.”²⁵¹ However, the law provides no direction on the punishment of traffickers.

The government depends on the Criminal Law to prosecute traffickers.²⁵² Anyone who trafficks a woman or child faces a base sentence of five to ten years in prison.²⁵³ The law defines abducting and trafficking a woman or child as “abducting, kidnapping, buying, trafficking in, fetching, sending, or transferring a woman or child, for the purpose of selling the victim.”²⁵⁴ Aggravating circumstances earn traffickers harsher punishments, including kidnapping for extortion, which earns ten years to life. A kidnapper who causes the victim’s death may be sentenced to death.²⁵⁵

Chinese law treats buyers less harshly than sellers. Those who buy trafficked children face sentences of “not more than three years.”²⁵⁶ Those who buy a victim, depriving the victim of personal freedom or committing criminal acts as well, are subject to increased punishment.²⁵⁷ Buying and selling a child also qualifies for harsher treatment.²⁵⁸ However, the law allows the court to not punish a buyer if the victim is not hurt. “Whoever buys an abducted . . . child but does not . . . maltreat the child nor obstruct his or her rescue may be exempted from being investigated for criminal responsibility.”²⁵⁹

The director of the Hengdong County Social Welfare Institute argued that this provision absolved him of criminal liability in the Hunan case.²⁶⁰ According to the director’s attorney, “the center provided staff with the sole duty of caring for these infants as well as doctors, the children had high-quality powdered milk to drink, and in the event of illness they could receive timely treatment, thus, he argued, there was emphatically no maltreatment of the infants.”²⁶¹ Although he was still convicted and sentenced to prison time, this measure of the Criminal Law may explain why the court sentenced him to a relatively light one-year term, as opposed to the

²⁵¹ *Id.*

²⁵² P.R.C. Criminal Law, *supra* note 38.

²⁵³ P.R.C. Criminal Law, *supra* note 38, art. 240.

²⁵⁴ *Id.*

²⁵⁵ P.R.C. Criminal Law, *supra* note 38, art. 239.

²⁵⁶ P.R.C. Criminal Law, *supra* note 38, art. 241.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ Deng, *supra* note 3.

²⁶¹ *Id.*

15-year-sentences handed down to several of the other traffickers in the case.²⁶²

C. American Law Focuses on Adoption Regulation

The United States signed the Hague Convention in 1994.²⁶³ Congress enacted the Intercountry Adoption Act of 2000 (IAA) to implement the treaty in 2000.²⁶⁴ One of the IAA's three stated purposes is "to protect the rights of, and prevent abuses against, children, birth families, and adoptive parents involved in adoptions (or prospective adoptions) subject to the Convention, and to ensure that such adoptions are in the children's best interests."²⁶⁵ In 2007, Congress finally enacted rules and regulations to implement the Hague Convention, clearing the way for ratification on December 12, 2007.²⁶⁶ The Hague Convention became fully effective for the United States on April 1, 2008.²⁶⁷

For years, individuals interested in intercountry adoption reform predicted the Hague Convention would be the vehicle for achieving needed changes.²⁶⁸ However, now that the United States has enacted regulations, advocates for ethical adoption practices express disappointment:²⁶⁹

[T]he regulations fail to address the vast majority of the most problematic features of current inter-country adoption practice. In several critical areas of child and family protection, the regulations may actually worsen current conditions. On the whole, the regulations are a bitter disappointment for those who had hoped that their release would signal meaningful and effective regulation.²⁷⁰

Although the regulations prohibit payments or inducements for adoption, they also create a broad exception to that prohibition. The language disallowing payments is clear:

Neither the applicant/petitioner, nor any individual or entity acting on behalf of the applicant/petitioner may, directly or indirectly, pay, give, offer to pay, or offer to give to any individual

²⁶² *Id.*

²⁶³ Status Table, *supra* note 240.

²⁶⁴ 42 U.S.C. §§ 14901-14945.

²⁶⁵ 42 U.S.C. § 14901(b)(2).

²⁶⁶ Status Table, *supra* note 240.

²⁶⁷ *Id.*

²⁶⁸ Graff, *supra* note 231.

²⁶⁹ ETHICA, COMMENTS ON THE FINAL REGULATIONS IMPLEMENTING THE HAGUE ADOPTION CONVENTION (2006), <http://www.ethicanet.org/HagueRegComments.pdf>.

²⁷⁰ *Id.*

or entity or request, receive, or accept from any individual or entity, any money (in any amount) or anything of value (whether the value is great or small), directly or indirectly, to induce or influence any decision concerning: (1) The placement of a child for adoption; (2) The consent of a parent, a legal custodian, individual, or agency to the adoption of a child; (3) The relinquishment of a child to a competent authority, or to an agency or person as defined in 22 CFR 96.2, for the purpose of adoption; or (4) The performance by the child's parent or parents of any act that makes the child a Convention adoptee.²⁷¹

Then, the exception to the prohibition allows payments for a long list of categories of expenses, as well as for any other cost “reasonably necessary.” The permissible services are:

(1) The services of an adoption service provider in connection with an adoption; (2) Expenses incurred in locating a child for adoption; (3) Medical, hospital, nursing, pharmaceutical, travel, or other similar expenses incurred by a mother or her child in connection with the birth or any illness of the child; (4) Counseling services for a parent or a child for a reasonable time before and after the child's placement for adoption; (5) Expenses, in an amount commensurate with the living standards in the country of the child's habitual residence, for the care of the birth mother while pregnant and immediately following the birth of the child; (6) Expenses incurred in obtaining the home study; (7) Expenses incurred in obtaining the reports on the child as described in 8 CFR [§] 204.313(d)(3) and (4); (8) Legal services, court costs, and travel or other administrative expenses connected with an adoption, including any legal services performed for a parent who consents to the adoption of a child or relinquishes the child to an agency; and (9) Any other service the payment for which the officer finds, on the basis of the facts of the case, was reasonably necessary.²⁷²

Especially disconcerting are the exceptions for (1) “[e]xpenses incurred in locating a child for adoption,” which could be interpreted to justify the kinds of fees the Hunan orphanages paid to the traffickers; and (2) the catch-all exception for “any other service.”²⁷³

International adoption offers child locators an unparalleled opportunity to earn what amounts to commissions The potential to earn large incomes from international adoption activities in turn greatly increases the risk that in-country facilitators

²⁷¹ 8 C.F.R. § 204.304(a) (2007).

²⁷² 8 C.F.R. § 204.304(b).

²⁷³ *Id.*

will have significant incentives to solicit large numbers of children (who may or may not be orphans) for international adoption.²⁷⁴

The catch-all exception is even broader, essentially providing a “loophole within a loophole” that allows any payment deemed “reasonably necessary.”²⁷⁵

The IAA also loosens the definition for qualification as an adoptee.²⁷⁶ In Hague Convention adoptions, a child who is not an orphan immigrates as the “immediate relative of a U.S. citizen” if two conditions are met: (1) the child’s birth parents have irrevocably released the child for adoption, and (2) the parents are not able to provide for the child.²⁷⁷ In a non-Hague Convention adoption, a child still needs to meet the requirements of the Immigration and Nationality Act’s definition of an orphan that previously governed all intercountry adoptions.²⁷⁸ In non-Hague Convention adoptions, birth parents do not have the option of relinquishing the child for intercountry adoption unless there is only one surviving parent and that parent is not able to provide for the child’s basic needs. By weakening the standard, the United States is relying on sending nations to ensure relinquishments are legitimate; “[u]nfortunately, the premise that foreign-sending nations who join the Hague Convention will have reliable procedures regarding relinquishments seems overly optimistic.”²⁷⁹

The statute that applies to non-Hague Convention adoptions provides more protection against illicit activities through its narrower definition of an orphan. An eligible child is one “who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption.”²⁸⁰ Corresponding regulations further define “abandonment by both parents” to mean:

[T]hat the parents have willfully forsaken all parental rights, obligations, and claims to the child, as well as all control over and possession of the child, without intending to transfer, or without transferring, these rights to any specific person(s). Abandonment must include not only the intention to surrender all

²⁷⁴ ETHICA, *supra* note 269.

²⁷⁵ *Id.*

²⁷⁶ Smolin, *supra* note 232, at 425.

²⁷⁷ 8 U.S.C. § 1101(b)(1)(F)(i).

²⁷⁸ 8 U.S.C. § 1101.

²⁷⁹ Smolin, *supra* note 232.

²⁸⁰ 8 U.S.C. § 1101(b)(1)(F)(i).

parental rights, obligations, and claims to the child, and control over and possession of the child, but also the actual act of surrendering such rights, obligations, claims, control, and possession.²⁸¹

The regulations continue with provisions aimed at precluding arrangements that come perilously close to buying children, including dealings directly between birth parents and adoptive parents or between birth parents and unauthorized third parties:

A relinquishment or release by the parents to the prospective adoptive parents or for a specific adoption does not constitute abandonment. Similarly, the relinquishment or release of the child by the parents to a third party for custodial care in anticipation of, or preparation for, adoption does not constitute abandonment unless the third party (such as a governmental agency, a court of competent jurisdiction, an adoption agency, or an orphanage) is authorized under the child welfare laws of the foreign-sending country to act in such a capacity.²⁸²

The law clearly declares that buying children is not allowed:

An orphan petition must be denied under this section if the prospective adoptive parents or adoptive parent(s), or a person or entity working on their behalf, have given or will give money or other consideration either directly or indirectly to the child's parent(s), agent(s), other individual(s), or entity as payment for the child or as an inducement to release the child. Nothing in this paragraph shall be regarded as precluding reasonable payment for necessary activities such as administrative, court, legal, translation, and/or medical services related to the adoption proceedings.²⁸³

“The law seems straightforward: If the adoptive parent, or someone working on the adoptive parent's behalf, gives money or other consideration to the child's parents, except for the payment of the necessary reasonable expenses outlined in the regulation, then the petition must be denied on the grounds of child buying.”²⁸⁴ In contrast to the regulations implementing the Hague Convention, the “necessary reasonable” expenses are limited to payments related to the adoption. “Nothing in this paragraph shall be regarded as precluding reasonable payment for necessary activities such as administrative, court, legal, translation, and/or medical services related to the adoption proceedings.”²⁸⁵

²⁸¹ 8 C.F.R. § 204.3(b).

²⁸² *Id.*

²⁸³ 8 C.F.R. § 204.3(i).

²⁸⁴ ETHICA, *supra* note 42, at 1.

²⁸⁵ 8 C.F.R. § 204.3 (2007).

This narrower exception would seem to appropriately limit the exchange of money to prevent trafficking. However, immigration officers face an almost impossible job when they seek to enforce this measure and deny an orphan visa.²⁸⁶ The standard of proof requires that U.S. immigration officers prove suspected trafficking in adoption through either an admission of guilt or direct evidence.²⁸⁷

Short of a confession, it is hard to fathom what kind of direct evidence [they] could possibly unearth to support the charge of child buying. Indeed, under this interpretation of the law, it would seem that anyone could traffic in children with impunity provided that they a) hired a “runner” or other non-employee to deliver the cash or contact the birth mothers; and b) the birth mother states that she intended to place the child irrespective of the payment she received. This statement is one that a mother can easily be coached to make.²⁸⁸

To date, U.S. policymakers have depended on immigration law and adoption law to prevent trafficking in intercountry adoption, and those laws have not done the job. The applicable laws clearly forbid buying, selling, or stealing children to profit from adoption but also provide loopholes that allow child trafficking in adoption to persist. Given the ineffectiveness of immigration law and the disappointing implementation of Hague Convention regulations, trafficking for adoption to the United States seems destined to continue. However, there may be another viable approach. With one small change to a definition, the United States would be able to attack the problem of trafficking in intercountry adoption by going after the trafficking, rather than regulating the adoption.

D. U.S. Anti-Trafficking Law Does Not Cover Illicit Adoption

The United States leads the fight against human trafficking worldwide.²⁸⁹ The Trafficking Victims Protection Act of 2000 (TVPA), along with its subsequent reauthorizations, takes a three-pronged approach.²⁹⁰ The TVPA combats trafficking through prevention, protections for victims, and prosecution.²⁹¹ Prevention

²⁸⁶ ETHICA, *supra* note 42, at 4.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ See generally Angela D. Giampolo, *The Trafficking Victims Protection Reauthorization Act of 2005: The Latest Weapon in the Fight Against Human Trafficking*, 16 TEMP. POL. & CIV. RTS. L. REV. 195 (2006) (a critique of the Trafficking Victims Protection Reauthorization Act of 2005).

²⁹⁰ 22 U.S.C. § 7101.

²⁹¹ *Id.*

measures include funding for a wide variety of programs, including “international initiatives to enhance economic opportunity for potential victims of trafficking as a method to deter trafficking,” public awareness campaigns, border interdiction measures, and consultation with non-governmental organizations.²⁹² Additionally, the TVPA requires the U.S. State Department to monitor human trafficking in other countries and publish a Trafficking in Persons (TIP) Report each year.²⁹³ The report ranks countries in a tier system.²⁹⁴ The report provides for sanctions against countries that do not meet minimum standards for the elimination of trafficking and do not make significant efforts to come into compliance with those standards.²⁹⁵ The victim protection measures, found in the TVPA, include a provision that allows victims to sue traffickers for civil damages.²⁹⁶

The prosecution provisions hinge on the statute’s definition of “severe forms of trafficking,” which is defined as:

(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.²⁹⁷

Under that definition, the purpose for which a person is trafficked determines whether the trafficking is criminal under the TVPA. If the person is forced to work or to participate in the commercial sex industry, the trafficking is criminal.²⁹⁸ If a child is bought, sold, or stolen for adoption, the trafficking is not considered criminal.²⁹⁹ This means that abducting or buying a baby from desperately poor parents and selling it to an orphanage for intercountry adoption, exactly the case in Hunan, is not considered trafficking.

The State Department reinforced the distinction between “illegal adoption and baby selling” and human trafficking in the 2005 Trafficking in Persons Report:

Unless adoption occurs for the purpose of commercial sexual exploitation or forced labor, adoption does not fall under the

²⁹² 22 U.S.C. § 7104.

²⁹³ 22 U.S.C. § 7107.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ 22 U.S.C. § 7108.

²⁹⁷ 22 U.S.C. § 7102(8).

²⁹⁸ *Id.*

²⁹⁹ DEP’T OF STATE, *supra* note 50.

scope of the Trafficking Victims Protection Act. . . . The purposes of baby selling and human trafficking are not necessarily the same. Some individuals assume that baby selling for adoption is a form of human trafficking because trafficking and baby selling both involve making a profit by selling another person. However, illegally selling a child for adoption would not constitute trafficking where the child itself is not to be exploited. Baby selling generally results in a situation that is nonexploitative with respect to the child. Trafficking, on the other hand, implies exploitation of the victims. If an adopted child is subjected to coerced labor or sexual exploitation, then it constitutes a case of human trafficking.³⁰⁰

According to the TVPA, selling a person is trafficking only if the sale is made for an exploitive purpose: "Trafficking . . . implies exploitation of the victims."³⁰¹ Stealing or buying and selling a baby for adoption to another country does not meet the statute's threshold definition of exploitive: "Baby selling generally results in a situation that is nonexploitative with respect to the child."³⁰² Such an assertion strains credibility. The *American Heritage Dictionary* defines "to exploit" as "to make use of selfishly or unethically."³⁰³ Certainly any practice that harvests newborn infants "like the cash crop they have become" is exploitive.³⁰⁴

III. RECOMMENDATIONS

The TVPA definition of severe forms of trafficking insinuates that the ends justify the means, or in this case that the ends criminalize the means.³⁰⁵ A child who is stolen from her parents and forced to work in a factory is trafficked. But a child who is stolen from her parents and sold to an orphanage to be sent to another country is not.³⁰⁶ In both cases the offensive action is the same: traffickers stole a child. In the first case, the government can prosecute the traffickers under TVPA.³⁰⁷ In the second case, the gov-

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 463 (4th ed. 2000).

³⁰⁴ See Graff, *supra* note 231. See generally David M. Smolin, *Child Laundering as Exploitation: Applying Anti-Trafficking Norms to Intercountry Adoption Under the Coming Hague Regime*, 32 VT. L. REV. 1 (2007) (extensively exploring the concept that trafficking for adoption is exploitation).

³⁰⁵ See DEP'T OF STATE, *supra* note 50.

³⁰⁶ See *id.*

³⁰⁷ See *id.*

ernment cannot.³⁰⁸ Such a policy seems to serve no purpose, although it may encourage child traffickers to focus their business on supplying orphanages rather than factories. The distinction drawn in the TVPA minimizes the harm done to children and families by corruption in adoption. Excluding this type of trafficking from the reach of the anti-trafficking statute allows it to continue by shielding the traffickers from prosecution and by insinuating that child trafficking for adoption is less offensive than other human trafficking. Excluding child trafficking for adoption from the reach of general anti-trafficking measures hobbles the law without any apparent benefit.

A. *Anti-Trafficking Measures Should Apply to Baby Buying in Adoption*

The United States should expand the scope of the TVPA to employ it against the traffickers who profit from selling children for adoption because using the TVPA to protect children is consistent with the intent of the CRC, the Hague Convention, and the United States' own statutes relevant to intercountry adoption.³⁰⁹ The CRC directs officials to "[t]ake all appropriate measures to ensure that, in intercountry adoption, the placement does not result in improper financial gain for those involved in it."³¹⁰ The Hague Convention requires the U.S. Central Authority, i.e., the State Department, to take "all appropriate measures to prevent improper financial or other gain in connection to an adoption."³¹¹ The TVPA protections are an appropriate measure to help ensure intercountry adoption does not result in improper financial gain.

The State Department-produced TIP Report evaluates foreign countries' anti-trafficking efforts.³¹² Countries are ranked on a tier system, with sanctions available against countries that do not make significant efforts to combat human trafficking.³¹³ If TVPA were extended to trafficking for adoption, the State Department could use trafficking for adoption as an additional evaluative criterion. Countries that do not make significant progress in fighting trafficking for adoption could be subject to sanctions. The threat of a poor tier placement and sanctions might motivate foreign govern-

³⁰⁸ *See id.*

³⁰⁹ *See* 22 U.S.C. § 7101; Convention on Rights of the Child, *supra* note 233; Hague Convention, *supra* note 36.

³¹⁰ Convention on Rights of the Child, *supra* note 233.

³¹¹ Hague Convention, *supra* note 36.

³¹² *See* 22 U.S.C. § 7107.

³¹³ *See* DEP'T OF STATE, *supra* note 50.

ments to enforce measures against improper financial gain in adoptions.

The IAA's stated intent is "to protect the rights of, and prevent abuses against, children, birth families, and adoptive parents . . . and to ensure that such adoptions are in the children's best interests."³¹⁴ Two of the TVPA's three prongs are in line with the IAA's purpose. The TVPA aims to prevent human trafficking and to protect victims.³¹⁵ The victims of trafficking for adoption include the children, the birth parents, and the adoptive parents. If the definition of "severe forms of trafficking"³¹⁶ was expanded, the TVPA could be used to protect these victims of trafficking.

The third prong of the TVPA, prosecution, would fill an identified need in adoption law: the need for criminal sanctions for baby selling. One criticism of the Hague Convention is that it fails to mandate that each country criminalize child trafficking for adoption or punish such traffickers.³¹⁷ "The most detrimental failure of the Hague Convention is the fact that it does not provide for specific enumerated punishments for participation in the black market."³¹⁸ The TVPA criminalizes human trafficking.³¹⁹ Although its jurisdictional reach might not extend to foreign country baby brokers, the prosecutorial measures of the TVPA could be employed to hold U.S. adoption facilitators responsible for their overseas contractors. Even that much reach might provide deterrent value. "If the international community is aware of the punishments that may be imposed for baby selling, those who profit from this practice may be much less likely to participate in the black market."³²⁰

By removing the distinction between child trafficking for adoption and human trafficking for forced labor or paid commercial sex, Congress would strengthen overall U.S. efforts to combat human trafficking. Currently, the TVPA creates different "levels" of human trafficking.³²¹ It identifies severe forms, which are subject

³¹⁴ 42 U.S.C. § 14901(b)(2).

³¹⁵ See 22 U.S.C. § 7101.

³¹⁶ 22 U.S.C. § 7102(14).

³¹⁷ Kathleen L. Manley, *Birth Parents: The Forgotten Members of the International Adoption Triad*, 35 CAP. U. L. REV. 627, 657 (2006) (citing Jonathan G. Stein, *A Call To End Baby Selling: Why the Hague Convention on Intercountry Adoption Should Be Modified To Include the Consent Provisions of the Uniform Adoption Act*, 24 T. JEFFERSON L. REV. 39, 45 (2001)).

³¹⁸ *Id.* at 661.

³¹⁹ See 22 U.S.C. § 7101.

³²⁰ Manley, *supra* note 317 (citing Stein, *supra* note 317).

³²¹ 22 U.S.C. §§ 7102(13)-(14).

to prosecution and leaves unaddressed everything else.³²² The implication is that some kinds of trafficking are not worth prosecuting. Without prosecution, there is no deterrence. The effect of no deterrence may be to actually encourage the “less severe” types of human trafficking.

The trafficking rings that profit from selling individuals might traffic more children for adoption specifically because the consequences of being caught are less severe. Traffickers often operate within organized criminal networks.³²³ Like legitimate businesspersons, criminals likely make cost-benefit analysis decisions. If trafficking infants for adoption is less risky than trafficking adults for prostitution, child trafficking for adoption is more attractive. Conversely, expanding the TVPA to include trafficking for adoption sends a clear message that all human trafficking is severe and forbidden.

The TVPA offers an additional advantage over other options for fighting trafficking for adoption. Remedies for victims of trafficking in intercountry adoption are sorely missing from existing intercountry adoption laws. The TVPA creates an opportunity for victims to sue for civil damages.³²⁴ Again, civil remedies may be out of reach when the trafficker is perhaps an unidentified individual in another country, but affiliations between U.S. adoption agencies and their foreign contractors may make it possible for victims to recover from U.S. adoption agencies.³²⁵ Such actions, if successful, could provide additional motivation for U.S. adoption providers to operate ethically and to ensure their agents do the same.

Finally, this change would be relatively easy to implement. The U.S. State Department is a key player in both intercountry adoption and American efforts to fight human trafficking.³²⁶ The United States named the State Department its Central Authority for purposes of the Hague Convention.³²⁷ The State Department also regulates immigration, including the process by which foreign children gain visas to come to the United States. Additionally, the State Department administers the TVPA monitoring and evaluates

³²² See 22 U.S.C. § 7101-02.

³²³ See DEP'T OF STATE, *supra* note 50; U.S. Dep't of State, 2006 Country Reports, <http://www.state.gov/g/drl/rls/hrrpt/2006/> (last visited Oct. 28, 2008); see also Radio Free Asia, *supra* note 39 (indicating that Chinese prosecutions of baby trafficking usually involve criminal organizations).

³²⁴ 22 U.S.C. § 7108(a)(2).

³²⁵ *Id.*

³²⁶ See generally Hague Convention, *supra* note 36.

³²⁷ See *id.*

foreign states' efforts to fight trafficking in persons each year.³²⁸ Because the State Department is so involved in both adoption and trafficking, it should be relatively easy for the state department to incorporate trafficking for intercountry adoption into the criteria used to evaluate countries for the purpose of its annual TIP Report.

B. Additional Recommendations for China

Trafficking for adoption is a complex issue. Successful prevention will require more than laws saying it is not allowed. It is, at its core, a human trafficking issue and needs to be addressed with all the seriousness of trafficking for other purposes.

Human trafficking, like drug trafficking, must be fought on three fronts: Supply, demand, distribution. You have to address all three at one time instead of just one or the other. Preventive campaigns without the interdiction, without the high penalties that make it high risk, will not work. Likewise, it is important to address the demand side: the customers who purchase trafficked humans. . . . [T]he best possible result, the end goal, is for countries to address their own trafficking problems, to have a national plan of action, to have their own preventive programs and their own law enforcement efforts.³²⁹

1. Recommendations for China

China's recent move to limit intercountry adoptions by restricting the demand is a step in the right direction. Also, the country's initiatives to address trafficking in general should continue and should be expanded to address trafficking for adoption.

Additionally, China could consider the following:

a. Changing its law to make buying children a serious offense

Currently, "while it is illegal to abandon, steal or sell a child, it is not necessarily illegal to buy one."³³⁰ Child buyers who do not harm the children or obstruct rescue operations may not face charges at all.³³¹ Criminalizing child buying may provide a disincentive to child trafficking in general. It also would provide an ad-

³²⁸ See DEP'T OF STATE, *supra* note 50.

³²⁹ Interview by David Denton & Caroline Vasquez with Laura J. Lederer, Senior Advisor on Trafficking, Office for Global Affairs, in New Haven, Conn. (Mar. 1, 2004).

³³⁰ Claire Dwyer Hogg, *Has Anyone Seen Our Child?*, OBSERVER, Sept. 23, 2007, at 50, available

at <http://www.guardian.co.uk/theobserver/2007/sep/23/features.magazine77>.

³³¹ *Id.*

ditional measure under which to prosecute orphanage officials who engage specifically in trafficking for adoption.

b. Creating mechanisms to more closely monitor local-level social welfare institutes

China has developed a well-regulated national system of intercountry adoption.³³² Local level operations, however, remain largely independent.³³³ The government needs a process that allows better monitoring of children coming into orphanages, as well as the money contributed to them. Transparency and accountability must drive operations at all levels.

c. Better funding for social welfare institutions

Intercountry adoption proceeds currently fund the operations of participating orphanages. These institutions have come to depend on intercountry adoption, which prompts them to discourage domestic adoption and procure as many babies as possible for foreign adoption.³³⁴ The government must revamp the subsidy system that supports social welfare institutions to minimize the dependence on intercountry adoption as a revenue stream.

d. Encouraging private adoption

China is supposed to prioritize domestic adoption over adoption by foreigners.³³⁵ There is robust demand for children to adopt domestically.³³⁶ However, only 1% of domestic adoptions involve children in the social welfare institutions. China needs to revise its adoption law to *actually* encourage domestic adoption. It needs to regulate how orphanages respond to domestic requests to adopt children, and how they charge fees for those adoptions. Basically, the country needs to create a system of domestic adoption that is just as efficient and robust as the intercountry program.

³³² See Luo & Smolin, *supra* note 33, at 602-03.

³³³ See, e.g., DOROW, *supra* note 69, at 74, 289.

³³⁴ See Stuy, *Hague Agreement*, *supra* note 104.

³³⁵ See Posting of Deng Fei to Research-China.org, Self-reflection Within the Chinese System of Adoption, <http://research-china.blogspot.com/2006/10/hunan-one-year-later-iii-reactions.html> (Oct. 17, 2006, 7:04 MDT)

³³⁶ See Stuy, *Hague Agreement*, *supra* note 104.

- e. Creating a penalty-free mechanism for parents to relinquish children

Current Chinese law criminalizes abandonment of a child.³³⁷ To avoid criminal sanctions, parents who decide not to raise a child abandon it anonymously.³³⁸ This involves immediate safety risks to the children, of course, but the practice also creates an easy entry for child traffickers. If China decriminalized child relinquishment, it might be able to better regulate the source of children. Additionally, a system of relinquishment would serve the goals of transparency and accountability in intercountry adoption. Records could be created. Voluntary statements of relinquishment could exist. The circumstances of giving up the baby could be recorded, which would protect the rights of all parties involved: birth parents, child, and adoptive parents. Of course, such a system brings its own issues; voluntary relinquishments can be corrupted, too.

2. Recommendations for the United States

Current measures aimed at regulating adoptions to the United States do little to prevent trafficked children from being adopted. Policymakers should revise regulations to close loopholes that allow corruption in intercountry adoption. Payments for services need particular scrutiny. The U.S. anti-trafficking legislation provides potent tools to fight human trafficking,³³⁹ but does not reach the practice of buying and selling children for adoption. Lawmakers should consider revising the statute to extend its reach. Additionally, the United States should consider the following:

- a. More strictly regulating U.S. adoption agencies

Adoption agencies are subject to little or no regulation.³⁴⁰ Recently, under the Hague Convention, the U.S. government has required them to be accredited.³⁴¹ This is a step in the right direction. The next step might be holding adoption agencies accountable for foreign colleagues and contractors. Currently, agencies have little responsibility for the actions of their foreign associates. To carry the market analogy of adoption forward, consumers ex-

³³⁷ Hogg, *supra* note 330.

³³⁸ Carrie Howard, Searching for Birth Families, <http://www.adoptivefamilies.com/articles.php?aid=1562> (last visited Oct. 5, 2008).

³³⁹ 22 U.S.C. § 7101.

³⁴⁰ ETHICA, ADOPTION REGULATION AND CONSUMER PROTECTION 2, <http://www.ethicanet.org/AdoptionRegulation.pdf> (last visited Oct. 28, 2008).

³⁴¹ Hague Convention, *supra* note 36.

pect U.S. companies to ensure goods imported from another country meet minimum standards. Adoption agencies should similarly be expected to ensure they are working with reputable colleagues who put the interests of children, rather than profits, first.

b. Encouraging documented histories of adoptees

As opposed to domestic U.S. adoptions, the children adopted from other countries often come with little or no pre-adoption history.³⁴² As the largest receiving country,³⁴³ the United States is in a position to encourage sending countries to document the children available for adoption. More detailed histories are a step toward transparency that protects all parties involved.

CONCLUSION

The Hunan baby trafficking case uncovered vulnerabilities in China's system of intercountry adoption that have not yet been addressed. The supply of children has decreased, even as the demand has risen,³⁴⁴ and traffickers are taking advantage of that dynamic. The process by which children become available for adoption presents an opportunity for child traffickers. The amount of money that adoptive parents contribute to an orphanage when they adopt provides a huge incentive for orphanage officials to buy babies from traffickers. That incentive is exacerbated by the de facto revenue source that intercountry adoption has become for Chinese social welfare institutions. The Chinese system of intercountry adoption created barriers to domestic adoption, despite a large demand within China for children to adopt. The barriers to officially sanctioned domestic adoption further drive child trafficking as criminal rings take advantage of the opportunity to provide children to Chinese parents who want to adopt them. Besides encouraging trafficking, when China places children with foreign parents rather than with Chinese families, China violates the Hague Convention on Intercountry Adoption.

The Hunan case also highlighted continuing problems in American regulation of adoption. Despite laws that clearly prohibit buying and selling children for adoption, regulations that implement those laws leave gaping holes that continue to allow brokered

³⁴² See Michele Carlson, Home in Homelessness, http://www.michelecarlson.com/writing/Carlson_Home_in_Homlessness.pdf (last visited Oct. 28, 2008).

³⁴³ Dep't of State, *supra* note 114.

³⁴⁴ See Stuy, *Hague Agreement*, *supra* note 104.

children to be placed with American families. The U.S. demand for adoptable children drives this process. As long as demand is strong and regulations do not effectively preclude trafficking for adoption, baby buying for adoption will continue. Policymakers need to put the interests of children first in fact, as well as in theory. To do so, they should close regulatory loopholes and recognize that buying and selling babies for adoption is human trafficking. By calling baby buying what it is – human trafficking – the United States can bring the powerful measures of the TVPA to bear against the crime of trafficking for adoption.