

# BIRTH PARENTS: THE FORGOTTEN MEMBERS OF THE INTERNATIONAL ADOPTION TRIAD

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## INTRODUCTION

Imagine a mother, in a far away country, nearing the end of her pregnancy. This woman has one child already, and she has never given any indication that she is an unfit mother. As the birth of her baby draws near and she goes into labor, she is taken to the hospital by a woman who “just happens” to be visiting the neighborhood. This woman ignores the mother’s pleas for those who were supposed to help her through the delivery. Once in the hospital she is given tranquilizers to ease the pain of delivery, but the medicine leaves her confused. She cannot understand why a woman she has just met and a man she has never seen before are claiming to be her sister-in-law and the father of her newly born child. This mother is somehow sent home without her baby, and she is promised that the baby will arrive in the next few days. She is told that to get her child back she must sign papers, which she promptly does. Unbeknownst to the mother, she is signing away her rights to the child and consenting to the international adoption of her newly born baby.

Although this story may seem unreal, it is not.<sup>1</sup> Elena Almada, the birth mother of this child, is now left to wade through the legal quagmire that birth parents, whose rights have been trampled on, face in international adoption.<sup>2</sup>

The concept that a child could be taken away from a birth parent merely by a signature is a strange and unbelievable concept to many foreign birth parents.<sup>3</sup> Some foreign mothers, who are taught from a very

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<sup>1</sup> See Diana Jean Schemo, *Adoptions in Paraguay: Mothers Cry Theft*, N.Y. TIMES, Mar. 19, 1996, at A1.

<sup>2</sup> *Id.*

<sup>3</sup> See Jini L. Roby, *Understanding Sending Country’s Traditions and Policies in International Adoptions: Avoiding Legal and Cultural Pitfalls*, 6 J.L. & FAM. STUD. 303, 304 (2004). One example of an unclear understanding of the international adoption process occurred in the Marshall Islands. *Id.* at 303–04. A woman who had been raised to always respect figures of authority thought it would be a breach of a promise not to sign the adoption papers. *Id.* at 304. Furthermore, “in the Marshallese culture adoption only

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early age to respect authority and to adhere to promises made, are often coerced into signing away the rights to their children by those who are fully aware of the mothers' respect for authority.<sup>4</sup>

Recent developments in international adoption law, while concentrating primarily on the best interests of the adopted children, do not go far enough to protect the rights of the birth parents, as these bodies of law do not adequately prevent children from being adopted who are not truly orphaned,<sup>5</sup> protect the birth parents from being misinformed about the rights that they are surrendering,<sup>6</sup> or prohibit black-market "baby selling." To sufficiently protect the rights of all parties, the promise of the Hague Convention<sup>7</sup> must be fulfilled by implementing the provisions of this treaty and modifying it to include penalties for violations of its purposes, pending U.S. law must be enacted, birth parents should be given more power to choose the destinies of their children, and criminal punishments must be imposed for those who participate in the black market and the manipulation of birth parents.

This Comment discusses the adequacy of protection of birth parent rights in international adoption. Part I discusses broadly the history of international adoption, especially as it relates to the issues and problems arising from international adoption, and the Hague Convention and its purposes. Part II focuses on the law currently in place to regulate international adoption, and those laws that are pending but have not yet taken effect. Finally, Part III focuses on three issues that affect birth parents in international adoption: (1) a child must qualify as an orphan in order to be adopted internationally; (2) birth parents may be misinformed in the process of international adoption, and it is very difficult for them to remedy fraud or deceit; and (3) the black market prevails in the

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bridged two families together to bring up children," and so this woman relinquished rights to her child with an incorrect understanding of the process. *Id.*

<sup>4</sup> *See id.*

<sup>5</sup> *See* Immigration and Nationality Act of 1965, 8 U.S.C. § 1101(b)(1)(F)(i) (2000). This Act defines an orphan as one who is "under the age of sixteen at the time [an adoption] petition is filed . . . [and] 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." *Id.*

<sup>6</sup> *See* Schemo, *supra* note 1.

<sup>7</sup> Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, May 29, 1993, S. TREATY DOC. NO. 150-52, 1870 U.N.T.S. 167 [hereinafter Hague Convention].

international adoption arena, and many birth parents feel pressured into selling their children “for a better life” without fully understanding the consequences.

## I. BACKGROUND

### A. *A Brief History of International Adoption and the Reasons for Its Existence.*

International adoption,<sup>8</sup> although not an entirely recent phenomenon,<sup>9</sup> has increased considerably over the past decade.<sup>10</sup> Even though the number of international adoptions has more than doubled over this time period, the same cannot be said for domestic adoptions, which have actually decreased.<sup>11</sup> This indicates that domestic adoptions have, to some extent, been substituted by international adoptions.<sup>12</sup> International adoption has become the preferred method of adoption for many people for many reasons, including assumptions and fears about domestic adoption versus international adoption, which may or may not be valid.<sup>13</sup> One major factor is the lack of adoptable, healthy Caucasian babies.<sup>14</sup> In the past, white women were, traditionally, “the largest demographic to surrender children for adoption,” but that number has dropped to below two percent.<sup>15</sup> The drop in available children<sup>16</sup> has also been attributed to

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<sup>8</sup> International Adoption is the process by which a child is adopted from a sending country by a person in the receiving country. See Alison Fleisher, Comment, *The Decline of Domestic Adoption: Intercountry Adoption as a Response to Local Adoption Laws and Proposals to Foster Domestic Adoption*, 13 S. CAL. REV. L. & WOMEN'S STUD. 171, 187–89 (2003). It requires that the sending country relinquish rights to the child and that the receiving country legally accept the child as one of its own citizens. See *id.*

<sup>9</sup> See *id.* at 176.

<sup>10</sup> See *id.* at 172–73 (discussing the fact that international adoptions more than doubled from 1991 to 2001).

<sup>11</sup> *Id.* at 173.

<sup>12</sup> *Id.* This trend has contributed to the large number of children in American foster homes. *Id.* The number of children in foster care increased by more than sixty percent between 1986 and 1994, and has continued to grow. *Id.*

<sup>13</sup> See Jordana P. Simov, *The Effects of Intercountry Adoptions on Biological Parents' Rights*, 22 LOY. L.A. INT'L & COMP. L. REV. 251, 251 (1999) (discussing the fact that many adoptive parents choose international adoptions because they believe the biological parents will not sue for visitation rights or custody).

<sup>14</sup> Donovan M. Steltzner, *Intercountry Adoption: Toward a Regime that Recognizes the “Best Interests” of Adoptive Parents*, 35 CASE W. RES. J. INT'L L. 113, 118 (2003).

<sup>15</sup> *Id.*

factors such as the increase in acceptance and use of contraception, the legality of abortion, and the trend of single parents keeping their children because it is more acceptable in present society.<sup>17</sup>

Furthermore, even though an adoptive parent generally waits four to eighteen months to adopt a “special-needs” child, that same parent may wait as long as seven to ten years to adopt a healthy, white infant.<sup>18</sup> This problem is compounded by the fact that only thirty-two percent of the children eligible for adoption are white.<sup>19</sup>

Aside from the lack of adoptable infants, many adoptive parents also choose the international system of adoption to avoid unwanted interference by birth parents.<sup>20</sup> Some foreign countries also have much more lenient requirements for the adoptive parents, especially in terms of that parent’s age or sexual orientation.<sup>21</sup>

International adoption also has been presented as a solution to the disparity between the great number of orphaned children in some countries and the number of families in other countries who are hoping to adopt children.<sup>22</sup> The potential adoptive families may turn to international adoption because they may not be able to accomplish this within a reasonable time in their own country.<sup>23</sup> People view adoption as a much better alternative than a child becoming a “street” child,<sup>24</sup> and it is estimated that there are about one hundred million of these children in the

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<sup>16</sup> This drop in available children is generally based on the shortage of healthy white infants. *Id.* There are still significant numbers of children who are available for adoption domestically, but this group is comprised of mainly minority children. *Id.*

<sup>17</sup> Bridget M. Hubing, Comment, *International Child Adoptions: Who Should Decide What is in the Best Interests of the Family?*, 15 NOTRE DAME J.L. ETHICS & PUB. POL’Y 655, 659 (2001).

<sup>18</sup> Stelzner, *supra* note 14.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 120. Stelzner noted the highly publicized cases (such as “Baby Richard” and “Baby Jessica”) were to blame for much of the misperceptions that potential adoptive parents have about unwanted birth parent interference. *Id.*

<sup>21</sup> *Id.* at 121.

<sup>22</sup> See Sara R. Wallace, Comment, *International Adoption: The Most Logical Solution to the Disparity Between the Numbers of Orphaned and Abandoned Children in Some Countries and Families and Individuals Wishing to Adopt in Others?*, 20 ARIZ. J. INT’L & COMP. L. 689, 690 (2003).

<sup>23</sup> See Stelzner, *supra* note 14, at 119.

<sup>24</sup> Hubing, *supra* note 17, at 664–65.

world.<sup>25</sup> Parentless children are also especially vulnerable to global ailments such as starvation, lack of shelter, contaminated water, and poor sanitation.<sup>26</sup> Many children are left parentless due to events such as war, famine, disease, or crime, all of which can either irretrievably separate the child from the parent, or orphan the child when the parent dies.<sup>27</sup> Surely, adopting a child internationally is a better alternative than allowing this same child to wander the streets or to die of starvation and lack of care.<sup>28</sup>

### *B. Problems in International Adoption*

Unfortunately, the international adoption process is not without a myriad of problems. Many children that are adopted internationally have been institutionalized for prolonged periods of time,<sup>29</sup> and this institutionalization can be extremely detrimental to a child's emotional, mental, and physical health.<sup>30</sup> On average, for each five-month period that a child spends institutionalized, that child will physically exhibit a one-month growth delay.<sup>31</sup>

As a result of cover-ups by international agencies regarding adopted children's health problems, the tort of "wrongful adoption" has been recognized with respect to international adoptions.<sup>32</sup> In one District of Columbia case, a court held that an adoption agency has a minimal

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<sup>25</sup> Lynn D. Wardle, *Parentlessness: Adoption Problems, Paradigms, Policies, and Parameters*, 4 WHITTIER J. CHILD & FAM. ADVOC. 323, 325 (2005).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 330.

<sup>28</sup> See Hubing, *supra* note 17, at 664–65.

<sup>29</sup> See Lisa H. Alberts et al., *Health of Children Adopted From the Former Soviet Union and Eastern Europe: Comparison With Preadoptive Medical Records*, 278 J. AM. MED. ASS'N 922, 922 (1997).

<sup>30</sup> *Id.* at 924.

<sup>31</sup> *Id.* at 922.

<sup>32</sup> Compare *Ferenc v. World Child, Inc.*, 977 F. Supp. 56, 59 (D.D.C. 1997) (acknowledging that the District of Columbia had not yet formally recognized wrongful adoption as a tort, but assuming that the claim was actionable based on its analogy to wrongful birth and the fact that other jurisdictions had recognized the tort), with *Sherman v. Adoption Ctr. of Wash., Inc.*, 741 A.2d 1031, 1033 (D.C. 1999) (affirming the trial court's judgment in favor of an adoption agency on a claim for wrongful adoption). However, the first court to recognize the tort of wrongful adoption in a domestic adoption was the Ohio Supreme Court in a case where the caseworker failed to disclose both the adopted child's true medical history as well as the history of the biological parents, who were both mental patients. *Burr v. Bd. of County Comm'rs of Stark County*, 491 N.E.2d 1101, 1105–06 (Ohio 1986).

contractual duty to provide adoptive parents with medical information concerning the child,<sup>33</sup> but in another case the court found that an international adoption agency did not have a duty to verify a potential adoptee's information.<sup>34</sup> Thus, it is speculative as to whether adoptive parents will have any remedy at law for a child adopted internationally that manifests severe health problems because it depends on the facts of their individual cases.

Parents intimidated by the complexities of domestic adoptions will not find relief in the international arena. International adoptions are complex because of "the need to adhere to the laws of three separate jurisdictions: United States federal immigration law; laws governing adoption in the state in which the adoptive parents reside; and the laws regarding adoption in the foreign state."<sup>35</sup> The foreign entity presents the most formidable challenges as a result of bureaucracy and corruption, which may cause frequent change in the laws and regulations of these governments.<sup>36</sup>

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<sup>33</sup> The court recognized that although an adoption agency may, in some cases, have a duty to investigate the background of prospective adoptees with reasonable care, that duty originates "in the contractual relationship between the parents and the agency, and [therefore] its scope may, by agreement of the parties, be varied by the terms of the contract." *Ferenc*, 977 F. Supp. at 60. Because the contract in this case between the adoptive parents and the agency diminished the agency's investigatory responsibility, the court granted summary judgment in favor of the agency. *Id.* at 61.

<sup>34</sup> *Sherman*, 741 A.2d at 1036. The court attributed causation at least partially to the adoptive parents, stating,

[E]ven if defendants had fallen somehow short of 'best efforts' to obtain medical information, a conclusion the record does not support, causation could not be proven when [the adoptive parent] hastened to proceed with an adoption aware both through the cautionary contract language and her own research of the risks the decision involved.

*Id.* The court dismissed the breach of contract claim against the international adoption agency, because the adoptive parent failed to establish causation. *Id.*

<sup>35</sup> Simov, *supra* note 13, at 251.

<sup>36</sup> Elizabeth Bartholet, *International Adoption: Overview*, in 2 ADOPTION L. & PRAC. § 10.03(1)(a)(iii) (2005). Adoptive parents sometimes must wade through a significant amount of bureaucracy and red tape. *Id.* It can be the case that the adoptive parents may not be able to get complete information about the child they are adopting, including medical records and family history. *Id.* § 10.03(1)(b)(ii). Furthermore, moratoriums and changes in foreign law can halt the processes of foreign adoption, even when the child is very close to being adopted. *See infra* notes 62–79 and accompanying text.

### C. Challenges Faced by Birth Parents

Aside from the problems facing potential adoptive parents, the birth parents are the group who likely suffer most as a result of corruption in the adoption process.<sup>37</sup> Due to the large number of children who are eligible to be adopted internationally and the growing demand for these children, a birth mother has less control over the process itself.<sup>38</sup> In fact, once a child is adopted internationally, the chances of a birth parent reclaiming that child are almost nonexistent.<sup>39</sup> This is because of the requirement that the child must “legally qualify as an ‘orphan,’ or ties [between the child and the birth parents] must be irrevocably severed in writing before the child can be adopted.”<sup>40</sup> American law makes it nearly impossible for a foreign birth parent who has been subjected to illegal or fraudulent practices to assert his or her rights, as this body of law is designed to cut all ties between the birth parent and the adoptee.<sup>41</sup>

In the gray area between a legal adoption and a black-market adoption is the practice of baby selling.<sup>42</sup> Countries such as South Korea,

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<sup>37</sup> See 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, 410–11 (2000) (discussing how pregnant women are coerced into giving up their children for adoption).

<sup>38</sup> Fleisher, *supra* note 8, at 190.

<sup>39</sup> *Id.* Even though finality in adoption is generally desirable, there are circumstances where permanency concerns should be evaluated in the context of birth parents who are entitled to have their children returned to them because of duress, coercion, or misunderstanding.

<sup>40</sup> *Id.* (citing Intercountry Adoption Act of 2002, H.R. 2909, 106th Cong. § 1 (2000)).

<sup>41</sup> See 8 U.S.C. § 1101(b)(1)(F)(i) (2000). The statute requires that a child be an orphan, which occurs by “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.” *Id.* The language of this statute states unequivocally that either the child must not have any parents due to the circumstances listed, or the child must be released irrevocably by the birth parents. See *id.* The impression of finality in this statute indicates that international adoptions are intended to be irrevocable. This is another reason that adoptive parents sometimes prefer international adoption over domestic adoption, as there is much less fear of birth parent interference. See *supra* note 20 and accompanying text.

<sup>42</sup> Holly C. Kennard, Comment, *Curtailing the Sale and Trafficking of Children: A Discussion of the Hague Conference Convention in Respect of Intercountry Adoptions*, 14 U. PA. J. INT’L BUS. L. 623, 627–29 (1994). Baby selling is a process where a lawyer, social worker, or agency worker may actively seek out expectant mothers to fill their demands for adoptions and encourage them to sell their baby for a fee. *Id.*

Guatemala, and Honduras are typical targets for baby selling, as it provides much-needed capital for these poor countries.<sup>43</sup> For example, in Guatemala, lawyers, in the absence of supervision by the state, have become the biggest offenders in baby selling.<sup>44</sup> They may be paid large sums of money for each adoption, and this can lead to the intimidation and coercion of pregnant women who are generally impoverished, not to mention uneducated about their rights.<sup>45</sup> Many birth parents may feel that there is no other choice than to “sell” their children, as it is likely that the birth parents will not be able to provide for that child’s care. These pregnant women are often offered incentives, including the payment of hospital bills—a luxury the birth mother would likely be unable to afford.<sup>46</sup> To compound this problem, if a birth mother changes her mind about giving up her baby for adoption, she may be threatened into submission by the lawyer or even by her husband who is eager for the commission.<sup>47</sup>

The disadvantaged position of birth parents is not only taken advantage of in legal adoptions; uninformed and uneducated birth parents are also the main target for the black market.<sup>48</sup> The process in a legal adoption involves the issuance of a new birth certificate to the adoptive parents that bears their names.<sup>49</sup> In a black-market adoption, the baby is illegally sold for a fee, and then one of two events happens: a birth certificate is issued to the adoptive parents as if there was never actually an adoption, or a new birth certificate is issued with the adoptive parents’ names printed on it.<sup>50</sup> In a standard black-market adoption, the birth mother is usually able to stay with the doctor until the birth of the child, and she is then free to return home without anyone knowing about the birth of the baby.<sup>51</sup> The

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<sup>43</sup> *Id.* at 626 (discussing that international adoptions yield \$15–20 million annually for South Korea, \$5 million for Guatemala, and approximately \$2 million for Honduras).

<sup>44</sup> Graff, *supra* note 37, 409–10.

<sup>45</sup> *Id.* at 410.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 410–11.

<sup>48</sup> See Kennard, *supra* note 42, at 628–29.

<sup>49</sup> Johnathan 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).

<sup>50</sup> *Id.*

<sup>51</sup> M. Haviland, *Black Market Adoption*, ADOPTION FORUM, <http://www.adoptionforum.org/Library/Articles/BlackMarketAdoption.pdf> (last visited Apr. 4, 2007) (discussing the process of black-market adoptions so that a child adopted by this process may be able to find his or her birth parents).

doctor generally then sells the baby to the adoptive parents and issues a birth certificate as if the adoptive parents were the biological parents of that child, thus dispensing with the need for a legal adoption.<sup>52</sup>

In the international arena, black-market adoptions can follow the same general process and raise the same issues, as prospective parents seek to adopt internationally from “impoverished, war-torn countries [that are] anxious for hard currency.”<sup>53</sup> The black market practice may be a result of “weak adoption laws in developing nations, and [of] corrupt intermediaries who are driven by personal financial gain. These intermediaries coerce birthmothers to relinquish legal rights to their babies with financial inducements . . . .”<sup>54</sup> The obstacles faced by birth mothers seem insurmountable, especially in the face of an unsympathetic international community.

## II. CURRENT LAW

### A. *Governing United States Law*

International adoptions coming into the United States are currently governed by the requirements laid out by the U.S. Immigration and Nationality Act (INA).<sup>55</sup> There are two determinations in the process of international adoptions.<sup>56</sup> The first is an application that assesses the prospective adoptive parents’ ability to provide “a proper home environment” and on the suitability of the parent.<sup>57</sup> The child must also qualify as an orphan under the INA’s definition.<sup>58</sup> This determination is necessary to ensure that all legal ties have been severed that would prevent the child’s adoption from being completed.<sup>59</sup> The United States has a great deal of pending law that has yet to be implemented,<sup>60</sup> but at this point, all procedures are governed by the INA’s requirements.<sup>61</sup>

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<sup>52</sup> *Id.*

<sup>53</sup> Kennard, *supra* note 42, at 626.

<sup>54</sup> Jennifer M. Lippold, *Transnational Adoption from an American Perspective: The Need for Universal Uniformity*, 27 CASE W. RES. J. INT’L L. 465, 487 (1995).

<sup>55</sup> Immigration and Nationality Act of 1965, 8 U.S.C. §§ 1101–1537 (2000).

<sup>56</sup> *See* 8 C.F.R. § 204.3(a)(2) (2006).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* For the definition of an orphan under the Immigration and Nationality Act, see *supra* note 5 and accompanying text.

<sup>59</sup> *See* 8 U.S.C. § 1101(b)(1)(F)(i).

<sup>60</sup> *See infra* notes 82–129 and accompanying text.

<sup>61</sup> *See* 8 C.F.R. § 204.3(a)(2).

*B. Foreign Law*

The United States is not the only country to take steps to regulate the international adoption arena, and those countries that have adopted the Hague Convention are arguably ahead of the United States in standardizing the international adoption process and imposing safeguards for birth parents. Korea is one country that has made efforts to facilitate adoptions that comply with the Hague Convention.<sup>62</sup> Korea has allowed for the termination of parental rights when parents no longer want to raise their child.<sup>63</sup> Furthermore, Korea is considering applying the same rules in governing adoptions to both Korean citizens and ethnic Koreans who are not Korean citizens.<sup>64</sup> Korea appears to highly favor the granting of adoption of Korean children to those who are of Korean ethnicity, whether or not they are actually Korean citizens.<sup>65</sup>

The Philippines have also taken measures to promote domestic adoption in developing educational programs geared toward placing children first with family members and, secondly, within the country.<sup>66</sup> International adoption is only considered when no adoptive home in the Philippines can be obtained for the child.<sup>67</sup>

Russia has implemented what it believes to be safeguards to protect corruption in the system.<sup>68</sup> Coming close to putting a complete moratorium on international adoptions, in January 2005, lawmakers instead passed a law that increased the time a child must be listed in the federal database before being adoptable internationally from three to six months.<sup>69</sup> This has been met with sharp criticism, and it has been suggested that a better solution would be to work toward the ratification of the Hague Convention, or to end the practice of independent adoption that poses the greatest threat for corruption.<sup>70</sup>

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<sup>62</sup> See Bae Keun-min, *Counseling Mandatory for Abusive Parents*, KOREA TIMES, May 3, 2005, <http://times.hankooki.com/lpage/200505/kt2005050316383810160.htm>.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> See *id.*

<sup>66</sup> See Jini L. Roby & Kristen Payne Whittenburg, *The Feasibility of Intrafamily and In-Country Adoptions in the Marshall Islands*, 86 FAMS. SOC'Y: J. CONTEMP. SOC. SERVICES 547, 549 (2005).

<sup>67</sup> *Id.*

<sup>68</sup> See Ann Hornaday, *Don't End Their Hope of a Home*, WASH. POST, Sept. 16, 2005, at A31.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

As a result of trafficking concerns, a suspension on Cambodian international adoption was imposed in 2001.<sup>71</sup> This was in response to “widespread evidence of fraud” that was discovered at the time.<sup>72</sup> As a result of private entities dominating a market that had little or no government oversight, the United States Citizenship and Immigration Services (USCIS) began refusing to grant visas to children adopted from Cambodia.<sup>73</sup> The corruption in Cambodia is a good example of what happens when it becomes “impossible to tell whether the children most in need of homes [are] being adopted, or whether the system of facilitators [has begun] to actually generate children who would be more desirable from an adoption point of view.”<sup>74</sup>

Perhaps the most extreme measure to protect the interests of an individual country has been in Romania.<sup>75</sup> This country has not only placed a moratorium on international adoption,<sup>76</sup> but it has also created legislation that considers international adoption only as a last resort, and allows it only for biological grandparents who live abroad.<sup>77</sup> Furthermore, only the court has the ability to decide the appropriate time, if ever, for the initiation of domestic adoptions after a determination that there is no possibility that the child will be placed with his or her family.<sup>78</sup> This policy has resulted in an increased number of children being institutionalized, and it has been met with a great deal of criticism because

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<sup>71</sup> *Intercountry Adoption: Important Update Regarding Cambodia Adoptions*, U.S. DEPT. OF STATE, BUREAU OF CONSULAR AFFS., Feb. 12, 2002, [http://travel.state.gov/family/adoption/country/country\\_361.html](http://travel.state.gov/family/adoption/country/country_361.html).

<sup>72</sup> *Update—Cambodia*, APR. 2004 NEWSLETTER (Ams. Adopting Orphans, Seattle, Wash.), Apr. 2004, at 4, available at <http://www.orphans.com/newsletters/2004-04.pdf>.

<sup>73</sup> Sara Dillon, *Making Legal Regimes For Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption*, 21 B.U. INT’L L.J. 179, 244 (2003).

<sup>74</sup> *Id.* at 246.

<sup>75</sup> See *International Adoption: Update of Romanian Moratorium on International Adoption*, U.S. DEPT. OF STATE, BUREAU OF CONSULAR AFFS., June 10, 2004, [http://travel.state.gov/family/adoption/notices/notices\\_2211.html](http://travel.state.gov/family/adoption/notices/notices_2211.html).

<sup>76</sup> *Id.*

<sup>77</sup> *In the Best Interest of the Children? Romania’s Ban on Inter-Country Adoption: Hearing Before the Commission on Security and Cooperation in Europe*, 109th Cong. 22 (2005) (statement of Sorin Ducaru, Ambassador of Romania to the United States).

<sup>78</sup> *Id.* at 22–23.

there are many American parents who were either waiting to adopt from Romania or willing to do so.<sup>79</sup>

Even though it appears that many of the measures taken by the above mentioned countries are primarily based on ethnocentrism,<sup>80</sup> these measures have the ancillary effect of offering some protection to birth parents against the black market. The provisions, which require a search for adoptive parents within the child's country of origin, mirror the Hague Convention's requirement that "possibilities for placement of the child within the State of origin have been given due consideration."<sup>81</sup>

These foreign laws and policies may be a reaction to what many believe is the exploitation of poorer countries in the black market, and to the large number of children adopted from these countries. However, the ethnocentric provisions in these laws recognize and emphasize the importance of a child's cultural heritage.

### III. PENDING LAW

#### A. *The Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*

The Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, a treaty discussing the rights of children being adopted internationally, concluded on May 29, 1993, and entered into force on May 1, 1995.<sup>82</sup> Currently, seventy-one countries have become parties to the Hague Convention, and three have signed but have not ratified.<sup>83</sup> The United States signed the convention on March 31, 1994, which was an indication that it planned to work toward ratifying the Convention.<sup>84</sup> However, the United States' efforts in implementing the

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<sup>79</sup> See *id.* at 11–12.

<sup>80</sup> Ethnocentric means "[r]egarding one's own race or ethnic group as of supreme importance." OXFORD ENGLISH DICTIONARY 424 (2nd ed. 1989). Ethnocentrism is evidenced in the belief that a child of these countries should only be adopted by someone of the same national origin.

<sup>81</sup> Hague Convention, *supra* note 7, art. IV(b).

<sup>82</sup> Hague Convention on Private International Law, Full Text, [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=69](http://www.hcch.net/index_en.php?act=conventions.text&cid=69) (last visited Apr. 4, 2007).

<sup>83</sup> Hague Convention on Private International Law, Status Table, [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=69](http://www.hcch.net/index_en.php?act=conventions.status&cid=69) (last visited Apr. 4, 2007).

<sup>84</sup> *Hague Convention on Intercountry Adoption and the Intercountry Adoption Act of 2000: Background*, U.S. DEPT. OF STATE, BUREAU OF CONSULAR AFFS., Mar. 2006, [http://travel.state.gov/family/adoption/convention/convention\\_2290.html](http://travel.state.gov/family/adoption/convention/convention_2290.html).

provisions of the Hague Convention have stalled, and it has yet to be ratified.<sup>85</sup> This delay is unfortunate because the Convention contains provisions that prohibit baby selling and require informed consent from birth parents.<sup>86</sup>

The objectives of the Hague Convention are:

(a) to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law; (b) to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent abduction, the sale of, or traffic in children; (c) to secure the recognition of Contracting States of adoptions made in accordance with the Convention.<sup>87</sup>

Furthermore, the Convention ensures that adoption can only take place if the authorities in the State of Origin “have established that the child is adoptable,”<sup>88</sup> and have ensured that “the persons, institutions and authorities whose consent is necessary for adoption, have been counseled as may be necessary and duly informed of the effects of their consent.”<sup>89</sup> It also requires that

such persons, institutions and authorities have given their consent freely, in the required legal form, and expressed or evidenced in writing, the consents have not been induced by payment or compensation of any kind and have not been withdrawn, and the consent of the mother, where required, has been given only after the birth of the child.<sup>90</sup>

This expressly prohibits the practice of intimidation<sup>91</sup> and black-market baby selling.<sup>92</sup>

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<sup>85</sup> *The International Adoption Scam*, TAMPA TRIB., Sept. 3, 2005, at 14, available at 2005 WLNR 14091887.

<sup>86</sup> See Hague Convention, *supra* note 7, art. IV.

<sup>87</sup> *Id.* art. I.

<sup>88</sup> *Id.* art. IV(a).

<sup>89</sup> *Id.* art. IV(c)(1).

<sup>90</sup> *Id.* art. IV(c)(2)–(4).

<sup>91</sup> See Nicole Bartner Graff, Note, *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, 424 (2000) (discussing the Article 4(c)(4) consent requirements and the  
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Another ancillary provision that indirectly protects the rights of birth parents is Article 4(b) of the Hague Convention. This article requires a determination, “*after* possibilities for placement of the child within the State of origin have been given due consideration,” that the best interests of the child are fulfilled by international adoption.<sup>93</sup> Even though seemingly based on concerns of ethnocentrism, it is likely that this provision offers some protection for birth parents, as placement with relatives or open adoptions must first be considered within the country of origin before international adoption can be an option, thus giving the birth parents more control over the destinies of their children.<sup>94</sup>

*B. The Intercountry Adoption Act of 2000*

The Intercountry Adoption Act of 2000 (IAA),<sup>95</sup> created for the purpose of implementing the Hague Convention,<sup>96</sup> also has yet to come into force, as most of the provisions take effect only upon the ratification of the Hague Convention by the United States.<sup>97</sup> The stated purposes of this Act are:

- (1) to provide for implementation by the United States of the [Hague] Convention; (2) to protect the rights of, and

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belief that it will effectively limit pressure by baby brokers on birth mothers to surrender a child after birth).

<sup>92</sup> See Shannon Thompson, Note, *The 1998 Russian Federation Family Code Provisions on Intercountry Adoption Break the Hague Convention Ratification Gridlock: What Next? An Analysis of Post-Ratification Ramifications on Securing a Uniform Process of International Adoption*, 9 *TRANSNAT'L L. & CONTEMP. PROBS.* 703, 719 (1999) (detailing how States will accept only adoptions that comply with Convention mandates).

<sup>93</sup> See Hague Convention, *supra* note 7, art. IV(b) [emphasis added].

<sup>94</sup> Placing children with family often allows birth parents to remain in contact with their children. See Megan M. O’Laughlin, Note, *A Theory of Relativity: Kinship Foster Care May Be the Key to Stopping the Pendulum of Terminations vs. Reunification*, 51 *VAND. L. REV.* 1427, 1451 (1998). In addition, open adoptions are structured to provide more types of contact with children, and this contact helps birth parents feel more in control of the adoption process. See Tammy M. Somogye, Comment, *Opening Minds to Open Adoption*, 45 *U. KAN. L. REV.* 619, 628 (1997). See also Marja E. Selmann, Comment, *For the Sake of the Child: Moving Toward Uniformity in Adoption Law*, 69 *WASH. L. REV.* 841, 864 (1994).

<sup>95</sup> Intercountry Adoption Act of 2000, 42 U.S.C. §§ 14901–54 (2000).

<sup>96</sup> *Id.* § 14901(b)(1).

<sup>97</sup> Intercountry Adoption Act of 2000, Pub. L. No. 106-279, Title V, § 505, 114 Stat. 844 (codified at 42 U.S.C. § 14901).

prevent abuses against, children, birth families, and adoptive parents involved in adoptions (or prospective adoptions) subject to the [Hague] Convention, and to ensure that such adoptions are in the children's best interests; and (3) to improve the ability of the Federal Government to assist United States citizens seeking to adopt children from abroad and residents of other countries party to the [Hague] Convention seeking to adopt children from the United States.<sup>98</sup>

This Act also provides for a central authority, and for this purpose chooses the Department of State to perform all functions under the Convention and the Act.<sup>99</sup> The function of this Act seems to be the creation of one central clearinghouse to which all international adoption agencies will be responsible. These agencies and persons providing adoption services also must be accredited by an accrediting agency<sup>100</sup> and are subject to strict oversight and approval requirements.<sup>101</sup> The Secretary of State retains the power to suspend or cancel accreditation to an entity if that agency is out of compliance with the requirements,<sup>102</sup> or may temporarily or permanently disbar an agency if there is substantial evidence that the agency is not complying with requirements and there is a pattern of willful or grossly negligent failure to comply.<sup>103</sup> The IAA will promulgate important safeguards against the corruption that exists in the international adoption business. Upon ratification of the Hague Convention, the IAA may help to clarify what is and is not acceptable in the practice of international adoption and, more importantly, make all agencies accountable to a higher power—the United States Department of State.

*C. The Intercountry Adoption Act of 2000 and Its Federal Regulations*

The development of international adoption law seems to be ever-changing. Since the drafting of the Hague Convention in 1993, the United States has attempted to implement its provisions with the IAA and to supplement its terms to make it workable.<sup>104</sup> Perhaps the most important

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<sup>98</sup> 42 U.S.C. § 14901(b).

<sup>99</sup> *Id.* § 14911(a)(1).

<sup>100</sup> *Id.* § 14921(a)(1).

<sup>101</sup> *Id.* §§ 14922–24.

<sup>102</sup> *Id.* § 14924(b)(1)(A).

<sup>103</sup> *Id.* § 14924(c)(1)(A)–(B).

<sup>104</sup> *See* 22 C.F.R. §§ 96.1–96.111 (2006).

tools in putting the Hague Convention and the IAA into practice are the Federal Regulations that will become binding once the Hague Convention is ratified. Rules have been proposed that will hopefully establish “procedures that the Department [of State] will use to designate accrediting entities for the purpose of evaluating agencies and persons and determining if they may be granted accreditation or approval . . . [and] procedures and standards to accredit agencies and approve persons to provide adoption services in Convention cases.”<sup>105</sup> On February 15, 2006, the United States issued final rules on the accrediting of international adoption agencies, which took effect on March 17, 2006.<sup>106</sup> Most recently, in July 2006, the State Department named the Council on Accreditation and the Colorado Department of Human Resources as the “entities responsible for accrediting nonprofit agencies or other providers to handle adoptions between countries that have implemented the Hague Convention.”<sup>107</sup> This is a necessary step in working toward implementation of the Hague Convention.

With respect to the Hague Convention, in September 2000, when the Senate gave its advice and consent, it was subject to the following condition: “The President shall not deposit the instrument of ratification for the Convention until such time as the Federal law implementing the Convention is enacted and the United States is able to carry out all the obligations of the Convention, as required by its implementing legislation.”<sup>108</sup> One of the most important provisions in the regulations implementing the Hague Convention concerns the black market. The “Prohibition on Child Buying” regulation states that the agency must prohibit “its employees and agents from giving money or other consideration, directly or indirectly, to a child’s parent(s), other individual(s), or an entity as payment for the child or as an inducement to release the child.”<sup>109</sup> However, an agency

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<sup>105</sup> 68 Fed. Reg. 54064 (proposed Sept. 15, 2003) (codified at 22 C.F.R. pt. 96).

<sup>106</sup> *State Department Issues Final Rules on Intercountry Adoption*, U.S. DEPT. OF STATE, Feb. 16, 2006, <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2006&m=February&x=20060216142905mvyelwar0.1766016>.

<sup>107</sup> *State Dept.: U.S. Closer to Implementing International Adoption Convention*, U.S. FED. NEWS, July 27, 2006, available at 2006 WLNR 13027511.

<sup>108</sup> 68 Fed. Reg. 54066 (Sept. 15, 2003) (codified at 22 C.F.R. pt. 96) (quoting 146 CONG. REC. S8866 (daily ed. Sept. 20, 2000)).

<sup>109</sup> 22 C.F.R. § 96.36 (2006). Most importantly, these regulations require, not only that no person engage in child buying, but that the “agency or person has written policies and procedures in place reflecting the prohibitions” against child buying or any related practice.

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[i]f permitted or required by the child's country of origin, . . . may remit reasonable payments for activities related to the adoption proceedings, pre-birth and birth medical costs, the care of the child, the care of the birth mother while pregnant and immediately following birth of the child, or the provision of child welfare and child protection services generally.<sup>110</sup>

This provision attempts to protect the birth parent by making it clear that an agency is prohibited from any transaction that would resemble black-market baby selling. In addition to the prohibitions on baby selling, these regulations implementing the Hague Convention also permit the birth parents, potential adoptive parents, and adoptees to lodge complaints concerning the agencies' services.<sup>111</sup> The regulations implementing the Hague Convention also require that the agency complained of respond to all complaints within thirty days, and furthermore, that agencies must respond more quickly when materials are "time-sensitive" or when there are "allegations of fraud."<sup>112</sup>

#### *D. Intercountry Adoption Reform Act of 2003*

In 2003, Congress proposed the Intercountry Adoption Reform Act of 2003 (ICARE) for the purpose of establishing "an Office of Intercountry Adoptions within the Department of State, and to reform United States laws governing intercountry adoptions."<sup>113</sup> This Act is not designed to override the provisions contained in the Hague Convention or the IAA; it was drafted for the purpose of complementing and supporting the reforms under the IAA.<sup>114</sup> Because "the IAA designated the State Department as the central authority under the Hague [Convention] but did not create an infrastructure under which the State Department could carry out that

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*Id.* This provision is incredibly important, as it makes agencies accountable by requiring the inclusion of rules against child buying, and prevents an agency using ignorance of the law as an excuse for engaging in prohibited practices.

<sup>110</sup> *Id.*

<sup>111</sup> 22 C.F.R. § 96.41. Any of these parties must be permitted to lodge a complaint or appeal about any of the services or activities of the agency or person that he believes are inconsistent with the Convention, the IAA, or the regulations implementing the IAA. *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> Intercountry Adoption Reform Act of 2003, S. 1934, 108th Cong. (2003) [hereinafter ICARE].

<sup>114</sup> Pass ICARE, Intercountry Adoption Reform Act of 2006: Frequently Asked Questions, <http://www.passicare.com/FAQ.shtml> (last visited Apr. 4, 2007).

responsibility[,] . . . [t]he ICARE bill attempts to fill in those gaps.”<sup>115</sup> Another main purpose of this Act is “to ensure that foreign born children adopted by United States citizens will be treated identically to a biological child born abroad to the same citizen parent.”<sup>116</sup> In introducing the bill to the Senate, Senator Don Nickles stated, “As a child of an American citizen, the foreign adopted child should be treated as such, not as an immigrant.”<sup>117</sup> Senator Mary Landrieu’s introduction to the bill expressed concern over the restrictions and suspensions of international adoption in Cambodia, Guatemala, and Vietnam.<sup>118</sup> She said that in every one of those cases, “the foreign governments have expressed frustration with the lack of action on the part of the U.S. to limit corruption or close potential loopholes in the system[,]” and she hoped that this legislation would work to remedy this problem.<sup>119</sup> Senator Landrieu’s statements indicate that ICARE was proposed, at least in part, to deal with the problems posed by the black market and corruption by international adoption agents and agencies.<sup>120</sup> This is further evidenced by the definition of “full and final adoption” in the Act, which is defined as an adoption:

(A) that is completed under the laws of the child’s country of origin or the State law of the parent’s residence; (B) under which a person is granted full and legal custody of the adopted child; (C) that has the force and effect of severing the child’s legal ties to the child’s biological parents; (D) under which the adoptive parents meet the requirements of section 205 of the Intercountry Adoption Reform Act; and (E) under which the child has been adjudicated to be an adoptable child in accordance with section 206 of the Intercountry Adoption Reform Act.<sup>121</sup>

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<sup>115</sup> *Id.*

<sup>116</sup> ICARE, *supra* note 113, § 2(b)(1).

<sup>117</sup> 149 CONG. REC. S15591, 15,647 (daily ed. Nov. 23, 2003) (statement of Sen. Nickles).

<sup>118</sup> *See id.* at 15,652 (statement of Sen. Landrieu).

<sup>119</sup> *Id.*

<sup>120</sup> *See id.* (stating that the legislation would allow “the Office of International Adoptions [to] be able to take the proactive measures necessary to limit corruption and ensure that adoptions [were] performed in the most efficient, transparent manner possible”).

<sup>121</sup> ICARE, *supra* note 113, § 201(a)(4)(A)–(E).

This provision stresses that the child's legal ties must be severed according to the child's country of origin,<sup>122</sup> and that the child must have been adjudicated to be adoptable,<sup>123</sup> which evidences the concern with the corruption of the black market. ICARE, although drafted with primary concern for the adopted child's citizenship,<sup>124</sup> does provide minimal safeguards to deter against black-market adoptions.

*E. Uniform Adoption Act of 1994*

The Uniform Adoption Act of 1994 (UAA), drafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL), is a body of law that comes closest to recognizing the importance of each party in the adoption process. The NCCUSL recognizes that, in adoption, emotions tend to take the place of rationality; therefore, the UAA is intended to create "a framework that would protect each member of the adoption triad."<sup>125</sup> The UAA provides an exhaustive list of parties whose consent is required for the adoption, including the biological mother and her husband, any man who attempted to marry the biological mother before the minor's birth, or any man judicially determined to be the biological father.<sup>126</sup> In all cases, this man must have provided reasonable support for the child,<sup>127</sup> or he must have cared for the minor in his home and openly held out the minor as his child.<sup>128</sup> Furthermore, there are stringent requirements on the giving of consent: consent must be in writing and witnessed; it cannot be given until after the child is born; counseling must be available to the birth parent, and the birth parent must be fully apprised of all the consequences of the consent; baby selling cannot be involved as inducement of consent; and, above all, consent must be completely voluntary.<sup>129</sup> The provisions contained in the UAA are an example of a more stringent and regimented approach to adoption. Unfortunately, these laws, unless specifically adopted by a jurisdiction, are not binding because they are only one commission's suggestion as to what the law governing adoption should be.

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<sup>122</sup> *Id.* § 201(a)(4)(A).

<sup>123</sup> *Id.* § 201(a)(4)(E).

<sup>124</sup> *See id.* § 2(b)(1)–(2).

<sup>125</sup> Stein, *supra* note 49, at 53.

<sup>126</sup> *See* UNIF. ADOPTION ACT § 2-401(a)(1) (1994).

<sup>127</sup> *Id.* § 2-401(a)(1)(iii)(A).

<sup>128</sup> *Id.* § 2-401(a)(1)(iv).

<sup>129</sup> *See* Stein, *supra* note 49, at 56–57.

#### IV. THE FAILURES TO PROTECT BIRTH PARENTS IN THE INTERNATIONAL ADOPTION ARENA

The Hague Convention and the Intercountry Adoption Act of 2000, while concentrating primarily on the best interests of the adopted children, do not go far enough to protect the rights of the birth parents, as these bodies of law do not adequately prevent children from being adopted who are not truly orphaned, protect the birth parents being misinformed about the rights that they are surrendering, or prohibit black-market baby selling. To sufficiently protect the rights of all parties, the promise of the Hague Convention must be fulfilled by ratifying this treaty and modifying it to include penalties for violations of its purposes, pending U.S. law must be enacted, birth parents should be given more power to choose the destinies of their children, and criminal punishments must be imposed for those who participate in the black market and in the manipulation of birth parents.

##### A. *The “Orphan” Definition*

Before the adoption process even begins, perhaps the most important step that can be taken in moving towards more adequately protecting the rights of a birth parent is to make certain that the prospective adoptee is truly an orphaned child, or that the birth parents have unequivocally surrendered their rights to that child. The INA defines an orphan as

a child, under the age of sixteen at the time a[n] [adoption] petition is filed . . . 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.<sup>130</sup>

As a prerequisite to adoption, a potential adoptive parent must complete the form I-600 Petition to Classify an Orphan as an Immediate Relative.<sup>131</sup> This is for the purpose of deciding whether or not the child is truly an orphan, according to the INA’s definition.<sup>132</sup>

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<sup>130</sup> Immigration and Nationality Act of 1965, 8 U.S.C. § 1101(b)(1)(F)(i) (2000).

<sup>131</sup> See U.S. Citizenship and Immigration Services, Form I-600: Petition to Classify Orphan as an Immediate Relative, <http://www.uscis.gov/files/form/i-600.pdf> (last visited Apr. 4, 2007).

<sup>132</sup> *Id.*; see also 8 C.F.R. § 204.3(b) (2006).

The USCIS finds it of paramount importance to clearly explain each component part in the definition of orphan.<sup>133</sup> For instance, the death of a parent means that the “natural parents are deceased and . . . [the] [child] has not acquired another parent.”<sup>134</sup> For example, according to this definition, if a child’s parents are killed and the grandmother is appointed guardian, the child remains an orphan, but if the grandmother legally adopts the child, the child is no longer an orphan.<sup>135</sup> The USCIS explains the word “disappearance” in the orphan definition as when a

parent[] has unaccountably or inexplicably passed out of the child’s life; his and/or her and/or their whereabouts are unknown, there is no reasonable hope of reappearance, and there has been a reasonable effort to locate them as determined by a competent authority in accordance with the laws of the foreign-sending country.<sup>136</sup>

The primary evidence of parental disappearance is that the child is a ward of the state and the parents’ rights have been unconditionally divested.<sup>137</sup> “Abandonment,” according to the USCIS, happens when 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).”<sup>138</sup> The problem here is the possibility that a foreign jurisdiction’s definition of abandonment may not fulfill the requirements set forth by the INA.<sup>139</sup> As with the definition of “disappearance,” abandonment can be proven through a court decree which unconditionally divests the parents of all parental rights.<sup>140</sup> Desertion is similar to abandonment, but different in the sense that, for the former, it requires the state to take action and assume custody of the child.<sup>141</sup> Separation is defined as “involuntary severance of

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<sup>133</sup> See U.S. Citizenship and Immigration Services, Adjudicator’s Field Manual: Redacted Public Version, § (d)(3)(B)–(H), <http://www.uscis.gov/propub/ProPubVAP.jsp?dockey=9022f28e5f4e8ac87fa57e374a57e681> (last visited Apr. 8, 2007) [hereinafter Adjudicator’s Field Manual].

<sup>134</sup> *Id.* § (d)(3)(B).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* § (d)(3)(C); see also 8 C.F.R. § 204.3(b).

<sup>137</sup> See Adjudicator’s Field Manual, *supra* note 133, § (d)(3)(C).

<sup>138</sup> *Id.* § (d)(3)(D)(ii); see also 8 C.F.R. § 204.3(b).

<sup>139</sup> See Adjudicator’s Field Manual, *supra* note 133, § (d)(3)(D)(i).

<sup>140</sup> *Id.* § (d)(3)(D)(iv).

<sup>141</sup> *Id.* § (d)(3)(E); see also 8 C.F.R. § 204.3(b).

the child from his or her parent(s) by action of a competent authority for good cause and in accordance with the laws of the foreign-sending country,”<sup>142</sup> whereas loss is described as permanent and involuntary severance of a child from a parent due to a calamitous event beyond the control of the parents.<sup>143</sup>

Moreover, whether the sole or surviving parent is incapable of providing proper care is determined by the child’s basic needs, and by the local standards of the foreign-sending community, and is not restricted to economic or financial concerns.<sup>144</sup> This is important because potential adoptive parents are required to demonstrate that they have the financial resources to care for the child, and this requirement can further highlight the disparity in economic resources between the potential adoptive parents and the birth parents.<sup>145</sup> Furthermore, the release or relinquishment must be written, in accordance with the laws of the foreign-sending country, in a language that the parent can read and sign, and irrevocable without stipulations or conditions.<sup>146</sup>

Even though this definition of orphan requires certainty that the child is, in fact, an orphan, some scholars believe that this definition makes it much more challenging for certain children to be adopted internationally.<sup>147</sup> In places such as Eastern Europe, where parents are finding difficulties in caring for their children, a parent cannot voluntarily give a child up for adoption because a showing of complete abandonment or desertion is required.<sup>148</sup> As such, parents who want their children to be

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<sup>142</sup> Adjudicator’s Field Manual, *supra* note 133, § (d)(3)(F); *see also* 8 C.F.R. § 204.3(b).

<sup>143</sup> Adjudicator’s Field Manual, *supra* note 133, § (d)(3)(G); *see also* 8 C.F.R. § 204.3(b).

<sup>144</sup> Adjudicator’s Field Manual, *supra* note 133, § (d)(3)(H)(iii); *see also* 8 C.F.R. § 204.3(b). This is important, as it prevents an industrialized and advanced country, such as the United States, from removing a child from a poorer country for the sole reason that the child’s care does not live up to the adopting country’s standards. It would be unfair to allow economic stability to be the sole deciding factor with regard to the fitness of a parent.

<sup>145</sup> Wardle, *supra* note 25, at 347 (discussing the fact that this economic disparity also leads “[w]ealthy prospective adopters (in the world economic sense) [to be] tempted to ‘buy’ children from their poor parents, to ‘bribe’ officials to expedite legal processes (take shortcuts), and thereby circumvent protections that would prevent exploitation and commercial trafficking in human children”).

<sup>146</sup> Adjudicator’s Field Manual, *supra* note 133, § (d)(3)(H)(iv).

<sup>147</sup> *See* Simov, *supra* note 13, at 258.

<sup>148</sup> *Id.*

adopted must completely abandon their children and are unable to know anything about their children's future.<sup>149</sup>

Aside from birth parents having little control over the process, further confusion results because a foreign country's evaluation of a child's orphan status does not provide any assurance that the child will be defined as an orphan according to the INA and United States law.<sup>150</sup> The foreign-sending country's standards may be vastly different from the INA's requirements,<sup>151</sup> and it may be difficult to harmonize the two.<sup>152</sup> It is not hard to imagine that difficulties will arise when the foreign-sending country severs all rights to the child through its own requirements, but the receiving country may not allow the child to be adopted because of different prerequisites which need to be met in order to be considered an adoptable child.<sup>153</sup> The efforts of birth parents who voluntarily relinquish their rights to a child may be thwarted by this conflict. Because the birth parents cannot care for the child, they give it up for adoption. But then this child may be left in limbo between one country in which he or she is considered an orphan and another country which cannot accept the child because it does not consider the child to be an orphan. One of the most prevalent problems that arises because of this inconsistency is "baby brokering," a process which illegally skirts all requirements placed on international adoption and takes advantage of birth parents.<sup>154</sup>

One logical solution to this dilemma is to make the orphan requirement the sole responsibility of the sending country,<sup>155</sup> because that country is the body relinquishing the rights over that child and is in the best position to determine whether that child is adoptable. This would eliminate confusion among the sending and the receiving country and place the responsibility for determining whether the child is an orphan on the country surrendering the rights to the child.

Lisa K. Gold advances two reasons why the sending countries should be given more autonomy: "First, the sending countries are giving away

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<sup>149</sup> *Id.*

<sup>150</sup> See MARGARET C. JASPER, INTERNATIONAL ADOPTION 1 (2003).

<sup>151</sup> *Id.*

<sup>152</sup> See *id.* at 2-3.

<sup>153</sup> See *id.*

<sup>154</sup> Hubing, *supra* note 17, at 693. Hubing also discusses the conflict that is created between laws of states within a country and the federal laws of that country, bringing to light the terrible situation in which a child is allowed into a country by the federal court but then is denied the domestic re-adoption in the individual state. See *id.* at 693-94.

<sup>155</sup> *Id.* at 693.

their youth; therefore, they have the most vested interest in the children. Second, the sending countries have a culturally derived sense or ‘natural instinct’ as to what is in the best interest of their children.”<sup>156</sup> The sending country is also in the best position to evaluate the rights of the party most likely to be taken advantage of in international adoption—the birth parents.<sup>157</sup>

The United States should make it easier for foreign birth parents to voluntarily relinquish the rights to their children while still maintaining a degree of control over the adoption process. Foreign countries should also follow suit to avoid imposing undue restrictions on birth parents who are knowingly and voluntarily willing to surrender rights to a child. However, a situation where the birth parents are willing to surrender a child for adoption must be distinguished from a situation where it merely *appears* that the birth parents are knowingly relinquishing their rights. The INA requirement that a child be orphaned should continue to serve as a guide to the foreign sending country to protect the birth parents, but it should not be an impediment to an adoptable child finding a home in the United States. The orphan determination is vital, but it can also be detrimental to those whose children are adopted improperly, because once the child has been determined to be a legal orphan, it is nearly impossible for a birth parent to reclaim that child.<sup>158</sup> More careful evaluation is needed in making a determination of the child’s legal status. A delicate balance must be struck between the interests of birth parents who truly do not want to raise their children, and those whose rights have been trampled on in the black market. There should be two standards of interpretation with respect to the orphan definition: a more lenient and understanding interpretation of the orphan definition for the former group, and a more stringent application of the INA’s requirement for the latter group.

Furthermore, the INA’s orphan definition is ineffective because it only indirectly protects birth parents. Instead of creating affirmative rules which respect the birth parents’ rights, the definition enumerates only which children are appropriate for adoption. The United States should have imposed more of a duty on others to assert birth parent rights. This could be accomplished by specifically prohibiting unethical or coercive practices, rather than by merely classifying the types of children that are

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<sup>156</sup> Lisa K. Gold, *Who’s Afraid of Big Government? The Federalization of Intercountry Adoption: It’s Not as Scary as it Sounds*, 34 TULSA L.J. 109, 124 (1998).

<sup>157</sup> *See id.*

<sup>158</sup> Fleisher, *supra* note 8, at 190.

eligible for adoption. Each step of the way, birth parent's rights must be evaluated so that no child is adopted unethically or illegally.

*B. Misinformed/Unprotected Birth Parents*

For birth parents whose rights have been either subverted or ignored, it is virtually impossible for them to succeed in getting their children back.<sup>159</sup> This is attributed to the fact that, in order to be adopted, a child must legally be an orphan, or "ties must be irrevocably severed in writing before the child can be adopted."<sup>160</sup> To date, there have been very few cases in which an internationally adopted child was returned to the birth parents due to invalid consent.<sup>161</sup> *In re Hua*<sup>162</sup> involved a Vietnamese woman who, during the Vietnam War, conceived a child with a black American soldier.<sup>163</sup> As the child grew older, and her heritage became more obvious, the biological mother was repeatedly confronted by a representative of an adoption agency who capitalized on her fears about prejudices to her child and caused her to be afraid for her child's life.<sup>164</sup> The Supreme Court of Ohio affirmed the decision of the appeals court, stating, "the Court of Appeals properly found the relinquishment form to have been executed under duress, [and] any issue as to the revocability of such a document becomes moot because such documents under Vietnamese civil law are revocable where duress in the execution of the document is established."<sup>165</sup>

One other case involved a child adopted from the Marshall Islands, whom the parents claimed to have legally adopted in Hawaii.<sup>166</sup> Both the courts in the United States and in the Marshall Islands denounced what they believed to be a black-market adoption, deciding that the birth mother had never actually given her consent to the adoption.<sup>167</sup> It was also concluded that the birth mother, because of lingual and cultural differences, did not understand that by signing her consent she was forever

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> 405 N.E.2d 255 (Ohio 1980).

<sup>163</sup> *Id.* at 256.

<sup>164</sup> *See id.* at 259.

<sup>165</sup> *Id.*

<sup>166</sup> *See* Walter F. Roche, Jr., *A Duel for a Daughter Agonizes Two Families*, BALTIMORE SUN, Nov. 3, 2003, <http://www.baltimoresun.com/news/nationworld/bal-te.adopt03nov03,0,47533333.story?coll=bal-home-headlines>.

<sup>167</sup> *Id.*

surrendering any and all rights to that child.<sup>168</sup> The Marshall Islands, being a poverty-stricken country, has become a prime target for fraudulent adoptions,<sup>169</sup> and this case represents one of the very few examples where the court recognized this problem. It is astounding that there have been only a few cases in which the birth mother has successfully petitioned for the return of her child, considering the fact that fraudulently induced birth parent consent appears to be a frequent occurrence in the international adoption arena.

Compounding the problem for birth parents is that there are no open intercountry adoptions,<sup>170</sup> which makes it virtually impossible for birth parents, even if their consent is fraudulently obtained, to get any information about where their child is currently living. Furthermore, while the INA makes it difficult for willing birth parents to give up their children,<sup>171</sup> it also “forecloses on biological parent rights as much as possible by creating stringent requirements for the immigration of an adopted foreign child, even though it does not *directly* control the rights of the biological parents themselves.”<sup>172</sup> Although there are some potential ways for foreign biological parents to challenge an international adoption,<sup>173</sup> in comparison to American birth parents, their chances of succeeding are virtually nonexistent because of financial problems and language barriers that inhibit access to United States courts.<sup>174</sup> It has been proposed that, because foreign biological parents face many more obstacles

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<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> Fleisher, *supra* note 8, at 191.

<sup>171</sup> *See supra* notes 147–49 and accompanying text. It is argued that the “disconnection between adoptee and birth mother in intercountry adoption is primarily due to the ‘orphan’ status requirement and the irrevocable relinquishment of parental rights necessary for intercountry adoption.” Fleisher, *supra* note 8, at 191 n.141.

<sup>172</sup> Simov, *supra* note 13, at 267.

<sup>173</sup> *Id.* at 272. Simov suggests that biological parents may challenge an international adoption on the basis that “the consent [of the sole parent] was not properly obtained under the statute, or that he or she did not properly relinquish his or her rights to the child.” *Id.* A birth parent may also challenge the validity of the consent by “arguing that the consent was obtained fraudulently or under duress or arguing that the statute’s requirements governing consent were not properly followed.” *Id.* Simov properly recognizes the difficulty and the unlikely chance of succeeding, by reiterating that most states in the U.S. only require “substantial compliance” with adoption statutes, which makes it virtually impossible for the birth parent to claim the consent was fraudulent. *Id.*

<sup>174</sup> *See id.*

than American biological parents, they “should receive more leeway.”<sup>175</sup> It is not logical that a biological parent from another country should be completely without a remedy when American birth parents are entitled to seek redress in the judicial system.

Steps should be taken to afford foreign biological parents the chance to present their grievances that arise out of any and all international adoption proceedings. Crossing international barriers to litigate their claims can prove extremely difficult for birth parents that lack the means to do so.<sup>176</sup> As it stands currently, the Hague Convention provides no forum or process for those birth parents who may have been taken advantage of in the process of international adoption. The Hague Convention should be amended to create proper procedures that afford birth parents due process rights before their children are lost forever. Furthermore, even though the regulations implementing the IAA provide that agencies must allow for complaints by birth parents and must respond to these allegations,<sup>177</sup> they do not come into effect until the ratification of the Hague Convention. This further makes it necessary for the United States to enter into the Hague Convention in a timely manner.

### C. *The Black Market*

Perhaps the most egregious failure in the international adoption system is the continuation of black-market adoptions. Two examples of countries that continue to struggle with black-market adoptions are Guatemala and Romania.<sup>178</sup> Guatemala’s black market has become so “successful” that it has resulted in a shortage of healthy infants in that country.<sup>179</sup> This is attributed to the “close interrelation between the lawyers being paid large sums of money and the adoption itself, all under the complete absence of

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<sup>175</sup> *Id.* at 281 (“Foreign parents should not necessarily receive more rights than do American parents, but they should be able to avail themselves to certain procedures to better protect their rights.”).

<sup>176</sup> *See id.*

<sup>177</sup> 8 C.F.R. § 96.41 (2006). These regulations go as far as to require the agency to supply a summary of all complaints lodged to the accrediting entity and to the complaint registry, and requires these reviewing agencies to assess any patterns that may appear in the functioning behavior of those providing international adoption services. *Id.* Furthermore, the agency is expressly prohibited from taking any action in retaliation against any client who is filing a grievance or scrutinizing the conduct of the agency. *Id.*

<sup>178</sup> Graff, *supra* note 37, at 411.

<sup>179</sup> *Id.* at 409.

State supervision, that seems to lead to dishonesty and corruption.”<sup>180</sup> Lawyers have become the middlemen in this country, soliciting large funds from prospective adoptive parents for filling their orders for newborn babies.<sup>181</sup> Poor neighborhoods are watched for young and uneducated pregnant women, who are then coerced into signing away their rights to their babies.<sup>182</sup> Unethical practices surrounding the international adoption process in Guatemala resulted in a moratorium on Guatemalan adoptions.<sup>183</sup> In September 2003, the Guatemalan Solicitor General’s Office began processing backed-up adoptions that were delayed in this moratorium.<sup>184</sup> In this confusion, many adoption cases were not even sent to the Solicitor General during this time, and the Constitutional Court of Guatemala ruled that Guatemala’s accession to the Hague Convention was unconstitutional.<sup>185</sup> At this point, Guatemala is working toward the implementation of a new international adoption process.<sup>186</sup>

Romania has also traditionally been a main target for the international black market.<sup>187</sup> One opponent of Romanian international adoptions stated that “[t]he Hague Convention . . . is opposed to such adoptions because . . . ‘[b]roadly speaking it is depriving poor countries and poor families of their children,’”<sup>188</sup> and that “[t]here are no orphans in Romania . . . but children who have been taken from their mothers by intimidation, poverty and strong-arm tactics.”<sup>189</sup> Views in opposition of international adoption can be traced to the opinion that “[c]hildren are being sacrificed to notions of group pride and honor,” and also that international adoption is akin to

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<sup>180</sup> *Id.* at 409–10.

<sup>181</sup> *Id.* at 410.

<sup>182</sup> *Id.*

<sup>183</sup> *UNICEF Calls for a Moratorium*, GUATEMALA ADOPTION INFO. & NEWS, Oct. 17, 2004, <http://www.guatadopt.com/archives/000225.html> (indicating that moratoriums on Guatemalan adoptions were imposed in both 2003 and 2004).

<sup>184</sup> *See Adoption Miracle Int’l, Important Notice on Guatemalan Adoptions*, Sept. 12, 2003, <http://www.adoptionmiracle.org/news.asp>.

<sup>185</sup> *See Important Notice on Guatemalan Adoptions*, U.S. DEPT. OF STATE, BUREAU OF CONSULAR AFFS., Dec. 1, 2003, [http://travel.state.gov/family/adoption/notices/notices\\_481.html#](http://travel.state.gov/family/adoption/notices/notices_481.html#).

<sup>186</sup> *Id.*

<sup>187</sup> Kathleen Hunt, *The Romanian Baby Bazaar*, N.Y. TIMES MAG., Mar. 24, 1991, at 24.

<sup>188</sup> Ann Marie Hourihane, *Does Going West Really Mean a Better Life?*, SUNDAY TRIBUNE (Dublin, Ir.), Jan. 5, 2003, at 8.

<sup>189</sup> *Id.*

colonialism with “wealthy Westerners robbing poor countries of their children, and thus their resources.”<sup>190</sup> Romania was also compelled to place a moratorium on international adoption on June 21, 2001, and this moratorium was extended in June 2003, “until new legislation governing adoption is implemented.”<sup>191</sup> This moratorium was in response to the general opinion that Romanian law did little to protect children, which opened the door for corruption in every aspect of the international adoption process.<sup>192</sup> However, although both Romania’s new laws which permit international adoption only as a last resort and the moratorium on international adoptions are aimed at protecting its children, they likely do more harm than good. When long waits are imposed for adoptions, there is no other option than to leave children institutionalized while willing and potential parents are prevented from adopting them internationally.<sup>193</sup>

Corruption in the international adoption process, however, is not limited to Guatemala and Romania. A similar moratorium has been placed on adoption in the Marshall Islands,<sup>194</sup> while recent moratoriums in Liberia<sup>195</sup> and Vietnam<sup>196</sup> have been resolved. Even though a moratorium may be a solution to prevent those involved in the corruption in the adoption process, the fact remains that there are still children who need homes in these countries and birth parents who are truly willing to surrender their children for a better life. The black market causes every person in the adoption triad—birth parents, children, and adoptive parents—considerable harm, first by creating avenues for corruption, and second by causing a harsh backlash in which undue restrictions are placed on international adoption.

The United States is moving towards a clearer path to prevent baby selling in international adoption. The regulations implementing the Hague

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<sup>190</sup> Wardle, *supra* note 25, at 350.

<sup>191</sup> Joint Council on International Children’s Services, Update on Romanian Adoption Moratorium, June 2, 2003, <http://www.jcics.org/Romania.htm>.

<sup>192</sup> *See id.*

<sup>193</sup> *See In the Best Interest of the Children?*, *supra* note 77, at 11.

<sup>194</sup> *Important Notice Regarding Adoptions in the Republic of the Marshall Islands*, U.S. DEPT. OF STATE, BUREAU OF CONSULAR AFFS., May 5, 2003, [http://travel.state.gov/family/adoption/notices/notices\\_472.html](http://travel.state.gov/family/adoption/notices/notices_472.html).

<sup>195</sup> Joint Council on International Children’s Service, Changes to Liberian Adoption Requirements, Oct. 5, 2004, <http://www.jcics.org/Liberia.htm>.

<sup>196</sup> *Important Notice: Expected Delays in Adoptions in Vietnam*, U.S. DEPT. OF STATE, BUREAU OF CONSULAR AFFS., Jan. 27, 2003, [http://travel.state.gov/family/adoption/notices/notices\\_1994.html](http://travel.state.gov/family/adoption/notices/notices_1994.html).

Convention, intended to aid the implementation of the International Adoption Act, clearly prohibit the practice of baby selling.<sup>197</sup> The prohibition states that an agency or person providing international adoption services must “prohibit[] its employees and agents from giving money or other consideration, directly or indirectly, to a child’s parent(s), other individual(s), or an entity as payment for the child or as an inducement to release the child.”<sup>198</sup> This puts the responsibility in the hands of the international adoption provider, who is accountable to the Department of State,<sup>199</sup> for any unethical practices. These regulations do, however, allow payment, if permitted by the child’s country of birth, “for activities related to the adoption proceedings, pre-birth and birth medical costs, the care of the child, the care of the birth mother while pregnant and immediately following [the] birth of the child, or the provision of child welfare and child protection services generally.”<sup>200</sup> Even though these provisions make it abundantly clear what is and is not permitted by international adoption agencies in the United States, until the ratification of the Hague Convention (and thus the implementation of the International Adoption Act), these provisions are not binding, and serve only as a guideline for what will be the law in the future.<sup>201</sup>

The United States should take affirmative action in moving towards ratifying the Hague Convention. Countries, such as Russia, that are distrustful of international adoption, are taking steps to prevent the adoption of children by any nation that has not ratified the Hague Convention.<sup>202</sup> By not ratifying the Hague Convention, the United States is impeding its own citizens’ ability to adopt children. Foreign countries most likely are not comfortable jeopardizing the rights of their birth parents and child citizens for a country that has not agreed to the terms of the Hague Convention. The policies and procedures needed to implement the Hague Convention must move forward.

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<sup>197</sup> See 22 C.F.R. § 96.36 (2006).

<sup>198</sup> *Id.*

<sup>199</sup> Intercountry Adoption Act of 2000, 42 U.S.C § 14911(a)(1) (2000).

<sup>200</sup> 22 C.F.R. § 96.36.

<sup>201</sup> See 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, 372 (2006).

<sup>202</sup> See Ann Hornaday, *Don’t End Their Hope of a Home*, WASH. POST, Sept. 16, 2005, at A31, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/15/AR2005091502143.html?sub=new>.

However, a mere ratification of the Hague Convention may not be enough; in response to the Hague Convention's failure to protect birth parents in international adoption transactions, some have suggested that the consent provisions in the Hague Convention must be strengthened to prevent corruption.<sup>203</sup> One recommendation is to use the consent provisions from the UAA to replace the current consent provisions in the Hague Convention.<sup>204</sup> The UAA's provisions provide an exhaustive list of those whose consent must be obtained to any adoption and place specific requirements on the type of consent, such as requiring that it be in writing, and not be coerced by duress or monetary compensation.<sup>205</sup>

One major flaw of the Hague Convention is, in fact, its seeming oversight of the black market in international adoptions, and the corruption faced by birth parents. Jonathan Stein sharply criticizes the Hague Convention as failing to protect against the black market, because at no point does it expressly outlaw this practice, nor does it mandate that signatories ban baby selling or punish wrongdoers.<sup>206</sup> It appears that the drafters assumed that each individual country would implement its own provisions for preventing baby selling. Even though the United States has laws in place that will prohibit this practice when the Hague Convention is ratified, the drafters of the Hague should not have relied upon each individual country to take affirmative steps towards the abolishment of baby selling. An amendment to this Convention, specifically prohibiting any and all black-market practices, would make it clear to the international community that such practices are unacceptable. Furthermore, specific and enumerated punishments for baby selling must be implemented, namely, criminal sanctions. 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.

The Hague Convention requires that there be no contact between the birth parents and the potential adoptive parents during the early stages of

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<sup>203</sup> See Stein, *supra* note 49, at 81–82.

<sup>204</sup> See *id.* at 77–81.

<sup>205</sup> See *id.*

<sup>206</sup> *Id.* at 77. Stein points out that the Convention only outlines procedural requirements for international adoptions, and that it ignores the fact that private independent adoptions are a main source for the black market. See *id.* Stein feels the Convention could have done much more to proactively provide a means for discovering baby selling schemes and punishing baby sellers. *Id.*

the international adoption process.<sup>207</sup> Strangely enough, this provision is viewed to be a protection against the corruption of the black market, as parents may feel pressured or coerced into giving up their child for adoption.<sup>208</sup> Another criticism of the Hague Convention, in regard to it not providing proper enforcement procedures, is that there are no provisions which directly state how to implement this rule.<sup>209</sup> The level of contact between the birth parents and the potential adoptive parents is a determination that is left up to the individual states.<sup>210</sup> This leaves too much leeway in the hands of the state for the purposes of determining appropriate contact between the birth parents and the adoptive parents. The Hague Convention, once again, is lacking specifically enumerated procedures punishing the violation of its rules. To prevent black market practices, it is vital for the international community to refuse to recognize an adoption where the birth parents have been coerced, and the Hague Convention should provide for the nullification of such an adoption.

The main reason that the black market is so prevalent is because it is a creature of supply and demand, stemming from a shortage of healthy, white infants.<sup>211</sup> One solution that has been proposed to address the problems of international adoption has been to avoid this process altogether.<sup>212</sup> It has been suggested that “[o]ne way to avoid the problem of adopting children with medical and psychological problems from foreign countries may be to create incentives or disincentives that make foreign adoption a less attractive alternative in comparison to domestic adoption system, or conversely, to make domestic adoption a more attractive option.”<sup>213</sup> This could be accomplished by offering better incentives to adopt children domestically, such as funding for the care of the adopted child and tax breaks for the adoptive parents. The United States may also benefit by being less stringent in its requirements for adoption (i.e., age, sexual orientation, and race). By lessening the demand

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<sup>207</sup> William Duncan, *Intercountry Adoption: Some Issues in Implementing and Supplementing the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, in CHILDREN ON THE MOVE: HOW TO IMPLEMENT THEIR RIGHT TO FAMILY LIFE 75, 76–77 (Jaap Doek, Hans van Loon & Paul Vlaardingerbroek eds., 1996).

<sup>208</sup> *See id.*

<sup>209</sup> *Id.* at 77.

<sup>210</sup> *See id.*

<sup>211</sup> Steltzner, *supra* note 14, at 118.

<sup>212</sup> *See id.* at 149.

<sup>213</sup> *Id.*

for children from foreign countries, the perpetrators of the black market will not have as great of an incentive to take advantage of birth parents, as there is less money to be made in the industry.

Those who choose to adopt internationally also must bear some responsibility. There are many potential adoptive parents who are more than willing to circumvent the proper procedures for completing a legal adoption to get the child they desire and to expedite the process.<sup>214</sup> Poor or uneducated birth parents cannot be expected to defend themselves fully against adoptive parents who have more resources and more powerful influences. Adoptive parents can play the most vital part in making sure that they are legally adopting a child who is truly an orphan. Criminal penalties should be introduced for those adoptive parents that choose to circumvent the legal requirements for international adoption. Furthermore, any adoptive parent who procured a child through illegal means should not be permitted to keep the child, especially over the objections of the birth parents.

#### CONCLUSION

The United States has, thus far, been reluctant to ratify the Hague Convention.<sup>215</sup> This is further evidenced by the fact that it has been four years since the State Department has held a meeting for the purpose of eliciting public response to the drafting of the regulations which implement the Intercountry Adoption Act of 2000.<sup>216</sup> The United States' current national policy has been described as "allowing large sums of cash to leave the country in an entirely unregulated system and browbeating foreign governments into surrendering children in a decision making process for their foster children that none of our fifty states would permit for America's waiting children."<sup>217</sup> The delay in the implementation of these laws has upset government officials, including Senator Landrieu, who has stated that "[m]any members of Congress are very displeased with this very slow pace . . . [because t]he new rules are purposely drafted to close loopholes that currently exist."<sup>218</sup> Although the United States cannot be held completely responsible for the prevalence of the black market and the

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<sup>214</sup> See *supra* notes 49–52 and accompanying text.

<sup>215</sup> Posting by Maureen Flatley to Children's Law Blog, [http://www.childlaw.us/2005/05/federal\\_regulat.html](http://www.childlaw.us/2005/05/federal_regulat.html) (May 20, 2005, 11:21 EST).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> Steve Friess, *Overseas Adoptions Have a Somber Side*, USA TODAY, Sept. 14, 2005, at 8D.

temptation to take advantage of foreign birth parents, the fact that it has yet to ratify the Hague Convention demonstrates a lack of care and concern for these members of the adoption triad.

By failing to ratify the Hague Convention and to put provisions in place to implement its practices, the United States is failing both foreign birth parents, and its own citizens. There are now countries that are refusing to allow international adoptions to the United States because, without the Hague Convention, there are not adequate safeguards in place.<sup>219</sup> Furthermore, the extent of corruption in many countries has gone so far that they are responding with a critical backlash against any and all adoptions by persons outside of their homeland.<sup>220</sup>

One crucial step towards respecting foreign birth parents is to make absolutely sure that a child adopted internationally is truly an orphaned child. This is a simple observation when the child is living in an orphanage, but it becomes much more complicated in other instances. The INA requires that a child be orphaned,<sup>221</sup> but this works as a double-edged sword. This provision makes it increasingly difficult for birth parents, who are willing to surrender their children, to have any control over the process. Also, there is a chance that a child will be left in limbo when the foreign-sending country's orphan determination does not meet the standards of the receiving country. The INA's requirement, as a result, must be applied carefully. This dilemma indicates that a more lenient standard is necessary for birth parents willing to surrender a child, but the strict standard must be maintained for an adoption that presents any indication of corruption.

Compounding the problem of corruption in international adoptions is the fact that, once a child is removed from its birth parents, there is a minimal to nonexistent chance that the birth parents can successfully petition for the return of that child.<sup>222</sup> The Hague Convention does not provide for a forum where birth parents can bring a grievance when an international adoption has been illegally completed. Procedures must be implemented to allow a birth parent full due process, and a forum must be

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<sup>219</sup> See *supra* note 202 and accompanying text.

<sup>220</sup> See *supra* notes 62–81 and accompanying text. Korea, the Philippines, Russia, and Romania are all examples of countries that have enacted laws which essentially favor ethnocentrism in adoption, and will allow international adoption only as a last resort. See *id.* Many of these laws have resulted in a growing number of children in orphanages, and a freeze on adoptions which may have been close to completion. See *In the Best Interest of the Children?*, *supra* note 77, at 11–12.

<sup>221</sup> See Immigration and Nationality Act of 1965, 8 U.S.C. § 1101(b)(1)(F)(i) (2000).

<sup>222</sup> See Fleisher, *supra* note 8, at 190.

provided to allow a foreign birth parent to contest the validity of an adoption proceeding.

The most detrimental failure of the Hague Convention is the fact that it does not provide for specific and enumerated punishments for participation in the black market.<sup>223</sup> The drafters should not have left it up to the individual countries to provide their own safeguards against the black market, as many poorer countries have much to gain from these illegal adoptions. The United States has provisions in place which provide for the protection of birth parents,<sup>224</sup> but without the ratification of the Hague Convention, these provisions are worthless. Timely ratification of the Hague Convention is a necessity for the United States. Also, the Hague Convention should be amended to place more responsibility on potential adoptive parents. This group of people should not be permitted to claim ignorance when it is entirely clear that a reasonable person would know that an adoption has been conducted illegally.

Overall, the Hague Convention is lacking clear provisions or punishments to deal with the violators of its purposes. Criminal punishments should be implemented for adoptive parents who illegally adopt, for adoption agencies who violate the provisions of the Hague Convention and, most importantly, for individuals who participate in the black market. If all parties to an international adoption are aware of what is expected and what is prohibited, none can claim ignorance of the law. The United States, as one of the major participants in intercountry adoptions,<sup>225</sup> has a responsibility to ensure that the Hague Convention is ratified in the very near future, and that the provisions of the Intercountry Adoption Act of 2000 and its regulations are taken seriously.

Although it may be a daunting task to modify the Hague Convention and to place more responsibility on those parties involved in international adoption, the payoff will be invaluable. Those birth parents who often pay dearly with the loss of their children will be protected, and the horrors experienced by parents like Elena Almada, whose newborn child was torn away from her at birth, will be a distant memory.

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<sup>223</sup> See *supra* note 206 and accompanying text.

<sup>224</sup> See Intercountry Adoption Act of 2000, 42 U.S.C. §§ 14901–54 (2000); 22 C.F.R. §§ 96.1–96.111 (2006).

<sup>225</sup> Steltzner, *supra* note 14, at 113.

