

CONTROLLING IMPROPER FINANCIAL GAIN IN INTERNATIONAL ADOPTIONS

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When I went with the lawyer to pick up Kate—some part of town I could never find again—her mother was lying there, not in a house really, more like a stall with a bed in it. . . . It was like we were going baby shopping.¹

Although once rarely contemplated, international adoption has become a realistic option for couples in the United States. In fact, the United States has received more foreign children for adoption than any other country in the world.² Since the first wave of international adoptions in the late 1940s,³ over 130,000 children have been adopted into this country.⁴ As international adoptions have grown in popularity, both licensed agencies and private individuals have appeared in great numbers as adoption intermediaries.⁵ High demand for adoptable children encourages these intermediaries to trade children for large amounts of money.⁶ Informally, this practice is known as “baby selling.”⁷ While there is no clear consensus that the exchange of some

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1. Mary Jo McConahay, *The Baby Trade*, L.A. TIMES, Dec. 16, 1990, (Magazine) at 12, 13 (quoting Cathy Dickenson, a woman from the United States who adopted a child in Honduras).

2. *Romanian Adoptions: Hearing Before the Subcomm. on Int'l Law, Immigration, and Refugees of the House Comm. on the Judiciary*, 102d Cong., 1st Sess. 197 (1991) [hereinafter *Romanian Adoptions*] (statement of William L. Pierce, President, National Committee for Adoption).

3. International adoptions began after World War II when many U.S. citizens began adopting children to “rescue” them from war-torn countries. Margaret Liu, Note, *International Adoptions: An Overview*, 8 TEMP. INT'L & COMP. L.J. 187, 191 (1994).

4. Richard R. Carlson, *Transnational Adoption of Children*, 23 TULSA L.J. 317, 318 (1988). International adoptions by U.S. citizens are estimated to account for more than half of all international adoptions. *Romanian Adoptions*, *supra* note 2, at 197 (statement of William L. Pierce).

5. See Arsenio Oloroso, Jr., *A Baby Boom for Adoption Biz: Chicagoan Sees Overseas Supply for Local Demand*, CRAIN'S CHI. BUS., Feb. 21, 1994, at 17.

6. Legalized abortion and readily available contraceptives have contributed to a decrease in the supply of adoptable children in developed countries like the United States. At the same time, the demand for adoptable children in those countries has grown. Single parenting has gained increased societal acceptance, and women in Western countries increasingly spend many of their childbearing years building careers and delaying childbearing until later in life when conception is more difficult. Furthermore, domestic adoption agencies, with a limited supply of children to place, set demanding requirements of age, race, and income for adoptive parents which many prospective adoptive parents are unable to fulfill. Ellen F. Epstein, Note, *International Adoption: The Need for a Guardianship Provision*, 1 B.U. INT'L L.J. 225, 227-29 (1982); Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59, 61 (1987).

7. “The lack of state regulatory requirements for international adoption agencies has per-

money in an adoption process is morally wrong, the exchange of large amounts of money for children may create improper incentives for birth mothers to release their children for adoption.

Most international adoptions are arranged through agencies licensed by administrative or judicial bodies of a particular country to place children from that country.⁸ However, adoptions are also handled through "independent agents" who may be private adoption lawyers, social workers, or other persons acting as liaisons between the adoptive parents and the birth parents, guardian, or orphanage.⁹ In some countries, independent agents are part of the *de facto* adoption process.¹⁰ These individuals are not licensed to place children, but they may locate children for adoption, obtain the consent of the birth parents, and process the ensuing paperwork.¹¹ Although licensed agencies must process the adoption, intermediaries often procure the children¹² and the licensed agencies do not routinely monitor this portion of the endeavor.¹³

Since administrative oversight is negligible,¹⁴ independent agents have great opportunities to derive improper profits and use exploitative tactics in dealing with birth parents and prospective adoptive parents. Frequently, intermediaries deal with adoptive parents who are anxious or desperate to find children. Adoptive parents often must pay intermediaries large fees to obtain an adoptable child.¹⁵ Usually, birth parents only receive a small portion of this fee. Also, agents may work through unofficial channels to obtain babies. They use contacts with doctors and orphanages to learn when babies are born or they go directly to disadvantaged mothers or pregnant wom-

mitted unscrupulous individuals to set up businesses, often without prior experience or expertise in the field of adoption." U.S. DEP'T OF STATE, INTERNATIONAL ADOPTIONS 7 [hereinafter INTERNATIONAL ADOPTIONS] 1992.

8. 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 (1994).

9. *Id.*

10. *Id.* at 641 n.100 (discussing South Korea, which has one of the strictest intercountry adoption regimes, but in whose quasi-state-sponsored agency money still changes hands).

11. *Id.* at 627-28. Independent agents may be hired to avoid delays at state agencies, to circumvent agency investigations of the prospective adoptive family, or for the chance to choose a particular type of child. *Id.*

12. See McConahay, *supra* note 1, at 14-15.

13. See *id.* at 13-15 for a discussion of Honduras, which in 1990 had some of the least stringent adoption laws in the world. The official agency process for an adoption from Honduras includes hiring a Honduran lawyer whose high fees must be paid separately from the official agency fee.

14. Several officials interviewed for McConahay's article admitted that they felt children were better off leaving the desperately poor country in any manner possible. *Id.*

15. Payments to adoption intermediaries can range from \$3000 to \$15,000; usually, the birth mother gets only a tiny fraction of that amount. See Kathleen Hunt, *The Romanian Baby Bazaar*, N.Y. TIMES, Mar. 24, 1991, §6 (Magazine) at 24, 28 (discussing Romania); Kennard, *supra* note 8, at 628 n.1 (discussing Honduras); McConahay, *supra* note 1, at 13-15 (discussing Honduras).

en.¹⁶ Often, they convince these women to give up their children in exchange for a small gift or payment.¹⁷

Many of the abuses inherent in babyselling activities can be resolved through international agreement on proper adoption procedure. In May 1993, after negotiations and drafting meetings spanning three years, the Hague Conference on Private International Law completed the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption.¹⁸ The Hague Convention is the first international agreement specifically addressing trafficking in children for adoption placement purposes. The United States signed the Hague Convention on July 4, 1993¹⁹ and is expected to ratify it in late 1995.²⁰ The Convention combats baby selling by establishing international norms and procedures designed to prevent improper "financial or other gain" during international adoption activities.²¹

Currently, U.S. adoption laws devote insufficient attention to improper profiting from international adoptions. In particular, they fail to regulate payments made by the adoptive parents of a child to the child's birth parent or to an adoption intermediary. Once the United States ratifies the Convention, it must conform to all Convention mandates. Therefore, existing U.S. international adoption law must be altered to include provisions regarding discovery and prevention of improper profiting from adoptions.

Part I of this Note provides an overview of the Hague Convention and details how the Convention curbs improper profiteering from intercountry adoptions. Part II outlines current adoption goals, policies, and procedures within the United States. Part III argues that the United States must change

16. In some Latin American countries, "spotters" tour the slums looking for pregnant teenagers and women. Carroll Bogert, *Bringing Back Baby*, NEWSWEEK, Nov. 21, 1994, at 78.

Russia does not allow private adoptions. However, a "contribution" made to the orphanage may induce an orphanage director to declare a healthy child medically impaired, making the child eligible for adoption. *Id.*

17. Sometimes, although rarely, children are actually kidnapped by intermediaries and sold. In the mid-1980s, the *New York Times* exposed rings in Colombia, El Salvador, Mexico, and other Latin American countries that kidnapped and sold children for export to the United States. Sheila Rule, *Couples Taking Unusual Paths for Adoptions*, N.Y. TIMES, July 16, 1984, at A1.

Rumors persist about baby selling rings in Latin America. In early 1994, June Weinstock, a journalist visiting Guatemala from the United States, was beaten by villagers who suspected her of scouting for babies to steal. David Scanlan, *Stolen Children? A Child-Snatching Hysteria Sweeps the Country*, MACLEAN'S, Apr. 18, 1994, at 36.

18. Hague Convention on Private International Law: Final Act of the 17th Session, Including the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134, 1139 [hereinafter Convention].

The Hague Conference on Private International Law is an international organization formed to work for the unification of rules of private international law. The Conference has been in existence since 1893 and has drafted over 31 Conventions covering areas such as trade law, international civil procedure, and child protection. *Id.* at 1145. The Conference has 38 member states and is headquartered in the Hague, Netherlands. The United States became a member state in 1964. Kennard, *supra* note 8, at 631 n.43.

19. Treaty Actions, 5 U.S. Dep't of State Dispatch 445, 459 (Mar. 31, 1994).

20. Heather M. Little, *Open Hearts: For Everyone a Child, For Everyone a Family*, CHI. TRIB., July 10, 1994, §6 (WomaNews) at 1, 8.

21. Convention, arts. 8, 32, *supra* note 18, at 1140, 1143.

its international adoption laws to conform with Hague Convention mandates against improper gain from adoptions, and suggests ways in which U.S. law may be revised to achieve this goal. This Note concludes that the new international guidelines offered by the Hague Convention, coupled with modifications in U.S. immigration law, provide a useful framework for curbing international adoption abuses.

I. THE HAGUE CONVENTION

A. Prior International Agreements

Until recently, the international community had not taken explicit steps to address the problem of improper profiting from adoptions. Instead, "child trafficking" sections were included in other international agreements. The United Nations drafted several documents designed to regulate abuses against children. These agreements, however, are not expansive enough to provide procedural guidance in curbing trafficking in children for the purposes of adoption.²²

For example, in 1956, the United Nations passed the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery.²³ Although this agreement prohibits trafficking in children, it deals only with situations where children will be sexually exploited or used as laborers.

Further developments occurred in 1986, when the United Nations passed the Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally.²⁴ This Declaration prohibits "improper financial gain" derived from adoption.²⁵ However, it only generally prohibits improper gain and fails to establish a procedural framework that safeguards against such gain.

Soon thereafter, in 1989, the United Nations passed the Convention on the Rights of the Child, which includes the first international declaration specifically prohibiting child trafficking for any reason.²⁶ Article 35 of the Convention on the Rights of the Child requires that states take "all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form."²⁷ This agreement does not specifically address adoptive placements. Further, like the 1986 Declaration on Social and Legal Principles, it fails to outline clear procedures. The 1994 Hague Convention takes extensive steps towards establishing this procedural framework.

22. International agreements drafted by the Hague Convention or the United Nations have the legal force of treaties in countries which ratify them. Inherently, neither type of agreement carries more force than the other; rather, the law of the particular country determines whether later-in-time agreements will supersede earlier agreements in that country.

23. Sept. 7, 1956, 266 U.N.T.S. 40.

24. Dec. 3, 1986, 26 I.L.M. 1096.

25. *Id.*, art. 19, at 1101.

26. Nov. 20, 1989, 28 I.L.M. 1456.

27. Kennard, *supra* note 8, at 630 n.40.

In 1988, the Hague Conference on Private International Law initiated the Intercountry Adoption Project,²⁸ which developed the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption.²⁹ The project was inspired by news reports of atrocities involving international adoption in Romania after the fall of Ceaucescu.³⁰ The Seventeenth Session of the Hague Conference on Private International Law adopted the final text of the Convention in 1993.³¹ Although several countries, including the United States, have signed the Convention,³² as of yet, none have ratified it. The Convention becomes effective when the instruments of ratification of three countries have been deposited with the Ministry of Foreign Affairs, Kingdom of the Netherlands, depository of the Convention.³³

B. Goals, Policies, and Procedures Outlined by the Hague Convention

The Hague Convention distributes responsibilities for preventing baby selling between countries that send children abroad for adoption, or "States of Origin," and countries into which children are adopted, or "Receiving States."³⁴ Participating States must comply with rigorous criteria before a child is considered "adoptable" under the Convention. The Convention includes a general prohibition on "improper financial or other gain" from adoptions and activities related to adoptions³⁵ and relies heavily on Contracting States to pass specific laws to detect and prevent baby selling.³⁶

An international adoption performed between Contracting States to the Hague Convention must satisfy all Hague Convention requirements. These requirements aim to facilitate international adoption for as many children as possible, provided that important precautions against baby selling are observed.

To comply with the Convention, each Contracting State must create a "Central Authority" to oversee international adoptions.³⁷ Existing governmental organizations, such as public adoption agencies, may be authorized to perform the functions of a Central Authority.³⁸ Private adoption agencies

28. *Id.* at 631.

29. *See* Convention, *supra* note 18, at 1134.

30. Kennard, *supra* note 8, at 631.

31. Convention, *supra* note 18, at 1134.

32. Treaty Actions, 5 U.S. Dep't of State Dispatch 445, 459 (Mar. 31, 1994) (listing Burkina Faso, Canada, Finland, the United Kingdom, and the United States).

33. Convention, art. 43, *supra* note 18, at 1144.

34. The Convention only applies to children habitually resident in contracting states, and specifically excludes refugee children and other internationally displaced children. *Id.*, part C, at 1145.

35. *Id.*, arts. 8, 32, at 1140, 1143.

36. *Id.* at 1135 (Introductory Note by Peter H. Pfund, Assistant Legal Adviser for Private International Law, U.S. Department of State and Head of the U.S. Delegation to the 17th Session of the Hague Conference).

37. *Id.*, art. 6, at 1140.

38. *Id.*, arts. 9-11, at 1140-41. All references hereafter to Central Authorities refer to any body authorized or "accredited" by Central Authorities to perform these functions.

may also perform these functions if they qualify as "accredited bodies"³⁹ under the Hague Convention.

The most important responsibility of a Central Authority is to "take all appropriate measures to prevent improper financial or other gain in connection with [adoptions]."⁴⁰ Central Authorities of States of Origin have chief responsibility for assuring that parental consents have not been obtained with the aid of financial inducements.⁴¹ However, the responsibility of Receiving States to determine whether the child is adoptable according to its own laws,⁴² and the Convention mandate that an international adoption will not go forward unless both States agree that it may proceed,⁴³ places the burden on both States to ensure that no improper financial or other gain is derived from an international adoption or a related activity.⁴⁴

Children are eligible for adoption under the Convention if the following conditions are met: they are adoptable under the laws of their own country, an international adoption is in their best interests, and the rigorous standards for consent to the adoption have been satisfied.⁴⁵ Additionally, birth parents or guardians must relinquish the child in writing and undergo counseling as to the effect of their consent.⁴⁶ If consent by the birthmother is required by the laws of the State of Origin, it must be given after the birth.⁴⁷ Importantly, consent must not have been induced by "payment or compensation of any kind."⁴⁸

Under the Hague Convention, each Receiving State determines which children are adoptable into its territory.⁴⁹ States may find fewer children "adoptable" into their territory than would be "adoptable" under the Convention itself. However, States may not be less restrictive than the Hague Convention. All States ratifying the Convention must adhere to each requirement.⁵⁰ Current U.S. law, which allows adoptions involving improper financial gain, does not satisfy the requirements of the Convention.

39. Accredited bodies must: pursue only non-profit objectives according to the limitations and conditions of the state of accreditation, be directed and staffed by persons who are professionally and ethically qualified to place children, and be supervised by competent authorities of the State of Accreditation. *Id.*, art. 11, at 1140-41.

Although the Convention does not explicitly state that private agencies meeting the qualifications of accredited bodies must be *authorized* to perform the functions of Central Authorities, the Art. 11 requirement that accredited bodies be supervised by the State of Accreditation implies that private agencies who qualify as accredited bodies thereby become authorized by the State to perform the functions of Central Authorities.

40. *Id.*, art. 8, at 1140.

41. *Id.*, art. 4, at 1140.

42. *Id.*, art. 5, at 1140.

43. *Id.*, art. 17, at 1141.

44. *Id.*, art. 32, at 1143.

45. *Id.*, art. 4, at 1139-40.

46. *Id.*, at 1140.

47. *Id.*

48. *Id.*

49. *Id.*, art. 4, at 1139; *see also id.* at 1134 (Introductory Note).

50. *Id.*, art. 40, at 1144.

II. U.S. IMMIGRATION LAW: GOALS, POLICIES, AND PROCEDURES

The body of U.S. law relating to international adoption is found in the Immigration and Nationality Act.⁵¹ While the Hague Convention focuses on preventing improper financial gain from adoptions, U.S. international adoption laws contain no such provisions. Rather than curbing baby selling, U.S. laws focus on keeping adoptive children with their birth families if at all possible.⁵² As a result, the overall U.S. standard for adoptability inadequately addresses the aims of the Convention regarding child trafficking.

United States immigration statutes require that adoptive parents petition the U.S. government for permission to bring alien children into the country. These children are given high priority among immigrants because of the time pressures inherent in their situation.⁵³ Prospective adoptive children obtain an entry visa and are granted admission into the United States if they fall into one of three categories: special immigrants,⁵⁴ immediate relatives,⁵⁵ or aliens subject to numerical limitation.⁵⁶

In order to enforce the mandates of the Hague Convention against the sale of children, the U.S. petition process for international adoption will have to be changed to include an accounting of all payments made in the process

51. Immigration and Nationality Act, 8 U.S.C §§ 1101-1525 (1988).

In the United States, an adoption must also be recognized by the state in which the child will reside. While ratification of the Convention by the United States will not compel changes in state laws, changes may be needed to comply with the spirit of the Convention. Nearly all states prohibit the sale of children, but these laws may not apply expressly to intercountry adoptions. See generally, Bernadette W. Hartfield, *The Role of the Interstate Compact on the Placement of Children in Interstate Adoption*, 68 NEB. L. REV. 292, 304 (1989).

Under American choice-of-law rules, a court must apply the law of the forum state in deciding whether to grant an adoption. Although usually applied to interstate adoptions, some courts have used this approach in dealing with intercountry adoptions as well. Carlson, *supra* note 4, at 362; see, e.g., *Huynh Thi Anh v. Levi*, 586 F.2d 625 (6th Cir. 1978); 85 Op. Att'y. Gen. No. U85-34 (Aug. 27, 1985) (Ga. unofficial opinion); *Doan Thi Hoang Anh v. Nelson*, 245 N.W.2d 511, 517 (Iowa 1976). Some states have laws providing for the recognition of foreign adoption decrees as a matter of comity. Carlson, *supra* note 4, at 361 n.226 (listing Alaska, Arkansas, Colorado, Florida, Hawaii, Indiana, Iowa, Minnesota, Missouri, New Hampshire, North Dakota, Oklahoma, Oregon, Pennsylvania and Vermont).

52. Before a child may be adopted into the United States, she must fit the U.S. definition of "orphan." To be classified as an orphan, a child must not have parents or must have one parent who is incapable of taking care of her under the standards of that country. If a child has one or two parents who are capable of taking care of her under the standards of her native country, U.S. law will not recognize her as adoptable, even if her parents wish to give her up. See 8 C.F.R. § 204.3(c)(2)(ii) (1994); *infra* notes 64-70 and accompanying text.

53. If prospective parents are waiting to adopt an infant, for example, the usual processing delay experienced by adult immigrants to the United States—which can be months or even years—is impracticable. Delay is also impracticable when a child is waiting to be adopted out of a region of war or extreme poverty. Carlson, *supra* note 4, at 344.

54. 8 U.S.C. § 1101(a)(27) (1988).

55. This category includes children under the age of 16 who are in the legal custody of adoptive parents and have resided with them for at least two years. 8 U.S.C. § 1101(b)(1)(E) (1988). Most children entering the United States under this classification have been adopted by persons who have been living or are based abroad. Liu, *supra* note 3, at 206.

56. See 8 U.S.C. § 1101(b)(f) (1988). This is a classification for aliens seeking admission who do not fall into the other two categories. Numerical limitations are imposed on the number of these aliens permitted to enter from each country annually. 8 U.S.C. § 1151(a) (1988).

of obtaining the child. Currently, the main document that adoptive parents must file to bring an alien child into the United States as an "immediate relative" is the I-600 petition, or "Petition to Classify an Orphan as an Immediate Relative."⁵⁷ The I-600 is designed to ensure that the child will be adopted into a healthy living situation. As a result, it requires much more information about the prospective adoptive parents than about the child or the circumstances involved in procuring the child.⁵⁸ Prospective adoptive parents are required to provide the child's birth certificate, a certified copy of the adoption decree, and a translation of the decree if the adoption took place in the child's native country.⁵⁹ Most importantly, they must provide evidence of the child's "orphan" status.⁶⁰

Most children adopted internationally are brought into the United States as "immediate relatives" under U.S. immigration law.⁶¹ To fit within this group, they must be (1) under the age of sixteen and (2) "orphans."⁶² The definition of "orphan" is the crux of the federal regulation of transnational adoptions. In almost all cases, a child's adoptability into the United States depends on whether she can be successfully categorized as an "orphan."⁶³

Under U.S. law, children become "orphans" as a result of:

death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or [because] the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released a child for emigration and adoption.⁶⁴

According to the regulations for "orphan" status, children have a "sole parent" when they are illegitimate and without a stepparent, and have a "surviving parent" when one parent is living and there is no stepparent.⁶⁵ Chil-

57. 8 C.F.R. § 204.3 (1994).

58. *Id.* The I-600 requires documentation that at least one of the adoptive parents is a U.S. citizen, as well as information on the adoptive parents' age and marital status. Prospective parents are required to submit a "home study," an investigation of the adoptive parents and their residence. Since most states also require a home study before they will validate the adoption, the home study is usually performed by a licensed authority from the state in which the adoptive parents will live. See Carlson, *supra* note 4, at 346.

59. 8 C.F.R. § 204.3(c)(2)(i)(E), (H) (1994). The laws of most jurisdictions within the United States also require that if a child is adopted abroad the parents must be present in front of the court granting the adoption. Epstein, *supra* note 6, at 234 n.74.

60. 8 C.F.R. § 204.3 (c)(2)(i)(E)-(H) (1994).

61. 8 U.S.C. § 1101(b)(1)(E) (1988); Liu, *supra* note 3, at 206. By categorization as "immediate relatives," prospective adoptive children avoid the wait for a numerically restricted visa, a major cause of delay for most immigrants to the United States. Epstein, *supra* note 6, at 235 n.82.

62. 8 U.S.C. § 1101(b)(1)(F) (1988).

63. The rare cases in which children can be classified as "special immigrants" do not depend on "orphan" status. 8 U.S.C. § 1101(a)(27) (1988).

64. 8 U.S.C. § 1101(b)(1)(f) (1988). To be "incapable of providing proper care," the family must be impoverished by local standards; a family no poorer average family than the average family in a generally poor country will not qualify. Immigration & Naturalization Service, U.S. Dep't of Justice, Notice of Prospective Adopting Parents, Form-349 (May 9, 1991) [hereinafter Notice] reprinted in *Romanian Adoptions*, *supra* note 2, at 23.

65. 8 C.F.R. § 204.3(c)(2)(ii) (1994).

dren have "no parents" when they are unconditionally "abandoned" to an orphanage.⁶⁶

These legal definitions have been criticized because the strict prerequisites for designation as "abandoned" or "orphaned" complicate or preclude adoption of many needy children.⁶⁷ Some children who might be considered "adoptable" under Hague Convention standards are not considered "adoptable" under U.S. law because they are neither "orphaned" nor "abandoned." For example, current U.S. law precludes international adoption of children who are voluntarily given up by two parents.⁶⁸ Similarly, children whose parents refuse to perform their natural or legal obligations or children who are placed with an adoption agency, rather than an orphanage, are not adoptable under U.S. law.⁶⁹ Finally, the Immigration and Naturalization Service warns that "[i]f the natural parents exercise any parental control over the child, its placement or adoption, its support, or indicate an intent to reclaim the child in the future, a finding of abandonment cannot be made," and the child will not be considered an orphan.⁷⁰

The Hague Convention, on the other hand, does not dictate who may release children for adoption, or the degree of parental contact children must have to be "adoptable." Because of the narrow definitions of "orphan" and "abandoned" in U.S. law, children who are considered "adoptable" under the Convention may not be "adoptable" into the United States.

In at least one important regard, the U.S. definition of "adoptability" is less restrictive than that of the Hague Convention. The "orphan" definition is insufficient by itself to battle trafficking in children. Although the definition requires that children have been "irrevocably released" by their birth parents, it does not ensure that the parents have not been paid to give the children up. Consequently, current U.S. law fails to comply with the fundamental aims of the Hague Convention.

III. BRIDGING THE GAP BETWEEN U.S. IMMIGRATION LAW AND THE HAGUE CONVENTION

Current U.S. law fails to conform to the Hague Convention's flat prohibition against improper financial or other gain "in connection with an adop-

66. *Id.*

67. Commentators argue that parents may resort to "abandoning" children so that they may be legally adopted into the United States. Jane T. Ellis, Note, *The Law and Procedure of International Adoption: An Overview*, 7 SUFFOLK TRANSNAT'L L.J. 361, 387-88 (1983); Liu *supra* note 3, at 207.

68. Ellis, *supra* note 67, at 387-88.

69. In one exception, the child of an adulterous relationship was considered abandoned. *Id.* at 388 n.177 (discussing *In re Del Conte*, 10 I. & N. Dec. 761 (1964)).

70. Notice, *supra* note 64, reprinted in *Romanian Adoptions*, *supra* note 2, at 23. This narrow definition of abandonment created tremendous problems for U.S. citizens attempting to adopt Romanian children in 1990 and 1991. "Even a brief period of living with one parent or another may cause the visa petition to be denied." *Romanian Adoptions*, *supra* note 2, at 106 (statement of Melanie Barnes, adoptive mother of Romanian child).

tion"⁷¹ or "from an activity related to an intercountry adoption."⁷² The Immigration and Nationality Act⁷³ does not require that an adoption intermediary or the child's birth parents forgo profit from the adoption.⁷⁴ As a result, adoption intermediaries are able to demand money from adoptive parents at the beginning of the process and trap them into paying additional amounts before the adoption is over.⁷⁵ As long as the adoptive parents are able to get the healthy child they have been promised, and can prove that the child will go to a good home, U.S. immigration law ignores any payments made to get the baby.⁷⁶

Although the Immigration and Naturalization Service (INS) investigates "fraudulent practices" in adoption, the current investigative procedure is inadequate. The "fraudulent practices" investigated by the INS are limited to outright fraud, such as the non-delivery of promised babies when large fees have been charged, or representation of adoptive children as healthy when they are in fact very ill.⁷⁷ It appears that the INS does not investigate "fees" or other money paid to intermediaries or adoptive parents.⁷⁸ The agency's literature implies that the INS does not routinely investigate orphan petitions to uncover possible illicit payments.⁷⁹ Instead, adoptive parents are urged to demand an accounting of the services for which they are paying an agency or intermediary on their own accord.⁸⁰

To be in compliance with the Hague Convention, the United States must define "improper financial or other gain in connection with an adoption"⁸¹ and establish procedures for monitoring this type of gain. Every international adoption, even if done through a licensed agency, involves a fee for finding and processing the children. In many circumstances, the birth

71. Convention, art. 8, *supra* note 18, at 1140.

72. *Id.*, art. 32, at 1143.

73. See *supra* note 51.

74. A *60 Minutes* segment on adoption of Romanian babies contained the following exchange with Virginia Young, Consul General at the American Embassy in Romania:

Ms. Young: "There's nothing in our law that says if they, paid \$1000, that that [*sic*] makes it illegal."

Reporter: "How can our laws accept selling children?"

Ms. Young: "Well, I don't think it was even considered at the time that the law was put into effect."

60 Minutes: Babies for Sale (CBS television broadcast, Apr. 14, 1991) [hereinafter *60 Minutes*], transcript reprinted in *Romanian Adoptions*, *supra* note 2, at 238.

75. *60 Minutes*, *supra* note 74, transcript reprinted in *Romanian Adoptions*, *supra* note 2, at 235-40; see also *supra* notes 14-17 and accompanying text.

76. The lack of disciplinary action against adoptive parents may stem from legislators' and courts' perception of the adoptive parents as the children's rescuers, especially if they end up in good homes. See McConahay, *supra* note 1, at 13-15.

77. INTERNATIONAL ADOPTIONS, *supra* note 7, at 19.

78. INTERNATIONAL ADOPTIONS, *supra* note 7, at 6-8 (listing outright fraud and non-delivery of children as the only matters investigated by the Service).

79. There is no evidence in any of the intercountry adoption literature, including the Hearings on Romanian Adoptions, that the I.N.S. has ever investigated the amount of money changing hands in the course of an adoption.

80. INTERNATIONAL ADOPTIONS, *supra* note 7, at 8.

81. Convention, art. 8, *supra* note 18, at 1140.

parents or the intermediary who procures the children receives part of the fee.⁸²

There is no consensus as to whether this practice should be considered abusive. One could argue that the exchange of a small amount of money for a child is not harmful. Adoptive parents pay the expenses associated with adoption under any circumstances, and many wish to give the birth mother "something" anyway. If the adoptive parents receive the children whom they chose, the birth parents freely consent to the adoption, and the children are placed in good homes, then one can argue that no one has been harmed by a small amount of money changing hands. If the payment has not "induced" the birth parents to relinquish the child, then an adoption of the type described above might be interpreted to fit within the standards of the Hague Convention.

Problems with payments for children arise, however, in cases involving larger amounts of money, especially if the money is paid to intermediaries rather than birth parents. A large payment increases the likelihood that consent to the adoption has not been given freely and, therefore, that the adoption has not been conducted according to the requirements of the Hague Convention.⁸³ Although an adoption in which an exorbitant fee is paid is not within the bounds of the Hague Convention, it is not *per se* against current U.S. law.⁸⁴

Undoubtedly, investigations into payments made to birth parents and intermediaries would be difficult to carry out. In many countries sending large numbers of children to the United States, some payment to a country's adoption agency in return for children is common.⁸⁵ In other countries, where babies are procured through largely unofficial means, detecting payments is almost impossible for either native adoption officials or U.S. immigration officials.⁸⁶

One way to conduct such investigations would be to require that adoptive parents entering a country to consummate an international adoption provide an accounting of all cash in their possession at entry and documentation for cash spent in the country at their departure.⁸⁷ Additionally, birth parents and intermediaries could be required to testify to U.S. immigration officials as to how much money they have received in connection with an adoption. If any party receives an amount which U.S. officials suspect induc-

82. See *supra* notes 14-17 and accompanying text.

83. Convention, *supra* note 18, arts. 8, 32, at 1140, 1143.

84. See *supra* note 74.

85. See *supra* note 10 and accompanying text.

86. "It's very difficult to say whether the women I see in chambers have been paid [for their babies] or not. I've got suspicions about certain lawyers, but I can't prove anything. No one has ever brought me a receipt." McConahay, *supra* note 1, at 15 (quoting Honduras Family Court Judge Teodolinda Pineda de Aguilar).

87. See generally *60 Minutes*, *supra* note 74, reprinted in *Romanian Adoptions*, *supra* note 2, at 235 (explaining that many prospective adoptive parents bring large amounts of cash into countries in which they hope to find children in order to pay bribes to adoption intermediaries, birth parents, and other facilitators).

es consent to the adoption, then the children should not be allowed to immigrate.⁸⁸

The Hague Convention includes a number of provisions that can help the United States prevent an adoption once improper gain has been discovered. Since adoptions under the Hague Convention may go forward only if both States of Origin and Receiving States agree to them,⁸⁹ the United States can refuse to allow suspicious adoptions to proceed. It can refuse to recognize, as contrary to public policy, adoptions involving improper payments.⁹⁰ In addition, the United States may prevent foreign adoption agencies suspected of extracting improper gains from acting in its territory.⁹¹

IV. CONCLUSION

The number of international adoptions has increased steadily during the last five decades and probably will continue to rise. The Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption is an important first step in curbing the abuses too often associated with international adoption.

As the country receiving the largest number of transnationally adopted children,⁹² the United States is presented with a unique opportunity to implement legislation preventing improper financial gain from adoptions. In particular, U.S. law can and should define what payments for adoptive children are "improper."

United States immigration law should also mandate an investigation into all money paid throughout the international adoption process. Prospective adoptive children should not be classified as "adoptable" into the United States until immigration officials find that no one has received improper financial gain from the adoption. When the United States ratifies the Hague Convention by implementing legislation that effectively prevents baby selling, then U.S. citizens who wish to adopt internationally will no longer confront potential moral challenges in their efforts to adopt.

88. See Convention, art. 5(c), *supra* note 18, at 1140 ("An adoption within the scope of the Convention shall take place only if the competent authorities of the Receiving State have . . . determined that the child is or will be authorized to enter and reside permanently in that State.").

89. *Id.*, arts. 5-6, at 1140.

90. *Id.*, art. 24, at 1142.

91. Article 12 of the Convention provides that "[a] body accredited in one state may act in another Contracting State only if the competent authorities of both states have authorized it to do so." *Id.*, art. 12, at 1141. Since the generally accepted function of adoption agencies is to handle adoptions, a prohibition against "acting" in a state will likely be construed as a prohibition against handling adoptions from within that country. At this writing, however, no official interpretive material on the Convention was available.

92. See *Romanian Adoptions*, *supra* note 2 and accompanying text.

TRANSRACIAL ADOPTION

