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CURBING CHILD-TRAFFICKING IN INTERCOUNTRY ADOPTIONS: WILL INTERNATIONAL TREATIES AND ADOPTION MORATORIUMS ACCOMPLISH THE JOB IN CAMBODIA?

Kelly M. Wittner

Abstract: Over the past two decades an enormous increase in intercountry adoptions has prompted international concern over the victimization of children, birth parents, and adoptive families. Recently, the United States has closely scrutinized baby-trafficking in Cambodia. Reports of widespread buying, selling, and stealing of Cambodian infants for international adoption prompted the United States to place a moratorium on adoptions from Cambodia on December 21, 2001. In addition, the international community has drafted treaties such as the United Nations Convention on the Rights of the Child ("CRC") and the Hague Convention on Intercountry Adoption ("Hague Convention") to normalize and systematize the process of international adoptions. After ratifying the Hague Convention, the United States enacted the Intercountry Adoption Act of 2000 ("IAA").

This Comment argues that current U.S. and Cambodian initiatives to stem the rise of fraudulent adoptions from Cambodia are ineffective. Although Cambodia has ratified the CRC, it has not made significant efforts to implement its provisions. International treaties, such as the Hague Convention, which are designed to prevent black-market activities and protect children, do not provide the Cambodian government with adequate incentives or logistical and financial support and are thus unlikely to be adopted. The IAA, once implemented, will not apply to adoptions from Cambodia because Cambodia is not a signatory to the Hague Convention. Moreover, the Immigration and Naturalization Service ("INS") ban on adoptions from Cambodia temporarily masks, but will not cure, the black-market trade of infants from that country. The INS may prevent baby-trafficking for the duration of the moratorium, but without substantive changes to the adoption process in Cambodia, the moratorium does little to protect genuine orphans or future baby-trafficking victims. Instead, programs aimed at improving specific areas of the foreign adoption process, such as a national registry of adopted and adoptable Cambodian children and implementation of the "Adjudicate Orphan Status First" Pilot Program, are more likely to succeed in protecting parents and children from becoming victims of the black-market trade in children.

I. INTRODUCTION

On December 19, 2001, *20/20* aired a story that pulled at the heartstrings of America and outraged the adoption community.¹ Twelve American families traveled to Cambodia to be united with children whom they hoped to adopt and make part of their families.² But after nearly two months of waiting for Immigration and Naturalization Service ("INS")

¹ *20/20: Twelve Families Go to Cambodia to Adopt Children, But US Embassy Won't Grant Visas* (ABC television broadcast, Dec. 19, 2001), available at 2001 WL 21804083.

² *Id.*

approval to take the children into the United States, these families received the worst possible news.³ According to the INS, their children did not qualify as adoptable orphans and their visa petitions would be denied.⁴ At the center of the controversy, rumors unfolded that the children had been bought or stolen from their Cambodian birth parents.⁵

Two days after the 20/20 story aired, the INS announced a ban on American adoptions from Cambodia.⁶ This type of suspension was the first in INS history.⁷ The ban, still in effect, prevents the INS from approving immigration petitions filed on behalf of Cambodian adoptees.⁸ The suspension, however, did not affect the twelve families whose visas the INS previously had denied. In the same document that declared the ban, the INS announced that the thirteen Cambodian children, already adopted by the twelve American families, would be granted humanitarian parole so they could join their families in the United States.⁹

³ *Id.*

⁴ *Id.*

⁵ Chris Decherd, *U.S. Denies Visas to Adopted Babies, Says They were Trafficked*, ASSOC. PRESS, Nov. 20, 2001, WESTLAW, ALLNEWSPLUS.

⁶ Memorandum from James W. Ziglar, Comm'r, INS, to Michael A. Pearson, Executive Assoc. Comm'r of INS Field Operations, Suspension of Adjudication of Cambodian Orphan Petitions (Dec. 21, 2001), <http://www.ins.usdoj.gov/graphics/services/resadopcam.htm> (last visited Jan. 24, 2003) [hereinafter Memorandum from James W. Ziglar]; News Release, U.S. Dep't of Justice, INS Announces Suspension of Cambodian Adoptions and Offer of Parole in Certain Pending Cases (Dec. 21, 2001), at http://www.ins.usdoj.gov/graphics/publicaffairs/newrels/camb_adopt.htm (last visited Jan. 24, 2003) [hereinafter INS Announces Suspension].

⁷ Although this is the first formal suspension, the INS has expressed concern in the past for the adoption practices of some other countries, including most recently Guatemala and Vietnam. U.S. Dep't of State, *Update on Issuance of Guatemalan Passports for Adopted Children* (Jan. 31, 2002), at <http://www.travel.state.gov/guatemalpassports.html> (last visited Feb. 3, 2003); U.S. Dep't of State, *Important Notice Expected Delays in Adoption in Vietnam* (Jan. 28, 2003), at <http://www.travel.state.gov/vietnamupdate.html> (last visited Feb. 3, 2003). Although visa processing has not been formally suspended in Vietnam, the INS is processing adoptions from Vietnam only after conducting country-wide reviews of the adoption process there. See U.S. Dep't of Justice, *Adoption Processing in Cambodia: Questions and Answers*, Q&A 4 (Feb. 7, 2002), at <http://www.ins.usdoj.gov/graphics/publicaffairs/questsans/QAadopt.htm> (last visited Jan. 13, 2003).

⁸ The formal adoption occurs in Cambodia as a matter of Cambodian law. See discussion *infra* Part IV. The INS cannot prevent Americans from adopting a Cambodian child, but it can block the child's entry into the United States by denying the child's visa application. Press Release, U.S. Dep't of State, *International Adoptions: Guidelines on Immediate Relative Petitions* (Feb. 1997), at http://www.travel.gov/ir_petitions.html (last visited Feb. 3, 2003). Ultimately, the visa denial prevents the adoption from being completed. *Id.* Adoptive parents can circumvent this law by living abroad with their adoptive child for two years and applying for an IR-2 visa. U.S. Dep't of State, *Adoption Guidelines—Identifying a Child*, at <http://www.state.gov/m/dghr/flo/rsrscs/pubs/7317.htm> (last visited Jan. 13, 2003). The authority for this type of visa can be found in the Immigration and Nationality Act, 8 U.S.C. § 1101(b)(1)(E) (2000) (effective 1952). However, without a way to support themselves in a foreign country adoptive parents generally find this alternative an unattractive option.

⁹ INS Announces Suspension, *supra* note 6. Under the terms of the parole the adoptive families had to agree to obtain U.S. adoptions within two years, and return the child if he or she later proves not to be an orphan. See also 20/20: *INS Grants Cambodian Children Humanitarian Paroles so Their Adoptive*

At least two confirmed reports of baby-selling prompted the ban.¹⁰ The concern began when an impoverished Cambodian mother sought to recover two children she claimed to have sold for \$150.¹¹ When her attempts to recover her children proved unsuccessful, she turned to a non-governmental organization ("NGO"), the Cambodian League for the Promotion and Defense of Human Rights ("LICADHO"),¹² for help. LICADHO quickly uncovered a baby-buying ring in Phnom Penh in possession of ten infants and two older children.¹³ Among the infants were the two children in question.¹⁴ The ring members were arrested but were quickly released after the mother recanted her testimony.¹⁵ The ten other children were placed in the custody of LICADHO until their birth families could be located or they could be placed in an orphanage.¹⁶ After the raid became public, other women came forward claiming that their children had either been bought or stolen by the ring.¹⁷ These women's children were found among the twelve children and U.S. officials confirmed that one had already been referred to an American couple for adoption.¹⁸

This Comment examines the recent efforts to combat the trafficking of Cambodian babies for international adoption. Part II provides a brief overview of the black-market trade in infants around the world, including the motivations for international adoptions. Part III looks at the current

Families Can Bring Them into U.S. (ABC television broadcast, Jan. 18, 2002), 2002 WL 10835026. The immediate about-face by the INS is probably a result of Congressional pressure spearheaded by Senator Mary Landrieu, who urged the Senate to respond quickly to resolve the situation. Senator Landrieu's comments are available at 147 CONG. REC. S14031-01 (2002).

¹⁰ Letter from James W. Ziglar, Comm'r, INS, to prospective adoptive parents (Feb. 7, 2002), available at <http://www.ins.usdoj.gov/graphics/publicaffairs/prospe.pdf> (last visited Jan. 24, 2003) [hereinafter Letter from James W. Ziglar].

¹¹ *Cambodian Police Quiz Five Over Baby Trafficking*, AGENCE FR.-PRESSE, Sept. 4, 2001, 2001 WL 25003979.

¹² LICADHO was founded in 1991 and is the largest NGO operating in Cambodia. See the Cambodian League for the Promotion and Defense of Human Rights, at <http://www.asianexchange.org/Movements/94112031919172.php> (last visited Jan. 13, 2003) (providing a brief description of LICADHO).

¹³ *Cambodian Police Quiz Five Over Baby Trafficking*, *supra* note 11. One of the two older children, a nine-year-old girl, reported that she had been kept at the center to clean and care for the babies and that every four to five days new babies would enter and leave the center. Bill Bainbridge & Vong Sokheng, *Suspected Covert Adoption Center Uncovered*, PHNOM PENH POST, posted Jan. 21 2002, available at <http://www.oggham.com/Cambodia/archives/media/000300.html> (last visited Jan. 31, 2003).

¹⁴ *International Adoptions: Problems and Solutions: Hearing Before the Committee on International Relations*, 107th Cong. 67 (2002) [hereinafter *International Adoptions: Problems and Solutions*].

¹⁵ Bill Bainbridge & Lon Nara, *Baby Traffic Witnesses Recant*, PHNOM PENH POST, Mar. 15-28, 2002, available at <http://www.oggham.com/cambodia/archives/media/000460.html> (last visited Jan. 31, 2003). The mother later changed her story, stating that she had begged them to take her children and that they had given her the money out of pity. *Id.*

¹⁶ *Cambodian Police Quiz Five Over Baby Trafficking*, *supra* note 11.

¹⁷ *International Adoptions: Problems and Solutions*, *supra* note 14, at 66.

¹⁸ *Id.* at 66-67.

causes of infant-trafficking within Cambodia. Part IV is an overview of current Cambodian adoption law and provides an evaluation of some of its features. Part V discusses the international community's response to infant-trafficking and criticizes the Hague Convention on Inter-country Adoption as an ineffective tool to prevent adoption fraud. Part VI looks at the United States' ratification of the provisions of the Hague Convention through the enactment of the Inter-country Adoption Act ("IAA") and critiques the IAA as encouraging rather than stymieing adoption abuses. Finally, Part VII suggests possible solutions and policy initiatives that would encourage transparency in the Cambodian intercountry adoption process.

II. MOTIVATIONS FOR INTERCOUNTRY ADOPTIONS AND THE RISE OF THE BLACK-MARKET TRADE IN INFANTS

Inter-country adoptions became prevalent in the United States in the 1950s when the media focused attention on the thousands of children orphaned during the Korean War.¹⁹ Since then, American families have been particularly eager to open their homes and hearts to children from war-torn, poverty-stricken countries.²⁰ The reasons are two-fold. First, civil uprisings and severe poverty produce large numbers of orphaned children.²¹ Since their governments are often weak and financially unable to care for many of the orphans, the fees associated with adopting these children, including travel expenses, are comparable to domestic adoptions.²² Second, American adoptive parents often adopt with altruistic motives; beyond the desire to raise a child, parents often have a sense that they are saving their adopted child from a miserable existence in his or her birth country.²³

¹⁹ CHERI REGISTER, "ARE THOSE KIDS YOURS?": AMERICAN FAMILIES WITH CHILDREN ADOPTED FROM OTHER COUNTRIES 2 (1991).

²⁰ Nicole Bartner Graff, *Inter-country 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, 406 (2000).

²¹ REGISTER, *supra* note 19, at 1-3.

²² The average cost for a domestic adoption is \$15,000. See *The Adoption Guide* (Mary Mooney's Adoption Agency ed.), at <http://www.theadoptionguide.com/TAG/domestic/htm> (last visited Jan. 24, 2003). However, adopters of domestic babies must usually pay the medical expenses of the birth mother and the birth mother reserves the right to change her mind. *Id.* The average cost of an intercountry adoption is between \$10,000 and \$20,000 and the adoptive parents are almost assured of receiving a child. See Letter from Martha Osborne, Rainbow Kids, available at <http://www.rainbowkids.com/102ziglar.htm> (last visited Jan. 31, 2003). This letter was a response to the letter issued by Commissioner Ziglar to prospective adoptive parents. See Letter from James W. Ziglar, *supra* note 10.

²³ Kim Woulfe, one of the parents caught in limbo by the INS ban said, "I set out to add to my family and do some great humanitarian act by coming to a third world country and taking a child that I can offer a better life to." Eric Unmacht, *US Works to Improve Adoption Laws in Cambodia; Earlier this Month, the US Approved 45 Adoptions*, CHRISTIAN SCI. MONITOR, Apr. 18, 2002, 2002 WL 6425365.

The same factors that motivate adoptive parents to select a particular country also encourage the proliferation of black market adoptions. War-torn, poverty-stricken countries are more susceptible to the creation of a black market trade in infants because the country's adoption infrastructure is weak, the laws are underdeveloped or ignored,²⁴ and government officials are underpaid and susceptible to bribes.²⁵ Often, such countries lack laws adequate to protect the rights of the birth parents or the children involved and do not criminalize child trafficking for the purpose of international adoption.²⁶

A. Increased Demand for Foreign Children by American Families

During the last three decades, Americans have adopted over a quarter million children from other countries.²⁷ The U.S. adoption boom is largely a response to growing infertility rates among American couples and dwindling numbers of healthy adoptable children available domestically.²⁸ Decreased social stigmatization of single parenthood and increased access to birth control has furthered the need for adoptive parents to seek children outside the United States.²⁹ Unfortunately, increased demand for children has sparked a black market in the buying and selling of healthy infants. The black-market trade in infants is not a new problem, nor is it confined to Cambodia.

B. Baby-Trafficking Occurs Worldwide

Baby-trafficking has been documented worldwide. The following descriptions of baby-trafficking from Cambodia, Romania, and Guatemala demonstrate the variety and pervasiveness of the problem.

²⁴ See discussion *infra* Part VI.

²⁵ See discussion *infra* Part III.C.

²⁶ Under intense international pressure many developing nations have signed treaties prohibiting the trafficking of people (including children) for the purpose of prostitution, forced labor, or military replenishment. See, e.g., *Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, G.A. Res. 55/25, U.N. GAOR, 55th Sess., U.N. Doc. A/Res/45/49 (2000).

²⁷ THE EVAN B. DONALDSON ADOPTION INSTITUTE, INTERNATIONAL ADOPTION FACTS, 2002, available at <http://www.adoptioninstitute.org/FactOverview/international.html> (last visited Jan. 16, 2003).

²⁸ Jorge L. Carro, *Regulation of Intercountry Adoption: Can the Abuses Come to an End?*, 18 HASTINGS INT'L & COMP. L. REV. 121, 122 (1994).

²⁹ Elizabeth Bartholet, *International Adoption: Propriety, Prospects, and Pragmatics*, 13 J. AM. ACAD. MATRIM. LAW. 181 (1996). It is estimated that between twenty and forty families vie for every domestic, healthy, adoptable child. Janet Hopkins Dickson, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 918 (1991).

U.S. adoptions from Cambodia boomed over the last decade, increasing from just one adoption in 1993 to 407 in 2001.³⁰ Despite a population of less than thirteen million, Cambodia ranked among the top ten sending countries in 2000 and 2001, just behind India in U.S. foreign adoptions.³¹ In 2001, the waiting period for a referral to a Cambodian infant was three to six months, less than half the period for most other healthy foreign and American infants.³² Cambodia offered exactly what adoptive parents sought: expedited adoptions of healthy infants.³³ The speed of the Cambodian adoption process, however, belied fundamental flaws. Many babies offered for adoption were not orphans and had been separated from their parents through bribery or fraud.³⁴ By 2001, baby-selling had reached such a crisis level that U.S. officials were forced to prevent adoptions from Cambodia to ensure that Americans did not adopt trafficked children.³⁵

A similar crisis existed shortly after the collapse of the Soviet Union when Romania grappled with international adoptions without the benefit of well-established adoption laws. Baby-brokers took advantage of a loophole in Romanian adoption law that did not criminalize child trafficking in order to facilitate over ten thousand Romanian adoptions in 1990-91.³⁶ Rumors spread of Romania's corrupt system and sparked an intensive investigation of the problem on *60 Minutes*.³⁷ The Romanian government attempted to prevent adoption fraud by enacting stringent laws for approving international adoptions, as well as pursuing criminal charges against anyone caught giving

³⁰ THE EVAN B. DONALDSON ADOPTION INSTITUTE, *supra* note 27.

³¹ *Id.*

³² Sara Corbett, *Where Do Babies Come From?*, N.Y. TIMES MAG., June 16, 2002, available at <http://www.nytimes.com/2002/06/16/magazine/16ADOPTION.html> (last visited Jan. 31, 2003).

³³ According to Cambodian law, a child must live in an orphanage for three months before being eligible for adoption. Ministry of Foreign Affairs and International Cooperation, Sub-Decree on Application for Orphaned Baby or Orphaned Child to Adopt Abroad, No. 524 MFA-IC/LC2 (Mar. 2001), translated at <http://www.ins.usdoj.gov/graphics/services/govcam.pdf> (last visited Jan. 16, 2003) [hereinafter Sub-Decree]. The rationale of such a restriction is to leave a window of opportunity for mothers to reclaim their children. *International Adoptions: Problems and Solutions*, *supra* note 14, at 38 (statements by James W. Ziglar, Comm'r, INS). Theoretically an infant would be ineligible for adoption until they were at least three months old, assuming they were relinquished to the orphanage directly after birth. *Id.* However, adoptive parents have received referrals for children younger than three months. *Id.* This practice thwarts the rationale for such a law. *Id.*

³⁴ See discussion *infra* Part III.B.

³⁵ See discussion, *supra* Part I.

³⁶ ELIEZER D. JAFFE, *INTERCOUNTRY ADOPTIONS: LAWS AND PERSPECTIVES OF SENDING COUNTRIES* 42 (1995). This figure represented nearly one-third of all international adoptions for that year. *Id.*

³⁷ Kimberly A. Chadwick, *The Politics and Economics of Intercountry Adoption in Eastern Europe*, 5 J. INT'L LEGAL STUD. 113, 124 (1999). See also Katherine Calos, *Finding Happiness in Romania Americans Adopt Bundles of Joy*, RICHMOND NEWS LEADER, Jan. 16, 1991, 1991 WL 4736441.

or receiving money for an adoption.³⁸ The new Romanian law promoted international adoption as a last resort, and only if the child could not be placed domestically.³⁹ Although these laws were designed to limit fraud, a lack of transparency in adoptions continues to plague Romania.⁴⁰ In 2001, the Romanian government announced that it would place a one-year moratorium on international adoptions in order to overhaul its adoption procedures.⁴¹ In November 2002, Romania extended the moratorium through at least February 2003.⁴²

Concerns about adoption fraud also continue to plague Guatemala. In 1999, American families adopted fifteen hundred Guatemalan children. This number is particularly high when compared with a neighboring country such as Ecuador, which has approximately fifty adoptions per year.⁴³ According to a U.N. report, illegal Guatemalan adoption schemes work in the following way:

[N]etworks of (usually female) recruiters, hired by lawyers, pay rural midwives approximately US\$ 50 to register the birth of a non-existent child, using a false name for the birth mother. Upon payment of approximately another US\$ 50, another woman "becomes" the mother and is given a baby—usually stolen—and told to take the baby to Guatemala City to give it up for adoption. The woman signs the notary's documents giving up "her" child and the baby is placed in a foster environment, preparatory to adoption proceedings.⁴⁴

Since the Guatemalan government has been unable to regulate the vast majority of adoptions and has been unwilling to significantly restrict

³⁸ J.P. O'CONNOR, *THE INTERNATIONAL ADOPTION GUIDE: HOW TO LEGALLY ADOPT A CHILD IN OVER 80 COUNTRIES*, 113 (1994). See also *Romania Cracks Down on Sale of Babies*, *TORONTO STAR*, May 17, 1991, 1991 WL 9490825.

³⁹ Law No. 48, amendment to Law No. 11/1990, published in *MONITORUL OFICIAL*, No. 147, July 17, 1991. JAFFE, *supra* note 36, at 43.

⁴⁰ U.S. Dep't of State, *International Adoption Romania*, at http://www.travel.state.gov/adoption_romania.html (last visited Jan. 13, 2003).

⁴¹ *Id.*

⁴² U.S. Dep't of State, *Update on Romanian Adoption Moratorium*, <http://www.travel.state.gov/110802romanianadopt.html> (last visited Jan. 31, 2003).

⁴³ *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, Ms. Ofelia Calcetas-Santos, Addendum: Report on the Mission to Guatemala*, Commission on Human Rights, 56th Sess., Agenda Item 13, at 4, U.N. Doc. E/CN.4/2000/73/Add.2 (2000) [hereinafter *Report on the Mission to Guatemala*].

⁴⁴ *Id.* at 8. According to the report "since huge profits can be made, the child has become an object of commerce rather than the focus of the law," and illegal adoptions are apparently the rule instead of the exception in Guatemala. *Id.* at 5.

intercountry adoptions, receiving countries have been forced to implement extra safeguards to protect against black-market infants.⁴⁵ In the United States, before the INS will issue an immigrant visa to a Guatemalan child, the child must undergo a DNA test to prove that the "birth mother," who relinquished the child for adoption, is in fact the child's biological parent.⁴⁶

Instances of baby-trafficking are not limited to these countries. Since the advent of the Internet, baby-trafficking has become even more profitable, bringing together prospective parents and children at little or no cost; moreover, the Internet has made traffickers more difficult to track and prosecute.

III. FACTORS CONTRIBUTING TO BABY-TRAFFICKING IN CAMBODIA

Although numerous factors contribute to baby-trafficking worldwide, Cambodia possesses a combination of factors that make it especially prone to baby-trafficking. These factors include a long legacy of war, poverty, poor national health, and a raging AIDS epidemic.⁴⁷ Moreover, Cambodia's institutions are weak due to insufficient salaries for government officials, lack of judicial review, and adoption facilitators who manipulate and abuse the system.

A. *Cambodia: A Legacy of Two Decades of War*

During twenty years of war (1970-1991),⁴⁸ Cambodia lost an estimated one-third of its population⁴⁹ leaving many children orphaned and homeless. An estimated 250,000 children were orphaned during the rule of

⁴⁵ *Id.* at 10.

⁴⁶ DNA testing is required for all U.S. adoptions from Guatemala and has been successful in decreasing the incidence of fraudulent adoptions from that country. U.S. Dep't of State, *International Adoption Guatemala*, http://travel.state.gov/adoption_guatemala.html (last visited Jan. 16, 2003); *Report on the Mission to Guatemala*, *supra* note 43.

⁴⁷ See discussion *infra* Part III.A-B.

⁴⁸ Cambodia had essentially been at war since 1970 when a military coup overthrew the monarchy. CAMBODIA: CHANGE AND CONTINUITY IN CONTEMPORARY POLITICS xi (Sorpong Peou ed., 2001). The new regime (known as the Khmer Republic) then fought with guerrilla forces known as the Khmer Rouge until their defeat in 1975. *Id.* Pol Pot, the Prime Minister of the new Khmer Rouge regime, lorded over Cambodia, reigning bloodshed and terror upon the people (of the estimated 2.5 million Cambodians who lost their lives between 1970 and 1991 almost half died during this period) until he was ousted in 1978 by an invasion of Vietnamese troops. *Id.* The Vietnamese ruled Cambodia under the newly formed People's Republic of Kampuchea ("PRK") until 1989. *Id.* The PRK then fought for power with at least three other major resistance forces between 1989 and 1991. *Id.* Finally, in 1991, the four factions ended their conflict with the signing of a peace accord (the Paris Agreements) and invited the United Nations to help rebuild Cambodia. *Id.*

⁴⁹ *Id.*

the Khmer Rouge (1975-1978), alone.⁵⁰ During the reign of the Khmer Rouge, many families were separated and children over age five were sent to live in temporary work camps where they were forbidden from seeing their parents.⁵¹ In some cases, these forced separations became permanent because parents were later killed, starved to death, or died from lack of medical care.⁵² Moreover, when these forced work groups were disbanded, many children could not find their families and were sent to government orphanages.⁵³ Many other children ended up in orphanages because their families could not afford to feed them.⁵⁴

The first government-run orphanages opened in 1979 after the fall of the Khmer Rouge.⁵⁵ Orphanage Number One housed nearly five hundred children with only one staff member for every thirty-five children.⁵⁶ Although the orphanages were government-run, they lacked sufficient financial support to be adequately operated.⁵⁷ Most of the children who came to orphanages were malnourished and suffered from moderate to severe health problems.⁵⁸ Compounding these physical ailments, some of the children had experienced firsthand the atrocities committed by Khmer Rouge soldiers and were emotionally and psychologically scarred.⁵⁹ This legacy of war left the country struggling to find caretakers for thousands of orphaned children, and the Cambodian government subsequently embraced intercountry adoption as a viable solution.⁶⁰

B. Cambodia's Cycle of Poverty Fuels Baby-Trafficking

Poverty and a lack of education render rural Cambodians prime targets for baby-traffickers who prey on ignorance and desperation. About eighty-five percent of Cambodians are rural farmers and most live in

⁵⁰ CAROL WAGNER, *SOUL SURVIVORS: STORIES OF WOMEN AND CHILDREN IN CAMBODIA* 83 (2002).

⁵¹ *Id.* at 53.

⁵² *Id.*

⁵³ *Id.* at 203-206.

⁵⁴ *Id.* at 85.

⁵⁵ *Id.* at 184.

⁵⁶ *Id.*

⁵⁷ *Id.* According to a staffer who worked at Orphanage Number One from its opening in 1979 until 1992 and who now works at the Baby Rescue Center, an orphanage for young children newborn to age six, the government provided the orphanage about \$5 per child per month, but that formula alone cost \$60 per child per month. *Id.* at 185.

⁵⁸ *Id.* at 184.

⁵⁹ *Id.* at 153-154.

⁶⁰ THE EVAN B. DONALDSON ADOPTION INSTITUTE, *supra* note 27.

moderate or abject poverty.⁶¹ Cambodia's Council for Agricultural and Rural Development estimates that forty percent of the population lives on less than one dollar per day.⁶² Without an adequate source of income, rural families depend upon the earning power of every member, including children, to survive. Because rural families expect their children to work, few children attend school.⁶³ According to a report by Save the Children Norway, 83.8% of children enroll in primary school but only 16.6% enroll in secondary school.⁶⁴ This cycle of poverty and poor education traps many rural Cambodians because they cannot afford an education, and yet cannot find better paying work without one.⁶⁵

The buying and selling of babies is just another consequence of this cycle of poverty. Rural mothers,⁶⁶ many of whom already have other children, have been known to sell a baby for as little as \$12.40, either because they are unable to care for the baby or because they need to generate funds to feed their other children.⁶⁷ Unscrupulous "adoption facilitators"⁶⁸

⁶¹ Cambodia (Save the Children Norway ed.) at http://www.bigpond.com/kh/users/rb.cambodia/fact_about_children.htm (last visited Jan. 16, 2003) [hereinafter Save the Children Norway].

⁶² Ek Madra, *No Escape from Cambodia's Bleak Cycle of Poverty*, REUTERS, Apr. 4, 2002, available at http://www.oggham.com/cambodia/archives/cambodian_society/000471.html (last visited Jan. 31, 2003). Floods prevented more than half the country's rice crop from being planted in 2002 and droughts now threaten to destroy fields that were planted. Luke Hunt, *One Million Cambodians Hit as Flood Waters Peak*, AGENCE FR.-PRESSE, Aug. 26, 2002, available at http://www.softcom.net/webnews/wed/aq/Qcambodia-weather.RWOC_CaQ.html (last visited Jan. 31, 2003). Food shortages during 2003 are expected. Suy Se, *Chronic Food Shortages Forecast for One Million Cambodians*, AGENCE FR.-PRESSE, Oct. 10, 2002, available at http://www.softcom.net/webnews/wed/cq/Qcambodia-weather.RLKr_COA.html (last visited Jan. 31, 2003).

⁶³ Cambodia was recently classified as one of the forty-nine least developed countries by the United Nations. United Nations, *List of Least Developed Countries* (2002), <http://www.un.org/special-rep/ohrls/ldc/list.htm> (last visited Jan. 30, 2003). See *Royal Government of Cambodia, Country Presentation for Cambodia*, Third United Nations Conference on the Least Developed Countries, U.N. Doc. A/Conf.191/CP/40 (2001) [hereinafter *Country Presentation for Cambodia*]. See also Joseph R. McCarthy, *The Third United Nations World Conference on the Least Developed Countries: A Global Agenda for the New Millennium*, 18 N.Y.L. SCH. J. HUM. RTS. 487, 489 n.9 (2002).

⁶⁴ *Cambodian Children Face Staggering Problems: Report*, AGENCE FR.-PRESSE, May 8, 2002, 2002 WL 2402272. Almost one-third of Cambodians have never attended school. Save the Children Norway, *supra* note 61.

⁶⁵ Madra, *supra* note 62.

⁶⁶ Although baby-trafficking affects both Cambodian mothers and fathers, single mothers are at a greater risk of falling prey to baby-traffickers because they lack the financial support of another income-earner. For this reason, this Comment refers to "mothers" when discussing the birth parents of trafficked children. The reader should not infer that Cambodian fathers are not also affected. See a discussion of this issue in Latin America in REGISTER, *supra* note 19, at 15.

⁶⁷ Chris Decherd, *Babies Sold for Food in Cambodia*, ASSOC. PRESS, Jan. 29, 2001, available at <http://www.theadoptionguide.com/News/Cambodia2-01.html> (last visited Jan. 31, 2003).

⁶⁸ See discussion *infra* Part III.D.

offer poor mothers between \$100 and \$300 for each child.⁶⁹ This amount of money is the equivalent to a year's income for some mothers, which makes selling newborns an attractive option. Because most rural Cambodians are poorly educated and many cannot read, they are often forced to sign documents they do not understand.⁷⁰ Most mothers are told that their child is going to live in a Cambodian orphanage where he or she will receive food, healthcare, and an education.⁷¹ Some are even told that they can visit their babies regularly and can retrieve their babies if they are later able to support them.⁷² Mothers often do not find out until it is too late that they have signed away their parental rights and their child has been made available for international adoption.⁷³

Baby-traffickers also manipulate Cambodia's ailing healthcare system to buy or steal children from poor, rural mothers.⁷⁴ The AIDS epidemic compounds problems faced by Cambodia's already strained medical resources.⁷⁵ Notwithstanding the 3000 Cambodian children who die annually from AIDS, another 10,000 are orphaned by the disease and become candidates for adoption.⁷⁶ A report estimated that by 2010 there would be 140,000 children orphaned by AIDS; one new orphanage would need to be built every day to accommodate these children.⁷⁷ Facilitators use

⁶⁹ Greg Dabel, *Orphaned Again: Seedy Baby-Brokers Break Parents' Hearts and Thwart an Otherwise Healthy Adoption Business with Cambodia*, WORLD MAG., Vol. 17, No. 24, June 22, 2002, available at <http://www.oggham.com/cambodia/archives/media/000523.html> (last visited Jan. 31, 2003).

⁷⁰ *International Adoptions: Problems and Solutions*, *supra* note 14, at 80.

⁷¹ Bart Jones, *New INS Ban Ties Up Hundreds of Cambodian Adoptions*, NEWSDAY, Mar. 4, 2002, available at <http://www.oggham.com/cambodia/archives/media/000440.html> (last visited Jan. 31, 2003).

⁷² Unmacht, *supra* note 23.

⁷³ *Id.*

⁷⁴ Despite an infant mortality rate of 10%, Cambodia's population growth rate is booming at nearly 2.5%. Save the Children Norway, *supra* note 61. About 54% of Cambodia's population is under the age of 18. *Cambodian Children Face Staggering Problems: Report*, *supra* note 64. But poverty combines with a large rural population to make access to health care difficult. See discussion *supra* Part III.B. Many villages do not have adequate facilities, medicines, or health workers. WAGNER, *supra* note 50, at 101. During the late 1970s, the Khmer Rouge systematically murdered educated classes so that by 1980 only forty doctors remained in the country. *Id.* at 102. Even families who have access to medical care may not be able to afford the costs associated with quality patient care and proper administration of medicines, since, on average, Cambodians spend only seven dollars per year on healthcare. Chris Decherd, *Experts Say AIDS Could Overwhelm Cambodia's Health System in 10 Years*, ASSOC. PRESS, July 3, 2002, available at http://www.oggham.com/cambodia/archives/cambodia_news/000490.html (last visited Jan. 31, 2003).

⁷⁵ *Powell Challenges Foreign Envoys to Tackle AIDS Crisis*, AGENCE FR.-PRESSE, Dec. 3, 2002, 2002 WL 23663640. Cambodia has the largest number of HIV-positive adults in Asia. *Id.* Although more than 1.5 million Cambodians are infected with the disease, at last count, only about 500 have access to medicines to combat it. Luke Hunt, *Impoverished Cambodia Wages Battle Against AIDS Epidemic*, AGENCE FR.-PRESSE, Nov. 27, 2002, 2002 WL 23659186. See also the discussion of AIDS in *Country Presentation for Cambodia*, *supra* note 63, at 13.

⁷⁶ Save the Children Norway, *supra* note 61.

⁷⁷ Joe Cochrane & Khieu Kola, *The Parent Killer: the AIDS Epidemic is Creating a New Generation of Orphans in Cambodia*, NEWSWEEK INT'L, Dec. 9, 2002, 2002 WL 8965814.

the epidemic to their advantage by approaching expectant mothers who are HIV-positive and offering to pay their medical bills in exchange for their children.⁷⁸ Some facilitators approach these mothers after they have given birth and claim that the child needs to be taken for AIDS testing.⁷⁹ The facilitators then take the child to an orphanage for international adoption.⁸⁰ The mother is subsequently told that her child is HIV-positive and cannot be returned to her.⁸¹

C. *Corruption Continues to Plague Cambodia's Institutions*

Low salaries continue to plague Cambodia's government, tempting officials to accept bribes in return for adoption approvals. The Ministry of Justice reports that judges and ministry officials receive salaries of only \$20 or \$25 per month.⁸² This salary is usually only enough to support an urban family for a week or less.⁸³ The temptation for officials to accept bribes or "tips" in exchange for signing off on adoption paperwork is overwhelming. Officially stated adoption fees for a Cambodian child are \$250, which covers the cost of a Cambodian passport as well as a mandatory "donation" for orphans.⁸⁴ But, according to most adoption agencies, adoption fees typically range from \$10,000 to \$20,000.⁸⁵

Lauryn Galindo, an adoption facilitator working in Cambodia, claims to charge \$9000 on average for an adoption.⁸⁶ She claims that \$3500 goes for "donations," including \$400 going directly to the orphanage.⁸⁷ The remaining \$5500 is said to go to processing fees.⁸⁸ These costs are

⁷⁸ *International Adoptions: Problems and Solutions*, *supra* note 14, at 79.

⁷⁹ Unmacht, *supra* note 23.

⁸⁰ *Id.*

⁸¹ *Id.* No law requires that HIV-positive children be removed from their mothers. However, no market for infected children exists, so it is likely that children removed for this purpose are, in fact, not HIV-positive. *International Adoptions: Problems and Solutions*, *supra* note 14, at 79.

⁸² BASIL FERNANDO, PROBLEMS FACING THE CAMBODIAN LEGAL SYSTEM 82 (1998).

⁸³ *Id.*

⁸⁴ NGO Committee on the Rights of the Child, Cambodia: NGO Report 7 (1999), at <http://www.crin.org/docs/resources/treaties/crc.24/cambodiaNGOreport.pdf> (last visited Jan. 16, 2003) [hereinafter Cambodia: NGO Report]. Adoptive parents pay the fee directly to the Cambodian government and it is supposedly distributed to orphanages for food and other supplies. Jones, *supra* note 71.

⁸⁵ Richard Sine, *Inquiry Spotlights Cambodian Baby 'Locators' Evidence Mounts of Adoption Fraud*, BOSTON GLOBE, June 16, 2002, 2002 WL 4133558 [hereinafter *Inquiry Spotlights Locators*].

⁸⁶ Richard Sine, *Treasured or Traded? Do Adoption Facilitators Save Babies or Sell Them? A Profile of the Field's Largest Player*, CAMBODIA DAILY, June 22-23, 2002, available at http://www.camnet.com.kh/cambodia.daily/selected_features/adoption.htm (last visited Jan. 24, 2003) [hereinafter *Treasured or Traded*].

⁸⁷ *Id.*

⁸⁸ *Id.*

suspicious in a country with extremely minimal official adoption fees.⁸⁹ Galindo confirms the widespread use of bribes to speed adoptions and even affirms their appropriateness and legitimacy in a country where government salaries are so low.⁹⁰

If a Cambodian mother sells or relinquishes her baby or reports her baby stolen, she must overcome several hurdles in order to recover the child. Once an adoption is completed, a lack of judicial review of adoption proceedings⁹¹ makes it almost impossible for Cambodians to challenge the actions of the ministry officials who sign the adoption paperwork. The courts are unlikely to review decisions relating to adoption approvals because "Cambodian law as it exists now does not provide for any legal procedure to review the decisions made by administrative officers."⁹² First, she must locate her child. If she is aware of groups like LICADHO, she might seek their help in searching for her baby. If she is able to locate her child, she must then hope her child has not already been placed for international adoption. According to Cambodian law, children must reside in an orphanage for a minimum of three months before being eligible for adoption.⁹³ However, many children are referred to adoptive parents before that time has elapsed.⁹⁴ The mother may find it difficult, if not impossible, to retrieve her child once the adoption has been approved by the required governmental bodies⁹⁵ since there is no legal procedure to challenge the decisions of the ministries.⁹⁶ Baby-traffickers understand this system and use the mother's lack of power to quickly move the baby down the adoption pipeline and out of reach.

⁸⁹ See *supra* note 84 and accompanying text.

⁹⁰ *Id.*

⁹¹ FERNANDO, *supra* note 82, at 100.

⁹² *Id.*

⁹³ See Sub-Decree, *supra* note 33, art. 5.

⁹⁴ Corbett, *supra* note 32.

⁹⁵ Signatures must be obtained from the Council of Ministers, the Ministry of Interior, the Ministry of Foreign Affairs and International Cooperation, and the Ministry of Social Affairs, Labor, Vocational Training, and Youth Rehabilitation before the adoption is finalized. Matt McKinney & Lor Chandara, *Babies in Waiting*, CAMBODIA DAILY, Mar. 23-24, 2002, available at http://www.camnet.com.kh/cambodia.daily/selected_features/cambaby.htm (last visited Jan. 31, 2003). One adoptive parent was told that he would need to make a "donation" of \$300 for each of the four signatures. *Id.*

⁹⁶ This would amount to accusing the ministries of approving the adoption of a trafficked child. See FERNANDO, *supra* note 82, at 105-106, for a list of situations in which courts lack jurisdiction over officials and the ability to enforce orders or judgments. This includes the inability of the courts to compel ministry officials to appear in court and answer allegations made against them. *Id.*

D. *Unscrupulous Adoption Brokers*

Probably one of the most insidious causes of baby-trafficking in Cambodia is the work of "adoption brokers" and "facilitators" who match adoptive parents with Cambodian children and maneuver them through the adoption process. Lauryn Galindo, the oldest and most successful adoption facilitator working in Cambodia, is hailed as a humanitarian for her donations to, and work with, orphans.⁹⁷ However, adoption facilitators like her have helped create a system rife with fraud and irregularities. One adoption agency confirms that "[t]he sharp growth in agencies—from five to 20—and in facilitators—from two to 16—in the past two years along with Cambodia's loose enforcement of its adoption regulations, is 'just an invitation for corruption.'"⁹⁸ According to Naly Pilorge, deputy director of LICADHO, "the key is money . . . Americans are paying \$10,000 to \$20,000 [for a child] in a country where the average income is \$250 a year. . . . That comes to something like \$7.5 million a year, all under the cloak of humanitarian assistance."⁹⁹ Unlike Europeans, who usually must rely on their embassies to locate adoptable children, Americans are able to use facilitators who are considerably more expensive, but get results much more quickly.¹⁰⁰

Facilitators have been accused of manipulating the system to fill the "baby orders" of prospective parents.¹⁰¹ Baby-ordering can result from the intersection of American adoption preferences and Cambodian gender biases. Traditional Cambodian beliefs concerning marriage and elderly care make girls more culturally valuable to Cambodian parents than boys.¹⁰² Because of this, the majority of abandoned children are boys.¹⁰³ Americans,

⁹⁷ *Treasured or Traded*, *supra* note 86.

⁹⁸ Jones, *supra* note 71. See discussion *infra* Part IV.A.

⁹⁹ *Inquiry Spotlights Locators*, *supra* note 85.

¹⁰⁰ *Treasured or Traded*, *supra* note 86. According to Cindy Freidmutter, the Executive Director of the Evan B. Donaldson Adoption Institute, about three-fourths of adoptive parents who responded to a survey conducted by the Institute, claimed that they were required to carry abroad approximately \$3000 in cash to complete their adoption. *International Adoptions: Problems and Solutions*, *supra* note 14, at 44. Freidmutter complained that "American businesses do business in the countries that are the major sending countries all the time, and they don't take suitcases and truckloads of cash abroad in order to do business." *Id.*

¹⁰¹ Dabel, *supra* note 69.

¹⁰² *Treasured or Traded*, *supra* note 86.

¹⁰³ *Id.*

however, overwhelmingly prefer to adopt girls.¹⁰⁴ This market pressure has driven facilitators to artificially “stock” orphanages with infant girls.¹⁰⁵

Although this Comment discusses only the more egregious causes of baby-trafficking in Cambodia, many other factors contribute to the problem. Cambodia’s status as a developing nation,¹⁰⁶ its disappointing economic horizon,¹⁰⁷ and its lack of infrastructure¹⁰⁸ make it particularly susceptible to all types of human rights violations,¹⁰⁹ including baby-trafficking.¹¹⁰ Faced with grueling poverty, inadequate education, and lack of recourse for adjudicative or government action, it may be several years before Cambodia is able to overcome many of the factors causing baby-trafficking.

Cambodia, the international community, and the United States proposed policies, enacted laws, and even instituted moratoriums in an attempt to stem the tide of baby-trafficking. Parts IV-VI of this Comment examine the effectiveness of these laws, individually and in concert. Part IV analyzes Cambodian adoption law after Cambodia signed the United Nations Convention on the Rights of the Child (“CRC”) in 1992. Part V proposes the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (“Hague Convention”), assembled in 1993, as an alternative to the CRC, but concludes that the Hague Convention is ineffective because it puts the bulk of the burden associated with intercountry adoptions on the sending country. Finally, Part VI examines the two initiatives employed by the United States to curb trafficking: the Intercountry Adoption Act of 2000 and a moratorium on adoptions specifically from Cambodia, commencing December 21, 2001.

¹⁰⁴ *Id.* Agency workers report that adoptive parents “request girls over boys by a margin of four to one.” Corbett, *supra* note 32.

¹⁰⁵ *Treasured or Traded*, *supra* note 86. One observer called these children the “cute and cuddlies.” Corbett, *supra* note 32.

¹⁰⁶ See, e.g., *Country Presentation for Cambodia*, *supra* note 63.

¹⁰⁷ See Bertil Lintner, *A Heavy Burden*, 165 *FAR E. ECON. REV.* 38, at 52, Sept. 26, 2002.

¹⁰⁸ See *Country Presentation for Cambodia*, *supra* note 63, at 5.

¹⁰⁹ U.S. Dep’t of State, *Trafficking in Persons Report*, III. Country Narratives, Cambodia (Tier 3), June 5, 2002, available at <http://www.state.gov/g/tip/rls/tiprpt/2002/10679pf.htm> (last visited Jan. 31, 2003); Bill Bainbridge, *U.S. Threatens Sanctions Over Human Trafficking*, PHNOM PENH POST, June 7-20, 2002, available at http://www.unodccp.org.kh/News%20Articles/Human%20Trafficking/June%202002/2002_06_07%20US%20threatens%20sanctions%20over%20h_trafficking%20Phnom%20Penh%20Post.htm (last visited Jan. 31, 2003).

¹¹⁰ See discussion *supra* Part II.

IV. CAMBODIA'S DOMESTIC REGULATION OF INTERCOUNTRY ADOPTIONS

Cambodian adoption laws are lax and loosely regulated.¹¹¹ Cambodian law makes the trafficking of people for the purpose of prostitution a crime, but trafficking for the purpose of adoption is not a criminal offense.¹¹² The Law on Marriage and Family ("LMF") was the only adoption regulation until Cambodia issued the Sub-Decree on Application for Orphaned Baby or Orphaned Child to Adopt Abroad ("Sub-Decree") in an attempt to implement provisions of the Convention on the Rights of the Child ("CRC"). Although the Sub-Decree normalized adoption procedures in Cambodia, it did not adequately fulfill the requirements of the CRC, nor did it make an effort to curb problems associated with baby-trafficking, such as the lack of judicial review of adoption proceedings.

A. Cambodian Adoption Requirements Were Minimal Before the Ratification of the Convention on the Rights of the Child

In 1989, the Cambodian government enacted the Law on Marriage and Family ("LMF").¹¹³ Chapter IV of the LMF provides the legal requirements for foreign and domestic adoptions.¹¹⁴ Under the LMF, the exclusive eligibility requirement for adoptive parents is that the parent(s) must be at least twenty-five years old and at least twenty years older than the adoptee.¹¹⁵ The LMF does not specify who is eligible for adoption other than the child must be less than eight years old¹¹⁶ and the person or entity that has custody of the child must agree to the adoption.¹¹⁷ The LMF does not address financial stability, physical health, criminal record status, or other requirements usually considered vital to the eligibility of an adoptive parent. The LMF also does not address the suitability of adoption for particular children or their best interests in general.

¹¹¹ This probably explains why intercountry adoptions are supposed to be completed through the Ministry of Social Affairs, Labor, Vocational Training, and Youth Rehabilitation, but are occasionally completed through the courts. See discussion *infra* note 133.

¹¹² Bainbridge, *supra* note 109.

¹¹³ Law on the Marriage and Family (1989) (Cambodia), translation available at http://www.gocambodia.com/laws/law_marriage.asp (last visited Jan. 31, 2003).

¹¹⁴ *Id.* ch. IV, § IV.

¹¹⁵ *Id.* art. 109.

¹¹⁶ *Id.* art. 110.

¹¹⁷ *Id.* art. 112.

B. Cambodian Adoption Procedure Changes After the Ratification of the Convention on the Rights of the Child

In 1992, Cambodia ratified the CRC.¹¹⁸ The CRC is not principally focused on adoption but more generally centered on the rights of children.¹¹⁹ The CRC considers intercountry adoption only as a last resort if a child cannot be placed domestically.¹²⁰ Although the CRC contains provisions geared toward the welfare of children generally,¹²¹ Article 21 sets out the specific guidelines for placements of orphaned or abandoned children.¹²² Many of the Article 21 provisions, however, are not met under the LMF adoption provisions. For example, the LMF does not clearly refer to the best interests of the child, as required under the CRC.¹²³ There are also no provisions forbidding improper financial gains for parties involved in adoptions.¹²⁴

Although Cambodia ratified the CRC in 1992,¹²⁵ it has made minimal efforts to implement the provisions. In order to oversee the implementation of the CRC and report to the U.N. on its progress, Cambodia formed a coordinating body called the NGO Committee on the Rights of the Child ("NGOCRC") from delegates of twenty-three NGOs working on children's rights issues in Cambodia.¹²⁶ Although the NGOCRC has urged changes to Cambodia's adoption laws since 1992, additions to the LMF were not made until March 2001 when the Ministry of Foreign Affairs and International Cooperation issued a Sub-Decree on Application for Orphaned Baby or Orphaned Child to Adopt Abroad ("Sub-Decree").¹²⁷ The Sub-Decree adds

¹¹⁸ The United Nations Convention on the Rights of the Child, Nov. 20, 1989, pmbl., U.N. Doc. A/44/736 (1989) [hereinafter *Convention on the Rights of the Child*].

¹¹⁹ The Convention on the Rights of the Child discusses adoption in only one section. *Id.* art. 21.

¹²⁰ The CRC prefers foster care or even institutional care (orphanages) over intercountry adoption. *Id.* art. 21(b).

¹²¹ Although this Comment focuses only on the section discussing adoption, the report also made findings and recommendations on education, child protection, health care, and birth registration. See Cambodia: NGO Report, *supra* note 84.

¹²² Convention on the Rights of the Child, *supra* note 118, art. 21.

¹²³ *Id.* Law on the Marriage and Family, art. 113 (1989) (Cambodia), translation available at http://www.gocambodia.com/laws/law_marriage.asp (last visited Jan. 31, 2003).

¹²⁴ Convention on the Rights of the Child, *supra* note 118, art. 21(d). Law on the Marriage and Family, ch. IV, § IV (1989) (Cambodia), translation available at http://www.gocambodia.com/laws/law_marriage.asp (last visited Jan. 31, 2003).

¹²⁵ Cambodia: NGO Report, *supra* note 84, at 4.

¹²⁶ *Id.* This report was compiled in part to fulfill the requirements of Article 44 of the Convention on the Rights of the Child, which requires periodic reports to the U.N. on measures adopted in order to give effect to the Convention. Convention on the Rights of the Child, *supra* note 118, art. 44.

¹²⁷ Sub-Decree, *supra* note 33. Some observers do not rank the Sub-Decree on the same level as the LMF because the Sub-Decree is a regulation issued by the executive branch and did not need to be debated by parliament. See Catherine Barry, Managing Director of the Office of Visa Services, Bureau of Consular

adoption eligibility requirements to the LMF, including that prospective adoptive parents must be generally healthy, have no criminal record, and complete a dossier.¹²⁸ The dossier includes documents submitted to the Cambodian government: a letter detailing the parents' desire to adopt a Cambodian child, adoption application forms, certificate of an approved home study, medical and psychological reports, police record clearance, letter of employment and financial assessment, marriage certificate or statement of heterosexuality (if single), as well as signed statements that the child will be treated like a biological child, will not be abused, and will be given an education.¹²⁹ The parents must also pledge to submit yearly reports on the child's well-being to the nearest Cambodian embassy until the child is eighteen years old.¹³⁰

Under the Sub-Decree, adopting from Cambodia usually begins by contacting an adoption agency in the United States with a program for Cambodian adoptions.¹³¹ The agency works with a specific facilitator in Cambodia and that facilitator may have agreements with one or more orphanages that supply the children.¹³² The facilitator is responsible for submitting the completed dossier to the Ministry of Social Affairs, Labor, Vocational Training and Youth Rehabilitation ("MSALVTY")¹³³ and for

Affairs, Department of State, Remarks to Congressional staffers (Feb. 6, 2002), at <http://travel.state.gov/cambodiaremarks.html> (last visited Jan. 16, 2003) [hereinafter Remarks by Catherine Barry]. The Sub-Decree was issued at the end of a moratorium instituted by the Cambodian government in order to "revamp procedures" and weed out unethical facilitators and orphanages. See Chris Decherd, *Cambodia Disputes U.S. Claims that Baby-Selling is 'Serious Problem'*, ASSOC. PRESS, Mar. 6, 2002, WESTLAW, ALLNEWSPLUS. The moratorium began in June 2000 and ended March 2001, when the government issued a Sub-Decree on adoptions. *Cambodia Lifts Suspension on Foreign Adoptions*, AGENCE FR.-PRESSE, Mar. 2, 2001, 2001 WL 2353404.

¹²⁸ See Sub-Decree, *supra* note 33, art. 4.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ The following analysis is limited to the process for Americans adopting Cambodians. Other countries, especially European countries, often require prospective parents to locate and adopt children through their embassy in Cambodia and thus have a significantly different process for adopting. McKinney & Chandara, *supra* note 95. France is one country that conducts adoptions solely through its embassy in Cambodia. *Id.* French couples are not allowed to use facilitators and usually only pay a \$200 fee (probably for the child's passport) and a \$500 donation to the orphanage. *Id.* This is a far cry from the fee paid by most American adoptive parents. *Id.* On the other hand, since all French adoptions must be processed through the embassy, only a fraction of the requests from French couples are processed. *Id.* If processed, the waiting period is bound to be lengthier than it is for Americans. *Id.*

¹³² Dale Edmonds, an adoptive parent, recommends choosing the facilitator first since the agency depends on the facilitator to act ethically, but has no way of monitoring the facilitator's activities in Cambodia. Dale Edmonds, *What is the Difference Between an Agency and a Facilitator?*, at http://www.oggham.com/cambodia/archives/agencies_and_facilitators/000312.html (last visited Jan. 16, 2003).

¹³³ According to Dale Edmonds, all foreign adoptions should be handled through MSALVTY; however, many adoptive parents have been able to circumvent the process by adopting through the

locating a child for referral.¹³⁴ Article 5 of the Sub-Decree requires that a child to be adopted internationally be living in a state care facility (government orphanage) for at least three months.¹³⁵ Article 6 requires that the child be placed on MSALVTY's roster of adoptable children before the adoption will be authorized.¹³⁶ While the Sub-Decree regularizes who may adopt, who may be adopted, and the process for adoption, it still fails to criminalize baby-trafficking or prohibit improper financial gains from adoption.

C. The Convention on the Rights of the Child Alone is an Ineffective Domestic Policy Because it Contains No Enforcement Provisions

Although the CRC has the potential to "be a strong force in the fight against abuses in intercountry adoptions," since its inception in 1989, adoption abuses have worsened.¹³⁷ The treaty is problematic because the CRC contains a great deal of vague language and no enforcement provisions.¹³⁸ Since the CRC regards intercountry adoption as a last resort, countries like Cambodia have not been encouraged to strengthen intercountry adoption laws or procedures to prevent abuses.¹³⁹

Articles 44 and 45, the only real teeth of the CRC, require countries to submit periodic reports to the U.N. Committee on the CRC.¹⁴⁰ Articles 44 and 45 give the Committee power to obtain information from sources other than the States Parties themselves and to request that studies be undertaken pertaining to specific issues of concern.¹⁴¹ However, the NGOCRC, the committee that compiles these reports for Cambodia in preparation for Cambodia's report to the U.N., has made little use of these provisions. The NGOCRC's most recent report concludes that trafficking of children for

Cambodian courts. Dale Edmonds, *Court Adoptions—Briefly*, Jan. 21, 2002, http://www.oggham.com/Cambodia/archives/adoption_process/000298.html (last visited Jan. 31, 2003).

¹³⁴ *International Adoptions: Problems and Solutions*, *supra* note 14, at 80 (statements of Kek Galabru, President of LICADHO). See also Dale Edmonds, *supra* note 132. According to the Sub-Decree, a referral for a child should not be made until MSALVTY has approved the dossier. See Dale Edmonds, *Cambodian Requirements for Adoptions Through the Ministries*, at http://www.oggham.com/cambodia/archives/adoption_process/000350.html (last visited Jan. 16, 2003).

¹³⁵ Sub-Decree, *supra* note 33, art. 5.

¹³⁶ *Id.* art. 6.

¹³⁷ Graff, *supra* note 20, at 412.

¹³⁸ Convention on the Rights of the Child, *supra* note 118. Article 21 requires that adoption should be done in "the best interests of the child." *Id.* art. 21. But Article 21 neither gives a definition for "best interests" nor stipulates who should make that decision.

¹³⁹ *Id.*

¹⁴⁰ *Id.* arts. 44-45.

¹⁴¹ *Id.* See also Cynthia Price Cohen, *The United Nations Convention on the Rights of the Child: A Feminist Landmark*, 3 WM. & MARY J. WOMEN & L. 29, 56-57 (1997).

adoption is a serious and continuing problem in Cambodia but its recommendations for curbing fraud and trafficking are vague or untenable.¹⁴² The report recommends that the Cambodian government sign the Hague Convention on Intercountry Adoption¹⁴³ and pass new legislation which fulfills the requirements of the Hague Convention.¹⁴⁴ The report also recommends that the government set up national and international networks to combat illegal adoptions and prosecute those involved in the trafficking or exploitation of children for adoption.¹⁴⁵ These are admirable suggestions but difficult to achieve in practice.¹⁴⁶

Even if the provisions of the CRC were fully implemented, problems of enforcement would still plague Cambodia. The process for adoption in Cambodia, while it was made considerably more uniform by the issuance of the Sub-Decree, remains particularly susceptible to corruption.¹⁴⁷ Adoptive parents are usually so desperate to get a child that they are not in a good position to police agencies or facilitators. They may even be willing to pay a little more or use agencies or facilitators with questionable reputations if it means their applications will be expedited. It is up to the government to regulate the adoption of its children, but in a country as poor as Cambodia, the temptation for government officials to accept bribes in exchange for expediting adoptions or ignoring questionable paperwork is overwhelming.¹⁴⁸

Since Cambodia ratified the CRC, foreign adoptions have grown exponentially.¹⁴⁹ The Cambodian government has made it clear that it does not see trafficking for adoption as a serious problem facing Cambodia.¹⁵⁰ A government spokesperson admitted that isolated cases of baby-selling had occurred, but that it was not widespread.¹⁵¹ Although some agencies, facilitators, and orphanages have come under government suspicion, no one

¹⁴² See NGO Committee on the Rights of the Child, Cambodia Child Rights Report, sec. ii, at 5 (2002), at http://www.ngoforum.org.kh/Working_Group_Issues/CivilSociety/ngo_2002/17.htm (last visited Jan. 16, 2003) [hereinafter Cambodia Child Rights Report].

¹⁴³ See discussion concerning the Hague Convention, *infra* Part V.

¹⁴⁴ Cambodia Child Rights Report, *supra* note 142, sec. iii, para. 5.

¹⁴⁵ *Id.*

¹⁴⁶ It is unlikely that Cambodia will become a signatory to the Hague Convention. See discussion *infra* Part V. Many of these suggestions would require financial and political commitments from Cambodia, the United States, and many other countries to be implemented successfully.

¹⁴⁷ See discussion *supra* Part III.

¹⁴⁸ Although the government has made efforts to normalize adoption procedures, it has been unsuccessful in passing legislation that would curb financial gain by traffickers, facilitators, and government officials.

¹⁴⁹ THE EVAN B. DONALDSON ADOPTION INSTITUTE, *supra* note 27.

¹⁵⁰ Decherd, *supra* note 127.

¹⁵¹ *Id.*

has been convicted of trafficking or had their operation shut down.¹⁵² Existing Cambodian adoption laws have defined the process and basic eligibility requirements for adopting from Cambodia, but Cambodia has failed to implement laws aimed at substantially preventing adoption abuses. Laws prohibiting the more sinister aspects of intercountry adoption such as improper financial gains, bribery, and false documentation are necessary to effectively reduce baby-trafficking in Cambodia.

V. THE HAGUE CONVENTION: A UNIFORM APPROACH TO INTERNATIONAL ADOPTIONS

In 1988, the Hague Conference, a private international organization composed mainly of Western developed nations, proposed to draft legislation that would standardize intercountry adoptions and simplify existing procedures.¹⁵³ Some argued that the final version, titled the "Convention on Protection of Children and Cooperation in Respect to Intercountry Adoption" ("Hague Convention"), was in direct conflict with earlier treaties discussing intercountry adoption such as the CRC.¹⁵⁴ Unlike the CRC, which favors adoption in general but restricts intercountry adoption, the Hague Convention endorses intercountry adoption as an option on par with intra-country placement.¹⁵⁵ The objectives of the Hague Convention are to ensure that intercountry adoption occurs only when it is in the best interests of the child; to create a system of cooperation between countries to help prevent the abduction, sale, or trafficking of children; and to secure recognition of adoptions occurring among member countries.¹⁵⁶

A. *Requirements of the Hague Convention*

The Hague Convention provides the guidelines for intercountry adoption, offers provisions aimed at limiting trafficking of children, and sets

¹⁵² See example *supra* Part I.

¹⁵³ Since the Hague Conference consisted mainly of receiving countries, the existing members extended invitations to many other countries including most of the major sending countries. The Hague Conference on Private International Law: Final Act of the 17th Sess., Including the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 32 I.L.M. 1134, 1139 (1993) [hereinafter *Hague Convention*]. *Id.* The final delegation consisted of sixty-six delegates. A list of the participating countries can be found in the Preamble to the Final Act of the Seventeenth Session. *Id.* Among the participants were the United States, Canada, the United Kingdom of Great Britain, France, and many other European nations. *Id.* Cambodia was not a participant. *Id.*

¹⁵⁴ Richard R. Carlson, *The Emerging Law of Intercountry Adoptions: An Analysis of the Hague Conference on Intercountry Adoption*, 30 TULSA L. J. 243, 258 (1994).

¹⁵⁵ *Id.*

¹⁵⁶ Hague Convention, *supra* note 153, art. 1.

out minimum standards for the accreditation of adoption agencies. First, Articles 4 through 6 of the Hague Convention set out the guidelines for adoption.¹⁵⁷ Article 4 allows an adoption to take place only if designated authorities determine that a child is suitable for adoption and that consent to adoption was freely given, and not in exchange for compensation.¹⁵⁸ Article 5 requires the receiving country to determine whether the prospective adoptive parents are "eligible and suited to adopt" and requires the responsible authority to certify that the child may "enter and reside permanently" in that country.¹⁵⁹ Article 6 requires each country to create a Central Authority to discharge the duties of the Hague Convention and verify that there is no bar to adoption in either country.¹⁶⁰

Second, the Hague Convention also proposed rules aimed at limiting the buying, selling, and trafficking of children for adoption. Article 29 of the Hague Convention requires no contact between adoptive families and a prospective child or her family before the requirements in Articles 4 through 6 have been met.¹⁶¹ Drafters hoped that prohibiting contact between these parties would limit undue pressure on birth parents to relinquish the child, prevent wealthy adopters from enticing poor birth parents to "sell" their child by accepting "gifts," and curb other improprieties occurring due to the transaction-like nature of an adoption.¹⁶²

Third, Article 11 of the Hague Convention requires that the Central Authority accredit intercountry adoption agencies by establishing minimum standards of experience in intercountry adoption, ethics, and competence in adhering to the regulations of the Hague Convention.¹⁶³ Accreditation, in part, is aimed at curbing financially motivated adoption transactions.¹⁶⁴ An accredited agency must be non-profit¹⁶⁵ and personnel must not receive "remuneration which is unreasonably high in relation to services rendered."¹⁶⁶ These sections of Article 11 are consistent with Article 8 which obliges any country ratifying the Hague Convention to prevent "improper financial or other gain" by those involved in the adoption process.¹⁶⁷

¹⁵⁷ *Id.* arts. 4-6.

¹⁵⁸ *Id.* arts. 4(a), (c)(2)-(3).

¹⁵⁹ *Id.* arts. 5(a), (c).

¹⁶⁰ *Id.* arts. 6(1), 17(c).

¹⁶¹ Hague Convention, *supra* note 153, art. 29.

¹⁶² Carlson, *supra* note 154, at 265-266.

¹⁶³ Hague Convention, *supra* note 153, arts. 11(a)-(b).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* art. 11(a).

¹⁶⁶ *Id.* art. 32(a).

¹⁶⁷ *Id.* art. 8.

B. The Hague Convention is Infeasible for Developing Countries to Implement

Although the Hague Convention has the potential to be an effective tool in normalizing the process of intercountry adoption, it has not yet proven successful in preventing adoption abuses. Although the objectives of the Hague Convention are to stabilize and simplify existing intercountry adoption procedures, the Hague Convention will never be a completely effective instrument unless it is signed and ratified by a majority of sending countries. Unfortunately, signing the Hague Convention is wholly voluntary, giving no guarantee that Cambodia will ever accede to the Convention.¹⁶⁸ Moreover, the Cambodian government has not taken steps in that direction.¹⁶⁹ One commentator summed up this argument, stating:

while the Convention may be a good first step, it does not remedy the situation faced by young, fledgling nations incapable of implementing the necessary measures to ensure intercountry adoptions will truly benefit the children involved. Instead it accomplishes the exact opposite by placing a heavy burden in terms of multiple responsibilities on the sending countries. The sending country carries the brunt of the load in regulating the matching process, ensuring the rights of the child and biological family are protected, exploring alternatives to intercountry adoption that would permit the child to remain in his native country, and combating illegal adoption practices. This approach seems counterintuitive as the sending countries are the ones in need of international assistance to meet these goals. International efforts, such as this Convention, which merely officially state that these responsibilities belong to the sending country does [sic] nothing to solve the problem.¹⁷⁰

¹⁶⁸ Congressman Henry J. Hyde expressed doubt that the Hague Convention would completely curb adoption abuses because "some of the foreign countries whose systems are the most problematic are unlikely to ratify the Convention anytime soon." *International Adoptions: Problems and Solutions*, *supra* note 14, at 2.

¹⁶⁹ *Id.* at 5 (statements by Congressman Lantos). The most significant step was an urging by the NGO Committee on the Rights of the Child to sign and adopt the Hague Convention. See Cambodia Child Rights Report, *supra* note 142.

¹⁷⁰ Chadwick *supra* note 37, at 140 (citing ELIEZER D. JAFFE, *INTERCOUNTRY ADOPTIONS: LAWS AND PERSPECTIVES OF SENDING COUNTRIES* 227 (1995)) (footnotes omitted).

The Hague Convention requires contracting countries to implement a comprehensive system of laws regarding intercountry adoption, which the Cambodian government is unable or unwilling to undertake. First, implementation costs would be prohibitively high and would be impossible to attain if foreign aid were cut, as the United States is threatening to do.¹⁷¹ Second, very little incentive exists for the Cambodian government to substantially change a system that brings in nearly \$7.5 million a year.¹⁷² Many government officials rely upon revenues from adoptions to support not only orphanages, but themselves as well.¹⁷³

Even if every country in the world adopted the Hague Convention, problems would remain. Sending and receiving countries are bound to have vastly different beliefs about the use and appropriateness of intercountry adoptions. Receiving countries tend to be Western, politically stable nations with thriving economies, high rates of consumption, and low birth rates.¹⁷⁴ Sending countries tend to be just the opposite: politically unstable with fledgling economies, and high birth rates.¹⁷⁵ Receiving countries both perceive intercountry adoption as a source of children in crisis and prioritize simple adoption processes so that parents without children may create families.¹⁷⁶ Sending countries, however, often see intercountry adoption as a more sensitive issue touching upon national pride and government legitimacy.¹⁷⁷ Given its voluntary nature, the Hague Convention must reflect the policy concerns of both sending and receiving countries to be successful.

VI. U.S. DOMESTIC RESPONSES AND INITIATIVES TO BABY-TRAFFICKING

The United States has recognized that baby-trafficking for intercountry adoption occurs and that Americans, as the largest receiving group of foreign children, should be protected from becoming victims of baby-traffickers.¹⁷⁸ In response to growing concern over baby-trafficking,

¹⁷¹ Chris Decherd, *Official: U.S. Aid at Risk if Cambodia Doesn't Fight Human Trafficking*, ASSOC. PRESS, Jan. 24, 2003.

¹⁷² *Inquiry Spotlights Locators*, *supra* note 85.

¹⁷³ See discussion *supra* Part III.C.

¹⁷⁴ Chadwick, *supra* note 37, at 139-140.

¹⁷⁵ *Id.*

¹⁷⁶ See discussion *supra* note 23.

¹⁷⁷ There may be a cultural belief that children should be treasured as part of the nation's pride and heritage as well as an indication of a better future to come. REGISTER, *supra* note 19, at 17. "The notion that there is something shameful in sending homeless children abroad rather than taking care of 'one's own' has gained widespread acceptance." Bartholet, *supra* note 29, at 184.

¹⁷⁸ U.S. Dep't of State, *International Adoptions*, at <http://travel.state.gov/int'ladoption.html> (last visited Jan. 31, 2003).

the United States signed the Hague Convention in 1993 and ratified it by enacting the Intercountry Adoption Act ("IAA") in 2000 to implement its provisions. The IAA only applies to countries who have adopted the Hague Convention, therefore the United States must resort to other methods of preventing trafficked children from entering the United States via non-Hague Convention countries. The most recent attempt by the United States to prevent intercountry adoption fraud was to place a ban on adoptions of children from Cambodia beginning December 21, 2001.

A. U.S. Implementation of the Hague Convention: the Intercountry Adoption Act of 2000

The United States was a signatory to the 1993 Hague Convention, but Congress made no steps to ratify the Convention until it enacted the IAA in 2000.¹⁷⁹ Once implemented,¹⁸⁰ the IAA will bifurcate the process of approving visas for adopted children between Hague Convention countries and all other countries. The eligibility for immigration for children adopted from non-Hague Convention countries will remain unchanged, while the eligibility for immigration for children adopted from Hague Convention countries will be simplified. Instead of preventing baby-trafficking, the bifurcated system will serve to concentrate baby-trafficking in non-Hague Convention countries like Cambodia.

1. The IAA Applies Only Between the United States and Other Hague Convention Signatories

Although Congress enacted the Intercountry Adoption Act in 2000, the IAA is not expected to be implemented until 2004, at the earliest;¹⁸¹ once implemented, it will apply only to adoptions between Hague Convention signatories.¹⁸² Adoptions from non-Hague Convention countries will be subject to the current, more restrictive intercountry adoption and immigration requirements.¹⁸³ Section 101 of the IAA implements the

¹⁷⁹ Intercountry Adoption Act, 42 U.S.C. § 14901 et al. (2000).

¹⁸⁰ The IAA will be implemented after the INS and the Department of State publish implementing regulations in the Federal Register. Fact Sheet, U.S. Dep't of Justice, The Intercountry Adoption Act of 2000 (Jan. 22, 2001), <http://www.ins.usdoj.gov/graphics/publicaffairs/factsheets/adoption.htm> (last visited Jan. 31, 2003) [hereinafter Fact Sheet].

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

requirements of Section 6 of the Hague Convention.¹⁸⁴ It designates the Department of State as the Central Authority for implementing and enforcing the provisions of the Convention.¹⁸⁵ The procedures for accreditation of adoption agencies, including the requirements of Section 9 of the Hague Convention, are detailed in IAA §§ 201-204.¹⁸⁶

The IAA also amended the Immigration and Nationality Act ("INA") by adding Sections 101(b)(1)(G) and 204(d)(2).¹⁸⁷ These two sections apply only to adoptions occurring between the United States and other countries that have enacted the Hague Convention.¹⁸⁸ The INA requires that before a child is eligible for adoption and immigration to the United States, he or she must be classified as an "orphan" under a very restrictive definition of the word.¹⁸⁹ According to the INA, a foreign-born child is an orphan if he or she does not have any parents "because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents."¹⁹⁰ A child might also be considered an orphan if he or she has only one living parent and that parent is unable to properly care for the child.¹⁹¹ Section 101(b)(1)(G) modifies this restrictive definition of children eligible for adoption and immigration to the United States by permitting the adoption of children who would not normally qualify as "orphans" if they come from a Hague Convention country.¹⁹² Section 101(b)(1)(G) requires only that the adopted child's parent or parents be unable to provide proper care for the child and freely give their irrevocable consent to terminate their relationship with the child, allowing the child to be adopted and to immigrate to the United States.¹⁹³ Section 204(d)(2) requires the sending country's Central Authority to issue an adoption certificate as conclusive evidence of the adoption. With the adoption certificate in hand, the adoptive parents will not be required to re-adopt the child in the United States.¹⁹⁴

¹⁸⁴ 42 U.S.C. § 14911. This section implements Article 6 of the Hague Convention by designating the Department of State as the "Central Authority to discharge the duties which are imposed by the Convention." Hague Convention, *supra* note 153, art. 6.

¹⁸⁵ 42 U.S.C. § 14911.

¹⁸⁶ *Id.* §§ 14921-14924.

¹⁸⁷ Fact Sheet, *supra* note 180.

¹⁸⁸ *Id.*

¹⁸⁹ 8 U.S.C. § 1101(b)(1)(F).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* There is considerable confusion deciding when a child has only one parent and what the term "properly care for" entails. Corbett, *supra* note 32. Because of the confusion and misunderstanding about this part of the orphan definition, most agencies prefer to classify children under the first part of the definition. *Id.*

¹⁹² Fact Sheet, *supra* note 180.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

2. *The IAA May Foster Increased Fraud*

Unfortunately, the IAA may actually serve to foster increased fraud in adoptions from Cambodia. The provisions of the IAA, once implemented, will only apply to other contracting nations.¹⁹⁵ Since Cambodia is not a contracting nation under the Hague Convention, the more strict definition of orphan under the INA will need to be observed. Under this definition only children who are orphaned with no living parents or abandoned are eligible for adoption and immigration to the United States.¹⁹⁶ A child voluntarily relinquished by its parent(s) is ineligible under the INA.¹⁹⁷ This differentiation is likely to result in the fraudulent labeling of children as orphans to facilitate their adoption.

Abandoned children usually do not come with birth certificates or family information, so traffickers need only the most cursory information about the child, usually only the place and date where the child was found abandoned.¹⁹⁸ Baby-traffickers employ two tactics to preserve the "abandoned" status of trafficked children. First, they either buy or steal a child, who is then delivered to an orphanage with doctored paperwork or no paperwork at all.¹⁹⁹ Without authentic paperwork, there is almost no way to prove where the child came from or whether he or she is actually orphaned.²⁰⁰ Second, a trafficker buys or steals a baby from one region and then bribes a village official of another region to claim that the child was found abandoned in his village.²⁰¹ Traffickers likely have standing agreements with certain village chiefs to use them as middle-men.²⁰² There have been reports of villages with unusually high rates of abandonment

¹⁹⁵ Although the IAA will only apply to adoptions between Hague countries, Americans are in no way limited to adopting from these countries. INS Information Sheet Regarding the Intercountry Adoption Act of 2000, at <http://www.ins.usdoj.gov/graphics/services/adopt.htm> (last visited Jan. 16, 2003). They may continue to adopt from other countries under the regulations set out in 8 U.S.C. § 1101(b)(1)(E) and (F). *Id.*

¹⁹⁶ 8 U.S.C. § 1101(b)(1)(F).

¹⁹⁷ A child voluntarily relinquished does not qualify as an orphan unless he or she has only one parent and the parent is unable to properly care for the child. *Id.*

¹⁹⁸ According to Kek Galabru, President of LICADHO, "officials write a birth certificate or biography of each child, which states that the child is abandoned, and this is counter-signed by low-level government officials (such as village chiefs)." *International Adoptions: Problems and Solutions*, *supra* note 14, at 79.

¹⁹⁹ Corbett, *supra* note 32.

²⁰⁰ According to Naly Pilorge, deputy director of LICADHO, children are essentially laundered. *Id.*

²⁰¹ See a story related by one adoptive family concerning the "abandonment" of their child. *Id.*

²⁰² *Id.*

while others have almost none, strongly suggesting that these villages may be involved in trafficking.²⁰³

B. The Immigration and Naturalization Service's Moratorium on Adoptions From Cambodia

The INS, the body responsible for issuing visas so that adopted children may enter and reside in the United States, had witnessed such glaring examples of adoption abuses that it made the unprecedented move of suspending the processing of visas for all children adopted from Cambodia on December 21, 2001.²⁰⁴ The INS assured prospective adoptive families that the INS would move as quickly as possible to evaluate pending adoptions and review the current adoption procedures in Cambodia. Although an evaluation of the situation in Cambodia is a needed first step in the process, without an agenda for changing the current laws and procedures, the moratorium has forced the adoption process in Cambodia into a holding pattern with no prospect of resuming.

1. Task Force Sent to Cambodia to Evaluate Individual Cases and Review Adoption Process

Admitting that the ban was meant only as a temporary solution, the INS pledged that it would undertake two courses of action during the suspension in order to put the United States-Cambodian adoption process back on track. First, the INS announced that it would evaluate pending adoptions of Cambodian children by Americans on a case-by-case basis.²⁰⁵ The INS split waiting families into four categories based upon their relative place in the adoption process.²⁰⁶ These cases would be considered

²⁰³ *Id.* There was at least one village where the village chief reported that two babies were abandoned near his home in one day. *International Adoptions: Problems and Solutions*, *supra* note 14, at 68; *see also* Corbett, *supra* note 32. But when INS task force officials went to question the chief about this, he was not home. Corbett, *supra* note 32. Instead they questioned the chief's wife who said that no children had been abandoned in that village in several years. *Id.* This led INS officials to suspect the village chief might be part of a trafficking scheme. *Id.* But see the comments of Senator Mary Landrieu, who remarked that the statement of the chief's wife could have been misinterpreted and that she actually meant that no children from that village had been abandoned, but that children from other places had been brought to that village and abandoned. 147 CONG. REC. S14031-01.

²⁰⁴ Memorandum from James W. Ziglar, *supra* note 6; INS Announces Suspension, *supra* note 6.

²⁰⁵ Cambodian Adoptions: Talking Points for Congressional Briefing, Feb. 13, 2002, at <http://www.ins.usdoj.gov/graphics/services/TlkngPnts0202.pdf> (last visited Jan. 27, 2003).

²⁰⁶ The four categories are as follows: Category 1 includes families with an official adoption decree from the Cambodian government; Category 2 includes families with some official documents from the Cambodian government, or a court adoption in process; Category 3 includes families with I-171H forms

"pipeline" cases.²⁰⁷ The INS assured pipeline families that their cases would be evaluated as quickly as possible; however, many cases were not evaluated for many months.²⁰⁸ It was not until September 2002 that the INS announced plans to implement an "expanded initiative"²⁰⁹ in order to process the remaining families.²¹⁰ Under the expanded initiative, the INS set out new criteria for processing adoptions from Cambodia.²¹¹ Cases that would be processed before the moratorium was lifted included those of families who filed an I-600A application²¹² by December 31, 2001 and had designated Cambodia as their country of choice by September 1, 2002.²¹³ The new criteria also required the prospective child to have been born on or before December 31, 2001.²¹⁴

Second, after intense pressure from the adoption community, the INS devised a task force to travel to Cambodia and investigate the situation first hand.²¹⁵ The task force had to investigate individual circumstances of some of the 450 pending adoption cases.²¹⁶ This included interviewing government officials, orphanages, agencies, and facilitators as well as

approved before Dec. 21, 2001, but no official Cambodian government documents; and finally Category 4 includes families whose I-171H form had been approved or referral of a child had been given after Dec. 21, 2001. Dale Edmonds, *Status Quo: June 18, 2002*, at http://www.oggham.com/cambodia/archives/cai_new_and_information/000413.html (last visited Jan. 16, 2003). The I-171H form is issued by the INS after the I-600A and all other applicable documents are filed and approved by the INS. Brian, Combs, *International Adoption*, at <http://www.ahomestudy.com/international.html> (last visited Feb. 4, 2003).

²⁰⁷ According to William L. Pierce, Executive Director, U.S.A. Committee for International Association of Voluntary Adoption Agencies and NGOs, "pipeline" cases are those that have received approval to adopt in a certain country and have initiated steps toward a formal adoption. *International Adoptions: Problems and Solutions*, *supra* note 14, at 13.

²⁰⁸ The first group of families approved to travel to Cambodia and receive their children since the inception of the ban was notified in April 2002. Steve Friess, *40 U.S. Families get the Green Light to Complete Cambodian Adoptions*, USA TODAY at D9, Mar. 31, 2000. That group consisted of approximately forty families out of the 450 cases pending. *Id.* Some of the families in this group had been referred to their specific child since July 2001. *Id.*

²⁰⁹ Adoptions Task Force Update: Talking Points for Congressional Briefing, Oct. 18, 2002, <http://www.ins.usdoj.gov/graphics/services/resadopcam.htm> (last visited Jan. 25, 2003) [hereinafter Talking Points].

²¹⁰ Steve Friess, *INS to Allow Adoptions of Cambodian Children*, USA TODAY, Sept. 13, 2002, available at 2002 WL 4733493.

²¹¹ Cambodia Adoption Task Force, Parameters for the Final Expansion, Oct. 3, 2002, at http://www.ins.usdoj.gov/graphics/services/WHPParam_100302.pdf (last visited Jan. 16, 2003).

²¹² The I-600A application is usually the first document to be filed with the INS by the prospective adoptive parents. U.S. Dep't of Justice, *Inter-Country Adoptions*, at <http://www.ins.usdoj.gov/graphics/services/index2.htm#app> (last visited Feb. 25, 2003). It is used to determine whether the prospective adoptive parents will be able to care for an adoptive child. *Id.*

²¹³ Parameters for the Final Expansion, *supra* note 211.

²¹⁴ *Id.*

²¹⁵ Remarks by Catherine Barry, *supra* note 127.

²¹⁶ Talking Points, *supra* note 209.

reviewing the children's paperwork.²¹⁷ The task force was also given the duty of reviewing the general adoption laws and procedures of Cambodia in order to make recommendations for change.²¹⁸

Commentators have suggested that once the IAA is implemented, there will no longer be a need for moratoriums such as the one used for Cambodia.²¹⁹ However, as mentioned earlier, the IAA will only apply to countries that have ratified the Hague Convention.²²⁰ Therefore, it is unlikely that the IAA will have any direct effect on the processing of future adoptions from Cambodia. When the adoption moratorium is lifted, the INS will continue to process visas for adoptions from Cambodia under the procedures in place before December 21, 2001.

2. *U.S. Adoption Moratorium is an Ineffective Holding Pattern*

The INS ban on adoptions from Cambodia should be temporary. It is not a permanent solution, and by itself will not put an end to adoption abuses in Cambodia. The moratorium has been in place for more than a year and if the ban continues, its ultimate result will be to punish genuine Cambodian orphans. As children remain in orphanages and age, it becomes less likely they will be adopted because adoptive parents want infants.²²¹ As one adoptive parent noted, "children, if not adopted, have futures of begging or prostitution to look forward to."²²²

The INS suspension left an estimated 450 families in limbo, not knowing when or if they would ever be able to bring their children home.²²³ Many families had been invited to Cambodia to receive their child, only to arrive and be told that because the INS could not be sure of the child's orphan status, the child would be ineligible to immigrate to the United States.²²⁴ Unfortunately, some of these families had already been matched

²¹⁷ Remarks by Catherine Barry, *supra* note 127.

²¹⁸ *Adoption Processing in Cambodia: Questions and Answers*, *supra* note 7, at Q&A 7.

²¹⁹ 148 CONG. REC. S11554-02.

²²⁰ Fact Sheet, *supra* note 180.

²²¹ According to one report, even "a few months can make all the difference." McKinney & Chandara, *supra* note 95.

²²² *International Adoptions: Problems and Solutions*, *supra* note 14, at 43 (statements by Kimberly Edmonds-Woulfe, adoptive parent of a Cambodian child). Edmonds-Woulfe, along with many other families, felt that she had been manipulated and mistreated by INS officials and recommended that legislation should be passed that would require INS to give Congress at least thirty days notice before making suspensions in the future. *Id.*

²²³ David Shaftel, *Families to Finalize Adoptions*, CAMBODIA DAILY, posted Apr. 4, 2002, available at <http://www.oggham.com/cambodia/archives/media/000466.html> (last visited Jan. 31, 2003).

²²⁴ *International Adoptions: Problems and Solutions*, *supra* note 14, at 5 (statements by Congressman Lantos).

with specific children and some even had what they believed to be final adoption decrees from the Cambodian government.²²⁵ As a result, these adoptive parents are legally responsible for their child under Cambodian law, yet are unable to bring the child into the United States to make them part of a family.²²⁶ This is an intolerable situation for all parties involved. Children who are later determined to be ineligible for immigration to the United States are likely to “simply languish in squalid orphanages” because it is nearly impossible to locate their birth families.²²⁷

VII. PROPOSALS TO REFORM INTERCOUNTRY ADOPTIONS OF CAMBODIAN CHILDREN

Although domestic laws and international initiatives have been launched over the past fifteen years to protect children from the negative aspects of intercountry adoption, these measures have been unable to stem the tide of trafficked children.²²⁸ The CRC, compiled in 1989, briefly discussed the adoption of children but only suggested that it should be done in the best interests of the child.²²⁹ Moreover, the CRC endorsed intercountry adoption only as a last resort.²³⁰ Within a few years, the international community acknowledged that intercountry adoptions were growing exponentially and that sending and receiving countries needed a formalized process for facilitating the movement of children across borders.²³¹

Although the Hague Convention was designed to satisfy the need for a formal process, it puts most of the burdens of ensuring transparency in the adoption process on the sending country.²³² Since sending countries tend to be developing countries, they lack the stability and financial wherewithal to effectively implement the Hague Convention provisions.²³³ Furthermore,

²²⁵ For evidence of disagreement over whether these “decrees” were actually final, see *Adoption Processing in Cambodia: Questions and Answers*, *supra* note 7, at Q&A 6. But see Letter from Excellency Nim Thoth, Secretary of State, Ministry of Social Affairs, Labor, Vocational Training, and Youth Rehabilitation, concerning Final Decree of the Council of Ministers (Jan. 11, 2002), available at http://www.cambodiaadopt.com/final_decree.htm (last visited Jan. 16, 2003).

²²⁶ Some families have even taken the unprecedented step of renting an apartment in Cambodia so they can live with their child while they wait. Friess, *supra* note 208.

²²⁷ Steve Friess, *Adoptive Parents, Kids Languish in Cambodian Limbo; Baby-Trafficking Allegations Stall Process*, USA TODAY, Feb. 26, 2002, available at 2002 WL 4720543.

²²⁸ See discussion *supra* Part V.

²²⁹ Convention on the Rights of the Child, *supra* note 118, art. 21.

²³⁰ *Id.*

²³¹ See discussion *supra* Part V.

²³² *Id.*

²³³ *Id.*

sending countries like Cambodia often profit from black-market adoptions.²³⁴ Thus, Cambodia and similarly situated countries are unable or unwilling to sign the Hague Convention.²³⁵ Since Cambodia did not sign the Hague Convention, U.S. domestic law like the IAA will not apply to Cambodia, making it crucial that children from that nation retain their "abandoned" status.²³⁶ Since the Hague Convention has failed to entice Cambodia, the United States has been forced to implement a moratorium on adoptions from Cambodia.²³⁷ Without some process for changing Cambodian adoption procedures, the moratorium has become a holding pattern, neither furthering the cause of transparent intercountry adoptions nor protecting against future acts of trafficking.²³⁸

Eradication of the trafficking of children for international adoption can only be fully realized when the financial motivations of trafficking are removed from the equation. This Comment suggests two possible measures to be implemented at the domestic level to combat adoption abuses by initiating effective cooperation between sending and receiving nations.

A. Creation of a National Computerized Registry of Adoptable and Abandoned Children in Cambodia

One of the simplest measures to discourage baby-traffickers is to centralize all aspects of adoption in one ministry, which would be responsible for maintaining a complete database of adopted children.²³⁹ Cambodia currently has no centralized database of children adopted, nor does a single ministry have complete oversight of adoptions. Since there are no centralized records, available records are grossly inaccurate. For example, MSALVTY reported that in 1998, 206 children were adopted abroad, with 153 going to the United States.²⁴⁰ But, the Evan B. Donaldson Adoption Institute, which keeps statistics of adopted children, reported 351 Cambodians adopted by Americans in the same year. The discrepancy is staggering.²⁴¹

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ See discussion *supra* Part VI.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ But see *Saving the Children: Cambodia*, ECONOMIST, Oct. 7, 2000, available at 2000 WL 8143972 (proposing that centralization of adoption approvals might serve to "concentrate graft" in one ministry).

²⁴⁰ Cambodia: NGO Report, *supra* note 84, at 7.

²⁴¹ One observer commented, "If you ask how many orphanages there are in Cambodia you get a different number depending on which ministry you ask." McKinney & Chandara, *supra* note 95. Some

A complete registry of children adopted from Cambodia should be a first step, but it should be followed by a registry of adoptable children, including when and to whom they have been referred for adoption. Under current procedures, a child is referred to an adoptive family and if the family accepts the child, he or she is then placed on MSALVTY's roster of adoptable children.²⁴² A national registry of adopted and adoptable children could provide a record of children usable as a resource by birth mothers seeking to regain custody of their children. The registry could serve as a record of the child's existence as well as provide the physical location of the child, whether they are living within or without Cambodia. This information could aid in retrieving and reuniting trafficked children with their families.

The registry of adopted and adoptable children will not be immune from the corruption that plagues Cambodia and thus will need an independent organization to periodically audit the registry for accuracy. This job could be undertaken by one or more of the child advocacy organizations currently operating in Cambodia. One obvious choice might be LICADHO because it has already demonstrated its ability to investigate individual cases of baby-trafficking.²⁴³ Since LICADHO and other organizations like it are not connected with the Cambodian government, corrupt officials, adoption facilitators, and traffickers would be less able to manipulate the registry to further baby-trafficking.

B. "Adjudicate Orphan Status First" Pilot Program

The INS ban on adoptions from Cambodia encountered widespread opposition from adoptive parents.²⁴⁴ The most outspoken criticism came from parents who had already received final adoption decrees from the Cambodian government, making them legally responsible for their child, yet unable to bring that child into the United States. Most families felt the INS would be justified in refusing visas to children they could prove were not orphans, but should not deny a visa to a child simply because they lacked this proof.²⁴⁵ Unfortunately, most adoptive parents must undertake much of

discrepancies in total adoption numbers should be expected since MSALVTY only has statistics for adoptions completed through the ministries and would not have statistics on adoptions completed through the courts. However, court adoptions are the exception and not the rule and cannot account for a discrepancy of almost 200 children.

²⁴² Sub-Decree, *supra* note 33, art. 6.

²⁴³ See discussion *supra* Part I.

²⁴⁴ Opposition for the ban came not only from adoptive parents, but from over one hundred concerned Senators and Congressmen. Friess, *supra* note 227.

²⁴⁵ According to one commentator, the twelve families held up by INS in December of 2001 involved children that came from orphanages or facilitators who had been under suspicion for baby-trafficking, but

the adoption process before they find out whether their child will qualify as an orphan. The adoptive parents may have already met or "received"²⁴⁶ the child and most have already forged lasting bonds with that child, only to find out that the child is ineligible for a visa.

One program that might prevent such backward and painful experiences is the INS' Adjudicate Orphan Status First pilot program.²⁴⁷ The program allows adoptive parents or agencies to file a petition with the INS to determine the orphan status of a particular child, either before or after a child is referred to a specific family, but before the family travels to the child's country.²⁴⁸ The pilot countries are Poland, Sierra Leone, Haiti, Honduras, and the Philippines.²⁴⁹ If the pilot program is successful, the INS plans to introduce a second phase of the program in Vietnam, India, and Guatemala.²⁵⁰ This type of initiative is especially needed in non-Hague Convention countries²⁵¹ like Cambodia to prevent future complications and lessen the potential uncertainties of the process for adoptive parents and children alike.²⁵² Although this pilot program will not immediately stop baby-trafficking, it will prevent the need for INS moratoriums because concerns will be addressed on a case-by-case basis, rather than a country-by-country basis.²⁵³

the INS could not prove that the specific children involved were trafficked, nor could they prove that the children did not qualify as orphans. *20/20: Twelve Families Go to Cambodia to Adopt Children, But US Embassy Won't Grant Visas*, *supra* note 1.

²⁴⁶ Typically, the final step in a Cambodian adoption is for the parents to actually receive their child. Cambodian Adoption Frequently Asked Questions, at

http://www.cambodiaadoptionconnection.com/adoption_faqs.htm (last visited Feb. 4, 2003). This is called the receiving ceremony and usually consists of the child's caretaker at the orphanage physically handing the child to his or her new parents. *Id.*

²⁴⁷ INS Announces Timetable and Countries for Adjudicate Orphan Status First Pilot, at <http://www.ncfa-usa.org/INSupdate.txt> (last visited Jan. 16, 2003).

²⁴⁸ *International Adoptions: Problems and Solutions*, *supra* note 14, at 21.

²⁴⁹ INS Announces Timetable and Countries for Adjudicate Orphan Status First Pilot, *supra* note 247.

²⁵⁰ *Id.*

²⁵¹ Most of the countries that will be part of the pilot program are signatories to the Hague Convention. See Hague Convention, *supra* note 153. Poland and the Philippines have ratified the Hague Convention. Fact Sheet, *supra* note 180. Sierra Leone and Guatemala are the two non-Hague Convention countries taking part in the pilot. See Hague Convention, *supra* note 153.

²⁵² See the opinion of one adoptive family who voiced its hope that when INS is reconfigured to integrate with the new Department of Homeland Security, at least one division of the new INS is devoted to determining the orphan status of prospective adoptees before the parents travel to retrieve their child. Editorial, *INS Should Work Closely with Adoption Agencies; Immigration Officials Should Realize that Foreign adoptions aren't Going Away*, PORTLAND PRESS HERALD, Nov. 22, 2001, available at 2001 WL 27639608.

²⁵³ There are many other causes of baby-trafficking in Cambodia that need addressing in order to substantially curb baby-trafficking. The most pressing of these causes is the range of improper financial inducements associated with intercountry adoptions. An effective solution must include some provisions for eradicating the view that the adoption process is a financial transaction.

VIII. CONCLUSION

The number of children adopted internationally continues to grow, despite widespread fraud and abuse of the adoption process. Although intercountry adoptions have occurred regularly over the last half century, it has only been within the last fifteen years that the international community has recognized the need for laws that would normalize the process of adoption between sending and receiving countries.

The international community has responded to allegations of abuse by drafting treaties designed to normalize the adoption process among countries as well as to extinguish the financial motivations currently inherent in the process. The voluntary nature of the treaties, as well as the substantial burdens their provisions place upon sending countries make them unlikely solutions to Cambodian adoption abuses. Cambodia cannot afford to implement the provisions required by the Hague Convention, nor is Cambodia likely to voluntarily change its lucrative adoption process.

In addition to the victimization of trafficked children and their families, trafficking children for international adoption punishes all other children genuinely in need of homes. Trafficked children who are not genuine orphans clog up already overcrowded orphanages and deprive genuine orphans of the chance to be adopted. Sadly, there is no shortage of orphans in Cambodia. For those who are not adopted, the outlook is bleak.²⁵⁴ International adoptions will only be free from fraud and abuse when policies and initiatives exist that more equally delegate the burdens and benefits of a transparent international adoption process.

²⁵⁴ Since Cambodian law does not permit the adoption of children over age eight, many orphaned or impoverished children become street beggars or prostitutes at a very young age. *Saving Sex Slaves*, SYDNEY MORNING HERALD, Dec. 4, 2001, available at <http://old.smh.com.au/news/0104/12/text/features1.html> (last visited Jan. 31, 2003). Girls as young as ten have been known to work as prostitutes in exchange for food and shelter and it is estimated that approximately one-third of prostitutes between age ten and nineteen are HIV-positive. *Id.*

