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INTERNATIONAL ADOPTION AND THE “BEST INTERESTS” OF THE CHILD: REALITY AND REACTIONISM IN ROMANIA AND GUATEMALA

I. INTRODUCTION

This Note will examine the effects of recent legislation, passed, proposed, and pending, in countries that provide a significant percentage of the world's internationally adopted children.¹ The geographically and culturally disparate countries of Romania and Guatemala have been two of the largest providers of internationally adopted children over the past two decades,² but recent legislation on both the national and international levels has effectively halted international adoptions from both countries, leaving thousands of children facing uncertain futures.³ Ironically, bans on international adoption from both countries were effected to *promote* the best interests of orphaned and abandoned children, as mandated by the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (the “Hague Convention”).⁴ The nearly 80,000 institutionalized orphans in Romania as of 2007, however, present a vivid counterargument to the purported benefits of a ban on international adoptions⁵ and provide a haunting warning to Guatemala as it reforms its own international adoption process.

1. In 2007, 4,728 immigrant visas were issued to Guatemalan orphans coming to the United States; this number is second only to the number of immigrant visas issued to Chinese orphans. Furthermore, Guatemala has ranked in the United States' “top-five orphan issuing countries” since 1997. See U.S. Dep't of State, *Immigrant Visas Issued to Orphans Coming to U.S.: Top Countries of Origin (2007)*, http://travel.state.gov/family/adoption/stats/stats_451.html (on file with author). Additionally, despite periodic bans on international adoptions from Romania, 257,000 children were adopted from that country between 1989 and 2005. *Id.*

2. See *supra* note 1 and accompanying text.

The traditional areas that have contributed large numbers of IAC [internationally adopted children] to the United States have been Eastern Europe Romania, China, and Korea have, for decades, been the primary countries of origin for IAC. . . . There are currently higher numbers of IAC originating from South America [most notably from Guatemala] . . . than had been seen in previous decades.

PORTLAND STATE UNIV., MULTICULTURAL TOPICS IN COMMUNICATION SCIENCES & DISORDERS: INTERNATIONAL ADOPTION, http://www.multicsd.org/doku.php?do=show&id=international_adoption (last visited May 12, 2010) [hereinafter MCS].

3. See *infra* note 35.

4. See Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption art. 4, May 29, 1993, S. TREATY DOC. NO. 105-51 (1998), 32 I.L.M. 1139 [hereinafter Hague Convention].

5. Molly S. Marx, Comment, *Whose Best Interests Does It Really Serve? A Critical Examination of Romania's Recent Self-Serving International Adoption Policies*, 21 EMORY INT'L L.

II. HISTORY AND EVOLUTION OF INTERNATIONAL ADOPTION

In the past thirty years, more than 250,000 children have been adopted from foreign countries by individuals in the United States. International adoptions worldwide have increased by 180 percent in the past fifteen years.⁶ However, international adoption was virtually nonexistent in the Western Hemisphere before World War II due to a variety of factors, including a societal value in continuing familial blood lines⁷ and the harsh quota system of the United States that severely limited immigrants in the 1920s.⁸ In the aftermath of World War II, the dire refugee situation in Europe stirred enough sympathy in the United States that the Displaced Persons Act was passed, allowing for the entry of European orphans into America for adoption.⁹ At the same time, the availability of adoptable United States-born children was shrinking,¹⁰ leading to even greater demand for international adoptions. After the Korean War, international adoptions in the United States increased even more dramatically when soldiers stationed abroad witnessed the plight of orphans firsthand.¹¹

REV. 373, 385 (2007).

6. MCS, *supra* note 2.

7. See Richard R. Carlson, *Transnational Adoption of Children*, 23 TULSA L.J. 317, 323 (1988).

Adoption of foreign-born children was neither necessary nor favored. Adoptable American-born children were available in abundance without extended waiting periods and for little or no adoption fee. . . . [T]he concept that adoption should “mirror biology” predominated in adoption law The focus of this view was to match adoptive parents with children who, by outward appearance, could have been birth children. Adoption of an immigrant child born to parents of a different culture, and especially adoption of an immigrant child of a different race, would have been the antithesis of an adoption mirroring biology.

Id. (citations omitted).

8. See Immigration Act of 1924, ch. 190, 42 Stat. 153 (1924). The Act limited the number of immigrants who could be admitted from any country to two percent of the number of people from that country already living in the United States in 1890, as determined by the census of 1890. § 11(a), 42 Stat. at 159. The purpose of the law was to restrict the immigration of Southern and Eastern Europeans, who were arriving in large numbers starting in the 1890s, as well as to prohibit the immigration of individuals from Asia and the Subcontinent. See generally ARISTIDE ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* (2006). The immigration policies of the 1920s were shaped by both racial and economic concerns; many congressional supporters believed in “racial hygiene theory” and sought to limit the influx of “less desired races” to the country, while others feared immigrants would supplant an American born workforce. *Id.*

9. See Displaced Persons Act of 1948, ch. 687, 62 Stat. 1009, 1009–11 (amended 1950) [hereinafter DPA] (allowing permanent U.S. residence for eligible displaced persons and permitting entry to 205,000 displaced persons and 17,000 orphans from Europe).

10. See *infra* note 14 and accompanying text. See also Carlson, *supra* note 7, at 377.

11. See Jennifer Banks, Note, *The U.S. Market for Guatemalan Children: Suggestions for Slowing the Rapid Growth of Illegal Practices Plaguing International Child Adoptions*, 28 SUFFOLK TRANSNAT’L L. REV. 31, 35 n.18 (2004) (commenting that “[m]embers of the armed forces perhaps inspired the international adoption movement more than any other interest group” and detailing the rise of international adoptions from Korea by U.S. service personnel). See also Marx, *supra* note 5, at

Between 1953 and 1981, families in the United States adopted more than 38,000 children from South Korea alone.¹² This trend extended to other countries as the United States involved its troops in other conflicts around the world.¹³

While foreign conflicts created a ready supply of adoptable children, social trends in the second half the twentieth century stoked the demand for these children in the Western Hemisphere.¹⁴ Where citizens of affluent English-speaking countries once adopted foreign-born children for humanitarian and charitable reasons,¹⁵ international adoptions were increasingly seen as a means of family-building when the wider availability of abortion and contraception coupled with the de-stigmatization of single parenthood meant that adoptable children were not readily available domestically.¹⁶ This preference for international

375 (“The Korean War was [a] catalyst that propelled international adoptions to the forefront of the public arena. United States citizens began adopting South Korean orphans after American soldiers stationed in Asia drew attention to the suffering of South Korea’s abandoned children.”) (footnotes omitted).

12. Sara R. Wallace, Note, *International Adoption: The Most Logical Solution to the Disparity Between the Numbers of Orphaned and Abandoned Children in Some Countries and Families and Individuals Wishing to Adopt in Others?*, 20 ARIZ. J. INT’L & COMP. L. 689, 692 (2003). It is interesting to note, however, that many of these adopted children were not fully Korean but children whose fathers were U.S. servicemen. Furthermore, these adoptions were facilitated both by the Korean government and the United States’ passage of the Refugee Relief Act in 1953, ch. 336, 67 Stat. 400, which was directly tailored to allow Americans to adopt Korean War orphans. See MARY KATHLEEN BENET, *THE POLITICS OF ADOPTION* 120 (1976).

13. On April 3, 1975, at least 2,000 children were flown out of Saigon in the last days of the Vietnam War. They were immediately adopted by families in the United States, Canada, Europe, and Australia. See Allison Martin, *The Legacy of Operation Baby Lift*, CHOSEN CHILD, Mar. 2000, available at <http://www.adoptvietnam.org/adoption/babylift.htm>.

14. See Marx, *supra* note 5, at 376 (listing “the legalization of abortion, the rise in infertility rates, the availability of contraceptives, and the increased social acceptance of single-parent homes” as contributing factors to the decrease in the number of children available for domestic adoption and the corresponding increased demand for international adoptions) (footnotes omitted).

15. See Carlson, *supra* note 7, at 322–24 (noting that care of orphans was a charitable endeavor and rarely seen as an acceptable alternative to having natural children).

16. *Id.* at 331.

Over time, transnational adoption by American citizens has ceased to be a humanitarian act to “rescue” war orphans, and has become a widely accepted option for couples or even single parents seeking to create or expand families by means other than natural birth.

The importance of this option has grown as the availability of adoptable American-born children has declined. The shortage of American-born children, which persists to this day, is the product of the convergence of several social and demographic trends. First, the mortality of parents, which was once the principal cause of the availability of children for adoption, has declined drastically since the early part of this century. Second, while the number of births out of wedlock has multiplied, single women are more likely to decide to keep their children. Finally, increased use of birth control and abortion have reduced the number of unwanted births. The consequences of the shortage of adoptable, American-born children are ever-lengthening waiting periods and soaring costs.

adoptions has been mirrored by a federal immigration policy that encourages international adoption in the United States.¹⁷

III. THE “BEST INTERESTS” OF THE CHILD, AS MANDATED BY INTERNATIONAL LAW

A heated debate¹⁸ over the respective benefits and dangers of international adoption has raged for years among human rights advocates, children’s rights advocates, nationalists of many countries,¹⁹ and adoptive parents and prospective adoptive parents. While valid arguments exist on both sides, “[t]he law regarding international adoption is overwhelmingly negative” and often results, whether directly or indirectly, in some contexts, in the prohibition of “international adoption altogether.”²⁰ To examine how international adoption law has functioned to promote moratoriums on international adoption in both Romania and Guatemala, it is necessary to examine the current conventions promulgated by the United Nations, most notably the United Nations Conventions on the

Id.

17. While U.S. federal immigration policy does encourage international adoption, the process is still complex and costly for adoptive parents. *See* Banks, *supra* note 11, at 35; *see generally* U.S. DEP’T OF STATE, OFFICE OF CHILDREN’S ISSUES: INTERCOUNTRY ADOPTION FROM A TO Z 3 (2008), <http://adoption.state.gov/pdf/Intercountry%20Adoption%20From%20A-Z.pdf>. U.S. immigration policy in general is beyond the scope of this Note other than those aspects of U.S. implementation of the Hague Convention that have imperiled Guatemalan adoptions, discussed *supra* at note 4.

18. Laura McKinney succinctly summarizes at least one aspect of this debate: “On the one hand, [international adoption] makes loving families available to provide homes and care to the neediest of the world’s children. On the other hand, unregulated, international adoption can lead to the ‘commodification’ of children and abusive adoption practices brought about by market behavior.” Laura McKinney, *International Adoption and the Hague Convention: Does Implementation of the Convention protect the Best Interests of Children?*, 6 WHITTIER J. CHILD & FAM. ADVOC. 361, 368 (2007).

19. Feelings of nationalism in the native countries of adopted children (sender countries), which are often impoverished and almost powerless on a national scale, have contributed to a negative view of international adoption—where the receiving countries (countries of origin of adoptive parents) are predominantly white, affluent, and powerful, sender countries can be quick to perceive underlying remnants of colonialism. *See, e.g.*, Margaret Liu, Comment, *International Adoptions: An Overview*, 8 TEMP. INT’L & COMP. L.J. 187, 194–95 (1994).

20. Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issues*, 13 BUFF. HUM. RTS. L. REV. 151, 164 (2007). Bartholet goes on to comment that international adoption law reflects the general negativity of all adoption law regarding the transfer of a child to adoptive parents, but adds a layer of additional negativity related to the particular issues involved in international adoption. *Id.*

Rights of the Child (“CRC”),²¹ and the above-mentioned Hague Convention.²²

The Hague Convention is significantly more “pro-international adoption” than its predecessor, the CRC.²³ “Previously, the 1989 U.N. Convention on the Rights of the Child recognized international adoption . . . only if the child could not be cared for ‘in any suitable manner’ in his or her country of origin, including foster or institutional care.”²⁴ This

21. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, G.A. Res. 44/25, Annex, U.N. Doc. A/RES/44/25 (Nov. 20, 1989) [hereinafter CRC] (addressing the protection of children without families, adoption nationally and internationally, and the sale, trafficking, and abduction of children in articles 20, 21, and 35).

22. See generally Hague Convention, 32 I.L.M. 1139.

23. See Catherine M. Bitzan, Note, *Our Most Precious Resource: How South Korea is Poised to Change the Landscape of International Adoption*, 17 MINN. J. INT’L L. 121, 138–39 (2008). “The opening words of the 1993 Hague Convention marked a significant change in the international view of what constitutes the best interest of the child, deeming placement in ‘a family environment’ the highest priority.” *Id.*

24. *Id.* at 139. Bitzan compares this negative view of international adoption embodied by the CRC to the Hague Convention, which “holds paramount the need of a child for a permanent family, stating that a family placement outside of the child’s nation of origin is preferential to foster or institutional care for the child in his or her country of origin.” *Id.*; Hague Convention art. 20, 32 I.L.M. at 1141. The language of the CRC has been thought to give a negative overall impression of international adoption:

Article 20:

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
2. States Parties shall in accordance with their national laws ensure alternative care for such a child.
3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or *if necessary placement in suitable institutions for the care of children*. When considering solutions, due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.

Article 21

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

- (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child’s status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counseling as may be necessary;
- (b) Recognize that *inter-country adoption may be considered as an alternative means of child’s care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin*;
- (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
- (d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

language “seems to relegate intercountry adoption to a ‘last resort’ available only when no in-country care,” regardless of the quality of that care, is possible.²⁵ The CRC also places a high priority on “continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.”²⁶ This provision also appears to weigh heavily against a preference for international adoption.²⁷ Both the CRC and the Hague Convention place the “best interests” of the child as the highest possible priority,²⁸ but the concrete framework set out by the latter²⁹ and its aforementioned favorable outlook on international adoption, have led many to argue that the Hague Convention is more attuned to adoptive children’s best interests.³⁰ Some proponents of intercountry adoptions have recognized support within the Hague Convention in the form of the

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

CRC arts. 20–21 (emphasis added).

25. McKinney, *supra* note 18, at 377. See CRC art. 21(b).

26. CRC art. 20.

27. McKinney, *supra* note 18, at 378–79. Critics of international adoption have repeatedly used the provisions of the CRC to “underscore[] that intercountry adoption is, in certain respects, inherently *destructive* to the rights of the child.” (emphasis added). *Id.* at 379 (quoting David Smolin, Professor, Cumberland Law School, Samford University) (citation omitted). See CRC arts. 20–21.

28. CRC art. 3(1) (“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the *best interests* of the child shall be a primary consideration.”) (emphasis added). See also Hague Convention pmb., 32 I.L.M. at 1139 (recognizing “the necessity to take measures to ensure that intercountry adoptions are made in the *best interests of the child* and with respect for his or her fundamental rights”) (emphasis added).

29. See Hague Convention pmb., 32 I.L.M. at 1139 (“Recognizing that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin . . .”). See also Bitzan, *supra* note 23, at 139 (commenting that the Hague Convention prioritizes the rights of children in the international adoption process through a “concrete framework” that requires the establishment of a central monitoring authority in each country, provides any adoption agency must be certified by that authority, requires these agencies to gather substantial information of the child’s health, parents, and documentation of birth, and also establishes a formal process for bringing complaints against the agency).

30. See Bartholet, *supra* note 20, at 174. Bartholet makes several arguments that the net impact of the Hague Convention is favorable to international adoption. First, it reinforces positive opinions of international adoption and will help to promote adoption-friendly policies worldwide; second, that it may help reduce adoption scandals (e.g., trafficking and baby-buying) that are themselves problems, but that also trigger drastic anti-adoption reforms, as in Romania; third, it may improve the perception of such adoptions in sender countries where the adoptions are considered tantamount to child trafficking; fourth, it will provide “cover” to political leaders who may themselves want to promote international adoptions, but fear a backlash for being seen as selling their countries’ “most precious resources.” *Id.*

substantive and procedural standards designed to facilitate international adoption.³¹

However, “there is considerable controversy about whether international instruments,” such as the Hague Convention, purportedly “designed to ensure the best interests of the child,” have actually hindered these interests by requiring “expensive and time-consuming systems that sending countries are unable to realistically provide.”³² This description

31. McKinney, *supra* note 18, at 389. The Hague Convention’s adoption of guidelines and safeguards for international adoptions can be viewed as the Convention’s implicit endorsement of international adoption. *Id.*

32. Bitzan, *supra* note 23, at 140. *See supra* note 21. *See also* Hague Convention, 32 I.L.M. 1139. Chapter three of the Hague Convention lays out detailed requirements for the establishment and functioning of a Central Adoption Authority, as well as for accreditation of bodies within the State that may facilitate international adoptions:

Chapter III Central Authorities and Accredited Bodies

Article 6

(1) A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

(2) Federal States, States with more than one system of law or States having autonomous territorial units shall be free to appoint more than one Central Authority and to specify the territorial or personal extent of their functions. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

(1) Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their States to protect children and to achieve the other objects of the Convention.

(2) They shall take directly all appropriate measures to-

(a) provide information as to the laws of their States concerning adoption and other general information, such as statistics and standard forms;

(b) keep one another informed about the operation of the Convention and, as far as possible, eliminate any obstacles to its application.

Article 8

Central Authorities shall take, directly or through public authorities, all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention.

Article 9

Central Authorities shall take, directly or through public authorities or other bodies duly accredited in their State, all appropriate measures, in particular to-

(a) collect, preserve and exchange information about the situation of the child and the prospective adoptive parents, so far as is necessary to complete the adoption;

(b) facilitate, follow and expedite proceedings with a view to obtaining the adoption;

(c) promote the development of adoption counseling and post-adoption services in their States;

(d) provide each other with general evaluation reports about experience with intercountry adoption;

(e) reply, in so far as is permitted by the law of their State, to justified requests from other Central Authorities or public authorities for information about a particular adoption situation.

typifies the current situation in Guatemala, which, like Romania before it, has in place an effective moratorium on international adoption, all in the name of promoting the best interests of the child.³³ The United States' implementation of the legislation necessary to comply fully with the Hague Convention³⁴ has effectively halted the long-standing practice of international adoption between the country and Guatemala.³⁵ In reality,

Article 10

Accreditation shall only be granted to and maintained by bodies demonstrating their competence to carry out properly the tasks with which they may be entrusted.

Article 11

An accredited body shall-

- (a) pursue only non-profit objectives according to such conditions and within such limits as may be established by the competent authorities of the State of accreditation;
- (b) be directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of intercountry adoption; and
- (c) be subject to supervision by competent authorities of that State as to its composition, operation and financial situation.

Article 12

A body accredited in one Contracting State may act in another Contracting State only if the competent authorities of both States have authorized it to do so.

Article 13

The designation of the Central Authorities and, where appropriate, the extent of their functions, as well as the names and addresses of the accredited bodies shall be communicated by each Contracting State to the Permanent Bureau of the Hague Conference on Private International Law.

Hague Convention arts. 6–13, 32 I.L.M. at 1140–41.

The implementation of this level of bureaucracy in Guatemala, given the extremely private and decentralized nature of the previous system, will most likely take a significant amount of time and resources, and in the meantime, thousands of children will be ineligible for international adoption. See the discussion of problems with implementation, *infra* notes 86 & 93.

33. It has been observed that “the balance between the Hague Convention’s initial goals of both facilitating and safeguarding international adoption has shifted decidedly toward regulation and restriction rather than timely placement of parentless children with families.” McKinney, *supra* note 18, at 389. It is the author’s assertion that this shift spurred the passage of Laws 272 and 273 in Romania and the current standstill of international adoptions in Guatemala.

34. Media Note, U.S. Dept. of State, United States Ratifies the Hague Convention on Intercountry Adoption (Dec. 12, 2007), available at <http://2001-2009.state.gov/r/pa/prs/ps/2007/dec/97148.htm>.

On December 12, Assistant Secretary of State for Consular Affairs Maura Harty formalized the United States’ ratification of the Hague Convention on Intercountry Adoption at a ceremony at The Hague. The United States is now a full member of the Hague Convention, and its provisions will govern intercountry adoptions between the United States and other Convention member countries beginning April 1, 2008.

Id.

35. See *supra* note 1 and accompanying text. Until Guatemala is able to demonstrate full compliance with the Hague Convention, international adoptions to the United States cannot resume. U.S. DEP’T OF STATE, OFFICE OF CHILDREN’S ISSUES: INTERCOUNTRY ADOPTION, GUATEMALA COUNTRY INFORMATION (2010), <http://adoption.state.gov/country/guatemala.html>.

compliance with the Hague Convention and other adoption reforms seems to do little to serve the best interests of children and more to improve international perception of the sending country.

IV. ROMANIA: AN END TO INTERNATIONAL ADOPTION AND A WARNING TO GUATEMALA

A. Romania and International Adoption

On June 21, 2004, Romania enacted a statute permanently halting all international adoptions.³⁶ Law 272 on the Protection and Promotion of the Rights of the Child (“Law 272”), effective since January 1, 2005, states that abandoned children retain the right to have their legal guardianship “entrusted to natural persons or jointly to the husband and wife who have the [sic] domicile in Romania.”³⁷ Law 273, passed in conjunction with Law 272, further states that the “international adoption of the child whose domicile is in Romania may only be approved in case the adopter or one of the spouses in the adopting family who have domicile abroad is the grandparent of the child.”³⁸ It is widely believed that these laws were influenced by European Union (“EU”) recommendations for severe restrictions on intercountry adoptions.³⁹ Desperate for EU admission, Romania effectively “closed the door between thousands of orphaned and

36. On the Protection and Promotion of the Rights of the Child, Law No. 272/2004, Rom. Official Gazette (2004) (Rom.) [hereinafter Law 272]. All citations to Law 272 hereinafter are based on the unofficial English translation of the law, which is available at http://tdh-childprotection.org/component?option=com_doclib/task,dl/docid,177/1,1/.

37. *Id.* art. 41, sec. 1.

38. On the Legal Status of Adoption, Law No. 273/2004, Rom. Official Gazette (2004) (Rom.) [hereinafter Law 273]. All citations to Law 273 hereinafter are based on the unofficial English translation of the law, which is available at <http://www.icnl.org/knowledge/library/browseSearchResults.php?countrytosearch=Romanianlanguageetosearch=English> (select “Law #273 on the Legal Status of Adoption”). Article 39 of Law 273 restricts intercountry adoption to biological grandparents; international adoptions by unrelated families are prohibited. This results in a ban on all international adoptions except those by biological grandparents. *Id.* art. 39.

39. Carrie A. Rankin, Note, *Romania’s New Child Protection Legislation: Change in Intercountry Adoption Law Results in a Human Rights Violation*, 34 SYRACUSE J. INT’L L. & COM. 259, 260–61 (2006). The Romanian government made an international request for comments on the proposed legislative package containing Laws 272 and 273. In spite of concern from the international community regarding the impact of the restrictions, the Romanian government was heavily influenced by the European Union’s concern over what was considered widespread abuse in the international adoption system in Romania. *See also* Marx, *supra* note 5. In particular, the pressure to enact a ban has been attributed to Baroness Emma Nicholson, the former European Parliament Rapporteur for Romania and an outspoken opponent of intercountry adoption. McKinney, *supra* note 18, at 397. Nicholson described the international adoption process in Romania as a “profitable trade in child trafficking” and charged institution officials with selling babies.” Rankin, *supra*, at 263.

abandoned children and the families willing to welcome them into a home abroad.”⁴⁰

To understand why the EU would promote such restrictive policies and why Romania would enact them, it is necessary to examine the history of international adoption in Romania, which is strongly rooted in the Communist dictatorship of Nicolae Ceausescu.⁴¹ Under Ceausescu’s regime, birth control and abortion were banned from 1966 to 1989, and married women were required to produce “five children for the nation.”⁴² If they failed to do so, their families were punished by the denial of “jobs, housing, and medical coverage.”⁴³ These laws coincided with staggering national poverty in Romania, and the result was thousands of children abandoned at state-run institutions.⁴⁴ When the regime fell in 1989, over 100,000 abandoned children were confined to state institutions, most in horrifying conditions.⁴⁵ The Western media played a role as well, running sensational stories of Romanian children tied to beds and locked in filthy rooms.⁴⁶ Such reporting led to a wave of humanitarian interest and an incredible number of corresponding international adoptions.⁴⁷ Over 30,000 foreign families adopted Romanian children in 1990.⁴⁸ Romanian adoptions continued to be prevalent in the early 1990s, and “by 1991

40. Rankin, *supra* note 39, at 260. Paradoxically, Laws 272 and 273 were enacted in the midst of Romanian efforts to reform the system and “to bring it into compliance with Hague Convention standards, including the creation of a National Authority for Child Protection and Adoption.” McKinney, *supra* note 18, at 397. This process has been effectively halted by the moratorium imposed by Laws 272 and 273. *Id.* at 397–98.

41. See Marx, *supra* note 5; see also Rankin, *supra* note 39. Rankin notes that “Romania’s unique history of abandoned children” and the resulting prevalence of international adoption, originated under the “harsh rule of communist dictator Nicolae Ceausescu.” Rankin, *supra* note 39, at 261.

42. Rankin, *supra* note 39, at 261. Ceausescu’s laws were motivated by the belief that children were a symbol of strength and national pride and were part of an effort to halt “a declining birth rate and ensure future labor supplies.” Marx, *supra* note 5, at 382.

43. McKinney, *supra* note 18, at 373.

44. See Rankin, *supra* note 39, at 261. Rankin states that “Ceausescu’s campaign . . . resulted in the unusual *tradition* of child abandonment in Romania” and dire conditions gave rise to the belief by Romanian women that “if the government wanted the children, the government should raise them.” *Id.* (emphasis added).

45. *Id.* See also Marx, *supra* note 5, at 382. “[T]he Iron Curtain lifted to reveal the shocking and horrible conditions of the country’s state-run orphanages, which ‘were found with children in squalid conditions . . . receiving little or no personal care or affection.’” *Id.*

46. Kathleen Hunt, *Romania’s Lost Children: A Photo Essay by James Nachtwey*, N.Y. TIMES MAG., June 24, 1990, at 28.

47. *Id.* “Approximately 100,000 children . . . remain in the care of the state, many confined to institutions indescribable in their filth, degradation and misery—understaffed and ill-equipped nurseries, preschool orphanages and homes for the handicapped and ‘irrecoverables.’” *Id.*

48. Rankin, *supra* note 39, at 261–62.

Romania was the source of one-third of the children supplied for all international adoptions.”⁴⁹

B. Adoption Abuses in Romania and the Cycle of Restriction and Relaxation

Due to the massive demand for Caucasian children in Western countries and the relative wealth of adoptive parents, a large black market trade in young children quickly grew in Romania, which created embarrassment for the government and hampered its efforts at recognition within the international community and, more specifically, the EU.⁵⁰ In 1991, amidst rumors of child-abduction and baby-selling,⁵¹ the Romanian government issued a temporary ban on all international adoption.⁵² In 1997, however, due to international pressure, “Romania revamped its international adoption policies once again” and removed restrictions to international adoptions.⁵³ The pendulum swung back quickly though, with another ban on international adoption in 2001.⁵⁴ This was followed by another easing of restrictions and finally, the passage of Laws 272 and 273 in 2004, which ban international adoption by anyone other than the child’s biological grandparents.⁵⁵ These laws were enacted in the face of harsh EU criticism of Romania’s child-welfare system, which appeared to be vulnerable to trafficking, bribery, and other abuses each time international adoption was allowed to resume.⁵⁶

49. Marx, *supra* note 5, at 383 (footnotes omitted).

50. Rankin, *supra* note 39, at 263. “The situation was so critical by 2000 that Romanian authorities received pressure from . . . the EU to apply a moratorium in 2001 to stop the extremely high numbers of intercountry adoptions.” *Id.*

51. *Id.* at 262 (“[R]eports surfaced of baby-smuggling rings, baby-selling schemes, bribed and coerced birth mothers, and forged documents, all of which caught the world’s attention.”) (citation omitted).

52. Marx, *supra* note 5, at 383.

53. *Id.* at 383–84.

The [Romanian Adoption] Committee removed hurdles, such as the six-month waiting period for international adoptions, which paved the way for foreign parents to adopt a mere sixty days after a child was officially declared an orphan. . . . Unfortunately, the easing of the intercountry adoption laws coupled with the lack of preventative measures to combat fraud once again left Romania vulnerable to corruption.

Id. (citations omitted).

54. *Id.* at 387.

55. One commentator pointed out, “Romania and Korea are typical examples of developing countries’ experience with intercountry adoption. For a while they open the doors to let unwanted children be adopted abroad, and then they slam the doors shut. They seem to prefer leaving their unwanted children to die in the warehouses.” *Id.* at 384 (quoting Anthony D’Amoto, Cross-Country Adoption: A Call to Action, 73 NOTRE DAME L. REV. 1293, 1245 (1998)).

56. See Marx, *supra* note 5, at 386; see also Rankin, *supra* note 39, at 267. In a 2001 Report on

Paradoxically, every member of the EU except Ireland, but *including* Romania, has signed and ratified the Hague Convention, which in article 4 enthusiastically supports the practice of international adoption.⁵⁷ Article 4 states that an international adoption shall occur when the proper authorities “have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child’s best interests.”⁵⁸ Having signed and ratified the Hague Convention in 1994, Romania is legally obligated to uphold the Hague Convention’s objectives;⁵⁹ any assertion that these objectives can be satisfied in the face of the country’s present ban is ludicrous given Romania’s current social environment.

The cultural practice of child abandonment in Romania is deeply entrenched and shows few signs of abating, even with the ban on international adoption signaling that these abandoned children have almost no hope of being adopted.⁶⁰ Because the practice is so widespread and socially acceptable,⁶¹ it is expected to continue in the face of the rampant

Romania’s membership to the EU, the EU applauded the 2001 moratorium, stating:

The Commission welcomes this moratorium as a mechanism to end practices . . . which risked opening opportunities for trafficking in children and other forms of abuse. The Romanian authorities need to reform legislation on international adoptions and to develop the appropriate administrative structures and capacity in order to ensure that adoption decisions are made exclusively in the best interest of the child.

Commission of the European Communities, *2001 Regular Report on Romania’s Progress Towards Accession*, at 24-25, SEC (2001) 1753 (Nov. 13, 2001), available at http://ec.europa.eu/enlargement/archives/pdf/key_documents/2001/ro_en.pdf.

57. See Hague Convention, 32 I.L.M. 1139.

58. Hague Convention art. 4(b), 32 I.L.M. at 1139. See also Marx, *supra* note 5, at 401. “The [Hague Convention] strongly advocates the proposition that the child’s need for a permanent home and family is greater than the child’s need to remain in his or her birth country.” *Id.* at 403.

59. The main objectives stated in the Hague Convention are:

- (1) to establish safeguards to ensure intercountry adoptions take place in the best interests of the child . . . ;
- (2) to establish a system of co-operation amongst Contracting States to ensure those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children;
- (3) to secure the recognition in Contracting States of adoptions made in accordance with the Convention.

Hague Convention art. 1(a)–(c), 32 I.L.M. at 1139.

60. See Marx, *supra* note 5, at 385. Approximately 10,000 children are abandoned at state hospitals per year. *Id.* As of May 2007, more than 80,000 Romanian children resided in orphanages or foster care. UNICEF, Romania: Background, http://www.unicef.org/infobycountry/romania_background.html (last visited May 12, 2010). Furthermore, “an astounding number of abandoned infants have no identity by the time they are discharged” from Romanian hospitals; “the percentage of unidentified, abandoned babies can be as high as sixty-four percent when discharged from pediatric hospitals.” Marx, *supra* note 5, at 392.

61. Ceausescu’s regime left behind a “tradition of child abandonment.” Marx, *supra* note 5, at 385.

poverty that impairs the ability of Romanian mothers and families to care for their children.⁶² While under current international law “each country is free to determine its own definition of ‘best interests’ . . . there is no credible argument that it is in a child’s best interests to be raised in a state institution as opposed to a stable, albeit foreign, home.”⁶³

The current situation for abandoned and orphaned children in Romania is dire.⁶⁴ Without the outlet of international adoption, children are left to languish in a welfare infrastructure where care is often insufficient, funding is unpredictable, and staff lack qualifications.⁶⁵ Furthermore, domestic adoption in Romania does not address the rampant problems in the child-welfare system; only “a fraction” of children who are orphaned or abandoned are placed in permanent homes.⁶⁶ Meanwhile, these orphaned and abandoned children are left vulnerable to the devastating effects of institutionalization.⁶⁷ International adoption experts have stated definitively that “putting a child in a long-term institution is an act of abuse.”⁶⁸

Romania’s situation may be instructive for similarly situated states. As Guatemala’s private adoption system skids to a halt while the government attempts to add the necessary levels of bureaucracy required by the Hague Convention, officials and policymakers would do well to observe the

62. *See id.* at 386. The Romanian government expected a drop in child abandonment as the effects of Ceausescu’s regime faded, but the communist government’s “two-decade tolerance and implicit encouragement of abandonment” has done lasting damage to the national psyche, resulting in thousands of abandonments per year. *Id.* In actuality, child abandonment in Romania has continued at the same level for the past forty years, with no signs of abatement. *Id.* at 387.

63. *Id.* at 407. Romania purports to be acting in the “best interests” of the child in continuing the ban, but this argument has little merit in light of the crisis of children abandoned to inadequate state institutions in Romania.

64. Conditions in Romanian orphanages have been found to cause post-traumatic stress disorder (“PTSD”) even in children fortunate enough to have been adopted before the ban on international adoptions; the PTSD conditions are posited to be the result of “the extreme physical and social neglect occurring in the orphanages.” R. A. C. Hoksbergen et al., *Posttraumatic Stress Disorder in Adopted Children from Romania*, 73 AM. J. OF ORTHOPSYCHIATRY 255, 255 (2003).

65. *See generally* NAT’L AUTH. FOR CHILD PROT. & ADOPTION IN ROM. (ANPCA) & UNICEF ROM., CHILD CARE SYSTEM REFORM IN ROMANIA 23 (2004), available at <http://www.unicef.org/romania/imas1.pdf>. This study was compiled at the request of the National Authority for Child Protection and Adoption in Romania.

66. Rankin, *supra* note 39, at 279. In 2005, Romania reported only 1,355 domestic adoptions. *Id.* This number compares unfavorably with the 30,000 international adoptions in 1990. *Id.* at 261–62.

67. *See* Hoksbergen et al., *supra* note 64 and accompanying text.

68. Bartholet, *supra* note 20, at 194 (citing LAURIE AHM & ERIC ROSENTHAL ET AL., HIDDEN SUFFERING: ROMANIA’S SEGREGATIONS AND ABUSE OF INFANTS AND CHILDREN WITH DISABILITIES, at iii–v, 1, 3, 4 (2006), available at http://www.mdri.org/projects/romania/romania_may%209%20final.pdf [hereinafter MDRI REPORT]). The findings of Dr. Dana Johnson, specialist in international adoption pediatrics, indicate that institutionalized children’s “cognitive abilities are lower, their growth is terrible and their brain development is abnormal as well.” *Id.* at 21.

lasting damage that a ban on international adoptions has caused to a lost generation of Romanian children who remain institutionalized and cut off from the outside world.

V. INTERNATIONAL ADOPTION IN GUATEMALA

A. Adoption Process Prior to 2007

Geographically and systematically disparate from the squalid institutions of Romania, Guatemala, largely through its long-held practice of private, decentralized adoptions, has established a place as leading “exporter” of children for the past two decades. As cultural biases against adopting racially diverse children lessened in the United States, the relative speed of Guatemalan adoptions placed the Central American country near the top of the list of countries of origin for international adoptions.⁶⁹ As in Romania, social, political, and economic forces have led to a large number of children unable to be cared for by their biological parents or extended families.⁷⁰ Civil unrest has orphaned more than 200,000 children in Guatemala over the second half of the twentieth century, and the country has also suffered from widespread poverty.⁷¹ In the face of these tragic circumstances and the fact that the average rural Guatemalan woman will bear six children in her lifetime,⁷² international adoption has been one means of fulfilling the needs of orphaned and abandoned children in Guatemala.

Before the effective freeze on international adoptions, Guatemala’s system consisted primarily of private adoptions negotiated by “facilitators,

69. See *supra* note 1 and accompanying text. Before the ban, one child in every one hundred born in Guatemala was adopted by an American family, totaling 18,298 children adopted by Americans from 1995–2005. Laura Beth Daly, *To Regulate or Not to Regulate: The Need for Compliance with International Norms by Guatemala and Cooperation by the United States in Order to Maintain Inter-country Adoptions*, 45 FAM. CT. REV. 620, 621 (2007).

70. See generally Banks, *supra* note 11.

71. *Id.* at 39. Paramilitary guerrilla organizations and the Guatemalan government engaged in violent combat for decades, causing lasting damage to the country’s infrastructure and its people. During the first ten years of the conflict, the victims of the state-sponsored terror were primarily students, workers, professionals, and opposition figures, but in the last few years there were thousands of mostly rural Mayan farmers and non-combatants who were victimized. Many villages were destroyed and over one million people became refugees. *Conclusions: Human Rights Violations, Acts of Violence and Assignment of Responsibility*, in COMM’N FOR HIST. CLARIFICATION, GUATEMALA: MEMORY OF SILENCE (1999), available at <http://snr.aas.org/guatemala/cen/report/English/toc.html>.

72. See Banks, *supra* note 11, at 39 (“This fertility rate, the highest in Latin America, breeds a population in which fifty-one percent of the country’s inhabitants are less than eighteen years of age.”) (footnote omitted).

attorneys, and governmental actors.”⁷³ The efficacy of the private system resulted in quicker adoptions of children at a younger age before significant developmental damage typical in institutionalized children could occur.⁷⁴ However, because of the perceived laxity of regulation,⁷⁵ it was widely believed that baby trafficking was endemic in Guatemala and that poor women were often either paid by baby brokers or tricked into giving up their children.⁷⁶ Though the United States implemented legislation that required a positive DNA match between the biological mother and the child, it was still feared that the system lacked sufficient safeguards to prevent abuses.⁷⁷ In 2000, the United Nations issued a controversial report on international adoptions from Guatemala that concluded:

[L]egal adoption appears to be the exception rather than the rule. Since huge profits can be made, the child has become an object of commerce rather than the focus of the law. It would seem that in the

73. See Katherine Sohr, Comment, *Difficulties Implementing the Hague Convention on the Protection of Children and Co-Operation in Respect of Intercountry Adoption: A Criticism of the Proposed Ortega's Law and an Advocacy for Moderate Adoption Reform in Guatemala*, 18 PACE INT'L L. REV. 559, 565 (2006). In Guatemala, international adoptions were primarily processed through a notarial system of law where birth parents directly contacted facilitators or attorneys to relinquish their children for adoption. On the other side, prospective adoptive parents worked with U.S. professionals (often attorneys) who in turn contacted Guatemalan attorneys to complete the adoption process. The Guatemalan attorney played a central role. The system was said to be subject to abuses because the attorney represented the adoptive parents, the child, and the Guatemalan government. However, participants in the Guatemalan adoption program dispute the existence of potential for abuse in the system in terms of coercion of birth mothers or other forms of “baby stealing.” See Banks, *supra* note 11, at 41–43; see also *infra* notes 81–82 and accompanying text.

74. See Hoksbergen et al., *supra* note 64 and accompanying text, on the dangers of institutionalizing children.

75. Banks, *supra* note 11, at 47–48. Because Guatemalan adoption laws lacked procedural guidelines, critics argued that the adoption system was legal “in form but illegal in content because no measures” existed to prevent attorneys from “partaking in fraudulent and corrupt practices.” *Id.* at 50.

76. *Id.* at 31–32. For example, one widely circulated story of adoption abuse is that notaries would hire a “recruiter” to pay a rural midwife to register the birth of a fictitious child. The recruiter then paid another woman to “become” the mother of a stolen baby, and the child was relinquished to the notary who then represented the child, the “birth mother,” and the adoptive American parents. *Id.* at 42–43. One documented incident details how an attorney-intermediary offered to help a birth mother “get medical treatment” for her child; the birth mother was told she had to sign a number of documents and volunteer her own blood, and after the child was taken for the supposed “medical treatment,” the birth mother found out that the child had been put up for adoption. News Release, Child Rts. Info. Network, Attorney Uses Tricks and Deceit to Take Children from Mothers and Offer them for Adoption (Nov. 28, 2005), available at <http://www.crin.org/resources/infoDetail.asp?ID=6655>. The possible veracity of such sensational stories is strongly denied, however, by adoptive parents. See *infra* note 81.

77. Embassy of the U.S., Guatemala, “U.S. Embassy Uses DNA Testing to Protect Children Adopted in Guatemala,” U.S. Dep’t of State, <http://guatemala.usembassy.gov/pbe20070802.html> (requiring DNA testing of birth mother and DNA match between birth mother and child).

majority of cases, international adoption involves a variety of criminal offences including the buying and selling of children, the falsifying of documents, the kidnapping of children⁷⁸

Proponents of the traditional Guatemalan notarial system⁷⁹ strongly contest the conclusion of this report and others like it, arguing that the then-existing safeguards were “sufficient to combat coercion and corruption.”⁸⁰ Some parents who have previously adopted under the Guatemalan notarial system agree with its efficacy. For example, Krystal and Jeff Beckner, of St. Louis, Missouri, have adopted three of their six children from Guatemala, through organizations that utilized private Guatemalan attorneys.⁸¹ Mrs. Beckner recalled that in their experience, it was unimaginable how a birth mother could be deceived into giving up her child. A birth mother is required to sign her parental rights away at four different and specific instances, some several months apart, and she must also submit to a DNA test. Due to the multiple safeguards witnessed by the couple, they had absolutely no concerns about corruption in the process. Additionally, birth mothers retain the right to change their minds at any time during the adoption process, which for the Beckners lasted between seven to fifteen months.⁸²

The relatively short timeframe for adoptions is another aspect of the notarial system that has been praised by advocates of international adoption from Guatemala. The decentralized system means that children spend less time in limbo, and little, if any, time in institutionalized care facilities.⁸³

78. OFELIA CALCETAS-SANTOS, U.N. COMM’N. ON HUMAN RTS., REPORT ON THE MISSION TO GUATEMALA, *addendum to REPORT OF THE SPECIAL RAPporteur ON THE SALE OF CHILDREN, CHILD PROSTITUTION, AND CHILD PORNOGRAPHY* 5 (2000), available at <http://www.unhcr.org/refworld/docid/3ae6b0fe0.html>. Ms. Calcetas-Santos has since admitted she could not substantiate her assertion that “legal adoption appears to be the exception rather than the rule” with any statistical evidence. McKinney, *supra* note 18, at 404. Nonetheless, the media attention garnered by her initial report contributed substantially to widespread negative public opinion on the Guatemalan notary system.

79. See *supra* note 73 for an explanation of the notarial system.

80. McKinney, *supra* note 18, at 404 (noting that “a large network of adoptive parents, adoption attorneys, and academics” found the notarial system was most advantageous for Guatemalan children). *Id.* at 405.

81. Interview with Krystal and Jeff Beckner, adoptive parents of Guatemalan children, St. Louis, Mo., Jan. 4, 2009.

82. *Id.* The Beckners also praised the system with ensuring their children received personal, as opposed to institutional, care from foster mothers during the months that the adoptions were being processed. *Id.*

83. *Id.* Some data suggest children adopted at earlier ages, or children who receive the benefit of quality foster care, are less likely to suffer from attachment or separation disorders and bond more easily to their adoptive families. See generally Tiffany Field, *Attachment and Separation in Young Children*, 47 ANN. REV. OF PSYCHOL. 541, 541–61 (1996).

B. Implementation of the Hague Convention by the United States and Guatemala

Unlike the Romanian government's ban, the current halt of international adoptions from Guatemala stems primarily from United States legislation,⁸⁴ although current Guatemalan reforms have contributed to the halt of international adoptions as well. The United States signed the Hague Convention on March 31, 1994, and in 2001, Congress enacted the legislation necessary for the Department of State to promulgate the implementing regulations.⁸⁵ The Hague Convention entered into force in the United States in mid-2007, officially making the United States a "Hague Country."⁸⁶ With U.S. entrance into the Convention, adoptions between the United States and Guatemala have been effectively halted until Guatemala also enters the Convention by establishing mandatory frameworks.⁸⁷

But as Guatemala takes steps to comply with the Hague Convention on Intercountry Adoption, the adoption process remains stagnant. Early in

84. The Hague Convention was accepted in the United States through the Intercountry Adoption Act of 2000, 42 U.S.C. §§ 14901–14954 (2006), and the preparations for the implementation of the treaty were codified in the U.S. State Department's Final Rule, issued February 15, 2006. *See* Accreditation of Agencies and Approval of Persons Under the Intercountry Adoption Act of 2000, 22 C.F.R. § 96 (2006); Issuance of Adoption Certificates and Custody Declarations in Hague Convention Adoption Cases, 22 C.F.R. § 97 (2006); Intercountry Adoption—Convention Record Preservation, 22 C.F.R. § 98 (2006).

85. Both houses of Congress passed the Intercountry Adoption Act of 2000 ("IAA") in September of 2000 and President Bill Clinton signed the IAA in October of 2000. *See* Sohr, *supra* note 73, at 575.

86. *See* Daly, *supra* note 69, at 620. It is important to note that it took thirteen years for the United States to implement the Convention from the time of its signing in 1994 to its entry into force in 2007, and six years from the passage of implementing legislation to its effective date. *Id.* at 623. Guatemala, after protracted political infighting over international adoptions, finally passed its own implementing legislation for the Hague Convention in December of 2007. U.S. DEP'T OF HOMELAND SECURITY, OFFICE OF COMMUNICATIONS, USCIS ANNOUNCES NEW GUATEMALAN ADOPTION LEGISLATION (2008), http://www.uscis.gov/files/pressrelease/Guatemala_Adoption_Law_Update_01_25.08.pdf. However, as of March 30, 2010 the United States had "not determined that Guatemala's intercountry adoption procedures are in compliance with the Hague Convention on Adoption," and adoptions have not yet resumed. U.S. Dep't of State, Office of Children's Issues: Guatemala, Adoption Alert, <http://adoption.state.gov/news/guatemala.html> (last visited May 12, 2010). If it takes as long for Guatemala to enter the Convention into force as it took the United States, Guatemalan-U.S. adoptions will not resume until 2013, and in the meantime orphaned children will be deprived of families that desperately want them.

87. *See supra* note 24 for a discussion of Hague Convention framework requirements. Currently, for adoptions occurring between the United States and any Hague Country, U.S. law requires that prior to the issuance of an immigrant visa for an adopted child, U.S. consular offices must certify that the adoption was completed according to the Hague Convention. 22 C.F.R. § 96 (2009). Economic and political circumstances in Guatemala will most likely prevent Guatemala's full compliance with the Convention for years to come. *See supra* note 24; *infra* note 89.

2008, the country established a central adoption authority, the National Adoption Council.⁸⁸ Commentators have stated that the task of completely altering the system of adoption from the notarial system to a fully Hague-compliant system is an “unrealistic goal[] for an impoverished country.”⁸⁹ As of June 2008, however, regulations that would fully implement the Hague Convention remained in an early draft stage. While some cases that have gone through Guatemala’s current review process have been released, many of the estimated 3,000 pending cases “remain in limbo, and many agencies had placed a temporary hold on adoption programs.”⁹⁰ With international adoption no longer an option, there are few alternatives in this country for orphaned and abandoned children.⁹¹

In the meantime, the U.S. government and the State Department have not offered any solutions to remedy the conditions that led to the moratorium and have done little other than express hope that Guatemala can expedite its reforms.⁹² The practical effect of the implementation of

88. Adoptive Families, Guatemala Adoption: An Overview, http://www.adoptivefamilies.com/guatemala_adoption.php (last visited Feb. 15, 2010).

89. Sohr, *supra* note 73, at 582. Speculating on proposed reforms in 2006, Sohr notes:

[F]inancial and administrative burdens may create a potentially grave situation for the orphaned Guatemalan children and no solution for birth families who cannot care for their children. . . .

[T]he Hague Convention’s reforms involve[] . . . requiring poverty-stricken sending countries, including Guatemala, to completely revamp their adoption systems without financial means for such reforms.

Id. at 582–83. Sohr suggests the result will be the “entrapment of thousands of children in orphanages,” a prediction which is sadly coming true in Guatemala. *Id.* at 583.

90. Adoptive Families, *supra* note 88.

91. Ctr. for Adoption Pol., Guatemala Tries to Implement Domestic Adoption Program, <http://www.adoptionpolicy.org/archive/2008/oct08.html> (last visited May 12, 2010) (“[D]ue to the implementation by the U.S. of the Hague Convention for Intercountry Adoption as well as UNICEF pressure and concerns about corruption, Guatemala is closed to [intercountry adoption]. Guatemala is a poor nation without a tradition of publically provided children’s services. Into this vacuum, the Guatemalan Department of Social Welfare is trying to build a foster care system. So far in a nation of 13 million, officials have recruited 45 foster families.”).

92. Action by the United States in this arena has been severely limited. In November 2009, the Guatemalan National Council on Adoptions announced in a letter to the State Department its intention to launch a “limited two-year pilot program that will allow for the adoption of a small number of older children, groups of siblings, and children with special needs,” in an attempt to resume international adoptions from Guatemala in a Hague-compliant manner. The State Department did respond with an “expression of interest on the part of the United States,” but remains overwhelmingly negative on the issue of a timely resumption of international adoption between the United States and Guatemala:

[W]e remain deeply concerned about the history of malfeasance in intercountry adoptions from Guatemala This expression of interest on the part of the United States does not mean that new adoptions from Guatemala will start any time soon, and prospective parents should not make any plans to start new adoptions in Guatemala at this time. Our expression of interest does not in any way signal that DOS has found Guatemala’s intercountry adoption procedures in compliance with the Hague Convention on Adoption.

the Hague Convention by the United States⁹³ and the attempts at implementation by Guatemala is the same as that of Laws 272 and 273 in Romania—international adoption is foreclosed as an option to children in need, almost certainly in violation of the spirit, if not the letter, of international law.⁹⁴

VI. CONCLUSION

While Guatemala should be applauded for its attempts to end potential abuses in its international adoption program, Guatemalan policymakers should take note of the situation in Romania, where there was a comparable intention to end similar abuses. Though Guatemala does not face the kind of cultural issues that promote and accept the abandonment of children as those present in Romania, equally devastating economic hardship for a majority of its population looms. A protracted delay in effectuating international adoptions will almost certainly lead to an increase in the institutionalization of orphaned and abandoned children in Guatemala. This increase will expose Guatemalan children to the same threats that Romanian children face as wards of the state.⁹⁵ As the leading recipient of children via international adoption, the United States should recognize this danger as well. Its own purported support of international

Bureau of Consular Aff., Dep't of State, *Guatemala Adoption Alert: CNA's Announcement of a Two-Year Limited Pilot Program*, <http://adoption.state.gov/news/guatemala.html> (last visited May 12, 2010).

93. See Daly, *supra* note 69, at 626. It is unrealistic for the State Department to believe Guatemala will be able to implement reforming regulations any faster than the protracted six years it took the U.S. Meanwhile, the U.S. government is "taking no active measures" to help the thousands of Guatemalan children barred from American adoptive homes solely because of political and legislative reasons. *Id.*

94. See Bitzan, *supra* note 23, discussing the primary purpose of the Hague Convention and the CRC to promote the "best interests" of the child. In addition, the United States is not the only "receiver country" whose implementation of the Hague Convention has been a destructive force to international adoptions from Guatemala; many other Hague countries, including Canada, Germany, the Netherlands, Spain, and Great Britain have also discontinued adoptions from Guatemala, further exasperating an already desperate situation. Daly, *supra* note 69, at 627.

95. *Id.* "Evidence shows that in many cases institutionalized children of all ages are submitted to continuous physical and psychological cruelty, daily beatings and assaults, food deprivation leading, in some cases, to starvation, and sexual abuse." *Id.* at 631 (citation omitted).

As evidenced by Romania . . . and many other countries, there is a strong trend for a country's conditions for its orphaned children to sharply decline and disintegrate once its intercountry adoption borders are closed. Guatemala's present conditions for its orphaned children are not as destitute as those in Romania . . . but there is a high likelihood that they could spiral into that if intercountry adoptions with the United States are banned and increased numbers of Guatemalan children remain in the country.

Id. (citations omitted).

adoption law through Hague Convention compliance in actuality detracts from the “best interests” of Guatemalan children.

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