

# THE ROAD TO PARENTLESS CHILDREN IS PAVED WITH GOOD INTENTIONS: HOW THE HAGUE CONVENTION AND RECENT INTERCOUNTRY ADOPTION RULES ARE AFFECTING POTENTIAL PARENTS AND THE BEST INTERESTS OF CHILDREN

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## INTRODUCTION

The Hague Conference on Private International Law's Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention)<sup>1</sup> went into force in the United States in April 2008.<sup>2</sup> The aim of the Hague Convention is to provide needed regulation for intercountry adoption.<sup>3</sup> However, this Note questions whether the Hague Convention is actually accomplishing its goals and whether the best interests of children are actually being met. The Hague Convention seeks to provide standards for and transparency of the intercountry adoption process, but while the aims are honorable, the practical reality is that children may be negatively affected. Preferred countries for intercountry adoption, such as China, Romania, Guatemala, and Vietnam, have reacted to global scrutiny by tightening their regulations and in some cases closing their borders altogether. Examining such countries will

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1. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 19, 1993, S. Treaty Doc. No. 105-51, 32 I.L.M. 1134 [hereinafter Hague Convention].

2. Intercountry Adoption Act, 42 U.S.C. §§ 14901–54 (2000).

3. One of the stated objects of the Hague convention is “to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or fundamental rights as recognized in international law.” Hague Convention, *supra* note 1, art. 1. The Hague Convention seeks to ensure that children grow up in a family environment if possible, while simultaneously protecting against the harms that can arise when a country allows intercountry adoption, such as trafficking. *Id.*

provide insight into how the Hague Convention is affecting children. The system does indeed need safeguards, but at what cost?

This Note argues that the Hague Convention process inadequately protects vulnerable children. Part I discusses the need for reforms in intercountry adoption. Part II focuses on how the Hague Convention seeks to implement such reforms, and how current regulations are not ensuring that the best interests of children are realized. Part III, by looking at specific countries, demonstrates how restricting intercountry adoption can lead to less than optimal results for children. Finally, Part IV briefly suggests a proposal to remedy the flaws in the current Hague Convention.

## I. HISTORY AND DEVELOPMENT OF INTERCOUNTRY ADOPTION

Due to its high demand for children, the United States is a major player in intercountry adoptions and has been for quite some time. Potential American parents have looked outside the country as the availability of domestic infants has waned.<sup>4</sup> The United States issued immigrant visas to 19,613 orphans in 2007, which is almost three times as many visas as it issued in 1990.<sup>5</sup>

An orphaned child in need of a permanent home and family is not a new phenomenon. The phenomenon of intercountry adoption took off after World War II and grew in the following decades as natural disasters, wars, and the Acquired Immune Deficiency Syndrome (AIDS) epidemic left increasing numbers of now-orphaned children without traditional family care.<sup>6</sup> Even with increased numbers of orphans, a country's decision whether or not to

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4. Margaret Liu, *International Adoptions: An Overview*, 8 TEMP. INT'L & COMP. L.J. 187, 190 (1994) (suggesting that the "imbalance of supply and demand" in America, which has made those seeking to adopt turn to intercountry adoption, is caused by, among other things, the rise of contraceptive use, the legalization of abortion, and greater societal acceptance and support of single parent families with the growth of the welfare state); Kevin D. Williamson, *Lost Generation*, NAT'L REV., Aug. 4, 2008, at 34-36 (arguing that a major side effect of *Roe v. Wade* has been that "[w]ould-be parents trek to the Far East and mount expeditions to South America because there are so few infants available for adoption in the United States" since the landmark Supreme Court case "ensured that those babies who survived to birth were born to women who were much less likely to choose adoption").

5. BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, REPORT OF THE VISA OFFICE 2007, tbl. XIII, <http://travel.state.gov/pdf/fy07AnnualReportTableXIII.pdf> (last visited Apr. 1, 2008).

6. Liu, *supra* note 4, at 187-92. This Note uses the term "orphan" broadly, referring both to children, under the age of eighteen, whose parents have died and vulnerable, abandoned children.

allow its children to be adopted internationally often depends on its current political and social situation.<sup>7</sup> The usual suspects with high rates of intercountry adoptions are often poor and economically unstable.<sup>8</sup> Sub-Saharan Africa is reported to have the highest proportion of orphans, but the “absolute numbers of orphans are much higher in Asia.”<sup>9</sup> While exact numbers are hard to come by, estimates from 2003 showed 143 million orphans “in 93 countries in sub-Saharan Africa, Asia, Latin America, and the Caribbean,” with roughly 15 million of those orphaned due to the HIV/AIDS epidemic.<sup>10</sup> Generally, wealthy countries are the receivers of adopted children, while underdeveloped and developing countries are the senders.<sup>11</sup> Furthermore, a serious supply and demand problem exists.<sup>12</sup> Healthy infants are in high demand, with many potential parents reluctant to adopt older children or ones with special needs. While the same demand (if not higher) exists for adopted children as it did a few years ago, major senders of children are creating narrow restrictions and regulations, and some are cutting off the flow of adopted children altogether.<sup>13</sup> These restrictions are to some degree warranted, as intercountry adoption procedures are not without imperfections.

#### A. Perils and Pitfalls of Intercountry Adoption

Countries such as China and Romania are generally reluctant to participate in intercountry adoption for two main reasons. First, there

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7. Shelley Sperry, *Politics of Adoption*, NAT'L GEOGRAPHIC, Jan. 2008 (providing the example of Russia, which began allowing intercountry adoption after the conclusion of the Cold War).

8. Liu, *supra* note 4, at 192 (“International adoption is practiced predominantly in nations where not only the families, but the countries themselves, cannot care for their own children.”). One notable exception is China. John J. Tkacik, Jr., *China's Superpower Economy* (Heritage Foundation, WebMemo No. 1762 Dec. 28, 2007) (describing China's economic growth and stating “China is an economic superpower”).

9. JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS ET AL., CHILDREN ON THE BRINK 2004: A JOINT REPORT OF NEW ORPHAN ESTIMATES AND A FRAMEWORK FOR ACTION 3 (July 2004), available at [http://pdf.dec.org/pdf\\_docs/PNACY333.pdf](http://pdf.dec.org/pdf_docs/PNACY333.pdf).

10. *Id.* at 7.

11. See generally Lindsay Carlberg, Note, *The Agreement Between the United States and Vietnam Regarding Cooperation on the Adoption of Children: A More Effective and Efficient Solution to the Implementation of the Hague Convention on Intercountry Adoption or Just Another Road to Nowhere Paved with Good Intentions?*, 17 IND. INT'L & COMP. L. REV. 119 (2007).

12. See generally Richard A. Posner, *Regulation of the Market in Adoptions*, 60 B.U. L. REV. 59 (1987).

13. Sperry, *supra* note 7.

is a concern for children.<sup>14</sup> Although adoption is essentially a transaction between two parties, the human element of adoptions produces considerations and concerns that differ from those of other commercial transactions. More specifically, trafficking and corrupt parties are major concerns. Second, some countries and international organizations—notably the United Nations Children’s Fund (UNICEF)—are concerned about possible losses of cultural identity and believe children should be raised domestically, not abroad, to ensure that children understand their heritage.<sup>15</sup> This second perspective seems to view children as a natural resource that should be protected. Also, a country that is known to have a mass exodus of its children may be concerned about its international reputation, especially when it is trying to portray itself as a modern, developed country. For example, a country’s international reputation may be important if the country is trying to gain entrance into the European Union or bidding to host the Olympics.

### 1. Trafficking

First, intercountry adoption is desirable because in its absence a corresponding black market is unavoidable. Although restrictions on intercountry adoptions aim to curb illegal trafficking of children,<sup>16</sup> some couples want children so badly that they buy children on the black market where they are readily available.<sup>17</sup> In these black markets, “baby brokers” commonly exist, charging fees to birth mothers (or, as has been suggested, people posing as birth mothers but who are passing off someone else’s child for quick cash), and placing children into the adoption market.<sup>18</sup> Black markets suffer from “an obvious lack of law and oversight,” and in black markets children are “sold as a commodity.”<sup>19</sup> To some potential parents who participate in the black market exchange, the ends justify the means, since the children will be provided with good homes and parents who can support them.<sup>20</sup>

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14. *See infra* Part I.A.1.

15. *See infra* Part I.A.2.

16. *See* Wendy Koch, *Cuts in Foreign Adoptions Causing Anxiety in USA: Rules Protecting Kids Create Barriers for Some*, USA TODAY, Aug. 13, 2008, at 1A.

17. Liu, *supra* note 4, at 190.

18. Laura Beth Daly, Note, *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 Intercountry Adoption*, 45 FAM. CT. REV. 620, 624 (2007).

19. *See id.* (discussing the black market in Guatemala).

20. *See id.* at 624-25 (discussing the black market in Guatemala).

Not all actors in the black market seek to act as an adoption agency. Instead, vulnerable children may be exploited or abducted, a problem that often occurs following emergencies, such as during the 2004 Southeast Asian tsunami.<sup>21</sup> Children orphaned by such situations are often exposed to “child trafficking, labor and sexual exploitation, or recruitment as child soldiers.”<sup>22</sup>

Ensuring that children are not exploited—either by being sold into slavery or on the black market to desperate potential parents—is certainly an admirable goal. The trafficking of children is a serious problem that needs a serious solution. Yet, limiting intercountry adoption may not be the appropriate solution to the problem of child trafficking. As will be discussed later, disallowing intercountry adoptions may threaten a child’s well-being in other dangerous ways, including perpetuating life in substandard and even squalid orphanages, increasing homelessness, and augmenting problems that exploited children on the black market already face, such as prostitution and enslavement.<sup>23</sup> Nonetheless, the existence of the black market and the possibility that children will be abused or exploited are the main reasons why UNICEF believes that intercountry adoption should be used only as a last resort when children “cannot be placed in a permanent family setting in their countries of origin.”<sup>24</sup> The Hague Convention was enacted specifically with the hope that child exploitation (including illegal trafficking) could be stopped by regulating the countries that want to engage in intercountry adoption.

## 2. The Threats of a Loss of Cultural Identity and International Reputation

A second reason countries seek to limit intercountry adoption is due to the potential loss of cultural identity or international reputation. Since countries that place children up for adoption are

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21. See EVAN B. DONALDSON ADOPTION INSTITUTE, INTERCOUNTRY ADOPTION IN EMERGENCIES: THE TSUNAMI ORPHANS 1 (April 2005), available at [http://www.adoptioninstitute.org/publications/2005\\_Brief\\_ICA\\_In\\_Emergencies\\_April.pdf](http://www.adoptioninstitute.org/publications/2005_Brief_ICA_In_Emergencies_April.pdf).

22. *Id.* at 2.

23. See *infra* Part III.

24. UNICEF, UNICEF’S POSITION ON INTERCOUNTRY ADOPTION, [http://www.unicef.org/media/media\\_41918.html](http://www.unicef.org/media/media_41918.html) (last visited Mar. 25, 2008) (“Over the past 30 years, the number of families from wealthy countries wanting to adopt children from other countries has grown substantially. At the same time, lack of regulation and oversight, particularly in the countries of origin, coupled with the potential for financial gain, has spurred the growth of an industry around adoption, where profit, rather than the best interests of children, takes centre stage. Abuses include the sale and abduction of children, coercion of parents, and bribery.”).

usually underdeveloped or developing, the exportation of children may make a country feel as if it were admitting to the rest of the world that it has a weak child and social welfare system and cannot support its own children. For example, as China bid for and subsequently began to prepare for its hosting duties of the 2008 Summer Olympics, it may have been concerned that its international reputation would be tarnished if the international community thought that China was unable to care for many of its children and was instead exporting them to America and other wealthy countries.<sup>25</sup> Since many countries view children as a valuable resource and a treasure, China may have felt that its pride would have been at stake should it have to admit that Americans were raising thousands of Chinese children in American culture.

A child's right to its cultural identity and heritage is also a concern. "[C]hildren's advocates of all stripes agree that when possible, children should be raised by their own families and in their own cultures."<sup>26</sup> So, a child who is raised in a country other than the one into which he or she was born may lose appreciation of his or her cultural heritage.<sup>27</sup> While many adoptive parents seek to educate their child on where they came from, other parents may choose not to do so. However, this potential loss of cultural identity may not be as serious of a concern when the alternatives are considered; a child who is homeless or in an orphanage in his or her country of origin still may be deprived of other basic human rights.<sup>28</sup>

## II. THE HAGUE CONVENTION

The Hague Convention seeks to protect children by creating procedural safeguards that will ensure that children will be moved

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25. Elisa Poncz, Note, *China's Proposed International Adoption Law: The Likely Impact on Single U.S. Citizens seeking to adopt from China and the Available Alternatives*, 48 HARV. INT'L L.J. ONLINE 74, 77 (2007), available at <http://www.harvardilj.org/online/112> (last visited Mar. 26, 2009).

26. Pat Wingert, *When There's No Place Like Home: Children's Advocates Can't Agree on How Much to Emphasize Intercountry Adoption as a Solution*, NEWSWEEK (INT'L ED.), Feb. 4, 2008, <http://www.newsweek.com/id/105531>.

27. IRA MARK ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 1265-66 (4th ed. 2004) ("Race matching policies in adoption are also justified under a 'collective group rights' theory. If large numbers of African American children are being adopted by white families, many will grow up lacking a black racial identity.").

28. Poncz, *supra* note 25, at 81 ("The proponents of international adoption argue that without international adoption these children will live out their lives in orphanages and on the streets. The opponents of international adoption argue that corruption robs sender-countries of their dignity and their most precious resource—the children themselves.").

through the adoption process in a lawful manner. It was designed “to encourage adoption at home rather than abroad, . . . to end the international baby trade[,]” and “to restore order, transparency and decency to the adoption process.”<sup>29</sup> Still, the Hague Convention does not reject intercountry adoption.<sup>30</sup> It does, however, prize domestic adoption over intercountry adoption, noting 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.”<sup>31</sup> Because of this bias toward domestic adoption, the Hague Convention mandates certain procedures dealing with intercountry adoption in any country that is party to the Hague Convention. In particular, countries must create national “central authorities” that oversee all intercountry adoptions.<sup>32</sup> Restructuring internal child welfare systems to conform with the Hague Convention will not happen overnight. Whether this problem with the Hague Convention will only have short-term effects remains to be seen.

The Department of State is designated as the central authority of the United States.<sup>33</sup> Many countries, such as the United States, have state-based adoption systems, not federal ones, so implementation of a “central authority” may take some time.<sup>34</sup> It is likely that some children’s best interests in the short term are being negatively affected as a result of the delay in implementation.<sup>35</sup> Furthermore, whether the Hague Convention will be successful in the long run remains to be seen, but critics of the Hague Convention have noted that its “rules may prove so rigorous and indiscriminate that they will severely curtail international adoption as a vital escape route for children in troubled regions.”<sup>36</sup> The central authorities for both receiving and sending countries are required, among other things, to prepare reports on each child considered for adoption.<sup>37</sup>

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29. Mac Margolis, *Who Will Fill the Empty Cribs: International Adoptions are on the Decline, Despite Growing Demand and an Endless Supply of Orphans*, NEWSWEEK (INT’L ED.), Feb. 4, 2008, <http://www.newsweek.com/id/105530>.

30. Hague Convention, *supra* note 1, pmbl.

31. *Id.*

32. *Id.* ch. III.

33. 42 U.S.C. § 14911(a)(1) (2006).

34. *See* Margolis, *supra* note 29.

35. *Id.* (“In the long run, the Hague convention could prevent abuses. But in the short term, imposing tougher standards, screening child and would-be foster families more closely and eliminating for-profit foster care may mean longer stays in orphanages for many children.”).

36. *Id.*

37. Hague Convention, *supra* note 1, arts. 15, 16.

The United States took more than a decade to ratify the Hague Convention. It may be unreasonable to assume that other countries that have far less resources than the United States will ever be able to comply with the Hague Convention.<sup>38</sup> The United States has far more resources at its disposal and experience at implementing policy than most countries, and it still took years to meet the standards of the Hague Convention. Some countries are put between a rock and a hard place: they are unable to comply with the Hague Convention yet face international criticism for allegations of trafficking. Such countries may view the best solution to be simply disallowing intercountry adoption, as Vietnam did.<sup>39</sup> Children in these poor, unstable countries then remain in orphanages, on the streets, or with families who cannot support them. For the Hague Convention, an international effort to ensure that children's best interests are realized, this is an unwanted side effect. Another unwanted and related side effect of the Hague Convention is that countries, in their efforts to comply with the Hague Convention and also encourage domestic adoption, may enact regulations so strict that children end up paying the price. For example, China's new regulations guarantee that some people will be unable to adopt from China; at the same time, China has not proven that children will be readily adopted domestically and not languish in an orphanage.<sup>40</sup>

#### A. The "Best Interests" Standard

Both those for and against intercountry adoption claim they have children's "best interests" at heart.<sup>41</sup> The "best interests" standard is commonly used in matters involving children. Under this standard, the child's best interests are used to determine what course of action should be taken. The Hague Convention references the best interests standard several times.<sup>42</sup> The United Nation's Convention on the Rights of the Child<sup>43</sup> confirms that in adoption proceedings "the best interests of the child shall be the paramount consideration."<sup>44</sup>

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38. Carlberg, *supra* note 11, at 136 ("By failing to create an immediate incentive for countries to ratify the Hague Convention, sending countries are permitted to put off compliance until they become more stable, which could result in indefinite non-compliance.").

39. *See infra* Part III.C.

40. *See infra* Part III.A.

41. *See infra* Part III.A.

42. Hague Convention, *supra* note 2, pmb., arts. 1, 4, 16, 21, 24.

43. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/Res/44/25 (Nov. 20, 1989) [hereinafter CRC].

44. *Id.* art. 21.

Similarly, in the Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally the United Nations again affirms that the best interests of the child are paramount in any adoption decisions.<sup>45</sup>

Some organizations and diplomats have used this standard to limit the availability of intercountry adoption. In particular, UNICEF has repeatedly stated that it is usually not in a child's best interests to be adopted by a family in another country.<sup>46</sup> Also, the Convention on the Rights of the Child states that "intercountry 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."<sup>47</sup> This seems like quite a high threshold to overcome; intercountry adoption is painted as an unattractive option, a last resort that should be avoided if at all possible. The Declaration on Social and Legal Principles has a slightly softer, albeit vaguer, view, stating that the "primary aim of adoption is to provide the child who cannot be cared for by his or her own parents with a permanent family" and that when "considering possible adoption placements, persons responsible for them should select the most appropriate environment for the child."<sup>48</sup>

However, prizing domestic adoption far above intercountry adoption may threaten other rights of a child and, thus, may not always be in a child's best interests. The preamble of the Convention on the Rights of the Child says that a child should "grow up in a family environment."<sup>49</sup> If there is low demand for domestic adoption and intercountry adoption is not encouraged, then a child who is raised in an orphanage or on the street certainly is not, in any sense, being brought up in a "family environment." Children have the right to be protected against violence, abuse, neglect, and maltreatment.<sup>50</sup> As mentioned above, children who are bought and sold on the black market may indeed face abuse, and as will be discussed shortly, even

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45. Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, G.A. Res. 41/85, art. 5, U.N. Doc. A/Res/41/85 (Dec. 3, 1996) [hereinafter Declaration].

46. See CRC, *supra* note 43, art. 21.

47. *Id.*

48. Declaration, *supra* note 45, arts. 13-14.

49. CRC, *supra* note 43, pmb. See also Declaration, *supra* note 45, arts. 13-14 (stating that a child should be placed within a permanent family unit).

50. CRC, *supra* note 43, art. 19.

children in orphanages are often neglected, abused, or maltreated. If children are left to fend for themselves, they are often exposed to violence or exploitation. Children have the right to “an adequate standard of living,”<sup>51</sup> and it is unclear if such a standard of living is available to those children whose countries would rather have them adopted domestically or remain inside the country than be sent to adoptive parents in a foreign country. Many critics of UNICEF’s policy believe that, while it has noble roots, the policy lacks empirical support regarding its efficacy. Thus by limiting access to willing adoptive families, a limitation which could deny children their basic rights by condemning them to life in substandard conditions, UNICEF is not acting with the best interests of the child in mind.<sup>52</sup>

#### B. Restricting Intercountry Adoption May Not Protect the Best Interests of Children

Although the Hague Convention purports to promote the best interests of the child, the standards of the Hague Convention (in combination with the regulations of individual countries) do not adequately protect children. Because domestic families might not adopt their domestic orphans at a greater rate than willing foreigners, orphaned children usually face one of two alternatives if they are unable to be adopted internationally. If old enough, they can live on the street and try to survive on their own. Otherwise, children will likely spend their formative years in orphanages. Homelessness and orphanages will briefly be discussed first, and then the issue of supply and demand will be addressed.

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51. *Id.* art. 27.

52. *See, e.g.,* Liu, *supra* note 4, at 189 (“A large number of the world’s children lead lives void of opportunities to develop pursuant to the specifications of the U.N. Declaration of the Rights of the Child. Obviously, situations where children find they must steal or sell their bodies in prostitution generally do not permit them to maintain a life in the manner that the U.N. mandates. For example, it is clear that orphaned children surviving on the streets, or in orphanages under squalid conditions, are not living at the U.N.-articulated standards. Ironically, a large number of families who are willing to provide for these children have been denied access to them.”); EVAN B. DONALDSON ADOPTION INSTITUTE, *supra* note 21, at 7 (“In countries with established practices of intercountry adoption, there is no evidence to suggest that banning the practice halts such abuses as the trafficking of children . . . Imposing blanket bans in response to reported abuses relegates children legitimately in need of homes to additional years in institutions, or worse.”).

### 1. Undesirable Alternatives to Intercountry Adoption: Homelessness and Orphanages

Romania stopped allowing intercountry adoption in 2001.<sup>53</sup> In 2006 an estimated 1,500 Roma children were living on the street in that country.<sup>54</sup> UNICEF has noted that such children are “at risk of becoming victims of trafficking (both internationally and nationally), mostly for sexual exploitation, and for begging in the case of children with disabilities.”<sup>55</sup> Compared to other countries, “Roma children are over-represented both in terms of abandoned children, children living in institutions, street children, and children in conflict with the law.”<sup>56</sup> Abandoned children who live on the street lack identity cards and are therefore unable to attain public services.<sup>57</sup> They are often malnourished and in ill health<sup>58</sup> and have likely been sexually or physically abused.<sup>59</sup> A study of all street children in Romania indicated that about one-fifth of the children had never been to school and about one-third of them were illiterate.<sup>60</sup> Again, Romania has closed its doors to foreigners seeking to adopt.<sup>61</sup> Clearly, Romania’s decision to stop foreign adoption has left some of its children on the streets in conditions that are arguably worse than what they would have experienced had they been able to be adopted. But the conditions off the street, in orphanages, may not be much better.

About one hundred years ago America started moving away from the use of orphanages and instead put a premium on ensuring that children were adopted.<sup>62</sup> President Theodore Roosevelt was dismayed with the “Dickensian conditions” of the nation’s orphanages.<sup>63</sup> In 1909, he “convened the first White House Conference on the Fare of Dependent Children and established as a matter of national policy that, where possible, homeless children

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53. Sperry, *supra* note 7.

54. UNICEF, CHILDREN ON THE BRINK 2006: A FOCUSED SITUATION ANALYSIS OF VULNERABLE, EXCLUDED, AND DISCRIMINATED CHILDREN IN ROMANIA 12 (2006) [hereinafter, UNICEF, CHILDREN ON THE BRINK 2006].

55. *Id.*

56. *Id.*

57. *Id.* at 56.

58. *Id.*

59. *Id.* at 56-57.

60. *Id.* at 57.

61. Sperry, *supra* note 7.

62. Williamson, *supra* note 4, at 36.

63. *Id.*

should be placed in permanent adoptive homes.”<sup>64</sup> The Conference declared that “[h]ome life is the highest and finest product of civilization. It is the great molding force of mind and character. Children should not be deprived of it except for urgent and compelling reasons.”<sup>65</sup> Orphanages in America are almost unheard-of today.<sup>66</sup> Admittedly, other factors may have influenced this result, such as the development of the foster care system and fewer children being put up for adoption.<sup>67</sup>

Orphanages still exist in other countries, and their conditions do not seem to be much better than the “Dickensian conditions” that spurred Roosevelt into exploring alternatives.<sup>68</sup> It is believed that in Europe and Central Asia over one million children live in orphanages.<sup>69</sup> UNICEF has recognized that “[m]any children are placed unnecessarily and for too long in institutions, where they receive less of the stimulation and individual attention needed to grow to their full potential.”<sup>70</sup> Visitors to Chinese orphanages have observed developmental delays and signs of a failure to thrive among the children.<sup>71</sup> In addition, other countries have orphanages that clearly compromise a child’s best interests. In Russia, for example, parents with HIV/AIDS are pressured to institutionalize their children.<sup>72</sup> Once placed in an orphanage, children with HIV/AIDS are “often separated from other children, leading to further stigmatization.”<sup>73</sup> Again, studies show that children in these orphanages may have “difficulty forming meaningful, lasting relationships” due to “[i]nadequate staff-to-child ratios, the lack of training for caretakers, and high staff turnover.”<sup>74</sup> In 2007, the non-governmental organization Human Rights Watch singled out both

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64. *Id.*

65. *Id.*

66. JOHN E. B. BYERS, CHILD PROTECTIONS IN AMERICA: PAST, PRESENT, AND FUTURE 77 (2006) (“The number of children in orphanages peaked during the Great Depression at roughly 144,000. Following World War II, orphanages declined, and by 1980, Americans viewed orphanages as a thing of the past.”).

67. *See generally* Williamson, *supra* note 4.

68. *Id.*

69. WORLD VISION, CHILDREN IN CRISIS, [http://meero.worldvision.org/sf\\_childrenin crisis.php](http://meero.worldvision.org/sf_childrenin crisis.php) (last visited Apr. 1, 2009).

70. UNICEF, CHILD PROTECTION INFORMATION SHEET: CHILDREN WITHOUT PARENTAL CARE (2006).

71. *See generally id.*

72. UNICEF, ENHANCED PROTECTION FOR CHILDREN AFFECTED BY AIDS 16 (2007).

73. *Id.*

74. *Id.* at 15.

Liberia and India for their orphanages with “substandard” conditions.<sup>75</sup> This data indicates that institutionalized orphaned children face serious physical, mental, and emotional challenges. Since children in orphanages are often left without many of their basic needs, placing children in orphanages does not support the best interests of children. The “Dickensian” conditions do not seem to be going away anytime soon.

## 2. Supply and Demand: Domestic v. Foreign Demand

It should be noted that any statistics mentioned very well might be lower than the actual number of children who are abandoned, living in institutions, or living on the street, since not all countries have transparent child welfare systems. It is hard to track exactly what is happening to abandoned children and what the effects of adoption systems are upon them. What is clear, however, is that such restrictions are ensuring that many fit foreign parents will be unable to provide a permanent home to abandoned children and, simultaneously, are not addressing the problem of a lack of potential domestic parents willing to adopt. Countries such as China that are enacting limits on intercountry adoptions claim that there are not enough children to meet the demand.<sup>76</sup> But, as the case studies below demonstrate with children still in orphanages and still on the streets, this claim seems highly untenable.

What China really may be struggling with is the capability to process all the adoption applications they receive.<sup>77</sup> This is a bureaucratic, administrative problem. A better system is needed, not only to streamline and expedite the adoption process, but also to ensure that all adoptions are legal and ethical. But if the actual supply of children is not lower than the demand then it seems unnecessary and against a child’s best interests to cut off intercountry adoption or restrict it to an unwarranted degree. Even if there were enough domestic homes in which to place abandoned children, studies indicate that that might not be the best solution. A study conducted by UNICEF noted that putting an abandoned child with their

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75. HUMAN RIGHTS WATCH, WORLD REPORT 2008: EVENTS OF 2007, 134, 277 (2008).

76. Pam Belluck & Jim Yardley, *China Tightens Adoptions Rules for Foreigners*, N.Y. TIMES, Dec. 12, 2006, available at <http://www.nytimes.com/2006/12/20/us/20adopt.html>.

77. Margolis, *supra* note 29.

extended families or with families who cannot support them might not be in that child's best interests.<sup>78</sup>

One example of a country with low domestic demand is Romania. Its moratorium on intercountry adoption proves how little domestic adoption is occurring in an abandoned child's country of origin and how harmful restrictive policies can be. Numerous studies support the position that children are not being adopted domestically to any great degree in Romania.<sup>79</sup> A study conducted in 2000 reported that while a significant number of abandoned children were placed with extended family or in foster care, only 0.22%— 43 children— were adopted domestically.<sup>80</sup> Romania cannot seriously argue that there is such a high domestic demand for children that intercountry adoption is unneeded when less than one percent of abandoned children are being adopted domestically. Other countries have realized just how low domestic demand is compared to foreign demand for abandoned children. In 1988, South Korea banned all intercountry adoptions. Like China and the 2008 Olympics, it was under fire in the lead-up to the 1988 Olympics being held in Seoul.<sup>81</sup> In 1994, the ban was lifted when the South Korean government realized that, since the 1994 ban, “domestic adoption did not increase enough to offset international adoption.”<sup>82</sup> Romania and other countries that have banned intercountry adoption should learn from

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78. UNICEF, ENHANCED PROTECTION FOR CHILDREN AFFECTED BY AIDS, *supra* note 72, at 15 (“While these traditional community coping mechanisms are often protective, studies have shown that children in these arrangements are less likely to receive an equal share of household resources compared to biological children. This is particularly the case when resources are scarce. Children living in households without either parent are also less likely to attend school and are at greater risk of exploitation, abuse and neglect.”).

79. *See infra* Part III.E.

80. UNICEF, CHILDREN ON THE BRINK 2006, *supra* note 54, at 11 (“[T]he overall change due to reform has affected the type of care, but has not resulted in a dramatic decline in the number of children in need of placement measures.”).

81. Eun Jung Cahill Che, *Adoption by Foreigners Can Be Fine*, INT'L HERALD TRIB. (Paris, Fr.), Aug. 23, 2001, [http://www.iht.com/articles/2001/08/23/edcahill\\_ed3\\_php](http://www.iht.com/articles/2001/08/23/edcahill_ed3_php).

82. *Id.* It should be noted that currently South Korea is trying again to encourage domestic, rather than intercountry, adoptions with campaigns aimed at ending the stigma attached with having an adopted child and also with monthly allowances to adopting families and health benefits for the children. Norimitsu Onishi, *Korea Aims to End Stigma of Adoption and Stop 'Exporting' Babies*, N.Y. TIMES, Oct. 9, 2008, available at <http://www.nytimes.com/2008/10/09/world/asia/09adopt.html>. It is also important to note that “last year, for the first time, more babies [in South Korea] were adopted by South Koreans than foreigners.” *Id.* If domestic demand now truly trumps foreign demand then perhaps any restrictions that South Korea seeks to impose should not be met with the same apprehension as restrictions and bans already in place in other countries.

South Korea's experiences and admit that their current supply of abandoned children outweighs any domestic demand.

### C. Short Term and Long Term Effects of the Hague Convention

If there is a silver lining to the dark cloud of restrictive adoption policies, it is that there may be a rise in the adoption of children who were previously marginalized. Because potential parents are sometimes restricted in intercountry adoption, they may adopt older children and children with special needs from their own countries.<sup>83</sup> In addition, because of restrictions in intercountry adoptions in Asia and the former Soviet Union, traditionally two popular regions for adoption, potential parents may look to adopting children in other parts of the world. There is a need for adoptive parents for children in Africa, "where AIDS, political instability and ethnic violence have taken their toll on families."<sup>84</sup>

Besides the adoption of children who in the past were often not adopted, the Hague Convention has the potential to end the abuse and exploitation of trafficked children. But in the short term it is likely that children will feel detrimental effects of countries trying to comply with the Hague Convention or trying to shed their reputation as a country that has a black market in babies. As countries like Guatemala and Vietnam cease intercountry adoptions to try to comply with the Hague Convention and address issues of child abuse and exploitation, it is likely that many of the children who may have previously been adopted by foreigners will not be adopted domestically and, instead, will be without a permanent home and family.

The long-term effects of the Hague Convention are obviously speculative at this point. Admittedly, it could end the illegal baby trade, which is certainly in the best interest of children. But in the long run, children may still be neglected, abused, or exploited—the threat to children's best interest may just be within their country of origin, not in an adoption system. Romania's policy has demonstrated that children are not being adopted in sufficient numbers domestically to offset the need for intercountry adoption.<sup>85</sup> Children, who are in ready supply, are not being protected by domestic policies that limit or eliminate all foreign demand for those children. If not

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83. Koch, *supra* note 16.

84. Margolis, *supra* note 29.

85. *See* discussion *infra* Part III.E.

adopted, abandoned children will most likely remain in orphanages or on the streets.

### III. CASE STUDIES: COUNTRIES RESISTING INTERCOUNTRY ADOPTIONS

The following are examples of countries that either have closed themselves off completely to intercountry adoption or have enacted very strict requirements. Policies that have a complete ban on intercountry adoption, such as Romania's, make it so that no one outside of the country is able to adopt. Policies that are very restrictive, such as China's new regulations, create huge obstacles to intercountry adoption. Examining the effects of such restrictions may help shed light on the possible effects of the Hague Convention.

#### A. China

China's one-child policy makes domestic adoption unlikely.<sup>86</sup> Not surprisingly, its orphanages are mostly filled with girls.<sup>87</sup> China's orphanages were notorious in the 1990s for their miserable, almost inhumane conditions. Human Rights Watch found that an orphan had only a fifty percent chance of surviving beyond one year in 1989.<sup>88</sup> Furthermore, the mortality rate at Chinese orphanages was "far higher than [the rate] documented in any other country,"<sup>89</sup> due to neglect, lack of medical training among the staff, and even deliberate deaths.<sup>90</sup> At some orphanages the deaths were the result of "an apparently systematic program of child elimination in which senior medical staff played a central role."<sup>91</sup>

Despite these conditions, some of these orphanages were even praised by the Chinese governments as "national model[s] for the care of abandoned and disabled children" and received financial support from the government.<sup>92</sup> Human Rights Watch did a follow-up report in response to China's criticisms of the earlier report and found even more egregious behavior on the part of the Chinese

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86. Anne Thurston, *In a Chinese Orphanage*, ATLANTIC MONTHLY, Apr. 1996, at 30.

87. *Id.*

88. HUMAN RIGHTS WATCH, DEATH BY DEFAULT: A POLICY OF FATAL NEGLECT IN CHINA'S STATE ORPHANAGES 2 (1996).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 7.

92. *Id.* at 5.

government. It found that the Chinese government does not always make relevant information publicly available and in fact may try to conceal evidence of abuses.<sup>93</sup> The report also found that the funding that the government did provide was inadequate to ensure that each child was provided with an appropriate amount of food, clothing, and medical treatment.<sup>94</sup> These conditions have led one observer to note that in China “abandonment is all too often tantamount to infanticide.”<sup>95</sup>

Moreover, these children were not even being readily adopted. While not impossible, it is unlikely that many of these children will find homes domestically if the one-child policy continues to exist. Yet China, through the China Center for Adoption Affairs (CCAA) also recently enacted restrictions, effective May 2007, for foreigners seeking to adopt.<sup>96</sup> Adoption is limited to married heterosexual couples between the ages of thirty and fifty.<sup>97</sup> They must be “physically and mentally fit” and, among other conditions, cannot have AIDS, blindness in either eye, hearing loss, paralysis, severe facial deformation, schizophrenia, depression, anxiety, or a body mass index of forty or more.<sup>98</sup> They must have fewer than five children under the age of eighteen, and neither partner can have a significant criminal record.<sup>99</sup> These new regulations will prevent many people from being able to adopt from China. It is predicted that populations of “liberal urban centers” in America, which often have single individuals or non-traditional couples (such as gays and lesbians) seeking to adopt, will be hit hard by these restrictions.<sup>100</sup> The CCAA wants potential adoptive parents to be the “cream of the crop” according to their standards.<sup>101</sup> Critics of the new regulations are also concerned about the body mass index, depression, and anxiety requirements, as they are “common diagnoses here in America.”<sup>102</sup>

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93. HUMAN RIGHTS WATCH, CHINESE ORPHANAGES: A FOLLOW-UP 7-9 (1996).

94. *Id.* at 6.

95. *Id.* at 4.

96. OFFICE OF CHILDREN’S ISSUES, DEP’T OF STATE, COUNTRY SPECIFIC INFORMATION FOR CHINA (Jan. 23, 2009), <http://adoption.state.gov/country/china.html> (last visited Mar. 4, 2009).

97. *Id.*

98. *Id.*

99. *Id.*

100. Patricia Wen, *China’s Policies Lead to Drop in Bay State Adoptions—Local Economy Also a Factor*, BOSTON GLOBE, May 1, 2006, at A1.

101. Belluck & Yardley, *supra* note 76.

102. *Id.* Major depressive disorder is one of the leading causes of disability in the United States, affecting about 14.8 million American adults each year. About 6.8 million American

Disagreement exists about whether such restrictions are necessary. Some see the new requirements as reasonable and even necessary to weed out less desirable parents since, as the Chinese government has reportedly claimed, there is an “enormous spike in applications by foreigners, which has far exceeded the number of available babies.”<sup>103</sup> Others question the motives of the Chinese government as well as any statistics they may proffer. While China may have wanted to ensure that its children would be raised by Chinese parents and not overweight, depressed Americans, it is also likely that China was aware of how the export of its children would be viewed by the international community, especially in light of its hosting the 2008 Summer Olympics.<sup>104</sup> Critics of China’s new regulations doubt China’s claim “that there simply is not an excess supply of children waiting in institutions for adoption” because of “various accounts of steady levels of Chinese babies in orphanages.”<sup>105</sup> In reality, domestic adoptions may not be enough to make sure that Chinese orphans will be adopted.<sup>106</sup> Even if there are fewer children to be adopted, this may be caused by “troubling social practices” such as gender-specific abortions.<sup>107</sup> Accordingly, the numbers the Chinese government provides may not be completely reliable. If children are not being adopted domestically, then it is also likely that they are languishing in orphanages with conditions probably similar to those described above—conditions that do not seem to meet the best interests standard.

## B. Guatemala

While China’s restrictions seem to be going too far, Guatemala does not go far enough to provide regulations to protect children. Guatemala is known for baby trafficking and its thriving black market and lacks sufficient safeguards in this area. In recent years Guatemala was one of the top sender countries of adopted children to America.<sup>108</sup>

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adults suffer from generalized anxiety disorder. Any one of these individuals would be denied the opportunity to adopt from China. NATIONAL INSTITUTE OF MENTAL HEALTH, THE NUMBERS COUNT: MENTAL DISORDERS IN AMERICA, *available at* <http://www.nimh.nih.gov> (last visited Mar. 4, 2009).

103. Belluck & Yardley, *supra* note 76 (reporting the comments of American adoption agencies that had been briefed by Chinese officials).

104. Ponz, *supra* note 25, at 77.

105. *Id.*

106. *Id.* at 76.

107. *Id.*

108. Daly, *supra* note 18, at 624.

According to some studies, it was second only to China, which is surprising due to the huge population gap between the two countries.<sup>109</sup> The large numbers of adopted children sent to the United States is due to the lack of regulation and oversight by the Guatemalan government over intercountry adoption.<sup>110</sup> This lack of regulation and the abuses that take place seem to make Guatemala the poster-child for the type of adoption reform the Hague Convention seeks to attain. As of the fall of 2008, the Guatemala's National Council on Adoption (CNA) announced it would not review any new adoption cases while it worked on establishing guidelines to bring the country into compliance with the Hague Convention.<sup>111</sup> Although CNA anticipated compliance by January 2009, by all accounts, that goal has not been met.<sup>112</sup> It is unclear when full compliance in Guatemala will actually be achieved.

Compliance—especially timely compliance—is certainly a good thing, but the costs, even if they may be short-lived, of halting intercountry adoption should be considered. Many wonder if compliance really has to be all-or-nothing. For example, some argue that the U.S. Intercountry Adoption Act (IAA), which implements the Hague Convention, allows the United States to waive some requirements of the IAA if doing so is in the “interests of justice” or to “prevent grave physical harm.”<sup>113</sup> A child who is homeless or is in an orphanage, the argument continues, is in grave physical harm and is an affront to justice.<sup>114</sup> There seems to be no immediately apparent reason why Guatemala could not have a similar philosophy.

One proposed alternative to the mandates of the Hague Convention would be for a temporary system that would allow for adoptions to continue during the transition between an almost completely unregulated system and one in full compliance with the

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109. *Id.*

110. *Id.*

111. OFFICE OF CHILDREN'S ISSUES, DEP'T OF STATE, COUNTRY SPECIFIC INFORMATION FOR GUATEMALA (Mar. 24, 2009), <http://adoption.state.gov/country/guatemala.html>. At the time of publication, the Guatemalan guidelines were not finished.

112. *Id.*

113. Intercountry Adoption Act, 42 U.S.C. § 14952(b)(1) (2000).

114. Daly, *supra* note 18, at 630. “[T]he best interests of Guatemalan children must be placed at the forefront of the United States’ concern, and terminating adoptions is not in their best interests. To enforce laws at the expense of children who require homes is not justifiable when alternatives exist for accommodating Guatemala’s specific and rare situation within the international context.” *Id.* at 626.

Hague Convention.<sup>115</sup> While this sounds ideal, proponents do not fully discuss the nuts and bolts of this alternative system. The only thing that is clear is that it is likely that during any transition period there exists the real threat of children who otherwise could be adopted ending up on the street or in orphanages. There is statutory authority under the IAA for the United States to allow for continued intercountry adoption during a transitional period; however, since it is Guatemala, not the United States, that has temporarily cut off adoptions, it is not clear whether such an alternative solution will be embraced.

It is also not clear whether any alternative solution will be effective in the long run. If Guatemala's new regulations become as strict as China's, then allowing continuing adoption during the transition period when regulations are being developed will do little good. Guatemala's compliance with the Hague Convention, as well as any documented effects upon children during the transition, will be extremely helpful in evaluating whether the Hague Convention is ultimately in children's best interests.

### C. Vietnam

Like Guatemala, Vietnam has a history of lax, if not non-existent, intercountry adoption regulations.<sup>116</sup> In 2005, the United States and Vietnam entered into a bilateral agreement to encourage Vietnam to develop safeguards for its adoption system.<sup>117</sup> According to the terms of the agreement, both parties were to see that "appropriate measures should be taken [by both parties] under their respective laws to prevent and deal with actions of adoption abuse involving the exploitation of children for labor, sex, illicit gain, and other infringements on a child's lawful rights and interests."<sup>118</sup> Unfortunately, the agreement expired on September 1, 2008.<sup>119</sup>

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115. *Id.* at 627-28.

116. Carlberg, *supra* note 11, at 144-45 ("One reason for this [lack of oversight] is that Vietnam is a war-torn and poverty-stricken country that has a weaker adoption infrastructure; therefore, it is more susceptible to corruption. . . . With neighboring China's strict and well-established adoption rules, adoptive parents have been turning to Vietnam, where the rules are much more lenient." (footnote omitted)).

117. Agreement Between the United States of America and the Socialist Republic of Vietnam Regarding Cooperation on the Adoption of Children, U.S.-Vietnam, June 21, 2005, Temp. State Dep't No. 06-10, 2005 WL 3826041.

118. *Id.* art. 4, ¶ 2.

119. OFFICE OF CHILDREN'S ISSUES, DEP'T OF STATE, COUNTRY SPECIFIC INFORMATION FOR VIETNAM (Oct. 16, 2008), <http://adoption.state.gov/country/vietnam.html> (last visited Mar.

The United States is concerned that Vietnam still has not ensured that children will not be exploited or abused, noting that field investigations found “serious adoption irregularities, including forged or altered documentation, cash payment to birth mothers . . . coercion or deceit to induce the birth parent(s) to release children to an orphanage, and children being offered for intercountry adoption without the knowledge or consent of their birth parents.”<sup>120</sup> The Vietnamese Department of International Adoptions (DIA) no longer processes adoption applications, as it cannot do so in the absence of an agreement.<sup>121</sup> As in the case of Guatemala, the question remains what will happen to children when intercountry adoption is completely closed off, even if the suspension is only temporary.

Vietnam’s experience demonstrates another important point about the Hague Convention—it requires vast in-country resources. Countries like Vietnam may be reluctant to conform to the Hague Convention because of the “the cost and the organization entailed to implement and conform to the Hague Convention.”<sup>122</sup> Vietnam lacks the strong, organized government that is needed to develop regulations.<sup>123</sup> If a country like Vietnam does not have the resources—both in terms of finances and experience—to care for its own abandoned children, then it also probably does not have the resources necessary to conform to the Hague Convention.<sup>124</sup> Vietnam highlights one of the biggest concerns regarding the Hague Convention: while the Hague Convention’s ideals are commendable, it may be just too hard for poorer countries to implement. If Vietnam’s non-compliance means that the United States, a party to the Hague Convention, is unlikely to adopt from Vietnam, then what happens to the orphaned

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4, 2009). Nothing new has happened since the expiration of this agreement, and adoption remains closed until a new agreement is signed between the parties. *Id.*

120. *Id.*

121. *Id.*

122. Carlberg, *supra* note 11, at 146.

123. *Id.* at 147 (“Implementation and start-up costs would be extraordinarily high and would be almost impossible to attain in under-developed countries without continued foreign aid.” (footnote omitted)).

124. *Id.* (“Most sending countries like Vietnam culturally oppose dependence on intercountry adoption to raise their children, yet they continue to engage in the practice out of necessity. If Vietnam had the resources, it would likely devote that money to caring for its orphans in order to end the shameful practice of baby trafficking rather than expending those resources on implementing the Hague Convention. Unfortunately, Vietnam does not have the financial resources needed to do either of these things. Instead, it has decided to take the passive approach of putting off compliance for an extended period of time; realistically, it may never finalize compliance, thereby undermining the goals of the Hague Convention.” (footnotes omitted)).

and abandoned Vietnamese children? In a poor country like Vietnam, it is wishful thinking to believe that they will be adopted domestically in any great number.

#### D. Russia

Russia may present a forecast of how Vietnam's "temporary" suspension of intercountry adoption will affect children, since Russia temporarily closed off intercountry adoption in 2007.<sup>125</sup> Although the Russian government tried to encourage its own citizens to adopt, this effort proved unfruitful, as "very few Russian families want to adopt orphans because they're often seen as sick or somehow damaged."<sup>126</sup> So, if Russia's "temporary" solution during this transitional period when Russia was trying to develop and implement safeguards was to persuade Russians to adopt Russian orphans, it appears that such a solution was ineffective.

Many children remained in orphanages, including special closed institutions for children who were considered mentally or physically disabled. Children in such institutions were twice as likely to die than children in "regular" Russian orphanages.<sup>127</sup> Russians are also unlikely to adopt a child with HIV/AIDS, which is a growing problem in that country,<sup>128</sup> and abandoned children with HIV/AIDS in Russia are likely to be stigmatized or neglected at any orphanage or institution in which they are placed.<sup>129</sup> Potential foreign adoptive parents, who have the resources and desire to care for a child with special needs, may be more willing than potential domestic adoptive parents to adopt a disabled child. Eager to be parents, they are often amenable to adopting and raising a child that will need extra care and attention. But if the doors are closed to such prospective parents, then it appears the child will most likely not be part of an adoptive family at all; instead the child likely will be raised in an orphanage. Like the Chinese, who are unlikely to adopt because of the one-child policy, and the Vietnamese, who are unlikely to adopt due to lack of financial means, Russians also seem unlikely to adopt their own

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125. Gregory Feifer, *Russia's Halt on Adoption Spotlights Conditions*, NAT'L PUB. RADIO Apr. 25, 2007, <http://www.npr.org/templates/story/story.php?storyid=9810880>.

126. *Id.* (noting that roughly half of all children adopted in Russia each year "are taken in by foreigners").

127. *Id.*

128. See HUMAN RIGHTS WATCH, *POSITIVELY ABANDONED: STIGMA AND DISCRIMINATION AGAINST HIV-POSITIVE MOTHERS AND THEIR CHILDREN IN RUSSIA 1-2* (2005), available at <http://www.hrw.org/sites/default/files/reports/russia0605.pdf>.

129. *Id.*

children at such a rate that would render foreign adoption unnecessary. Thus, children, especially those with special needs who are stigmatized by Russian society, seem to be affected negatively during any suspension of intercountry adoption.

#### E. Romania

Of the countries discussed in this note, Romania may best demonstrate how cutting off foreign adoption can negatively affect children. In 2001, the Romanian government imposed a ban on intercountry adoption.<sup>130</sup> The main motivation behind this was that Romania wanted to gain acceptance into the European Union, which had “conditioned Romania’s acceptance to the Union on its need to reform its adoption system.”<sup>131</sup> Such an ultimatum was not entirely unwarranted, as Romania had a booming baby trade. The trade grew out of the government’s push for adoption in the 1990s instead of filling state-run orphanages with abandoned children (who were abundant when the government banned sex-education, contraceptives, and abortion).<sup>132</sup>

Since the implementation of the ban, some children have been “forced back on destitute families.”<sup>133</sup> Many other children have been placed in orphanages. According to a UNICEF report, in 2006 there were an estimated 77,866 abandoned children who were in public or private care.<sup>134</sup> Of these children, 28,516 were living in institutions.<sup>135</sup> Only 474 were placed in any sort of adoption system.<sup>136</sup> Many abandoned children are homeless and are left to live and work on the streets of Romania.<sup>137</sup> The effects of the 2001 moratorium are not unsurprising, as Romania’s weak social welfare system is simply “not equipped to handle the number of abandoned children.”<sup>138</sup> Lifting the ban on intercountry adoption would help Romania “ease the strain

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130. Grainger Laffan, *Romania’s Policy of Emptying Its Orphanages Raises Controversy*, 331 BRIT. MED. J. 1360, 1360 (2005).

131. Daly, *supra* note 18, at 630-31. *See also* UNICEF, CHILDREN ON THE BRINK 2006, *supra* note 54, at 137 (“European integration began to influence the child care and child protection system, as this became a political criterion for EU accession.”).

132. Laffan, *supra* note 130, at 1360.

133. *Id.*

134. UNICEF, CHILDREN ON THE BRINK 2006, *supra* note 54, at 37.

135. *Id.* at 42.

136. *Id.*

137. *See supra* notes 53-61 and accompanying text.

138. Che, *supra* note 81, at 6.

on [its] state institutions.”<sup>139</sup> While domestic adoption should be encouraged, Romania should realize that, like China, not enough domestic demand exists to outweigh adoption by foreigners.<sup>140</sup>

The United States has been vocal in its concern over Romania’s ban on intercountry adoptions. Reform certainly was needed for Romania’s adoption system,<sup>141</sup> but at the same time, the United States argues that a complete ban on intercountry adoption is to the ultimate detriment—not the benefit—of children, noting that the regulations are “so restrictive” that they have “ended up harming the very children and families it was ostensibly designed to protect.”<sup>142</sup> Abandoned children in Romania “continue to face long term[sic] institutional care” because there is large disparity between the “number of Romanian children in need and the relatively smaller number of Romanian families looking to adopt domestically.”<sup>143</sup> While the United States recognizes that Romania was concerned about its acceptance to the European Union, the U.S. Department of State believes that “there is no European Union law or regulation restricting intercountry adoptions to biological grandparents or requiring that restrictive laws be passed as a prerequisite for accession.”<sup>144</sup> In 2005 and 2006, the House of Representatives and the Senate both passed resolutions calling for the “[g]overnment of Romania to amend its child welfare and adoption laws to decrease barriers to adoption, both domestic and intercountry”<sup>145</sup> since the “number of Romanian children adopted domestically is far less than the number abandoned.”<sup>146</sup> While Romania did need adoption reform to end corrupt practices, its moratorium has left thousands of abandoned children without a family. The United States has recognized this fact, and perhaps international pressure, including

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139. *Id.*

140. *Id.* Romania’s former president Ion Illiescu acknowledged this in 2001 when he questioned who in Romania “will adopt the abandoned children ‘when we have an average salary of \$100.’” *Id.*

141. See Maura Harty, Assistant Sec’y of State for Consular Affairs, U.S. Dep’t of State, Testimony at Comm’n on Sec. & Cooperation in Europe (Helsinki Commission), Sept. 14, 2005 (transcript available at [http://travel.state.gov/law/legal/testimony/testimony\\_2635.html](http://travel.state.gov/law/legal/testimony/testimony_2635.html)) (“Romania’s previous adoption laws failed to provide child welfare protections, and reform of the system was imperative.”).

142. *Id.*

143. *Id.*

144. *Id.*

145. S. Res. 359, 109th Cong. (2006) (enacted).

146. H.R. Res. 578, 109th Cong. (2006) (enacted).

pressure from the United States and the European Union, will lead Romania to rethink its current practices.

#### IV. POSSIBLE SOLUTIONS TO REMEDY THE DRAWBACKS OF THE HAGUE CONVENTION

The objectives of the Hague Convention are commendable. All children deserve to be protected from exploitation. But such protection should not be at the expense of other children; instead of being adopted, these children will spend their youth homeless on the street or in orphanages. Countries can achieve the goals of the Hague Convention without making such sacrifices. First, countries and international organizations should rethink their views on intercountry adoption and consider whether restricting adoptions, with all its possible baleful effects, is a desirable alternative. Second, parties to the Convention must figure out a way to address the harms that occur during transitional periods when countries are developing and implementing regulations.

##### A. Countries and International Organizations Should Critically Examine their Positions on Intercountry Adoption

UNICEF, a leader among non-governmental organizations geared towards protecting and promoting the rights of children, should carefully consider its position on intercountry adoption and whether that position is ultimately in children's best interests. Also, countries and other international organizations should consider whether domestic adoption should always be prized over intercountry adoption. While problems that arise in the context of intercountry adoption certainly should be addressed, such concerns may also be inflated.

First, there is the concern over a loss of cultural identity, lineage, and heritage. Within the United States, federal law "prohibits the use of racial criteria in adoption placement."<sup>147</sup> Studies of American children adopted by parents of a different race have reported that such adoptions present no real threat to a child and that "transracial adoptees do not deny their racial identification nor, for the most part, do their adoptive parents."<sup>148</sup> The "colorblind" domestic adoption policy of the United States recognizes that "so long as the number of minority children needing permanent homes exceeds the number of

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147. Williamson, *supra* note 4, at 37.

148. Arnold R. Silverman, *Outcomes of Transracial Adoption*, 3 ADOPTION 104, 117 (1993).

minority families able to accept them, transracial placement is a resource that should not be ignored.”<sup>149</sup> Otherwise, the alternative may leave many vulnerable children without permanent families. The parallel between such an outcome and what is occurring in countries such as China cannot be ignored; “[c]ritics compare such policies [that place a premium on domestic rather than foreign adoption] to those promoted in the 1970s by black American social workers, who argued that only African-American families could ethically adopt black babies. As a result, many minority children spent most of their childhoods in state care.”<sup>150</sup> Cultural identity should not be disregarded, but what value is cultural identity to a child who is homeless or grows up in an orphanage?

Second, there are the concerns, such as those voiced by UNICEF, over trafficking and other related abuses and exploitations, but critics of UNICEF argue that the organization “plays up rare cases of abuse and corruption.”<sup>151</sup> Furthermore, “no evidence [exists] to suggest that banning the practice [of intercountry adoption] halts such abuses as the trafficking of children.”<sup>152</sup> UNICEF should determine whether its policy has the actual affect of limiting trafficking. Likewise, countries that have bans or very strict regulations should examine the practical effects of curbing intercountry adoption on children. Finally, if UNICEF is truly committed to promoting the best interests of children, then perhaps it should examine the underlying causes of abandoned children. Many countries are too poor to provide for vulnerable children and their families or may lack infrastructure and resources. Other policies of individual countries may also be contributing factors to the more than 143 million orphans. China’s one-child policy means both that undesirable babies, such as girls, are abandoned and that the Chinese are unlikely to adopt domestically in any great number. Similarly, Romania’s policies on birth control and sex-education created a rise in unwanted pregnancies and abandoned children. If countries want to take care of their own children and not have them adopted overseas, they should carefully consider the implications of any policy that affects children.

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149. *Id.*

150. Wingert, *supra* note 26.

151. *Id.*

152. EVAN B. DONALDSON ADOPTION INSTITUTE, *supra* note 21, at 7.

## B. Countries that are Party to the Hague Convention Should Implement Safeguards During Transitional Periods so that the Best Interests of Children are Promoted

A major flaw with the Hague Convention is that it either did not contemplate or decided not to address the problems that occur when countries completely shut off their intercountry adoption pipeline as they try to comply with the Hague Convention (*e.g.*, Guatemala). Alternatives to a complete cessation of intercountry adoption should be embraced. Temporary solutions should be used during transitional periods so that children continue to be adopted. While it may seem like western imposition of conditions on others, developed countries should be actively involved in helping less-developed countries comply with the Hague Convention. Countries like the United States have the resources and experience to assist poorer countries in the development of effective laws, regulations, and adoption systems.

For countries that have had a dark history of intercountry adoption abuse, such as Guatemala, heightened oversight may be necessary to protect any children who are up for adoption during a transitional period. During this passage of time between signing and ratifying the convention, developed countries with resources should be called upon to assist other countries in setting up infrastructure to comply with the Hague Convention. Under the Hague Convention, signatories are to work together through their “central authorities” during the adoption process.<sup>153</sup> Thus, countries should aim to work together during transitions to develop good standards and practices. So instead of closing off its adoption pipeline, a country may have to make a case-by-case analysis, individually scrutinizing each child’s situation and determining that there has been no exploitation. This task may be time-consuming, but if the concerns of the critics of intercountry adoption are exaggerated, then it also may be very fruitful.

## FINAL CONSIDERATIONS

Critics of the Hague Convention and of countries’ policies regarding intercountry adoption (*e.g.*, China’s new regulations) sometimes take an extreme view. Because the potential exists for children to be harmed under such policies, they are looked at with

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153. Hague Convention, *supra* note 1, chs. III, IV.

contempt.<sup>154</sup> Such an extreme view may not be needed. Certainly there is something to be said for the Hague Convention's effort to end the trafficking, abuse, and exploitation of children, but the Hague Convention does not do enough to ensure that regulations and standards created by countries are narrowly tailored and no more restrictive than necessary. Policies such as China's are too strict. Children in such countries are not being adopted domestically, and homelessness and institutionalization cannot be in their best interests.

Countries and international organizations, if they are truly concerned with protecting children, should also be careful how they vocalize their opinions on intercountry adoptions. A country that has children languishing in decrepit orphanages should be criticized, especially if they are trying to gain status in an organization (*e.g.*, Romania with the European Union) or international favor (*e.g.*, China with the Olympics). But when countries and organizations criticize intercountry adoption too harshly by, for example, likening it to "exportation" and insinuate that countries who do not have domestic demand should be viewed critically, then it is no surprise that countries feel pressured to cut off intercountry adoption altogether. Instead, what is needed is an effort to encourage regulation.<sup>155</sup>

The Hague Convention is a good step in the right direction, but until international organizations like UNICEF reconsider their positions on intercountry adoption and countries reconsider their moratoriums on adoption, children's best interests may be compromised. Those that are party to the Hague Convention should, if they are able, seek to provide oversight to countries who are lagging behind in attaining compliance, and work with them to have adoptions be processed on a case-by-case basis, rather than having countries cut off adoption all together. If it takes a village to raise a child, it will take a global effort to make sure that a child is also raised in a permanent family.

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154. Poncz, *supra* note 25, at 82 ("If . . . these regulations prohibit even one child from being adopted, then in my opinion they will have failed.").

155. As the case studies indicate, there is no denying that many countries need regulation. *See supra* Part III.