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### Suspended Animation: The Implementation of the Hague Convention on Intercountry Adoption in the United States and Romania

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**SUSPENDED ANIMATION:  
THE IMPLEMENTATION OF THE  
HAGUE CONVENTION ON INTERCOUNTRY  
ADOPTION IN THE UNITED STATES  
AND ROMANIA**

*Sarah Sargent<sup>†</sup>*

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**I. INTRODUCTION**

Recent high profile cases in the popular media highlight on going problems with intercountry adoption. These cases involved the sending of infants from the United States to families in the United Kingdom who had not been approved for adoption under United Kingdom

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<sup>†</sup> Sarah Sargent is an attorney with the Kansas Children's Service League. I would like to give special thanks and acknowledgement to Professor Trevor Buck, University of Leicester, United Kingdom, for his guidance and teaching in International Child Law, and to Daniel Gronniger, General Counsel with Kansas Children's Service League, for his helpful comments and encouragement. A final and most special thank you goes to L.H., who, on a train journey to Glasgow, gave me the inspiration in the first place. The views, opinions, and positions presented in this Article are those of the Author, and not those of Kansas Children's Service League.

standards.<sup>1</sup> This is despite the efforts in each country to enact the protections afforded to children under the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry

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1. Felicity Collier, *News from BAAF: Intercountry Adoption*, ADOPTION & FOSTERING, Spring 2003, at 3. Commenting on these adoption cases:

Continued concerns about the conduct of some intercountry adoptions were highlighted on March 7 when Mr. Justice Munby heard an application for a freeing order on a three-year-old child, whose adoption in the USA by an English couple had broken down. The adopters had travelled to Texas in 2000 with a private homestudy report written by Jay Carter, an independent (and unqualified) social worker. The infant had been placed by a Texas licensed adoption agency which had accepted this homestudy and had the consent of the young African-American birth mother within five days of birth. Money had apparently changed hands. The adopters turned out to be grossly unsuitable, with a number of previous marriages and children. The adoptive mother, who had cancer and a drug problem, shortly left the father, taking with her the infant and two other children. She then killed herself. The father refused to care for the adopted child who is now being looked after. Mr. Justice Munby publicly condemned the sale of children and the circumstances in which the young birth mother had been allowed to give her consent, named the social worker and requested that a transcript of his judgment be sent to the Director of Public Prosecutions, the Attorney General, the Department of Health and the Home Office.

Private homestudies in this country have previously been the subject of criticism, and since January 2000 have been explicitly unlawful . . . [M]oves are in train to finally close the "Kilshaw" loophole (the Kilshaws tried notoriously in 2001 to adopt the "internet twins"), whereby because adoptions made in countries, including the United States, on the designated list are automatically recognized in the UK, people resident in this country may be able to adopt a child overseas whatever the status of the home study reports. The reported case demonstrates that it is still possible in some states in the USA, and no doubt elsewhere, for infants to be placed for adoption at a few days old and for the birth mother to sign consent forms when money has been an incentive and without access to proper counseling. Clearly it could have been possible also for this healthy infant to be placed with adopters in her own country and yet she was placed with a UK couple, contrary to the spirit of the Hague Convention.

*Id.*

The main case referred to is that of *Re M*, 1 Fam. 1111 (2003) (Eng.). See *Flintshire County Council v. K*, 2 Fam. 476 (2001) (Eng.) (case of the "Internet Twins"). The ultimate fate of those involved in the case of the "Internet Twins" is an interesting story in and of itself. The woman who brokered the adoptions of the twins was arrested in February 2003 on wire fraud charges. Donald E. Franklin & Tim Bryant, *Mother in Internet Adoption Case Feels Vindicated by Broker Arrest*, ST. LOUIS POST-DISPATCH, Feb. 14, 2003, at C1. The rights of the natural parents to the twins were terminated in December 2002. An older sister of the twins also faced a decision by the court as to whether her parents would still have legal rights to her. The natural mother of the twins pleaded guilty to cheating on welfare benefits but maintains that she never received any money that exchanged hands in the adoption of the twins. Tim Bryant, *Mother of Internet Twins Insists They Were Never "Sold"*, ST. LOUIS POST-DISPATCH, Feb. 8, 2003, at 12. On March 30, 2004, by a 4-3 decision, the Supreme Court of Missouri reversed and remanded the case that terminated the rights of the biological mother of the Internet Twins. *In re K.A.W.*, No. SC 98683, 2004 WL 616342 (Mo. Mar. 30, 2004).

Adoption<sup>2</sup> although at the time of the adoptions, these protections were not yet in force in either country.<sup>3</sup> Are these headline cases of intercountry adoption gone catastrophically wrong the norm or the exception in intercountry adoption?

Although the Convention is not yet in force in the United States<sup>4</sup> and only went into force in the United Kingdom on June 1, 2003,<sup>5</sup> the failure of each country to adhere to the protections that the Convention would provide, as well as the overriding monetary incentive in adoption, led to high profile baby selling cases. It is beyond the scope of this Article to look in-depth at the experience of each Hague member country; but a review of the implementation efforts in Romania and the United States illustrates the difficulties in meaningful implementation and provides a study in microcosm of the successes and failures of the Convention, with implications of what the future impact of the Hague Convention will be on intercountry adoption.

## II. THE HAGUE CONVENTION ON INTERCOUNTRY ADOPTION

The Hague Convention on Intercountry Adoption is an instrument of the Hague Conference on Private International Law.<sup>6</sup> The Hague Conference is an international, inter-governmental organization that is set up to work for the progressive unification of private international law and has, as of this writing, sixty-two member states.<sup>7</sup> The work toward the unification of private law is achieved through the development of multi-lateral treaties called "conventions."<sup>8</sup> The Hague Conference did not become a permanent organization until 1951.<sup>9</sup> Before that, the conferences were held as a series of sessions

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

3. The Hague Convention entered into force in the United Kingdom on June 1, 2003. The Intercountry Adoption (Hague Convention) Regulations 2003, (2003) SI 2003/118, <http://www.legislation.hms.gov.uk/si/si200301.htm> (last visited Feb. 29, 2004) [hereinafter 2003 Intercountry Adoption Regulations] (on file with the Texas Wesleyan Law Review). It is expected to enter into force in the U.S. after the passage of implementing regulations sometime in 2004, according to the U.S. Department of State. See *Hague Convention on Intercountry Adoption*, U.S. Bureau of Consular Affairs, U.S. Dep't of State (June 2002), at <http://travel.state.gov/hagueinfor2002.html> (on file with the Texas Wesleyan Law Review).

4. See *Hague Convention on Intercountry Adoption*, U.S. Bureau of Consular Affairs, *supra* note 3.

5. 2003 Intercountry Adoption Regulations, *supra* note 3.

6. *Frequently Asked Questions Regarding the Hague Conference and the Hague Conventions*, Hague Conference on Private Int'l Law, at <http://www.hcch.net/e/faq/faq.html> (last updated Dec. 3, 2002) (on file with the Texas Wesleyan Law Review).

7. *Id.*

8. *Id.*

9. *Id.*

that were hosted by individual countries.<sup>10</sup> Since 1956, Plenary Sessions of the Conference have been held every four years and "extraordinary sessions" can be held as needed.<sup>11</sup> The signature of a member country to a convention expresses the intention of that country to become a party to that convention; however, it does not require it to take any further action.<sup>12</sup> A country that ratifies a Hague Convention has a legal obligation to apply the terms of that convention in its domestic and international law.<sup>13</sup> Because the Hague Convention is enacted as part of national law, the penalties for non-compliance are found in each country's enabling legislation. For instance, in the United States, violation of the Intercountry Adoption Act has a civil law monetary penalty of up to \$50,000 for a first violation and not more than \$100,000 for each succeeding violation.<sup>14</sup> Criminal penalties impose a fine of not more than \$250,000, imprisonment for not more than five years, or both.<sup>15</sup> Penalties for violations vary by country. In contrast to the United States' penalties, violation of certain provisions of the Adoption (Intercountry Aspects) Act of 1999<sup>16</sup> results in a fine, possible imprisonment of not more than three months, or both.<sup>17</sup>

The Permanent Bureau of the Hague Conference is a body that carries out basic research for any subject that is taken up by the Conference. The Bureau also responds to requests for information from users of the Conventions and develops and maintains contacts with member states.<sup>18</sup>

The passage of the Convention on Intercountry Adoption was prompted by concerns about widespread problems occurring in intercountry adoptions.<sup>19</sup> Inadequacies of then existing legal protections were noted in a 1989 Permanent Bureau Memorandum.<sup>20</sup> Four needs were highlighted, and it was these needs that the Convention sought to address: the creation of legally binding standards in intercountry adoption; a system of supervision that would ensure the observation of these legal standards, including prevention of adoptions that were not in the best interests of the child, and that would protect children from adoptions that occurred through duress, fraud

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10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. Intercountry Adoption Act of 2000, Pub. L. No. 106-279, § 404(a), 11 Stat. 825, 842.

15. *Id.* § 404(c).

16. Adoption (Intercountry Aspects) Act, 1999, c. 40 (Eng.), at <http://www.hmso.gov.uk/acts/acts1999/90018--a.htm>.

17. *Id.* § 1(3)(b).

18. *See id.* sched. 1, art. 13.

19. G. Parra Aranguren, *Explanatory Report*, 1993 HAGUE CONVENTION ON PRIVATE INT'L LAW, 543, 543, 545.

20. *Id.* at 545.

or monetary reward; communication channels between authorities in sending and receiving countries; and cooperation between receiving and sending countries to promote confidence between those countries.<sup>21</sup> These concerns were fueled by an increase in the number of international adoptions, complex human problems with equally complex legal aspects, the insufficiency of domestic and international law to address these problems, and the need for a multilateral approach for problem resolution.<sup>22</sup>

In pursuit of providing the protections outlined in the Permanent Bureau Memorandum, the Convention objectives are: to establish safeguards that ensure an intercountry adoption is in the best interest of the child; a system of cooperation among the nations that have ratified the Convention, prevention of child selling, trafficking and abduction; and recognition of adoptions done in another country where both countries implemented the Hague Convention and the adoption fulfilled Convention requirements.<sup>23</sup>

The Hague Convention permits ratification of the Convention with limited "reservations." A reservation is a unilateral statement by a country that excludes or modifies the legal effect of an international law instrument in that country.<sup>24</sup> The permitted declarations in the Hague Convention are restricted to the options found in four articles of the Convention.<sup>25</sup>

As of this writing, seven nations have signed but not ratified the Convention, including the United States.<sup>26</sup> The United States signed the Convention on March 31, 1994.<sup>27</sup> Forty-two nations have ratified the Convention.<sup>28</sup> Romania signed the Convention on December 28, 1994 and was put into effect on May 1, 1995, one of the first three countries to do so.<sup>29</sup>

### A. Key Provisions

Although the entire Convention generally seeks to safeguard appropriate intercountry adoptions, some particular key provisions of the Convention have been created to ensure that safeguards are in

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21. *Id.*

22. *Id.*

23. The Hague Convention, *supra* note 2, art. 1.

24. *Explanation of Terms*, Queens Univ. Belfast, School of Law, at <http://www.law.qub.ac.uk/humanrts/treaties/terms.html> (last visited Feb. 28, 2004) (on file with the Texas Wesleyan Law Review).

25. The Hague Convention, *supra* note 2, arts. 22–24, 45.

26. *Concise Status Report Convention* #33, Hague Conference on Private Int'l Law, at <http://www.hcch.net/e/status/adoshte.html> (last updated Dec. 3, 2003) [hereinafter *Status Report*, Hague Conference on Private Int'l Law] (on file with the Texas Wesleyan Law Review).

27. Recent Actions Regarding Treaties to Which the United States is a Party, July 4, 1994, 33 I.L.M. 1393.

28. *Status Report*, Hague Conference on Private Int'l Law, *supra* note 26.

29. *Id.*

effect and are observed. These safeguards include the creation of a national Central Authority in each country to carry out the duties of the Convention and an outline of the duties of both receiving and sending countries.<sup>30</sup>

### 1. Central Authority

The role of a national Central Authority is set out in the Convention. Each member country must "designate a Central Authority to discharge the duties which are imposed by the Convention."<sup>31</sup> The Central Authority has responsibility for both the application of the Convention in the country and the smooth cooperation between countries involved in international adoption.<sup>32</sup> The Convention permits the duties of the Central Authority to be carried out by a designated public authority or by other bodies that have been accredited in their home country.<sup>33</sup> The implications of this proposed delegation of Cen-

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30. The Hague Convention applies where a child "habitually resident" in one country is moved to another country either for purposes of completing an adoption in the receiving country or after an adoption has been completed in the child's country of origin by adopters who are "habitually resident" in the receiving country. "Habitual residence" is not defined in the Convention. It is, however, a concept that is found in other international law instruments on children. Hague Conference on Private International Law: Final Act of the Fourteenth Session Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 19 I.L.M. 1501. A large body of case law has been created over the definition of "habitual residence" under the Hague Convention on Civil Aspects of Child Abduction. Interestingly, the English case of *Re JS (Private Int'l Adoption)*, 2 Fam. 638 (2000), involves matters of both child abduction and intercountry adoption. See *id.* at 639, 641. In this 2000 case, a mother in Texas relinquished rights to her two-day-old infant to a Texas adoption agency. *Id.* at 639. Later, the child was placed for adoption with an English couple who resided in the United Kingdom. *Id.* However, the English social services agency (local authority) involved in the case advised the Texas agency that the English couple were not fit to adopt the child. *Id.* at 640-41. After the English couple refused to return the child to the Texas agency, it then sought return of the child through the use of the Hague Convention on Civil Aspects of International Child Abduction. *Id.* at 641. The English court ruled that the child was to be returned to Texas, as the child was "habitually resident" in the U.S., since the Texas agency still had legal responsibility for the child. *Id.* at 642. Despite the payment of \$19,000 in adoption fees, the child was returned to the Texas agency, with a finding by the English court that jurisdiction and thus determination of the child's future were properly with the Texas courts. *Id.* at 639, 643. The Hague Convention on Intercountry Adoption was not in force in either the United States or the United Kingdom at the time of this case, and thus could not be used to resolve the adoption issues. The holding on what constituted "habitual residence" in this case might be an indication of future precedent for determination of a child's "habitual residence" in intercountry adoption.

31. The Hague Convention, *supra* note 2, art. 6.

32. The Hague Convention, *supra* note 2, art. 7.

33. Celica Bojorge, *Intercountry Adoptions: In the Best Interests of the Child?*, 2 QUEENSL. U. TECH. L. & JUST. J. 266, 270 (2002); see also The Hague Convention, *supra* note 2, arts. 6-11, 22.

tral Authority functions in the United States are discussed later in this Article.<sup>34</sup>

## 2. Duties of the Sending Country

The Convention sets forth requirements that the home country of the child or the sending country must follow. These duties are set out in Article 4 and they include: the child is adoptable; intercountry adoption is in the best interest of the child; all necessary consents to the adoption have been obtained; and, as appropriate, the wishes and consents of the child have been obtained.<sup>35</sup>

## 3. Duties of the Receiving Country

The duties of the receiving country where the child is going to reside permanently are set out in Article 5 of the Convention.<sup>36</sup> The receiving state must determine whether the adoptive parents are eligible and suitable for the adoption,<sup>37</sup> assure that the adoptive parents have received such counseling as determined necessary, and determine whether the child has been authorized or will receive authorization to enter and permanently reside in the receiving country.<sup>38</sup>

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34. The concept of a "Central Authority" is problematic in federalist countries such as the United States and Australia. See Australia's First Report under Article 44(1)(A) of the United Nations Convention on the Rights of a Child ¶ 600 (Dec. 1995), at <http://152.91.15.15/publications/croc/homepage.html> (on file with the Texas Wesleyan Law Review) ("Intercountry adoption is primarily a State or Territory responsibility" rather than that of the federal government.); see also *Hearing on the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption: Hearing on H.R. 2909 Before the House Comm. on Int'l Relations*, 106th Cong. 3-4 (1999) (testimony of Mary A. Ryan, Assistant Sec'y for Consular Affairs, U.S. Dep't of State) ("Adoption in the United States is regulated by States, which oversee home study standards and reviews, and child welfare programs . . . . Under the Convention the U.S. Central Authority will arrange for access to a central source of information on U.S. state laws relevant to intercountry adoption . . . .") [hereinafter *Hearing*].

35. The Hague Convention, *supra* note 2, art. 4.

36. The Hague Convention, *supra* note 2, art. 5.

37. Typically, a person or family wishing to adopt a child has a home study completed. A home study is a document that describes the suitability of the person or family to become adoptive parent(s). It includes personal background information on the prospective adopter, including information on health, employment, marital history, financial information, education, relationships with family and friends, and motivation for wishing to adopt. The proposed Hague Regulations, *infra*, note 122, requires that the home study include information on the identity, eligibility, and suitability of the prospective adopters to adopt, their family and medical history, social environment, reasons for adoption, ability to undertake an intercountry adoption, and characteristics of children that the prospective adopter would be qualified to adopt. See Hague Convention on Intercountry Adoption, 68 Fed. Reg. 54,064, 54,106-07 (proposed Sept. 15, 2003) (to be codified at 22 C.F.R. pt. 96).

38. The Hague Convention, *supra* note 2, art. 5.



B. *Problems in Intercountry Adoption: The Business of Intercountry Adoption*

Intercountry adoption is not without its critics. Some of these views were expressed in a 1995 briefing paper prepared by the U.S. Department of State. The paper noted that some countries and international organizations see intercountry adoption as “a process by which industrialized countries exploit a national resource of poorer developing countries, a view that has played to the self-esteem problems that authorities in some countries experience because they are currently not able to provide for appropriate care for some of the children resident in those countries.”<sup>39</sup> Little research has been done on intercountry adoption from the point of view of the sending country.<sup>40</sup> Intercountry adoption is viewed by critics as operating in the interest of families seeking a child, rather than in the best interest of the children themselves.

Those who tout adoption as international charity must first ask whether their mission is to find children for their clients—the adoptive families—or to serve the best interests of children based on an individual assessment of each family’s abilities and resources . . . . If adoption is determined to be in the child’s best interest, the process should protect birth families from exploitation even by those who have good intentions but may be culturally insensitive.<sup>41</sup>

There persists a “romanticized view of [intercountry] adoption as international charity.”<sup>42</sup>

Intercountry adoption can be very expensive, with fees in the United States ranging from \$10,000 to \$30,000.<sup>43</sup> The inherent economic imbalance between the major sending countries and the major receiving countries feeds into the financial problems found in intercountry adoption—perhaps it is even at the source of them. It is this situation of economic imbalance that leads to the criticism of intercountry adoption as an exploitation of developing countries.

It has been observed that international adoption in the United States has developed into a service business where prospective adopt-

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39. Peter H. Pfund, 1993 *Hague Convention on Intercountry Adoption: Briefing Paper (Revised)*, U.S. Dep’t of State (May 1995), at <http://www.webcom.com/kmc/adoption/law/un/ica-briefing.html> [hereinafter *Briefing Paper*] (on file with the Texas Wesleyan Law Review).

40. Jini L. Roby & Stephanie Matsumara, If I Give You My Child, Are We Not Family? A Study of Birthmothers Participating in Marshall Islands-U.S. Adoptions, 3 (unpublished manuscript, at [http://www.aforts.com/colloques\\_ouvrages/colloques/actes/interventions/robby\\_jini.doc](http://www.aforts.com/colloques_ouvrages/colloques/actes/interventions/robby_jini.doc)) (last visited Feb. 27, 2004) (on file with the Texas Wesleyan Law Review).

41. *Id.* at 28–29.

42. *Id.* at 4.

43. Bojorge, *supra* note 33, at 268.

ers are “‘willing to pay hefty fees.’”<sup>44</sup> Rising fees and a growing number of for-profit adoption service providers emerged as it became apparent that many people were prepared to pay a high price to adopt.<sup>45</sup> Prospective adopters from the United States expressed a sense of entitlement to adopt.

Studies in the USA have found that, on the whole, those who adopt from abroad consider themselves as having a right to do so and are annoyed at the need for investigations and the preparation of background reports. In their view, it is enough that their prosperity and social position guarantee the child a better life.<sup>46</sup>

Critics of the intercountry adoption process also note the tension that exists between domestic adoption and intercountry adoption. Does an increase in intercountry adoption lessen the chances of adoption of children in foster care?<sup>47</sup> For instance, there is no shortage of children awaiting adoption from the U.S. childcare system; indeed, 126,000 children were waiting to be adopted in September 2001.<sup>48</sup> Yet at the same time, the United States receives the most children from abroad in intercountry adoption.<sup>49</sup> In 2002, there were 20,099 children adopted in the United States from abroad,<sup>50</sup> a significant increase from the 7,093 children adopted in the United States from abroad in 1990.<sup>51</sup>

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44. John Triseliotis, *Intercountry Adoption: Global Gift or Global Trade?*, ADOPTION & FOSTERING, Summer 2000, at 45, 49 (quoting Dixie van de Flier Davis, *Capitalising on Adoption*, ADOPTION & FOSTERING, Summer 1995, at 25, 28).

45. *Id.* (citing Dixie van de Flier Davis, *Capitalising on Adoption*, ADOPTION & FOSTERING, Summer 1995, at 25, 28).

46. *Id.* at 46 (citing ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING* 146 (1993)).

47. See Trevor Buck, Certificate in Int'l Child Law Course Materials: Unit 6, Intercountry Adoption, at 20 (Oct. 2002) (unpublished manuscript on file with the University of Leicester).

48. *The AFCARS Report*, U.S. Dep't of Health & Human Servs., at <http://www.acf.hhs.gov/programs/cb/publications/afcars/report8.htm> (updated on Mar. 28, 2003) (on file with the Texas Wesleyan Law Review); see also U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/HEHS-97-93, *FOSTER CARE: STATE EFFORTS TO IMPROVE THE PERMANENCY PLANNING PROCESS SHOW SOME PROMISE* 1 (1997) (“The mid-1980s through the mid-1990s witnessed dramatic increases in the number of children placed in foster care. . . . From fiscal year 1984 to 1995, the foster care population rose from an estimated 276,000 children to 494,000.”).

49. See *Hearing*, *supra* note 34, at 1.

50. William L. Pierce, *Finding American Homes*, NAT'L REV. ONLINE (Oct. 24, 2002), at <http://www.nationalreview.com/comment/comment-pierce102402.asp> [hereinafter Pierce, *Finding American Homes*] (on file with the Texas Wesleyan Law Review) (citing statistics from the Office of Children's Issues, U.S. Dep't of State).

51. *International Adoption Facts*, The Evan B. Donaldson Adoption Inst., at <http://www.adoptioninstitute.org/factoverview/international.htm> (last visited Jan. 22, 2004) (on file with the Texas Wesleyan Law Review).

It is not the lack of American children who need a home that turns people to international adoption.<sup>52</sup> Most children that are adopted through intercountry adoption are younger than those adopted domestically.<sup>53</sup> It is the lack of younger children, not children who are in need of families, which prompt people to look to intercountry adoption. "There is increasing pressure on governments to allow and to facilitate international adoption. This comes from adopting parents directly, and also from population/demographic issues, the increasing scarcity of infants available for domestic adoption . . . ."<sup>54</sup> Factors that cause American families to seek intercountry adoption include frustration with the American adoption system, "humanitarian motives to help give orphans overseas homes," and family connections with a specific country that prompts them to seek a child from that country.<sup>55</sup> Both the rescue motive<sup>56</sup> and the desire to adopt an infant are recognized as current motivations for intercountry adoption.<sup>57</sup> There is a need for specific studies to be carried out to help shape the future of intercountry adoption.

Specifically, under what conditions is international adoption beneficial, and to whom: the child? adopting parents? siblings? the adopting family's community? What are the needs of international adoptees and their families? What services are adopting families and/or children likely to require, with what potential outcome? These are some of the applied issues that research can address.<sup>58</sup>

The policies and priorities of both instruments of international law that govern intercountry adoption, the United Nations Convention on the Rights of a Child, and the Hague Convention, are "based on the assumption that children are generally best left in the country of birth."<sup>59</sup> Is intercountry adoption "conducted as a business that ex-

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52. For a discussion on the adoption of children from foster care, see Sarah Sargent, *Adoption and Looked After Children: A Comparison of Legal Initiatives in the UK and the USA*, ADOPTION & FOSTERING, Summer 2003, at 44.

53. *International Adoption Facts*, *supra* note 51.

54. Lisa A. Serbin, *Research on International Adoption: Implications for Developmental Theory and Social Policy*, 20 INT'L J. BEHAV. DEV. 83, 90 (1997).

55. Pierce, *Finding American Homes*, *supra* note 50. Statistics also show that children adopted internationally tend to be younger than children adopted from the public care system. *Overview of Adoption in the United States*, The Evan B. Donaldson Adoption Inst., at <http://www.adoptioninstitute.org/factoverview.html> (updated Jan. 2002) (on file with the Texas Wesleyan Law Review); *supra* note 53 and accompanying text. Eighty-nine percent of children adopted internationally are under the age of five, while forty-eight percent of those adopted from the public care system are under the age of five. *See id.* Fifty-three percent of children adopted from public care are over the age of five, while only eleven percent of children adopted internationally are over the age of five. *See id.*

56. Serbin, *supra* note 54, at 84.

57. *Id.*

58. *Id.* at 90.

59. Roby & Matsumara, *supra* note 40, at 4 (citing Madelyn Freundlich, *Window to the World: Families Without Borders-I*, UN CHRONICLE, Vol. 36 No. 2, 1999, at 88;

exploits poor women and children?"<sup>60</sup> In order to combat the potential exploitation of poor mothers, some researchers recommend "international adoptions require the inclusion of information about the birthmother's circumstances and the provision by the adoption agency of prevention and community development services in the nations from which they remove the children."<sup>61</sup> Circumstances that support international adoption include the provision for abandoned children in impoverished countries, that if left in their original circumstances would face high risks of malnutrition, serious illness or death, a likelihood of psychosocial problems, developmental delays resulting from lack of adequate care and stimulation, and poor long-term educational and occupational prospects.<sup>62</sup>

The debate for and against international adoption is summed up in an article from the 1999 UN Chronicle:

International adoption has been the subject of intense debate with regard to both its implications for children and families and its impact on the international community of nations . . . .

. . . .

International adoption poses challenges to international understanding because it is intertwined with national interests of countries where children reside—emigration, protection of a country's human resources, and the country's image in relation to its ability to care for its citizens. From a national perspective, international adoption may be viewed negatively. It may be seen as a demographic threat as children leave the country; it may be perceived as another manifestation of exploitation of poorer nations by more affluent ones; there may be a sense that national pride is injured by what appears to be a form of "international charity."

. . . .

The less publicized side of international adoption is that characterized by mutual efforts on the part of countries where children reside and countries where adults, recognizing that many children do not have families, are eager to offer them love, permanency and security. This side of international adoption is grounded on the belief that the well-being of children is a global responsibility and not one defined by national boundaries. International adoption, in world view, serves as a viable connector between countries as they jointly work to meet the needs of children who do not have families. It recognizes that families from other countries can serve as important resources for children facing economic pressures that make it

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Rebeca Rios-Kahn, *Intercountry Adoption: An International Perspective on the Practice and Standards*, ADOPTION Q., Vol. 1 No. 4, 1998, at 3, 17).

60. Roby & Matsumara, *supra* note 40, at 3 (citing Kenneth J. Herrmann, Jr. & Barbara Kasper, *International Adoption: The Exploitation of Women and Children*, 7 AFFILIA 45 (1992)).

61. Roby & Matsumara, *supra* note 40, at 4 (quoting Herrmann, Jr. & Kasper, *supra* note 60, at 53).

62. Serbin, *supra* note 54, at 86, 90.

difficult for families to step forward to adopt and in countries where culturally adoption is not favoured as an alternative for children without families.<sup>63</sup>

### C. *Issues in the Implementation of the Hague Convention*

The 1995 U.S. briefing paper also noted doubts about whether, under the United Nations Convention on the Rights of a Child (a Convention not in force in the United States),<sup>64</sup> intercountry adoption is even legal.<sup>65</sup> Some views on the United Nations Convention on the Rights of a Child are that it made intercountry adoption illegal or a last resort for children.<sup>66</sup>

The briefing paper comments that the Convention overcomes these views by providing a "formal intergovernmental stamp of approval"<sup>67</sup> on intercountry adoption and by stating in its Preamble that, "intercountry adoption, providing the child a permanent family, should be placed ahead of foster or institutional care in the child's country of origin—a very welcome and important endorsement of intercountry adoptions if they meet the internationally agreed minimum requirements set out in the Hague Convention."<sup>68</sup>

A formal review of the Convention was done through a Special Commission that was called to look at its effectiveness.<sup>69</sup> Special Commissions are convened under Article 7 of the Hague Conference.<sup>70</sup> The purpose of the Special Commission is to "monitor the practical application of Hague Conventions."<sup>71</sup> The Special Commission report, dated December 2000, raised questions on evaluating the effectiveness of the Convention:

We are convinced that the Convention provides an indispensable [sic] instrument for the better protection of children. But, to date, can one say that the objectives the Convention of the Hague (THC) proposed have been achieved, respected? To what extent has the Convention reached the ethical, social and judicial efficiency it aimed at? If it is still limited, what are the reasons? What problems

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63. Freundlich, *supra* note 59, at 88–89. At the time of the writing of the article Madelyn Freundlich was the Executive Director of the Evan B. Donaldson Adoption Institute. As of this writing she is the Policy Director of Children's Rights, Inc., *Staff Directory*, at <http://childrensrights.org/about/staff.htm> (last visited Feb. 28, 2004) (on file with the Texas Wesleyan Law Review).

64. For a good discussion of the Convention, see *Convention on the Rights of the Child*, at <http://www.unicef.org/crc/convention.htm> (last visited Feb. 28, 2004) (on file with the Texas Wesleyan Law Review).

65. *Briefing Paper*, *supra* note 39.

66. *See id.*

67. *Id.*

68. *Id.*

69. *Frequently Asked Questions Regarding the Hague Conference and the Hague Conventions*, *supra* note 6.

70. *Id.*

71. *Id.*

remain to be solved or have surfaced in those first years of implementation of the THC? . . . We are convinced that solutions can be found, little by little, but that this cannot happen unless the problems are stated clearly and honestly.<sup>72</sup>

The report emphasizes that the interpretation of the Convention and the quality of its implementation are dependent on the capacity of each country to withstand pressures and on each professional involved to make ethical and political decisions.<sup>73</sup>

Potential pitfalls of the Convention include states that have enacted the Convention without modification of their policies, procedures, or adjustment of their structure of services, which thus weakens the effectiveness of the Convention.<sup>74</sup> Two issues in particular have plagued the effective implementation of the Hague Convention. One of these has to do with whether private adoptions should be permitted under the Convention, and the other has to do with the ability to charge fees in intercountry adoption.

The U.S. Department of State briefing paper comments on the debate of whether the Convention should permit privately arranged intercountry adoptions:

The U.S. delegation sought to ensure throughout the preparation of the Convention that, in addition to setting meaningful norms and procedures, the Convention would remain sufficiently flexible and capable of support by the various elements of the U.S. adoption community to permit the United States to become a party. Many of the participating countries, where unlike the United States, adoption services are provided only or primarily by public authorities, *perceived* private adoptions to be more prone to abuses, such as those that occurred in Romania a few years ago, than adoptions for which public authorities or licensed agencies provide adoption services.<sup>75</sup>

Would the prohibition of all privately arranged intercountry adoptions reduce child trafficking? The effort to make this part of the Hague Convention was thwarted—“[t]he attempt . . . to ban all privately arranged adoptions was bitterly resisted by many countries, especially the USA.”<sup>76</sup> As a result, one of the permitted declarations in the Convention is to allow the Central Authority functions to be per-

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72. *Special Commission of November/December 2000 on the Practical Operation of the Hague Convention of 1993*, Doc. 2 at 14, The Int'l Social Service, at [http://www.iss-ssi.org/resource\\_center/thcevaluation.pdf](http://www.iss-ssi.org/resource_center/thcevaluation.pdf) (last visited Mar. 13, 2004) (on file with the Texas Wesleyan Law Review).

73. *See Report and Conclusions of the Special Commission on the Practical Operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect to Intercountry Adoption*, Hague Conference on Private Int'l Law, at <http://www.hcch.net/doc/scrpt33e2000.doc> (Apr. 2000) [hereinafter *Special Commission Report*] (on file with the Texas Wesleyan Law Review).

74. *See id.* at 15–17.

75. *Briefing Paper*, *supra* note 39.

76. Triseliotis, *supra* note 44, at 51.

formed by "public authorities or bodies" who meet standards set by that country and includes the ability to delegate tasks to an "accredited" non-profit agency.<sup>77</sup>

The second issue, that of permissible adoption fees, remains unsettled. The issue was discussed during the 2000 Special Session, and two views emerged on what fees the Convention would permit.<sup>78</sup> One view, taking a literal application of the Convention, held that such charges were prohibited if they were not actual costs related to the provision of services for the completion of a particular intercountry adoption.<sup>79</sup> Others felt that if the additional fees were for child welfare protection programs, such a fee was within the parameters of what was permitted by the Convention.<sup>80</sup>

Although it exceeds the scope of this Article to give a fully developed discussion of the sociological underpinnings of intercountry adoption, they nevertheless must be recognized as part of the problem against which the Hague Convention sought to provide safeguards.<sup>81</sup>

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77. The Hague Convention, *supra* note 2, art. 22. The implications of the permitted Article 22 declarations in the U.S. proposed regulations are discussed further in this Article. See *infra* Part IV.B.

78. See *Special Commission Report*, *supra* note 73, at 23–24. Article 32 of the Hague Convention contains provisions on fees that can be charged in intercountry adoption. It provides that no one is to derive improper financial gain from intercountry adoption; that "only costs and expenses, including reasonable professional fees" are to be charged or paid; and that "directors, administrators, and employees of bodies" that perform intercountry adoptions are not to receive payments that are unreasonably high in relation to the service that was rendered. The Hague Convention, *supra* note 2, art. 32. Article 8 of the Convention says that improper financial gain from intercountry adoption is to be prevented. The Hague Convention, *supra* note 2, art. 8.

79. Michael W. Ambrose & Anna Mary Coburn, *Report on Intercountry Adoption in Romania*, U.S. Dep't of Health & Human Servs., at <http://www.acf.hhs.gov/programs/cb/publications/romandopt.htm> (Jan. 22, 2001) (on file with the Texas Wesleyan Law Review).

80. *Id.*

81. Whether intercountry adoption is a practice that is in the best interest of children is far from a settled question. Is the Hague Convention promoting the welfare of children or seeking to curb the abuses in a financially driven industry? Intercountry adoption, as noted in this Article, is a lucrative business in the United States, and the influence of those who profit from intercountry adoption, as noted in the discussion in this Article on proposed draft regulations in the United States, should not be discounted. See *supra* Part II.B. The comments from an intercountry adoptee reveal the motivations of her parents to adopt:

My parents have never denied that they adopted me for selfish reasons, to fill the void felt by a childless couple. At the same time, I believe they are sincere when they say that, since they were going to adopt, they might as well in so doing remove one drop from the ocean of misery in the world.

THE COLOUR OF DIFFERENCE: JOURNEYS IN TRANSRACIAL ADOPTION 4 (Sarah Armstrong & Petrina Slaytor eds. 2001) (quoting Ji Sun Sjörgen, *A Ghost in My Own Country*, ADOPTION & FOSTERING, Summer 1996, at 2, 33). Yet, the affects of intercountry adoption may not be all positive for the child.

My life in middle class Canberra was one of constant pain. I cannot recall all the names that I have been called, though a few spring to mind: little black bastard, black wog bastard, slopehead. I have been spat on, taunted and

### III. INTERCOUNTRY ADOPTION IN ROMANIA

Romania provides a real life illustration of what can go wrong in intercountry adoption when financial interests supersede the protections of the Convention. Although Romania was one of the first countries to sign and ratify the Convention,<sup>82</sup> intercountry adoptions from Romania are subject to a moratorium imposed by the Romanian government. This moratorium was put into place to combat widespread abuses occurring in intercountry adoption and to plan for the development and passage of legislation to curb those abuses.<sup>83</sup> The moratorium on adoptions was announced June 21, 2001.<sup>84</sup> Adoptions had effectively been suspended since December 2000, and the moratorium finalized the *de facto* suspension.<sup>85</sup>

This is not, however, the first time that intercountry adoption in Romania was brought to a halt. In 1997, the Romanian government briefly suspended international adoptions while it created a new system.<sup>86</sup> The new system was to have new functions: to provide matching of children for intercountry adoption; and to create a source of funds for child welfare activities in Romania.<sup>87</sup>

#### A. Adoption Moratorium and European Union Admission

Romania's implementation of the Hague Convention was troubled from its inception. Regulations to implement the Hague Convention in 1996 "created a legal framework for child trafficking world-wide."<sup>88</sup>

In Romania's efforts to seek admission to the European Union, its adoption system came under scrutiny. The improvement of the adop-

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rejected; all because of my Eurasian features. For someone who has been brought up in a white family and only knows how to be white, it is incredibly confusing having such foreign looks. Even now I sometimes look in the mirror and get a shock to see this unfamiliar face looking back at me. Will I ever accept that I am not white?

*Id.* at 16.

82. *Status Report*, Hague Conference on Private Int'l Law, *supra* note 26.

83. See Letter from Gabriela Coman, Secretary of State, Chair of the Romanian Committee for Adoptions, to Mr. Hans van Loon, Secretary General of the Permanent Bureau of the Hague Convention on Private International Law, The Hague, Neth. (Aug. 15, 2001), [http://www.hcch.net/e/conventions/adop\\_ro.pdf](http://www.hcch.net/e/conventions/adop_ro.pdf) (on file with the Texas Wesleyan Law Review).

84. *Id.*

85. *News of Romania*, Int'l Ass'n of Voluntary Adoption Agencies and NGO's, at [http://www.iavaan.org/news/countries.htm/romania\\_news.htm](http://www.iavaan.org/news/countries.htm/romania_news.htm) (last visited Feb. 22, 2004) (on file with the Texas Wesleyan Law Review).

86. See Letter from Gabriela Coman, *supra* note 83.

87. O. Jane Morgan et al., *Report on Domestic Adoption in Romania*, The National Authority for Child Protection and Adoption of the Government of Romania, at <http://www.acf.dhhs.gov/programs/cb/publications/romanadopt2002/appendb.htm> (Mar. 2002) (on file with the Texas Wesleyan Law Review).

88. Comm'n of the European Cmty's., Final Report on Romania's Application for Membership of the European Union and the State of Negotiations, COM(01)710 final at 7 [hereinafter Final Report].



tion system is one of the conditions that Romania must complete before it is to be admitted as a member country of the European Union.<sup>89</sup> The need for a change to the Romanian system, which relied heavily on the receipt of income through international adoptions, was summed up in a statement in the 1999 Regular Report from the Commission on Romania's Progress Toward Accession:

As it was already stated in the 1997 Commission Opinion, the rights of the child have long been a matter for concern in Romania. The system introduced in 1970 in an attempt to boost population growth were not accompanied by the requisite machinery for helping birth families or for placing children in foster homes; as a result many children were abandoned in squalid State orphanages. The Opinion also indicated that the situation was likely to improve, and indeed the 1998 Regular Report did register a positive change in the Government's policy on child protection. Management of institutions was decentralised [sic] and alternatives to placing children in institutions ("institutionalisation") were provided.

....

It is now of crucial importance that the Government, as it has been repeatedly requested by the Commission, gives top priority to child protection and accepts that it has primary responsibility for the well-being of all children in care . . . . Child protection, including implementation of policy reform, can no longer be made structurally dependent on international assistance.<sup>90</sup>

Conditions in Romania's institutions are strikingly horrific. The 2001 Draft Report on Romania's membership to the European Union

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89. Countries that wish to become members of the European Union must meet criteria that were established in 1993 at the Copenhagen European Council. *EU Enlargement—A Historic Opportunity*, European Union, at <http://europa.eu.int/comm/enlargement/intro/criteria.htm> (last visited Feb. 26, 2004) (on file with the Texas Wesleyan Law Review). Accession (becoming a member) criteria include the requirement that the candidate country have achieved "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities." *Id.* As noted in the 2002 Regular Report on Romania's Progress Towards Accession, "[T]he reforms concerning the protection of children in orphanages are a major step forward but have still to bear fruit." Comm'n of the European Cmty's., 2002 Regular Report on Romania's Progress Towards Accession, COM(02)700 final at Introduction. In a document released on July 15, 1997, the European Commission noted its concerns with Romania's problems with its orphans but commented upon the new system of adoption to be run by counties as having the potential to solve the orphanage problem. Comm'n of the European Cmty's., Agenda 2000—Commission Opinion on Romania's Application for Membership of the European Union, DOC(97)18 final at 17. Romania's goal is to achieve European Union membership by 2007. *Relations with Romania*, European Union, at <http://www.europa.eu.int/comm/enlargement/romania/index.htm> (last updated Feb. 16, 2004) (on file with the Texas Wesleyan Law Review).

90. Comm'n of the European Cmty's., 1999 Regular Report from the Commission on Romania's Progress Towards Accession, COM(99)510 final at 15–16.

comments on the conditions that face children:<sup>91</sup> "Evidence shows that [sic], in many cases institutionalised children of all ages are submitted to continuous physical and psychological cruelty (daily beating and assaults), food deprivation leading, in some cases, to starvation, sexual abuse, lack of or improper medical care and bizarre medical treatment practices or improper research."<sup>92</sup> This treatment has resulted in children who "in many cases either became socially disturbed [sic] physically or mentally handicapped or turn to the street for respite."<sup>93</sup> This is the brutal treatment creating or exacerbating the problems of children placed there.<sup>94</sup>

The Romanian adoption situation finally reached crisis proportions when, in 2001, the Rapporteur for the European Parliament, Baroness Emma Nicholson of Winterbourne, called for either a two-year moratorium on intercountry adoptions from Romania or for the European Union to end talks with Romania about joining the E.U.<sup>95</sup> On May 30, 2001, the *Financial Times*, a British based newspaper, printed information from the leaked draft report.<sup>96</sup>

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91. Comm'n of the European Cmty's., Draft Report on Romania's Membership Application to the European Union and the State of Negotiations, COM(00)710 at 11-14 [hereinafter Draft Report].

92. *Id.* at 13.

93. *Id.*

94. *Id.* Findings from a recent study on the health problems on children adopted from Romania are significant to show the deprived conditions that face children in institutions and the lingering effects of that deprivation even after the child has been adopted. Celia Beckett, et al., *Health Problems in Children Adopted from Romania: Association with Duration of Deprivation and Behavioural Problems*, ADOPTION & FOSTERING, Winter 2003, at 19, 22-27. The study is based on a sample of 165 children, 144 of whom were adopted from Romania and experienced institutional deprivation while there, and a comparison group of fifty-two children adopted within the U.K., who were not subject to institutional deprivation. *Id.* at 20-21. The study draws conclusions between health problems and behavioural outcomes. *Id.* at 19. Poor health conditions of children in Romanian institutions are well-documented by researchers. *Id.* This research shows over thirty-three percent of children are HIV positive. *See id.* at 19. Thirty-three percent of the children were also Hepatitis B positive in another study. *Id.* In yet another study, one third of Romanian children adopted in the U.S. had intestinal infections, including parasitical infections. *Id.* at 20 (citing Dana E. Johnson, *Medical and Developmental Sequelae of Early Childhood Institutionalisation in Eastern Europe*, in 31 THE EFFECTS OF EARLY ADVERSITY ON NEUROBEHAVIORAL DEVELOPMENT 113, 138 (Charles A. Nelson ed., 2000)). The study concluded that there were no associations found between "health problems and either cognitive impairment or disinhibited attachment." *Id.* at 25. A link however was shown "in relation to inattention/overactivity, which was associated with obstetric complications, chronic diarrhoea and hepatitis B. The mechanisms mediating this association remain unclear, but the link was not just a function of the duration of institutional deprivation." *Id.* at 27.

95. Morgan et al., *supra* note 87, at app. b.

96. EU Parliament Committee to Recommend Suspension of Negotiations with Romania, European Centre in Moldavia, at [http://www.iatp.md/ecm/news/see\\_010.html](http://www.iatp.md/ecm/news/see_010.html) (June 7, 2001) (on file with the Texas Wesleyan Law Review); Catherine Lovatt & David Lovatt, *News from Romania: Europe to Suspend Accession Negotiations?*, 3 CENT. EUR. REV. 20 (June 4, 2001), at <http://www.ce-review.org/01/20/romani-news20.html> (on file with the Texas Wesleyan Law Review).

Prior to the comments by Baroness Nicholson, Romania had been working on reforms to its system, including the placement of a National Authority for Child Protection and Adoption under the Secretary General of the Government.<sup>97</sup> However, as of 2001, the role of the National Authority had not been fully established, and its integration of children's policies with other policies such as social, health, education, and family policies had not been fully established.<sup>98</sup> On June 21, 2001, the Romanian Committee for Adoptions decided to suspend the registration of new adoption requests from new families for one year.<sup>99</sup>

A review of Romania's intercountry adoption situation, done in January 2001, identified several financial-related concerns.<sup>100</sup> Foremost was the concern that "adoption fees paid by adopting parents in the U.S. . . . were higher than the actual costs of adoption."<sup>101</sup> Also, there had been an improper accounting of funds leading to practices referred to as the "auction" of children.<sup>102</sup> Yet another concern was that domestic adoptions were being inhibited, leading to circumstances where willing relatives were denied the opportunity to adopt because a child would have been diverted to families adopting from abroad.<sup>103</sup> The report concluded with specific recommendations on what could be done to improve the situation in Romania. These included the improvement of the enforcement of current laws and regulations applicable to private Romanian foundations and adoption agencies, elimination of the current system that led to criticisms of holding child auctions, and encouragement and improvement of domestic adoption.<sup>104</sup>

The Romanian government has been making efforts to reform its intercountry adoption laws. In May 2001, the Romanian government issued an "Operational Plan for Implementation of the Government Strategy Concerning the Protection of the Child in Difficulty."<sup>105</sup> The

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97. Comm'n of the European Cmty's., 2001 Regular Report on Romania's Progress Toward Accession, SEC(01)1753 final at 24.

98. *Id.*

99. *Romanian Prime Minister's Political Statement on the Protection of Children in Need and Adoptions*, IAFA ROMANIAN NEWS (Int'l Adoption Families of Alta., Calgary, Can.) Aug. 31, 2001, at <http://www.nucleus.com/~iafa/romanian%20sept.htm> (on file with the Texas Wesleyan Law Review).

100. Michael W. Ambrose & Anna Mary Coburn, *Report on Intercountry Adoption in Romania*, U.S. Agency for Int'l Development (USAID) in Romania, <http://www.acf.hhs.gov/programs/cb/publications/romanadopt.pdf> (Jan. 22, 2001) (on file with the Texas Wesleyan Law Review).

101. *Id.* at 5.

102. *Id.* at 5-6.

103. *Id.* at 7.

104. *Id.* at 28-32.

105. *Government Strategy Concerning the Protection of the Child in Difficulty (2001-2004)*, World Health Org. Mediterranean Ctr., at [http://wmc.who.int/images/uploaded/romania\\_children\\_strategy.pdf](http://wmc.who.int/images/uploaded/romania_children_strategy.pdf) (May 2001) (on file with the Texas Wesleyan Law Review).

document noted "the complex process of EU accession is inexorably linked to the observance of the political criteria laid down in Copenhagen concerning the observance of human rights, with a special emphasis on the rights of the child."<sup>106</sup> In July 2001, the Romanian government began a comprehensive evaluation of legislation and procedures on international adoptions and began consultation with the Permanent Bureau of the Hague Convention on Private International Law, the European Commission, the U.S. Aid Mission in Bucharest, and UNICEF.<sup>107</sup> This request for consultation included a focus on domestic adoptions because "[t]he United States is seen as the leader in developing and using techniques to encourage domestic adoption, ranging from Federal financial incentives to innovative recruiting practices."<sup>108</sup>

Despite the reform efforts of Romania, the May 23, 2001 draft report prepared by Rapporteur Baroness Nicholson of Winterbourne, clearly stated that the reforms had not addressed the concerns about Romania's institutionalized children and that, in many cases, the children who were being offered for international adoption were not orphans at all.<sup>109</sup>

It is clear that the fundamental rights of children have been widely abused in Romania in recent years and that promised reforms were not carried out . . . . Most of these children are not orphans. They have been abandoned or "given to the State," frequently under improper pressures and because their families do not benefit from the minimum technical and financial support usual in European health care and welfare systems. Once abandoned, they can be swiftly drawn into a well established, financially led international adoption or trafficking system leading in many cases to uncertain futures.<sup>110</sup>

The report is critical of the Romanian implementation of both the United Nations Convention on the Rights of a Child and the Hague Convention.

[Romania's] ratification of the UN Convention of the Rights of the Child blurred key articles through mistranslations which altered meanings or elided sentences to produce different conclusions from the original. Nor, under the previous government did she [Romania] respect the lesser Hague Convention on International Adoption . . . . Due to the very large sums of money involved, the national reform programme . . . has been subsumed or diverted by the global market for children from or through Romania.<sup>111</sup>

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106. *Id.*

107. *Romania Boosts Efforts to Improve Child Protection*, ENLARGEMENT WEEKLY, 27 July 2001, at [http://europa.eu.int/comm/enlargement/docs/newsletter/weekly\\_270701.htm](http://europa.eu.int/comm/enlargement/docs/newsletter/weekly_270701.htm) (on file with the Texas Wesleyan Law Review).

108. Morgan et al., *supra* note 87, at app. b.

109. Draft Report, *supra* note 91, at 11, 13.

110. *Id.* at 13.

111. *Id.* at 13-14.

The Rapporteur concludes that an adoption moratorium is necessary for Romania to address the concerns and to enact necessary reforms.

To help the Government effect reform the high moratorium on international adoption announced in the Press by Government in February 2001 in response to the European Parliament's Request must be strengthened and maintained for at least 2 or 3 years, [sic]. This will allow the proper development of internal reform to UN Convention standards.<sup>112</sup>

### B. *Reaction to Romanian Adoption Moratorium*

There were strong reactions to the moratorium on Romanian adoptions. The International Adoption Families of Alberta (Canada), in an article in their August 26, 2002 newsletter, challenged the European Parliament's position in attempting to regulate or direct adoptions from Romania.<sup>113</sup> IAFA pointed out that the Hague Convention governs intercountry adoption and that reviews, recommendations, and enforcement of the conditions of intercountry adoption in Romania should be carried out directly from The Hague.<sup>114</sup>

Another adoption organization, the Holt International Children's Service, issued a "Response to the Moratorium on Intercountry Adoption in Romania."<sup>115</sup> Holt's response indicated that the remarks and report from Baroness Nicholson were selective and demonstrated "a lack of understanding of the complexities of permanency planning" and effective child welfare services, and those children who are older or have disabilities or other special needs have no realistic hope of being adopted within Romania.<sup>116</sup>

Despite the many efforts at reform, as of this writing, the moratorium on intercountry adoption from Romania remains in place. The

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112. *Id.* at 14. Romania has admitted to violating its own ban on adoption, as revealed in a January 23, 2004, news report. Oana Lungescu, *Romania Flouts Own Adoption Ban*, BBC NEWS, Jan. 23, 2004, at <http://news.bbc.co.uk/1/hi/world/europe/3423067.stm> (on file with the Texas Wesleyan Law Review). The news story reveals that Romania sent 105 children to Italy for adoption. *Id.* This move was condemned by Baroness Nicholson who said that the incident was a "flagrant breach of the UN Convention of the rights of the child." *Id.* The incident also does not bode well for the Romanian entry into the European Union. The Dutch Member of the European Parliament, Arie Oostlander, "has called for the suspension of entry talks with Romania until it improves its human rights record and tackles widespread corruption." *Id.*

113. Morgan et al., *supra* note 87, at app. b.

114. *A Report from the IAFA Romanian Coordinator Peter Mrazik (an excerpt from IAFA newsletter 26 August, 2001)*, ROMANIAN NEWS (Int'l Adoption Families of Alta., Calgary, Can.) Sept. 17, 2001, at <http://www.nucleus.com/~iafa/romanian%20sept.htm> (on file with the Texas Wesleyan Law Review).

115. *A Response to the Moratorium on Intercountry Adoption in Romania*, Holt International, at <http://www.holtintl.org/romania/moratorium.pdf> (June 29, 2001) (on file with the Texas Wesleyan Law Review).

116. *Id.*

U.S. State Department, in its "Update on Romanian Moratorium on International Adoption," stated: "The Romanian government has extended its moratorium on adoptions until new legislation governing adoption is implemented. The actual date of enactment and implementation of the new legislation cannot be predicted at this time."<sup>117</sup> Neither has Romania been admitted as a member of the European Union.<sup>118</sup> The Hague Convention remains in suspense.

#### IV. FINANCIAL CONUNDRUM IN THE UNITED STATES

The peculiar place that the United States holds in the international adoption community was noted in a comment from a special commission report. The United States has a high demand for children as a receiving country, yet it has an ever-increasing population of children awaiting adoption, mainly children who are part of the public child welfare system.

This raises the issue of accreditation and authorisation of the bodies concerned. It also raises the issue of the pertinence of these adoptions with regard to the best interest of the children. It is one of the outcomes of the dichotomy between the high demand for intercountry adoptions in a given receiving State and its inability to place its own children in domestic adoptions (a problem which does not exist only in the USA).<sup>119</sup>

This comment from the Special Commission report points out concerns about the United States: its high rate of adopting from abroad while being unable to place its own children in adoptions and also foreshadows the fight in the United States over the accreditation and regulation of those involved in the highly lucrative business of intercountry adoption.

No less than Romania has the United States been a battleground over the questions on financial practices in intercountry adoption. The United States passed the Intercountry Adoption Act in October 2000<sup>120</sup> but has not enacted regulations to put the Intercountry Adoption Act and the Hague Convention into effect. It will take the passage of federal implementing regulations to do so.<sup>121</sup>

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117. *Update on Romanian Moratorium on International Adoption*, U.S. Dep't of State, at <http://travel.state.gov/adoption.romania.html> (June 2003) (on file with the Texas Wesleyan Law Review).

118. See generally Final Report, *supra* note 88 (regarding Romania's application to become a member of the European Union).

119. *Special Commission of November/December 2000 on the Practical Operation of the Hague Convention of 1993*, *supra* note 72, at ¶ 5-5.

120. Intercountry Adoption Act of 2000, Pub. L. No. 106-279, 114 Stat. 825.

121. See *Briefing Paper*, *supra* note 39.

A. *Development of Implementing Regulations in the United States*

On September 15, 2003, the U.S. Department of State published its proposed regulations on the Hague Convention in the Federal Register.<sup>122</sup> The original sixty-day comment period expired on November 14, 2003.<sup>123</sup> The comment period, however, was extended an additional thirty days, until December 15, 2003.<sup>124</sup> The extension of the comment period was in response to requests for such an extension at a public meeting on October 29, 2003.<sup>125</sup>

Other proposed regulations necessary to implement the Hague Convention and Intercountry Adoption Act are planned to be published for comment at some point in 2004. The Department of State and Department of Homeland Security will be proposing regulations in 2004 to "implement the Intercountry Adoption Act's expanded definition of 'adoptable children,' and address procedural changes and new responsibilities that will be assumed in order to make Hague Implementation a reality."<sup>126</sup> Following the close of the comment period, the Department of State will publish its response to the comments in a future edition of the Federal Register.<sup>127</sup> Regulations are expected to go into force sometime in 2004, and they will then operate to bring the Hague Convention into force in the United States.<sup>128</sup>

The U.S. State Department hired the consultancy group of CACI AB, Inc. (formerly Acton Burnell, Inc.) to write the regulations.<sup>129</sup> Critics of CACI AB, Inc. believed it had "little experience with adoption (or even with human services in general) and, instead, delegated the task to a group of individuals dominated by social workers and lobbyists representing the adoption industry."<sup>130</sup> Reform of the In-

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122. Hague Convention on Intercountry Adoption, 68 Fed. Reg. 54,064 (proposed Sept. 15, 2003) (to be codified at 22 C.F.R. pt. 96).

123. *Id.*

124. Hague Convention on Intercountry Adoption, 68 Fed. Reg. 64,296 (proposed Nov. 13, 2003) (to be codified at 22 C.F.R. pt. 96).

125. William L. Pierce, *U.S. Department of State Extends Comment Period on Draft Hague Regulations to Dec. 15, 2003*, Int'l Ass'n of Voluntary Adoption Agencies and NGO's, Nov. 10, 2003, at [http://www.iavaan.org/archives/2003/november%202003/hague\\_state.htm](http://www.iavaan.org/archives/2003/november%202003/hague_state.htm) (on file with the Texas Wesleyan Law Review).

126. *Department of State and Department of Homeland Security Work Towards Implementation of the Hague Convention on Intercountry Adoptions*, Media Note, Office of the Spokesperson, U.S. Dep't of State (Nov. 17, 2003), at <http://www.state.gov/r/pa/prs/ps/2003/26281.htm> (on file with the Texas Wesleyan Law Review).

127. *Hague Convention on Intercountry Adoption*, U.S. Bureau of Consular Affairs, *supra* note 3.

128. *Id.*

129. *Hague Adoption Standards Project*, CACI AB Ever Vigilant, at <http://www.haguereg.org> (last modified Jan. 26, 2004) (on file with the Texas Wesleyan Law Review).

130. *International: Ideas for Getting Involved, Intercountry Adoption Act of 2000*, Bastard Nation, at <http://www.bastards.org/international> (last visited Feb. 26, 2004) (on file with the Texas Wesleyan Law Review) [hereinafter Bastard Nation, Interna-

tercountry Adoption Act has also been proposed through Senate Bill 1934, introduced into the Senate on November 23, 2003.<sup>131</sup> The bill proposes, among other reforms, that children who are adopted abroad by American citizens become an American citizen themselves "immediately upon final adoption."<sup>132</sup>

Groups with whom CACI AB, Inc. consulted for drafting regulations were criticized by the adoptee's rights group, Bastard Nation, as having the aim of permitting intercountry adoption to go on with a minimum of additional oversight while ignoring the aims of the law to protect the rights of children who are or may be adopted.<sup>133</sup> Some of the groups that CACI AB, Inc. consulted included the National Council for Adoption, the American Academy of Adoption Attorneys, and trade associations that represent large adoption agencies.<sup>134</sup>

A first set of draft regulations was produced by CACI AB, Inc., on which a series of meetings were held in 2001.<sup>135</sup> Many of the groups who offered commentary on the first set of regulations proposed by CACI AB, Inc. were sharply critical of them.

The Evan B. Donaldson Adoption Institute submitted two sets of recommendations to the U.S. State Department and also offered testimony to the U.S. House on the proposed CACI AB, Inc. The first recommendations, submitted on May 24, 2001 to the U.S. State Department and CACI AB, Inc., noted that international adoption is a lucrative and mostly unregulated business in the United States.<sup>136</sup>

The report noted that the "market forces inherent in international adoption pose a potential threat to the welfare of children being considered for adoption, as well as their birth parents and prospective adoptive parents."<sup>137</sup> The Adoption Institute report is also critical of the method that CACI AB, Inc. used to develop its suggested regulations.

[T]he Institute is concerned that the focus of regulation drafting to date has been primarily on accreditation, which from our perspective is not the most critical element of the regulations. First, it is essential to adopt specific and practical quality standards that are based on thoughtful input from providers, as well as triad mem-

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tional]. Bastard Nation is an adoptees' rights and advocacy group in the United States. *Id.*

131. Intercountry Adoption Reform Act of 2003, S. 1934, 108th Cong. § 1.

132. *Id.* § 2(a)(11).

133. *International: Ideas for Getting Involved, Intercountry Adoption Act of 2000*, *supra* note 130.

134. *Id.*

135. See *Hague Adoption Standards Project*, CACI AB, Inc., at <http://www.hague-egs.org> (last modified Jan. 26, 2004) (on file with the Texas Wesleyan Law Review).

136. *Recommendations to the State Department & Acton Burnell Re: Implementation of the Intercountry Adoption Act 2000*, The Evan B. Donaldson Adoption Inst. (May 24, 2001) [hereinafter May 24, 2001 *Recommendations*].

137. *Id.*



bers, and experts who have no financial interest in international adoption . . . .

Toward this end, the Institute urges the State Department to rethink its plan to complete this task in just a few months and to recognize that extensive consultation and information gathering on the issues raised by the Institute and other commentators is necessary to ensure the development of appropriate, effective regulations.

The ultimate goals of these regulations should be straightforward and clear: to elevate the interests of vulnerable children above the financial interests of small numbers of adoption profiteers, and to create national requirements for ethical and reliable international adoption practice.<sup>138</sup>

A second set of recommendations from the Institute was submitted on June 18, 2001,<sup>139</sup> further noting important items left out of the CACI AB, Inc. draft regulations, including: enforceable standards;<sup>140</sup> financial monitoring to “eliminate ‘unreasonable’ fees and unethical financial incentives”;<sup>141</sup> “[t]imely enforcement to put poor quality providers out of business”;<sup>142</sup> and “reliable reports to the State Department and Congress about systemic performance.”<sup>143</sup>

In testimony, the Adoption Institute identified areas of continued concern, including the need to curb undocumented cash transactions by American families adopting through intercountry adoption and the need for consumer-protective business arrangements between adoptive families and adoption service providers.<sup>144</sup>

The comments from Bastard Nation, an adoptees’ rights advocacy group, were also very critical of the process of drafting the regulations:

The proposed regulations on intercountry adoption appear to have been written by a small group of self-appointed and self-interested adoption industry representatives. The resulting draft epitomizes the naivete and lack of seriousness about accountability and regulation that has plagued adoption for decades. The regulations as proposed would almost certainly result in an unacceptable recreation or even amplification of existing problems which the Hague Convention on Intercountry Adoption and the International Adoption Act (IAA) sought to eliminate. *Nowhere in the proposed regulations are the rights of children upheld.* Similarly, the statutory rights granted to adoptive families under the IAA would be *directly infringed* by the proposed regulations. Perhaps most startling, the

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138. *Id.* at 10.

139. *Recommendations for Implementing the Hague Convention & the Intercountry Adoption Act of 2000*, The Evan B. Donaldson Adoption Inst. (June 18, 2001).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *International Adoptions: Problems and Solutions: Hearing Before the House Comm. on Int’l Relations*, 107th Cong. 44–45 (2002) (testimony by Cindy Freidmutter, Executive Director, Evan B. Donaldson Adoption Inst.).

proposed regulations make no reference to the clear and unambiguous requirements of the Convention. Consequently, the proposed regulations violate the IAA and the Convention in several respects.<sup>145</sup>

The American Adoption Congress also had concerns that the Final Draft of the Acton Burnell Regulations (from CACI AB, Inc.) would violate the Intercountry Adoption Act by allowing an exception to the requirement that reasonable efforts be made to place an American child in the United States before an American child could be placed for adoption or adopted in another country.<sup>146</sup> Their comments highlight the concern that children could be placed for intercountry adoption to obtain higher adoption fees or to evade state law requirements, such as birth father consent to the adoption.<sup>147</sup> The Intercountry Adoption Act requires reasonable efforts be made to recruit adoptive parents in the United States for an American child, and a showing that an American child could not be adopted in the United States in a timely manner despite such efforts is a prerequisite for the American child being adopted in another country.<sup>148</sup> This section applies in the

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145. *Comments to Acton-Burnell on Proposed Regulations on Implementation of the Hague Convention on Intercountry Adoption*, Bastard Nation, at <http://www.bastards.org/activism/hague-implementation-comments-1.html> (last visited Feb. 26, 2004) (on file with the Texas Wesleyan Law Review).

146. *Comments of the American Adoption Congress Concerning "Final Drafts" of Hague Regulations and of Convention Accreditation and Approval Procedures Submitted by Acton Burnell to the Department of State*, at [http://www.americanadoption-congress.org/articles-archives/hague/comments-final\\_drafts4-28-02.htm](http://www.americanadoption-congress.org/articles-archives/hague/comments-final_drafts4-28-02.htm) (Apr. 28, 2002) [hereinafter *Comments of the American Adoption Congress*] (on file with the Texas Wesleyan Law Review).

147. *Id.*

148. *Id.* See Intercountry Adoption Act of 2000, Pub. L. No. 106-279, § 303(a), 114 Stat. 825, 839-40:

(a) Duties of Accredited Agency or Approved Person.—

In the case of a Convention adoption involving the emigration of a child residing in the United States to a foreign country, the accredited agency or approved person providing adoption services, or the prospective adoptive parent or parents acting on their own behalf (if permitted by the laws of such other Convention country in which they reside and the laws of the State in which the child resides), shall do the following:

- (1) Ensure that, in accordance with the Convention—
  - (A) a background study on the child is completed;
  - (B) the accredited agency or approved person—
    - (i) has made reasonable efforts to actively recruit and make a diligent search for prospective adoptive parents to adopt the child in the United States; and
    - (ii) despite such efforts, has not been able to place the child for adoption in the United States in a timely manner; and
  - (C) a determination is made that placement with the prospective adoptive parent or parents is in the best interests of the child.

See also The Hague Convention, *supra* note 2, art. 4(b) (requiring that a determination be made that intercountry adoption is in the best interest of the child after considering placement within the country of the child's origin); The Hague Convention, *supra* note 2, art. 16(d) (requiring that the Central Authority determine that after

rare instance of the United States acting as a sending rather than a receiving country for intercountry adoption. However, the Final Draft of the Acton Burnell Regulations allows the avoidance of all reasonable efforts to find United States adoptive parents on the grounds that it would not be in the best interest of the child.<sup>149</sup>

The comments from the American Adoption Congress note that there is no such exception created in the statute and, therefore, cannot be legally created in the regulations.<sup>150</sup> The comments conclude that due to perfunctory adoption hearings in many states, this clause is an "invitation to evasion."<sup>151</sup> This provision, permitting the avoidance of

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reviewing reports that relate to the child and the prospective adoptive parents the proposed placement is in the best interest of the child). The Preamble to the Hague Convention recognizes "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." The Hague Convention, *supra*, note 2, pmbl. (emphasis added). The reasonable efforts exception in the proposed U.S. regulations poses not only a problem of incongruence with the provisions of the Intercountry Adoption Act, but may be violative of the Hague Convention itself. The reasonable efforts exception is also in conflict with statements contained in Article 17 of the Declaration on Social and Legal Principles relating to Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, Dec. 3, 1986, 26 I.L.M. 1096, 1101. This resolution was adopted by the U.N. General Assembly as Resolution 41/85. *Id.* at 1096. Article 17 states: "If a child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the country of origin, intercountry adoption may be considered an alternative means of providing the child with a family." *Id.* at 1101 (emphasis added). Clearly, under both the Hague Convention and the General Assembly Resolution, intercountry adoption should only be undertaken where the child cannot be adopted in his or her own country, making the reasonable efforts exception in the U.S. proposed regulations a violation of both the spirit and letter of applicable international law doctrines.

149. See Acton Burnell Inc., *Final Draft of Hague Regulations for P.L. 106-279*, § W.4 at 51 (Oct. 23, 2001). The final draft of the Acton Burnell Regulations states:

The agency or person shall demonstrate to the satisfaction of the State court with jurisdiction over the adoption that sufficient reasonable efforts were made over a sufficient period of time to identify an adoptive placement for the child in the United States or that reasonable efforts to find a placement in the United States were not in the best interest of the child.

*Id.*

150. See *Comments of the American Adoption Congress*, *supra* note 146.

151. See also May 24, 2001 *Recommendations*, *supra* note 136. The Evan B. Donaldson Adoption Institute emphasizes the reasonable efforts requirements as outlined in the Intercountry Adoption Act:

The IAA creates a national policy with respect to emigration of U.S. resident children in other countries requiring that accredited agencies/approved persons make "reasonable efforts to actively recruit and make a diligent search for prospective adoptive parents to adopt the child in the United States." This requirement applies to all US resident children potentially being placed for adoption in other countries. It also requires the search to be "timely" recognizing that children can be irrevocably harmed by delays in placement with a permanent family.

*Id.* at 8 (emphasis added) (citation omitted). The national policy of requiring reasonable efforts to be made in a timely fashion does not have a reasonable efforts exception, again highlighting whether the exception in the proposed regulations is appropriate. It exceeds the scope of this Article to develop fully the legal discussion

reasonable efforts to place a child in the United States if it is in the best interest of the child, remains in the proposed regulations published by the U.S. Department of State in the Federal Register on September 15, 2003.<sup>152</sup>

Not all of the commentary on the proposed implementing regulations has been critical. Ethica, a nonprofit group that advocates worldwide for ethical adoption practices, submitted comments on the regulations published in the Federal Register.<sup>153</sup> Ethica commented that:

A thorough review of the proposed regulations reveals that the Department of State . . . has responded to many of the concerns and suggestions voiced by the adoption community. Crafting a system that simultaneously balances the needs of children and creates a regulatory mechanism is difficult at best, and requires that a delicate balance be struck between the need for regulation and the need to create a workable system that will not be unduly burdensome.<sup>154</sup>

In particular, Ethica praised "the increased consumer protections evident in the regulations, especially the creation of the Complaint Registry,"<sup>155</sup> and "the evident effort to enact regulations that take into consideration the role of market forces."<sup>156</sup>

#### B. *Article 22 Declarations and the Proposed U.S. Regulations*

The proposed U.S. regulations incorporate the United States' desires to be able to delegate some Central Authority powers for the provision of some adoption services. Article 22 of the Hague Convention effectively draws distinctions between for-profit and not-for-profit entities.<sup>157</sup> Not-for-profit entities do not have to meet additional requirements that for-profit entities do, which are found in Article 22(2) of the Convention.<sup>158</sup> These require for-profit agencies to meet standards for "integrity, professional competence, experience,

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on this important issue, but it is one worthy of note as the U.S. regulations continue to be developed.

152. Hague Convention on Intercountry Adoption, 68 Fed. Reg. 54,064, 54,110 (proposed Sept. 15, 2003) (to be codified at 22 C.F.R. pt. 96) (Section 96.54(b) reads: "The agency or person demonstrates to the satisfaction of the State court with jurisdiction over the adoption that sufficient reasonable efforts to find a timely adoptive placement for the child in the United States were made, or that making such reasonable efforts was not in the best interests of the child.").

153. Memorandum from Ethica, to the U.S. Dep't of State 1, at <http://www.ethicanet.org/ethicahaguecomments.pdf> (last visited Feb. 27, 2003) (on file with the Texas Wesleyan Law Review).

154. *Id.*

155. *Id.* at 2.

156. *Id.*

157. *Hague Convention on Intercountry Adoption*, *supra* note 3.

158. The Hague Convention, *supra* note 2, art. 22(2).

accountability, ethical standards, and training or experience . . . ."<sup>159</sup> Only nonprofit agencies can be "accredited" under the language of the Convention,<sup>160</sup> so the U.S. regulations have created a status of "approval" that can be given to for-profit agencies and individual persons to provide adoption services.<sup>161</sup>

The Convention requires that only an "accredited" nonprofit agency can prepare an adoption home study or child background study.<sup>162</sup> The proposed regulations, however, provide that if a non-accredited agency or an individual prepares a home study or background study, it can be approved by an accredited agency in an attempt to comply with Article 22(5) of the Convention.<sup>163</sup> That article requires that these studies and reports be prepared under the responsibility of an accredited agency or a public authority.<sup>164</sup> Whether the proposed regulations will prove satisfactory to other countries in complying with this article remains to be seen. The Department of State's preamble to the proposed regulations comments that Convention countries have the right to declare that adoptions of children resident's in their country can take place only if Central Authority functions in the receiving country are performed by public authorities or accredited nonprofit agencies.<sup>165</sup> Thus, a Convention country could refuse to work with a country that uses approved for-profit agencies or individuals rather than accredited nonprofit agencies, creating a scenario where countries in theory could refuse to send their children to the United States for adoption. As more countries put the Convention into force, the effects of the U.S. declaration on the delegation of Central Authority powers will become more evident.

## V. CONCLUSION

What can be said about the successes and failures of the Hague Convention and its impact on the future of intercountry adoption? Until and unless the contracting States are willing to abide by the spirit and letter of the Convention, the abuses that it sought to curb will continue unabated. The Special Commission rightfully noted that the success of the Convention is dependent on the ability of each contracting State to withstand pressure to circumvent Convention safe-

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159. Hague Convention on Intercountry Adoption, 66 Fed. Reg. 54,064, 54,069 (proposed Sept. 15, 2003) (to be codified at 22 C.F.R. pt. 96).

160. *Id.*

161. *Id.*; see Intercountry Adoption Act of 2000, Pub. L. No. 106-279, § 203, 114 Stat. 825, 832-35.

162. Hague Convention on Intercountry Adoption, 68 Fed. Reg. at 54,069.

163. See, e.g., Hague Convention on Intercountry Adoption, 68 Fed. Reg. at 54,094 (defining "approved home study"); see also *id.* § 96.13(a) at 54,096 and § 96.14(b)(2) at 54,097.

164. The Hague Convention, *supra* note 2, art. 22(5).

165. Hague Convention on Intercountry Adoption, 68 Fed. Reg. at 54,069.

guards.<sup>166</sup> Such pressure may come from established domestic groups given the lucrative potential in the business of intercountry adoption.

The Convention brings regulatory structure to an industry long left to its own devices, and as the American experience shows, one which continues to resist oversight. Without strong domestic enforcement, the Convention cannot succeed. This is not a success or failure of the Convention itself but of those contracting States implementing it. The experiences of the U.S. and Romania collectively demonstrate the difficulty in passing, implementing, and monitoring laws and regulations, and in ensuring their enforcement.

The Hague Convention has been ratified by seven out of the top twenty countries from which the United States adopts.<sup>167</sup> Belarus, the Russian Federation, and the People's Republic of China have signed but not ratified the Convention, yet these countries accounted for more than half of intercountry adoptions in the United States in 2002.<sup>168</sup> Fully seventy-five percent of the intercountry adoptions by American citizens in 2002 were from countries that had either ratified The Hague Convention or who have signed but not yet ratified it.<sup>169</sup> The Hague Convention will soon impact tens of thousands of intercountry adoptions per year, as the United States moves closer to its implementation and as intercountry adoptions continue to increase.

Will Convention countries refuse to receive or send children for intercountry adoption to countries that have not yet ratified the Convention? "Experience so far has shown that full international regulation is the only way to bring greater legitimacy to the practice of international adoption. Leaving it to individual countries, whether sending or receiving, to put their house in order will not happen."<sup>170</sup>

One article reviewing the status of intercountry adoption suggests that, to shed its tarnished image, it needs to demonstrate:

The child is in genuine need of a new family.

Adoption by a family abroad is in the children's best interest.

The process follows closely [the] standards of good practice set by accredited agencies.

The laws of the sending and receiving countries strictly adhere to the Hague Convention on ICA.

Adoption is freely entered upon by all parties.

The process involves no profit, including disguised inflated fees and expenses.

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166. See *Special Commission Report*, *supra* note 73, at 15–17.

167. See William L. Pierce, Ph.D., *Three-Fourths of U.S. Adoptions Impacted by Hague Convention on Intercountry Adoption*, About, Inc., at <http://www.adoption.about.com/library/weekly/aa102802b.htm> (last visited Jan. 11, 2004) (on file with the Texas Wesleyan Law Review).

168. *Id.*

169. See *id.*

170. Triseliotis, *supra* note 44, at 50.

The arrangements are covered by a comprehensive range of after care services in the receiving country.<sup>171</sup>

What is striking in reviewing the attempts of Romania and the United States to implement the Hague Convention is the difficulty in implementation of regulations that carry out the letter and the spirit of the Convention. Romania was one of the first countries to implement the Convention, yet its experience has been plagued with problems in financial arrangements and accusations of child trafficking; accusations so serious that this situation impedes the admission of Romania to the European Union.<sup>172</sup> Intercountry adoptions from Romania remain suspended as of this writing, with no indication of when reformed legislation will be passed or when intercountry adoptions might resume. The United States, on the other hand, became a signatory to the Convention on March 31, 1994<sup>173</sup> and passed its enabling domestic legislation in October 2000,<sup>174</sup> but—almost four years since the passage of domestic legislation—is still in the process of developing the implementing regulations.

The debate on the passage of implementing regulations has been a long and divisive one. Neither quick implementation nor implementation drawn out over time can guarantee the success of the Convention. Domestic interests in both Romania and the United States have resulted in difficulties in the implementation of the Convention as intended, whether in regulatory passage or in actual practice. The Romanian experience shows the difficulty in reforming legislation. Despite numerous studies, international attention, and scrutiny, Romania has not corrected its domestic legislation sufficiently to permit the resumption of adoption.<sup>175</sup> The regulations proposed in the United States have been very controversial, and there is no consensus that these will allow for the implementation of the Hague Convention in a manner that will prevent the baby selling from the United States that has grabbed world headlines or prevent inappropriate financial transactions for children coming into the United States for adoption.<sup>176</sup>

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171. *Id.* at 52.

172. See generally *supra* Part III (discussing intercountry adoption in Romania).

173. Recent Actions Regarding Treaties to Which the United States is a Party, July 4, 1994, 33 I.L.M. 1393.

174. *Hague Convention on Intercountry Adoption*, U.S. Bureau of Consular Affairs, *supra* note 3.

175. *Update on Romanian Moratorium on International Adoption*, U.S. Dep't of State, available at [http://www.travel.state.gov/adoption\\_romania.html](http://www.travel.state.gov/adoption_romania.html) (Mar. 2004) (on file with the Texas Wesleyan Law Review).

176. Author's note: The reader should be aware that both the situation of intercountry adoption in Romania, its application for membership in the European Union, and the implementation of the Hague Convention in the United States are developing areas of law, and that the reader should update any information from the date of this publication to determine the current status.