ROMANIA'S NEW CHILD PROTECTION LEGISLATION: CHANGE IN INTERCOUNTRY ADOPTION LAW RESULTS IN A HUMAN RIGHTS VIOLATION

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INTRODUCTION

In June 2004, amidst countless domestic and international objections, the Romanian Parliament adopted a new child protection package that included legislation entitled, *On the Protection and Promotion of the Rights of the Child*[1] (Law 272) and *On the Legal Status of Adoption*[2] (Law 273).[3] Prior to the enactment of these new laws, the Romanian government made an international request for comments on the proposed legislative package.[4] In the end, the government heavily favored European Union (EU) recommendations that placed severe restrictions on intercountry adoption,[5] despite great

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1. On the Protection and Promotion of the Rights of the Child, Law No. 272/2004, Rom. Official Gazette (2004) (Rom.), *available at* http://copii.ro/Law272-2004.doc (last visited Nov. 9, 2006) [hereinafter Law 272].

2. On the Legal Status of Adoption, Law No. 273/2004, Rom. Official Gazette (2004) (Rom.), *available at* http://copii.ro/Law273-2004.doc (last visited Nov. 9, 2006) [hereinafter Law 273].

3. *Romania Curbs Foreign Adoptions*, BBC NEWS, June 15, 2004, *available at* http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/3810425.stm (last visited Nov. 15, 2006) [hereinafter *Romania Curbs Foreign Adoptions*]. *See also Romania Implements Law Restricting International Adoptions*, SOUTHEAST EUR. TIMES, Apr. 1, 2005, *available at* http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2005/01/04/feature-01 (last visited Nov. 15, 2006) [hereinafter *Romania Implements Law Restricting International Adoptions*].

4. Public Debate on the Current Version of the Legislative Package on Child Protection, Gen. Secretariat of the Rom. Gov't (2003) (Rom.), *available at* http://www.roembus.org/english/communities/copii/public_debate.htm (last visited Nov. 9, 2006) [hereinafter Public Debate].

5. For the purpose of this Note, the term "intercountry adoption" is used to describe non-domestic adoption. "Intercountry adoption" is also consistent with international instruments governing non-domestic adoptions, discussed *infra* notes 83-111. Alternative terms, such as, "inter-country adoption" and "international adoptions" will only be used when quoting directly from another source.

concern from the international community regarding the impact of such restrictions.[6] Law 273 significantly altered Romania's intercountry adoption process, as it completely prohibits intercountry adoptions to non-grandparents.[7] In a narrow exception, Law 273 permits intercountry adoptions by children's natural grandparents, but only after every attempt has been made to reintegrate abandoned children within their natural family or place them with another Romanian family.[8] Further, Law 272 stipulates that no child under the age of two shall be placed in an institution.[9]

Romania had the opportunity to effectively tighten child protection without prohibiting intercountry adoptions by following widely accepted international guidelines on intercountry adoption. Law 272 and Law 273, instead, closed the door between thousands of orphaned and abandoned children and the families willing to welcome them into a home abroad. As a result, these children will now spend their childhood in institutions or a revolving foster care system.[10] Romania is simply not equipped to handle the current needs of the orphaned and abandoned children within its borders, and its attempt to do so violates the rights of these children.[11]

This Note explores and critiques provisions of Law 272 and Law 273, as well as the vulnerable position of Romania's orphaned and abandoned children and Romania's unique challenges to protect them. The remainder of the Introduction maps the history of Romania's orphaned and abandoned children, highlighting the catalysts leading to Romania's need for reform of its child protection laws. Part I traces the drafting process of the new laws, with particular attention on outside influence and how the laws comply with existing international guidelines for intercountry adoption. Part II reveals the devastating consequences the new laws will continue to have on orphaned and

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6. *Romania Curbs Foreign Adoptions, supra* note 3.

7. Law 273, *supra* note 2, art. 39. The new law did not prohibit all intercountry adoptions. Article 39 restricts intercountry adoption to biological grandparents. This narrow provision, however, does prohibit adoptions by unrelated families, typically associated with intercountry adoption. For the purpose of this Note, any mention of Romania's "ban" or "prohibition" of intercountry adoption is a reference to these unrelated families and not grandparents. *See also Romania Curbs Foreign Adoptions, supra* note 3.

8. Law 273, *supra* note 2, art. 39.

9. Law 272, *supra* note 1, art. 60.

10. Elizabeth Rosenthal, *'Good Impulses' Strand Romanian Orphans*, INT'L HERALD TRIB., June 21, 2005, *available at* http://www.iht.com/articles/2005/06/21/news/adopt.php (last visited Nov. 18, 2006), *reprinted in* Elisabeth Rosenthal, *Romanian Law Backfires, Leaving Orphans in Limbo*, N.Y. TIMES, June 23, 2005, at A6 [hereinafter *Good Impulses*].

11. Law 272, *supra* note 1, art. 60.

abandoned children in Romania. Lastly, Part III demonstrates how these consequences constitute a human rights violation.

Romania's Orphaned and Abandoned Children

Romania's unique history of abandoned children led to a large number of intercountry adoptions before the enactment of the new laws.[12] Prior to 1990, Romanians lived under the harsh rule of communist dictator Nicolae Ceausescu.[13] In an effort to increase Romania's population, Ceausescu banned birth control and abortions in 1966 and mandated that women have five children for the nation.[14] Ceausescu then encouraged poor families to place their children in state-run institutions.[15] Romanian women left unwanted children at institutions and hospitals with the belief that if the government wanted the children, the government should raise them as well.[16] Ceausescu's campaign, thus, resulted in the unusual tradition of child abandonment in Romania.[17] The fall of Ceausescu in 1989 left an estimated 100,000 abandoned children living in appalling conditions throughout the country.[18]

In 1990, Romania began passing domestic legislation intended to improve the conditions of children within state run institutions, as well as significantly change the legal requirements for adoption.[19] Although the legislation indicated a preference toward domestic adoptions, it liberalized Romania's intercountry adoption policy, leading to "an explosion of international adoptions" in the early 1990s.[20] Approximately 30,000 families adopted Romanian children after the

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12. Kimberly A. Chadwick, Comment, *The Politics and Economics of Intercountry Adoption in Eastern Europe*, 5 J. INT'L LEGAL STUD. 113, 132 (1999).

13. *Good Impulses*, *supra* note 10; Chadwick, *supra* note 12, at 132.

14. *Good Impulses*, *supra* note 10. *See also* Margaret Liu, *International Adoption: An Overview*, 8 TEMP. INT'L & COMP. L. J. 187, 187 (1994).

15. Chadwick, *supra* note 12, at 132.

16. *Good Impulses*, *supra* note 10.

17. *Id.*

18. *Romania Curbs Foreign Adoptions*, *supra* note 3. *See also* Joint Council on Int'l Children's Services, Press Information, Rom. & Int'l Adoption, *available at* http://www.jcics.org/JCICSPressInformationRO.pdf (last visited Nov. 14, 2006) [hereinafter JCICS Press Information].

19. Nat'l Auth. for Child Prot. and Adoption in Rom. (ANPCA) & UNICEF Rom., Child Care System Reform in Romania 23 (2004), *available at* http://www.unicef.org/romania/imas1(1).pdf (last visited Nov. 14, 2006) [hereinafter ANPCA & UNICEF]. This study was compiled at the request of the National Assembly for Child Protection and Adoption in Romania, ANPCA, with technical and financial assistance from UNICEF Romania and performed by the Institute for Marketing and Polls, IMAS.

20. *Id.*

opening of Romania to intercountry adoption in 1990.[21] Over 8,000 of these children found permanent homes with U.S. families, while thousands of others joined families in Western Europe.[22] However, Romania's newly formed adoption system was easily manipulated, and soon reports surfaced of baby-smuggling rings, baby-selling schemes, bribed and coerced birth mothers, and forged documents, all of which caught the world's attention.[23]

In 1993, Romania passed companion legislation to its intercountry adoption provisions, defining a child as "abandoned" when a parent demonstrated no interest in the child for over six months.[24] Thus, the legislation qualified abandoned children as eligible for intercountry adoption.[25] This legislation, however, not only led to a new wave of intercountry adoptions, but also additional abuses of the adoption system as well.[26] During this time, Romanian child protection services were "susceptible to corrupt practices and . . . many of the financial resources generated for the child protection programs through the intercountry adoption process were . . . misappropriated," according to a 2001 report published by the U.S. Agency for International Development (USAID) and the U.S. Department of Health and Human Services (DHHS).[27] The report described Romania's adoption activities as "virtually uncontrolled," since prospective parents could go to Romania and adopt directly from the birth parents or institution officials.[28] The report also noted that there was "very little focus on the use of child-centered adoption procedures."[29] It was behind this backdrop that Romania began to take serious efforts to curb the abuses of intercountry adoption.

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21. *Romania Curbs Foreign Adoptions*, *supra* note 3.

22. Representative Christopher H. Smith, Address before the House of Representatives (Dec. 14, 2005), *available at* http://www.jcics.org/Chris%20Smith%20-%20December%2005.htm (last visited Nov. 14, 2006) [hereinafter Smith Address]. This statement is an extension of Representative Smith's remarks at the Helsinki Commission on Sept. 4, 2005. *See also* U.S. Department of State, Immigrant Visas Issued to Orphans Coming to the U.S., http://travel.state.gov/family/adoption/stats/stats_451.html (last visited Nov. 14, 2006).

23. Chadwick, *supra* note 12, at 124-25, 133.

24. ANPCA & UNICEF, *supra* note 19, at 23.

25. *Id.*

26. *Id.*

27. Maura Harty, Address before the Helsinki Commission (Sept. 14, 2005), *available at* http://travel.state.gov/law/legal/testimony/testimony_2635.html (last visited Nov. 10, 2006) [hereinafter Harty Address].

28. *Id.*

29. *Id.*

Catalysts to Romania's 2001 Moratorium on Intercountry Adoption

The situation was so critical by 2000 that Romanian authorities received pressure from international organizations, largely the EU, to apply a moratorium in 2001 to stop the extremely high numbers of intercountry adoptions.[30] The EU's insistence on the intercountry adoption ban was largely sparked by a critical report from Baroness Emma Nicholson – the European Parliament's representative responsible for monitoring Romania's ascension to the EU.[31] Baroness Nicholson, a fierce critic of Romania's childcare system, termed intercountry adoption a "profitable trade in child trafficking" and charged institution officials with selling babies.[32]

Despite the moratorium, Romanian officials estimate that 800 children were placed with foreign families after 2001.[33] A majority of these placements were pursuant to the Emergency Ordinance issued by the Romanian government, which allowed for the continued review of intercountry adoption applications if the case fell under extraordinary circumstances and the adoption was in the child's best interest.[34] In addition, exceptions also resulted from agreements between Romania and the governments of the receiving countries. For example, 105 children were placed with Italian families through an agreement between high government officials of Italy and Romania.[35]

Effects on the International Community

Romania's 2001 moratorium affected many countries since Romania previously provided one third of all children for intercountry

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30. JCICS Press Information, *supra* note 18, at 1. *See also Romania Curbs Foreign Adoptions, supra* note 3; Oana Lungescu, *Romania Flouts Own Adoption Ban*, BBC NEWS, Jan. 23, 2004, *available at* http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/3423067.stm (last visited Nov. 15, 2006) [hereinafter *Romania Flouts Own Adoption Ban*].

31. *Romania Implements Law Restricting International Adoptions, supra* note 3. *See also* Econ. & Soc. Comm., Comm'n on the Eur. Cmtys., *Opinion of the Economic and Social Committee on "Romania on the Road to Accession,"* 45 (C 241) OFFICIAL J. OF THE EUR. COMMUNITIES 110 (2002), *available at* http://europa.eu.int/eur-lex/en/archive/2002/c_24120021007en.html (last visited Nov. 15, 2006) (claiming that Romania's ban on intercountry adoptions in 2001 was a result of "pressure exerted by the EU (and, in particular, in a report drawn up by the European Parliament), which compared the practice to human trafficking").

32. *Romania Implements Law Restricting International Adoptions*, *supra* note 3.

33. *Romania Flouts Own Adoption Ban*, *supra* note 30.

34. JCICS Press Information, *supra* note 18, at 2-3 (reporting that 1,115 not 800, intercountry adoptions were processed under the exceptional procedure, including 384 in the U.S., 230 in Italy, 224 in Spain, 73 in France, 49 in Israel and 44 in Germany).

35. *Romania Flouts Own Adoption Ban*, *supra* note 30.

adoptions worldwide.[36] The U.S. pressured Romania to lift the ban as a condition to its admission to NATO, but the threat was not carried out.[37] Italy, Spain, and France also lobbied hard to lift the adoption ban.[38] In addition to the ban on future intercountry adoptions, the 2001 moratorium stalled the adoption applications of 50 French, 250 U.S., and nearly 1,200 Spanish families who simply awaited finalization of their adoptions.[39] In late 2004, Prime Minister Raffarin of France and then Prime Minister Nastase of Romania met and publicly proposed the creation of an international commission to review the pending cases. However, Prime Minister Nastase's government did not create the commission and the new Romanian government failed to pursue the issue as well.[40]

Spanish families went even further and influenced several individuals with EU status to submit over ten written questions to EU bodies regarding the stalled adoptions of nearly 1,200 Spanish families.[41] Both the EU Council and Commission of the European Communities issued official answers to the Written Questions.[42] Both responses recognized the distress that the 2001 moratorium placed on families in the process of adopting a Romanian child, yet also emphasized the inadequate adoption practices, which led to the moratorium and the need for new legislation to effectively monitor Romania's intercountry adoptions.[43] Further, both official EU responses mentioned the Emergency Ordinance issued by Romania that instructed Romanian courts to continue processing intercountry adoptions under review at the time the moratorium was activated.[44] The official response by the Commission indicated that only five percent of

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36. Chadwick, *supra* note 12, at 116.

37. *Romania Flouts Own Adoption Ban*, *supra* note 30.

38. *Id.*

39. *Romania Implements Law Restricting International Adoptions*, *supra* note 3.

40. Harty Address, *supra* note 27.

41. Written Question E-0982/02, International Adoption of Romanian Children, 2003 O.J. (C 52 E) 26 (indicating that the same response from the Commission was issued in response to twelve written questions) [hereinafter Written Question E-0982/02]; Written Question E-1125/02, Adoption of Children in Romania, 2002 O.J. (C 309 E) 101 (indicating that the Council issued the same response to multiple written questions) [hereinafter Written Question E-1125/02].

42. Written Question E-0982/02, *supra* note 41, at 38; Written Question E-1125/02, *supra* note 41, at 102 (illustrating the responses from the EU Council and Commission on the issue of stalled Spanish intercountry adoptions).

43. Written Question E-0982/02, *supra* note 41; Written Question E-1125/02, *supra* note 41.

44. Written Question E-0982/02, *supra* note 41; Written Question E-1125/02, *supra* note 41.

the institutionalized children in the process of being adopted were actually eligible for adoption under the Emergency Ordinance.[45] Both responses promised to monitor the situation.[46] The Council, however, promised to address the issue in appropriate channels, while the Commission stressed that it did not "have the competence to deal with individual cases involving international adoptions."[47]

Despite the Romanian government's recent denial of a majority of the pending applications resulting from the 2001 moratorium,[48] the affected families and their governments continue to fight.[49]

I. THE NEW LAW: CHILD PROTECTION LEGISLATION

A. Romania and the European Union

The EU's significant influence on Romania's 2001 moratorium and, ultimately, on the newly enacted laws, stems from Romania's hope to join the EU in 2007.[50] The Copenhagen Criteria of 1993 stipulates that EU membership for Central and Eastern European countries

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45. Written Question E-0982/02, *supra* note 41, at 38.

46. *Id.*; Written Question E-1125/02, *supra* note 41.

47. Written Question E-0982/02, *supra* note 41, at 38.

48. Denisa Maruntoiu, *Government Rejected All International Adoption Requests*, BUCHAREST DAILY NEWS, Dec. 7, 2005, *available at* http://crib.mae.ro/index.php?lang=en&id=31&s=5358&arhiva=true (last visited Nov. 28, 2006). State Secretary Theodora Bertzi announced that authorities decided not to approve the 1,100 international adoption requests pending after Romania issued its moratorium, stating: "Our decision is final and clear: none of the 1,100 children will be adopted by foreign families, as we will find the proper solutions to protect them, in accordance with the Romanian legislation." *Id.* This decision affected families from 24 countries, including the U.S., Spain, Germany, and Greece. *See also Romania Implements Law Restricting International Adoptions*, *supra* note 3 (describing additional efforts to achieve resolution of the stalled applications termed "pipeline cases").

49. *See* Oana Dan, *407 Signatures for Pipe-line Adoption Cases Declaration,* BUCHAREST DAILY NEWS, July 7, 2006, *available at* http://www.setbb.com/forgetmenot/viewtopic.php?t=84&mforum=forgetmenot (last visited Nov. 27, 2006). Since the submission of this note in March 2006, Members of the European Parliament (MEPs) Claire Gibault and Jean-Marie Cavada presented an initiative to the European Parliament regarding the status of over 1,000 Romanian orphans in the process of being adopted at the time of the 2001 moratorium. *Id.* Following the Gibault-Cavada initiative, over 400 MEPs signed a declaration urging Romania to end the plight of "pipeline" orphans. *Id.* MEP Gibault said that it was "very satisfying and also a great relief" that the European Parliament legitimized the Gibault-Cavada initiative, sending a powerful signal to the Romanian government. *Id.* The European Parliament is organizing a conference on the issue in November 2006. *See Child Protection: New Law Leaves Romanian Orphans Abandoned, Say MEPs,* EUR. REP., Apr. 26, 2006, *available at* http://www.charlestannock.com/pressarticle.asp?ID=1250 (last visited Nov. 21, 2006).

50. JCICS Press Information, *supra* note 18.

"requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities."[51] The European Commission views care of children as a matter of human rights, and will not initiate negotiations with a country applying for EU candidacy until proper child protections are in force.[52] Not surprisingly, child protection became "one of Romania's priorities for its 2001-2004 governing program in connection with EU integration."[53] The governing program included the general improvement of child protection and adoption laws, an increase in social services to encourage families to raise and take care of their own children, decentralization and restructuring of large, state run institutions to local levels, the promotion of domestic adoption within Romania, and child abandonment prevention.[54]

The EU pressed Romania for many years to change its adoption laws and eventually implied the country's application to join the EU was in jeopardy as a result.[55] While official reports regarding Romania's admittance into the EU did not make a ban on intercountry adoption a pre-requisite for admission, the EU representative Baroness Nicholson "repeatedly made adoption a high profile issue."[56] Although Nicholson "recommended suspending EU accession negotiations until improvements were made," she viewed the 2001 moratorium as progress.[57] In a 2001 Report on Romania's membership to the EU, the EU applauded Romania's 2001 moratorium:

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51. European Council in Copenhagen, Conclusions of the Presidency, SN 180/1/93, at 7(A)iii (1993), *available at* http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/72921.pdf (last visited Nov. 12, 2006).

52. ANPCA & UNICEF, *supra* note 19, at 27.

53. JCICS Press Information, *supra* note 18. *See also* GOV'T OF ROM., ACTION PLAN FOR THE GOVERNING PROGRAMME 2001-2004 143 (2001), *available at* http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN016038.pdf (last visited Nov. 12, 2006) [hereinafter Action Plan].

54. Action Plan, *supra* note 53, at 143-47.

55. *Romania Curbs Foreign Adoptions*, *supra* note 3.

56. Holt International, Update on Adoption Moratorium in Romania, Apr. 23, 2004, *available at* http://www.holtintl.org/romania/romania_update_042304.pdf (website no longer available, notes on file with the author) [hereinafter Holt Update].

57. Phelim McAleer, *When is Mihaela Coming Home?*, FIN. TIMES, Sept. 15, 2001, at 8. *See also* Phelim McAleer, *Romania Urged to Deal with Unwanted Babies*, FIN. TIMES, May 30, 2001, at 8 (stating that Baroness Nicholson believes Romanian officials encourage women to hand their children over to institutions, so that the institutions can collect the bribes paid by prospective adoptive parents: "Far from stopping abandonment or offering contraception or stemming it by introducing child welfare payments, there is clear evidence that the state is encouraging child abandonment").

> The Commission welcomes this moratorium as a mechanism to end practices . . . which risked opening opportunities for trafficking in children and other forms of abuse. "The Romanian authorities need to reform legislation on international adoptions and to develop the appropriate administrative structures and capacity in order to ensure that adoption decisions are made exclusively in the best interest of the child. This should be done prior to international adoptions being resumed."[58]

Despite the EU's dominant push for the ban on intercountry adoptions, "there is no EU law or regulation restricting intercountry adoptions to biological grandparents or requiring that restrictive laws on intercountry adoption be passed as a prerequisite for accession."[59] European Member States, generally, leave open the possibility for intercountry adoption, recognizing that there are circumstances where the child's best interests are "best" served by intercountry adoption.[60] In fact, all current EU Member States, with the exception of Ireland, ratified the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention), discussed *infra*.[61] EU Member States, of course, are not fighting the same intercountry adoption abuses as Romania and thus do not need such strong child protection measures. However, these Member States implemented the strong procedural mechanisms of the Hague Convention. Romania, however, decided not to follow this accepted trend, which established firm conditions on intercountry adoption without requiring such a debilitating ban.

B. The Drafting Process of the New Law

1. Internal Process

Following the goals set forth in its 2001-2004 governing program, Romania began to draft new child protection laws in 2001 to address

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58. Commission of the European Communitites, *2001 Regular Report on Romania's Progress Towards Accession*, at 24-25, SEC 1753 (2001), *available at* http://www.infoeuropa.ro/ieweb/imgupload/2001_Regular_Report.pdf (last visited Nov. 19, 2006).

59. Harty Address, *supra* note 27.

60. Letter from Pierre Poupard, UNICEF Romania's Representative, to Mr. Adrian Nastase, Prime Minister of the Gov't of Rom., regarding inter-country adoption (Sept. 28, 2004), *available at* http://www.unicef.org/romania/media_1919.html (last visited Nov. 15, 2006) [hereinafter Letter from Poupard].

61. Harty Address, *supra* note 27.

baby trafficking and corruption within the adoption system.[62] The new draft laws took two years to complete and the drafters enlisted the help of foreign consultants, EU experts, UNICEF, and other experts in the field of child protection.[63] The draft of Law 273 included a ban on intercountry adoptions, except by the child's natural grandparents or siblings living outside of Romania.[64]

2. Request for External Comments

In December 2002, Romania submitted a proposed legislative package for child protection to the public seeking comments from non-governmental organizations (NGOs), international organizations, and other countries.[65] While the U.S. supported Romania's efforts to improve child protection measures, it is not surprising that the U.S. objected to the intercountry adoption provisions given its stance on the 2001 moratorium. The U.S. considered intercountry adoption vital for hundreds of orphaned and abandoned children and viewed the proposed restrictions as a tragedy for Romanian children sitting in institutions, when thousands of foreign families wanted to give them a home.[66] In fact, the U.S. stance on the proposed intercountry adoption provisions differed so greatly from the stance of the EU that the Romanian Prime Minister Adrian Nastase proclaimed his country was "ambushed" by the weight of the differing views.[67]

NGOs also took the opportunity to offer comments on Romania's proposed laws. Ethica, an NGO that advocates for ethical domestic and intercountry adoptions, urged compliance of the proposed laws with the Hague Convention on Intercountry Adoption.[68] Ethica found provisions of Law 273 that "allow for children to be cared for in public or private

62. *Romania Curbs Foreign Adoptions*, *supra* note 3.

63. UNICEF Romania, Overview, New legislation for the protection of children's rights, *available at* http://www.unicef.org/romania/overview_1610.html (last visited Nov. 15, 2006) [hereinafter UNICEF Romania – New legislation]; Public Debate, *supra* note 4.

64. JCICS Press Information, *supra* note 18.

65. Public Debate, *supra* note 4.

66. *EU Congratulates Romania on New Adoption Law*, EUBUSINESS, June 22, 2004, *available at* http://www.eubusiness.com/East_Europe/040622162450.mhq7p3s0/ (last visited Nov. 14, 2006) [hereinafter *EU Congratulates Romania*]; *Romania Curbs Foreign Adoptions*, *supra* note 3.

67. *Romania Curbs Foreign Adoptions*, *supra* note 3.

68. Letter from Trish Maskew, President, Ethica, to the Honorable Petru Serban Mihailescu, General Secretariat of the Gov't of Rom. (Apr. 30, 2003), *available at* http://ethicanet.org/RomaniaLawComments.pdf (last visited Nov. 14, 2006) [hereinafter Letter from Maskew]. *See infra* notes 86-95 (discussing the Hague Convention on Intercountry Adoption).

institutions instead of being adopted internationally would seem to conflict with the basic tenets of the Hague Convention."[69] Ethica further objected to the new laws' negative impact on children under age two and commented that:

> If all the previous steps have been taken and no family is found to care for [the children] in Romania, then there is no benefit to forcing the child to wait until the age of 2 to be adopted internationally, especially in light of long-term developmental, educational and emotional effects of institutionalization, which have been well documented.[70]

Holt International, a U.S. international adoption agency, is just one of many agencies that opposed the new laws. Holt International noted that the Romanian government, working with international and local child welfare organizations, "effectively reduced the population of institutionalized children from over 100,000 to less than 50,000 through a broad range of services that [included] nearly 10,000 international adoptions to the United States."[71] Ultimately, Holt International believed the proposed legislation was "a major step backward for Romanian children."[72]

The Joint Council on International Children's Services (JCICS), a worldwide association of licensed, non-profit intercountry adoption agencies, child advocacy groups, parent support groups and medical clinics, stated its concern for "the development and care of the tens of thousands of children who will face little hope of ever having a permanent, loving family if this new legislation is approved."[73] JCICS believed the proposed laws must be amended to include "proactive measures to achieve permanent placement within a family structure as echoed in both UNICEF's position on intercountry adoption and the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption."[74]

In a letter to then Romanian Prime Minister Adrian Nastase, Romania's United Nations Children's Fund (UNICEF) Representative, Pierre Poupard applauded Romanian efforts to "find national solutions to the phenomena of abandonment of children [that] coincide perfectly

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69. Letter from Maskew, *supra* note 68.

70. *Id.*

71. Holt Update, *supra* note 56.

72. *Id.*

73. JCICS Press Information, *supra* note 18. *See also* Joint Council on International Children's Services, About JCICS, *available at* http://www.jcics.org/index.htm (last visited Nov. 10, 2006).

74. *Id.*

with UNICEF's standpoint on the issue," and that intercountry adoption is considered "an exceptional measure and last resort within the alternative forms of child protection."[75] UNICEF supported Romania's justification for the continued moratorium into the year 2004 and hoped that by 2007 Romania's internal child protections would make intercountry adoption rarely required and "a truly exceptional and individualised practice."[76] In the interim, however, Poupard suggested that Romania avoid "legislating the imposition of an unqualified and definitive ban on any future adoption of a Romanian child abroad."[77]

C. Final Law

Despite these strong objections, Romania bent to the pressure of the EU as reflected in the language of the new laws. The final draft, adopted by Parliament in 2004 and signed by the President in 2005 significantly altered the laws governing the care of orphaned and abandoned children and ultimately eliminated the possibility of intercountry adoption of Romanian children.[78] Setting family reintegration as a priority, the new laws permit domestic adoption of Romanian children only after efforts fail to reintegrate "the child in the family. . . or [with] the extended family."[79] A birth mother's right to her child is indefinite, under Law 272, and extends through years of absence.[80] Accordingly, the placement of orphaned or abandoned children under the age of two into temporary or permanent care "may only be decided [by] the extended. . . family."[81] Further, in an effort to address criticism that orphaned and abandoned children grew up in sterile institutions, under Law 272, it is "forbidden to place [a child under the age of two] in a residential service [institution]."[82] Law 273 permits intercountry adoptions, but only in the rare instance when the "adopter or one of the spouses in the adopting family who have the domicile abroad is the grandparent of the child."[83]

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75. Letter from Poupard, *supra* note 60.
76. *Id.*
77. *Id.*
78. *See EU Congratulates Romania, supra* note 66.
79. Law 273, *supra* note 2, art. 22; Law 272, *supra* note 1, art. 54.
80. Law 272, *supra* note 1, art. 62; *Good Impulses*, *supra* note 10.
81. Law 272, *supra* note 1, art. 60.
82. *Id. See also Good Impulses*, *supra* note 10.
83. Law 273, *supra* note 2, art. 39.

D. Romania's New Laws Compared to Existing International Law

As discussed above, the international community expressed concern that the new laws, if passed without amendment, lacked compliance with the governing international guidelines for intercountry adoptions. These guidelines are provided by the Hague Convention on Intercountry Adoption,[84] the U.N. Convention on the Rights of the Child,[85] and in UNICEF's position on Intercountry Adoption.[86]

1. The Hague Convention on Intercountry Adoption

The Hague Convention on Intercountry Adoption is a product of the Hague Conference on Private International Law. The Hague Conference is an intergovernmental organization with sixty-four members to date, tasked by the Statute of the Hague Conference "to work for the progressive unification of the rules of private international law."[87] By signing the Hague Convention, a State expresses its intention to become a Party to the Convention, but is not, in any way, obliged "to take further action (towards ratification or not)."[88] A State that ratifies a Hague Convention, however, "has a legal obligation to apply the terms of that convention to its domestic and international law."[89]

The Hague Convention entered into effect on May 1, 1995.[90] With

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84. 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, *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=69 (last visited Nov. 28, 2006) [hereinafter The Hague Convention].

85. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, *available at* http://www.ohchr.org/english/law/pdf/crc.pdf (last visited Nov. 13, 2006) [hereinafter UNCRC].

86. UNICEF, UNICEF's Position on Inter-country Adoption, *available at* http://www.unicef.org/media/media_15011.html (last visited Nov. 13, 2006) [hereinafter UNICEF's Position on Inter-country Adoption].

87. Hague Conference on Private International Law, Frequently Asked Questions: "What is the Hague Conference on Private International Law?", *available at* http://www.hcch.net/index_en.php?act=faq.details&fid=5 (last visited Nov. 14, 2006).

88. Hague Conference on Private International Law, Frequently Asked Questions: "What is the difference between signing, ratifying and acceding to a Hague Convention?", *available at* http://www.hcch.net/index_en.php?act=faq.details&fid=38 (last visited Nov. 14, 2006).

89. Sarah Sargent, *International Adoption and Cultural Transformation: Suspended Animation: the Implementation of the Hague Convention on Intercountry Adoption in the United States and Romania*, 10 TEX. WESLEYAN L. REV. 351, 354 (2004).

90. Hague Conference on Private International Law, Status Table for Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption, *available at* http://www.hcch.net/index_en.php?act=conventions.status&cid=69 (last visited

Romania's signature on May 29, 1993 and ratification on December 28, 1994, Romania became one of the first States worldwide to endorse the Convention.[91] Romania, therefore, has the legal obligation to uphold the Hague Convention's three main objectives as found in Article 1:

> (1) to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child. . .
>
> (2) "to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children;
>
> (3) to secure the recognition in Contracting States of adoptions made in accordance with the Convention.[92]

Moreover, the Preamble of the Hague Convention declares that "the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love, and understanding," and 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."[93]

The Hague Convention, however, does not hold that intercountry adoption applies in every case. Article 4 states:

> An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin –
>
> (a) have established that the child is adoptable;
>
> (b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests.[94]

In August 2001, Romanian Secretary of State Gabriela Coman wrote a letter to the Secretary General of the Permanent Bureau of the Hague Convention on Private International Law announcing the 2001 moratorium on intercountry adoption and Romania's intention to draft new child protection laws.[95] The letter indicated that during the drafting

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Nov. 14, 2006) [hereinafter Status Table].

91. *Id.*

92. The Hague Convention, *supra* note 84, art. 1.

93. *Id.* at pmbl.

94. The Hague Convention, *supra* note 84, art. 4 (a) & (b).

95. Letter from Gabriela Coman, Chair of the Romanian Committee for Adoptions, to Hans van Loon, Secretary General of the Permanent Bureau of the Hague Convention on Private International Law (Aug. 15, 2001), *available at* http://www.hcch.net/index_en.php?act=publications.details&pid=2277&dtid=28 (last

process of the new laws the government intended to view intercountry adoption "as a measure of child protection, only in those situations when, after a thorough investigation, it will be proved that a domestic solution, in the best interest of the child, could not be found."[96] The proposed draft of the new laws, however, did not reflect this position and essentially banned intercountry adoptions, as noted above.

2. U.N. Convention on the Rights of the Child

The U.N. Convention on the Rights of the Child (UNCRC) was the first legally binding international instrument acknowledging the full range of human rights to those less than eighteen years old, who often need special care and protection that adults do not.[97] Under the UNCRC, the basic human rights inherent to all children include the right to: survival; develop to the fullest; protection from harmful influences, abuse and exploitation; participate fully in family, cultural and social life.[98]

UNCRC contains provisions to ensure "adoption is [authorized] only by competent authorities, that inter-country adoption enjoys the same safeguards and standards which apply in national adoptions, and that inter-country adoption does not result in improper financial gain for those involved in it."[99] UNCRC further states in Article (21)(b) that parties shall "[r]ecognize that inter-country adoption may be considered as an alternative means of [a] child's care, if the child cannot be placed in a foster or adoptive family or cannot in any suitable manner be cared for in the child's country of origin."[100] Romania ratified the UNCRC in 1990, legally binding the country to protect the basic human rights of children, as set forth above.[101]

3. UNICEF's Position on Intercountry Adoption

Pursuant to its mission statement, UNICEF is "mandated by the United Nations General Assembly to advocate for the protection of children's rights, to help meet their basic needs and to expand their opportunities to reach their full potential," and is "guided by the

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visited Nov. 14, 2006) [hereinafter Communication from the Romanian Commission on Adoptions].

96. *Id.*

97. UNCRC, *supra* note 85, pmbl., art. 1.

98. *Id.* pmbl.

99. UNICEF's Position on Inter-country Adoption, *supra* note 86.

100. UNCRC, *supra* note 85, art. 21(b).

101. ANPCA & UNICEF, *supra* note 19, at 23.

Convention on the Rights of the Child and strives to establish . . . international standards of [behavior] towards children."[102] UNICEF, in its commitment to the UNCRC, believes intercountry adoption is one of many methods used to uphold the Convention, as illustrated in an official statement of its position on intercountry adoption:

> For children who cannot be raised by their own families, an appropriate alternative family environment should be sought in preference to institutional care, which should be used only as a last resort and as a temporary measure. Inter-country adoption is one of a range of care options which may be open to children, and for individual children who cannot be placed in a permanent family setting in their countries of origin, it may indeed be the best solution. In each case, the best interests of the individual child must be the guiding principle in making a decision regarding adoption.[103]

UNICEF strongly supports the ratification of the Hague Convention, which endorses the UNCRC's principles regarding intercountry adoption and helps to ensure the avoidance of risks associated with intercountry adoption.[104]

The language of the UNCRC portrays the importance of protecting children from potential abuses of intercountry adoption by requiring competent adoptions officials and prohibiting improper financial gain.[105] Reform efforts presented Romania with an opportunity to strongly align Law 272 and Law 273 with the very tenants of the UNCRC and the Hague Convention. In doing so, Romania had justification for strict limitations on intercountry adoptions in lieu of an all out prohibition of intercountry adoptions to non-grandparents. UNICEF supported such an approach, calling it "more consistent with the spirit and letter of the Convention on the Rights of the Child and the 1993 Hague Convention on Inter-country Adoption than total prohibition."[106]

According to a statement prepared by the Romanian government, the group of European Commission experts who helped draft the new laws, took into consideration the provisions of the UNCRC, the Hague Convention, and European practices in the field.[107] The EU further

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102. UNICEF, UNICEF's Mission Statement, *available at* http://www.unicef.org/about/who/index_mission.html (last visited Nov. 17, 2006).

103. UNICEF's Position on Inter-country Adoption, *supra* note 86.

104. *Id.*

105. *Id.*

106. Letter from Poupard, *supra* note 60.

107. Jeffrey Thomas, *Romanian Adoption Policy Examined as Human Rights Issue*, U.S. DEP'T OF STATE BUREAU OF INFORMATION PROGRAMS, Sept. 14, 2005, *available at*

endorsed the new laws in its 2004 Report on Romania's progress towards accession asserting:

> New legislation on Children's Rights and Adoption approved in June 2004 now limits inter-country adoption to extreme exceptions. These rules *appear* to meet the requirements of the U.N. Convention on the Rights of the Child as well as the practices of EU Member States. The priority is now the development of the administrative capacity to implement correctly the new rules.[108]

The above language reveals two significant flaws. First, the EU holds that the ban on intercountry adoptions "appears" to be in compliance with the UNCRC and the practices of EU Member States. As discussed previously, intercountry adoptions *do* have a place within the standards of the UNCRC, when used as an alternative means to ensure a child's protection and care.[109] Further, the UNCRC sets forth an expansive set of standards to govern the adoption process for both domestic and intercountry adoptions.[110] Prohibiting orphaned and abandoned children who do not have the luxury of living with Romanian adoptive or foster family from the possibility of a family abroad, violates the very rights the UNCRC is in force to protect - namely the right to develop fully, the right to protection from harmful influences and the right to participate fully in a family.[111] Secondly, the "practices of EU Member States" leave open the possibility for intercountry adoption, recognizing that there are circumstances where the child's best interests are "best" served by intercountry adoption.[112] Therefore, any claim that the new provision on intercountry adoption is in compliance with these international standards is a stretch, especially from the perspective of the Hague Convention, which puts priority on the "best interests of the child." It is hard to imagine how "the best interests of the child" equates to confinement in a country that cannot support the child's need for a permanent family environment.

II. THE EFFECTS OF PRIOR CHILD PROTECTION REFORM

The new laws capture many of the child protection measures put into place during the 1990-2004 reform period, such as decentralization

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http://usinfo.state.gov/eur/Archive/2005/Sep/14-103970.html (last visited Nov. 28, 2006).

108. Comm'n of the Eur. Cmtys., *2004 Regular Report on Romania's Progress Towards Accession*, at 29, COM(04)657 final (Oct. 6, 2004) (emphasis added).

109. UNCRC, *supra* note 85, art. 21.

110. *Id.*

111. UNCRC, *supra* note 85, pmbl.

112. Letter from Poupard, *supra* note 60.

of large state run institutions, foster care, reintegration with the natural family, and domestic adoption.[113] However, as outlined below, many of these mechanisms were weak even before the new laws were passed.[114]

A. Decentralization of Institutions

The aftermath of Ceausescu's regime left Romania with one of the highest rates of institutionalized children in Eastern Europe.[115] Institutions were understaffed and overpopulated and often did not meet the children's basic needs such as food and proper hygiene.[116] Reform measures to decentralize institutions into smaller and more local residential centers also integrated social welfare measures to better meet the children's developmental needs.[117] UNICEF-Romania reports that in February 2003, 42,777 children lived in public or private residential institutions and an additional 43,783 children lived in a family environment, such as foster families.[118] By the end of August 2004, the number of children in a family environment placement (49,180) and those placed in foster homes (15,446) "was significantly higher" than the number of children in institutions (32,053).[119] This shift demonstrates a drop in the number of institutionalized children and an increase of more family-like living arrangements. Additional 2004 statistics show that of the 691 placement centers for orphaned and abandoned children, 259 were still classic centers and 329 were family-type centers (flats or houses).[120] Further, the number of institutions housing less than 50 children more than doubled from December 2000 to June 2003 and many old residential institutions housing over 100 children are now closed.[121]

In 2004, the Romanian National Authority for Child Protection and

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113. *See generally* ANPCA & UNICEF, *supra* note 19, at 7, 23-26 (providing an overview of the various attempts to reform Romania's adoption law made in the 1990s).

114. *Id.* at 25-26.

115. *Id.* at 21.

116. *Id.* at 22.

117. *Romania Implements Law Restricting International Adoptions*, *supra* note 3.

118. UNICEF Romania, Overview, Country Profile, http://www.unicef.org/romania/overview.html (last visited Nov. 14, 2006) [hereinafter UNICEF Romania – Country Profile]; UNICEF Romania, The Children, Children in Institutions, *available at* http://www.unicef.org/romania/children_1600.html (last visited Oct. 4, 2004) [hereinafter UNICEF Romania – Children in Institutions].

119. UNICEF Romania – Country Profile, *supra* note 118; UNICEF Romania – Children in Institutions, *supra* note 119.

120. UNICEF Romania – Children in Institutions, *supra* note 118.

121. ANPCA & UNICEF, *supra* note 19, at 46, 47; UNICEF Romania - Children in Institutions, *supra* note 118.

Adoption and UNICEF published a report on child care system reform (Joint Report), which included an examination of the newly decentralized child protection system.[122] The Joint Report noted that the transition of responsibilities from large state institutions to local authorities "was, and continues to be slow; the delegation of responsibilities for central and local funding often lacks transparency; while some services are decentralized, others are not, and this can lead to a poor connection between linked sectors [such as] education, health, social services, child protection."[123] As a result, a large number of children were moved from the institutions to alternative means of care in a very short period of time without proper assistance.[124] Additionally, the progress of decentralization of child institutions differed between more prosperous regions and poorer areas.[125] The Joint Report added that while the new central and local level institutions were operational, the local infrastructure was often insufficient, funding was unpredictable, and the staff lacked qualifications, clarity of responsibilities, and strong collaboration.[126] The Joint Report further observed that the system lacked capacity to prevent new entries or monitor the children after they have left the system.[127] The Joint Report concluded:

> While it is remarkable that the number of such [child support] services has increased considerably in the past few years . . .our research shows that these only meet a small portion of the existing demand, because they are insufficient in numbers, available mainly in urban areas, distributed randomly, and sometimes of poor quality.[128]

B. Maternal Assistance (Foster Care)

Despite measures of decentralization, UNICEF still views alternative measures to institutionalization as a continuous "challenge for the new policies."[129] The foster care system in Romania is simply inadequate to meet the needs of these abandoned and orphaned children.[130] Gabi Comanescu, director of the Romanian NGO ProChild,

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122. ANPCA & UNICEF, *supra* note 19, at 25.
123. *Id.* at 25-26.
124. *Id.* at 46.
125. *Id.* at 26.
126. *Id.* at 28-29.
127. ANPCA & UNICEF, *supra* note 19, at 46.
128. *Id.* at 60.
129. UNICEF Romania - Children in Institutions, *supra* note 118.
130. *Good Impulses, supra* note 10.

declared "the [new] law says every abandoned child under [two] should be in foster care, but as far as I know there aren't nearly enough foster homes."[131] As a result of the foster care shortage, a number of abandoned infants now spend their first year of life in a hospital ward.[132] The 2004 Joint Report indicated that it was unclear whether the maternal assistance (foster care) program was a short-term or long-term service, although clearly it is a long term measure for those children who spend five to six years in the program.[133] A study within the Joint Report showed that 75% of maternal assistants (foster care givers) did not know how long to expect the children placed with them to stay in their home.[134] The program standard is three months, but foster care duration can range up to three years or more.[135] Ninety-five percent of the maternal assistants in this study had received forty to sixty plus hours of training, yet 80% claimed the foster allowance did not cover the child's expenses nor provide access to medical services.[136]

The study also found that foster caregivers tend to adopt a professional relationship with the child, which is "not in the best interest of the child, as professionalism does not imply sacrifice or total commitment like that of a parent."[137] Over 80% of the foster caregivers in the study indicated adoption by another family or reintegration into the child's natural family was the best solution for the child in their care.[138] Only 3% expressed interest in adopting the child themselves.[139]

While the foster care system is a marked improvement over the large institutions, only 15,446 children were in foster care in 2004, compared to the almost 50,000 children who were not.[140] It is evident by the disparity of these numbers that Romania's current foster care system cannot feasibly accommodate the vast population of orphaned and abandoned children. There are two significant benefits to permitting intercountry adoptions for orphaned or abandoned children not already in foster care. First, Romania could use the institutional funding allocated to those children eligible for intercountry adoption, instead, to further improve and expand the foster care system. Most

131. *Id.*
132. *Id.*
133. ANPCA & UNICEF, *supra* note 19, at 69-70.
134. *Id.* at 70.
135. *Id* at 71.
136. *Id.*
137. *Id.* at 73.
138. ANPCA & UNICEF, *supra* note 19, at 74.
139. *Id.*
140. UNICEF Romania – Children in Institutions, *supra* note 118.

importantly, by simply limiting the children eligible for intercountry adoption to those *not already* in the foster care system, Romania would drastically improve the lives of thousands of children.

C. Reintegration into the Natural Family

Since child abandonment has continued at the same level for the last forty years, a primary focus of the child protection reform was the reintegration of abandoned children into their natural families.[141] According to the 2004 Joint Report, a large number of children who left the institutional system from 2001-2003 actually reintegrated with their natural families.[142] The Joint Report indicated that many of these families lived in poverty and cared for at least three children under the age of eighteen in their home.[143] In many cases, children returned home within two weeks of the parents' request for reintegration, and others returned without their parents making any request at all.[144] The level of State assistance for families during the reintegration process was poor and many families received no support at all.[145] Moreover, fewer than half of these families received counseling before or after the child's return.[146]

D. Domestic Adoption

Another previous reform measure embodied in the new laws is the promotion of domestic adoption. Last year, however, Romania reported only 1,355 domestic adoptions applications – placing only a fraction of orphaned or abandoned children in permanent homes.[147] Moreover, Romanian couples traditionally do not adopt older children, who are just as in need of a family as infants.[148] Under the new laws, these older children have little hope of adoption since the door has been closed to those foreign families willing to welcome older children into their homes.[149]

According to Law 273, a birth mother must sign a paper formally ending the parent-child relationship in order to qualify a child for

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141. ANPCA & UNICEF, *supra* note 19, at 60; *Good Impulses, supra* note 10.
142. ANPCA & UNICEF, *supra* note 19, at 54-55.
143. *Id.* at 55.
144. *Id.*
145. *Id.*
146. *Id.* at 55, 78.
147. Smith Address, *supra* note 22.
148. *Good Impulses*, *supra* note 10.
149. *Id.*

adoption.[150] This provision makes adoption nearly impossible in cases where the mother abandoned the child and made no further contact.[151]

III. HUMAN RIGHTS VIOLATION CLAIM

Romania, under its new laws, developed a method to keep nearly all Romanian children within its borders and in child care systems inadequate to meet their needs. But how does this affect the children? Is this confinement a human rights violation under UNCRC?

A. Development Study

The new laws aim to end child abandonment in Romania, but an unintended result is that many deserted infants now spend their first year in a hospital ward because children under the age of two cannot be placed in institutions.[152] According to a March 2005 report by UNICEF, "child abandonment in 2003 and 2004 [in Romania] was no different from that occurring ten, twenty or thirty years ago."[153] UNICEF also reports that more than 9,000 children are abandoned in Romania's maternity wards or pediatric hospitals each year.[154]

Studies indicate that children abandoned at birth or in pediatric hospitals continue to comprise the largest number of institutionalized children.[155] The new laws are intended to protect children less than two years old from the devastating effects of institutionalization and assure that they grow up in a family environment.[156] UNICEF, however, reports that the "protective environment for some children in their first years of life is still under challenge."[157] Moreover, a 2005 UNICEF report, marked "not for distribution," concluded that "children under the age of [two], and especially newborns left without their mother, constitute an emergency segment that requires immediate priority."[158]

Dr. Dana Johnson of the University of Minnesota spent the last fifteen years studying the impact of institutionalization on child health and well being, with a majority of his research centered on Romanian

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150. *Good Impulses*, *supra* note 10. *See also* Law 273, *supra* note 2, arts. 12-18.

151. *Good Impulses*, *supra* note 10.

152. *Id.* See *also* Law 272, *supra* note 1, art. 60(1).

153. Smith Address, *supra* note 22.

154. *Id. See also Good Impulses*, *supra* note 10.

155. UNICEF Romania, The Children, Protection and Care, *available at* http://www.unicef.org/romania/children_1598.html (last visited Nov. 11, 2006) [hereinafter UNICEF Romania – Protection and Care].

156. *Id.*

157. *Id.*

158. *Good Impulses*, *supra* note 10 (internal quotations omitted).

orphans.[159] According to Dr. Johnson,

> The present laws in Romania leave children in institutional or temporary family care for an unacceptable period of time . . . . Development outside of a nurturing family during the first years of life leads to catastrophic loss of brain potential. As an international community, we need to do better for these children.[160]

Dr. Johnson also believes that "Romania's concentration on the reunification of an abandoned child with his or her biological family is only superficially consistent with the [UNCRC] or the Hague Convention."[161] Dr. Johnson notes that neither instrument indicates the amount of time that should be spent on regeneration efforts.[162] Thus, if the reintegration process takes a substantially long time, it is likely the child will still suffer developmental loss.[163]

In a 2005 news release, the U.S. State Department made its first allegation that Romania's ban on intercountry adoption was a human rights violation. The allegation relied on Dr. Johnson's study, which concluded that "contemporary child development research shows unequivocally that placing infants in hospital or orphanage care for longer than 4-6 months permanently damages them in terms of their cognitive, emotional and behavioral development."[164]

According to the study, it is estimated that an infant loses one to two I.Q. points per month and sustains predictable losses in growth, as well as motor and language development, between four and twenty-four months of age, while living in an institutional environment the first few years of life.[165] However, Dr. Johnson argues that placing these children into a caring, competent family, helps recover some of these

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159. *U. of M. Professor Testifies to Committee on Romanian Adoption Laws*, ACADEMIC HEALTH CTR. AT THE UNIV. OF MINN., Sept. 13, 2004, *available at* http://www.ahc.umn.edu/print/news/releases/johnson091305/home.html (last visited Nov. 8, 2006) [hereinafter *U of M Professor Testifies*]. As noted in the University of Minnesota article, Dr. Dana Johnson is a pediatrician and international adoption specialist. He serves as a consulting physician to the Bucharest Early Intervention Project, "the first randomized, controlled study of the effects of the foster and institutional care on early brain development." *Id.* Dr. Johnson is also a "founding member of the Bucharest Institute of Child Development." *Id. See also* Thomas, *supra* note 107; University of Minnesota, Neonatology, Directory, Dana E. Johnson, *available at* http://www.med.umn.edu/peds/neonat/directory/johnson/home.html (last visited Nov. 8, 2006) (providing a comprehensive list of Dr. Johnson's studies and achievements).

160. *U of M Professor Testifies*, *supra* note 159.

161. Smith Address, *supra* note 22.

162. *Id.*

163. *Id.*

164. Thomas, *supra* note 107.

165. *Id.*; Smith Address, *supra* note 22.

lost functions.[166] Otherwise, "a child that is abandoned in Romania today at the end of next summer will have permanently lost 15 I.Q. points; [and] that child two years from now will have permanently lost 30 I.Q. points, which means that half of those kids are going to be mentally retarded."[167]

As previously stated, Law 272 prohibits the institutionalization of a child before the age of two.[168] Consequently, many orphaned and abandoned Romanian infants spend the first two years of their lives within systems that are largely inadequate to meet their cognitive and developmental needs as outlined in the study.[169] Romania, therefore, is stunting the cognitive development of these children by confinement in child care systems that do not stimulate necessary growth.

B. Adolescents

UNICEF reports that as of December 2004, there were 12,435 children between fourteen and seventeen years old still living in institutions as well as 5,693 over eighteen years old.[170] The concept of adolescence is not prevalent in Romania. UNICEF defines adolescence "as a period of preparation before entering into adulthood with its [own] responsibilities and demands."[171] The lack of appreciation for this delicate time in a child's life is a contributing factor in issues such as child labor, street working, and the trafficking of children.[172]

Those Romanian children who leave the child protection systems often have no where to turn, and instead join the ranks of children living on the streets.[173] "Studies have . . . shown institutions no longer represent the main source of children on the streets, as broken homes, dysfunctional families and abandonment [have] also force[d] children to the streets."[174] According to UNICEF, the quality of life of these children is poor: one third of these children are illiterate, 40% have low

166. Smith Address, *supra* note 22.

167. Smith Address, *supra* note 22. *See also*, Thomas, *supra* note 107.

168. Law 272, *supra* note 1, art. 60(1).

169. Thomas, *supra* note 107.

170. UNICEF Romania, The Children, Adolescence, *available at* http://www.unicef.org/romania/children_603.html (last visited Nov. 8, 2006) [hereinafter UNICEF Romania – Adolescence].

171. *Id.*

172. *Id.*

173. *See generally* UNICEF Romania, The Children, Children Living in the Streets, *available at* http://www.unicef.org/romania/children_1603.html (last visited Nov. 8, 2006) [hereinafter UNICEF Romania – Children Living in the Streets].

174. *Id.*

writing and reading skills, nearly 20% never attended school, and most suffer from skin diseases, tuberculosis, or hepatitis.[175] Street children who are arrested by Romanian authorities often suffer a worse fate. Since "there is no juvenile justice system in place in Romania," there are no "non-custodial correction measures or community-based services for reintegration of young offenders."[176] Further, because of a lack of understanding of children's rights, judges often consider imprisonment as the only punishment for youthful offenders, regardless of the severity of the crime.[177]

Alternatively, if adolescents remain in institutions or foster care, they are likely to remain there permanently because traditionally Romanian families do not often adopt older children.[178] Gabi Mihalea Comanescu, director of the ProChild Romanian Foundation, states "there are older children who are as adoptable as ever, but no one to adopt them now [under the new laws]."[179] As previously discussed, the ban on intercountry adoption eliminates the opportunity for foreign families to welcome older children into their homes. These older children deserve the promise of a family, too, not just the promise of a life either in institutional or foster care, or on the streets.

Romania, again, sealed the fate of many of older children under the new laws, since intercountry adoption provided an alternative to life on the streets or a life without hope of domestic adoption.

C. Recent Claims: "Undeniably a human rights abuse" – Helsinki Commission

Dr. Johnson's study on child development in Romanian orphans was the catalyst for a recent Helsinki Commission hearing on the impact of Romania's newly implemented ban on intercountry adoptions.[180] The Helsinki Commission is "steadfast in its support of Romania's efforts to combat corruption and to promote the rule of law and good governance," but characterized the ban on intercountry adoptions as "undeniably a human rights abuse."[181] On September 14, 2005, the Helsinki Commission held a hearing entitled "In the Best Interests of

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175. *Id.*

176. UNICEF Romania, The Children, Juvenile Justice, *available at* http://www.unicef.org/romania/children_1606.html (last visited Nov. 15, 2006) [hereinafter UNICEF Romania – Juvenile Justice].

177. *Id.*

178. *Good Impulses*, *supra* note 10.

179. *Id.*

180. Thomas, *supra* note 107; Smith Address, *supra* note 22.

181. Thomas, *supra* note 107; Smith Address, *supra* note 22.

the Children? Romania's Ban on Inter-Country Adoption."[182] The Helsinki Commission implied that the hearing marked the beginning of several hearings to further debate the issue.[183]

While the EU was heavily criticized for pressuring Romania to adopt new law on intercountry adoption, the Helsinki Commission expressed disappointment that no representatives from the EU attended the hearing – three invitations were offered and all declined.[184] U.S. Senator Sam Brownback, the Commission Co-chair, argued, "You can be sympathetic with Romania's need to join the European Union and still recognize that these adoptions laws are deeply damaging to the lives of thousands of children."[185] He urged the EU and Romanian officials to "sit down and take seriously the fate of thousands of innocent children and loving families."[186]

At the hearing (and in later extended remarks), U.S. Representative Christopher H. Smith testified:

> Romania's new adoption law and [others] addressing child protection. . .create a hierarchy of placement for orphaned or abandoned children. By foreclosing the option of intercountry adoption, the laws codified the misguided proposition that a foster family, or even an institution, is preferable to an adoptive family outside the child's country of birth.[187]

A month following the hearing, the European Commission issued a press release stating that "according to the Romanian Office for Adoptions, there are 1,355 Romanian families registered to adopt one of the 393 children available for adoption. Thus there is little scope, if any, for international adoptions."[188] Representative Smith, in his extended remarks from the Commission's hearing, responded:

> The European Commission's press release fails to mention that more than 80,000 children in Romania are growing up without permanent

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182. Press Release, Commission on Security and Cooperation in Europe, Helsinki Commission Members Blast Romania Adoption Policies, Call for Immediate Reform (Sept. 14, 2005), *available at* http://www.csce.gov/index.cfm?Fuseaction=ContentRecords.ViewDetail&ContentRecord_id=458&Region_id=0&Issue_id=0&ContentType=P&CFID=1790150&CFTOKEN=17632682 (last visited Nov. 8, 2006).

183. Joint Council on International Children's Services, Romania, *available at* http://www.jcics.org/Romania.htm (last visited Nov. 8, 2006) [hereinafter JCICS – Romania].

184. Thomas, *supra* note 107; JCICS-Romania, *supra* note 183.

185. Thomas, *supra* note 107.

186. *Id.*

187. Smith Address, *supra* note 22.

188. *Id.*

> families—in orphanages, foster care, maternity hospitals, or on the streets. That less than 400 have been declared available for adoption is a denunciation of the child welfare system. Barely 1,000 children have ever been domestically adopted in Romania in any given year and since enactment of the new laws in 2004, the rate of domestic adoption has fallen further. There is no doubt that if more children were to be made available for adoption, there would be a great need for intercountry adoption to provide them with permanent, loving homes. For thousands of children abandoned annually in Romania, intercountry adoption offered the hope of a life outside of foster care or an institution. That hope has now been taken away.[189]

The Commission correctly characterized the ban on intercountry adoptions as "undeniably a human rights abuse" and accordingly made its case by applying both Dr. Johnson's study and the evidence of the number of Romanian children still living in institutional care.[190]

CONCLUSION

No one can fault Romania for trying to rebound from the devastating situation of orphaned and abandoned children left behind by the Ceausescu era. To Romania's credit, the child protection reforms enacted to address the influx of intercountry adoption and abuses of the early 1990s were indeed a bold effort. Even the 2001 moratorium placed on intercountry adoptions in order to gain control of the corruptible adoption system was well justified and supported by many in the international community. Yet, in its effort to develop new, lasting child protections and *still* appease the EU, Romania made a grave mistake by bowing to the EU's demands on intercountry adoption restrictions. Instead, Romania passed up the opportunity to tighten intercountry adoption mechanisms pursuant to international guidelines set forth in UNCRC, the Hague Convention, and UNICEF – none of which require legislating a ban on intercountry adoptions. Perhaps from a political, long-term perspective, Romania made a decision to best serve all of its citizens. The most vulnerable and politically powerless, however, were purposefully denied the most basic of needs, when a solution was well within reach.

While the idea of domestic adoption and family reintegration are preferable goals to institutionalization and even intercountry adoption,

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189. *Id.* Congressman Smith continues to say that the denial of a permanent family will fall hardest on the Roma children, who are least likely to be adopted in-country due to pervasive societal prejudices against the Roma minority.

190. Thomas, *supra* note 107.

these goals are lofty in light of the realities of Romanian life and the weaknesses of the child protection systems currently in place. Today, birth control is widely available in post-Communist Romania; however, mothers still desert their children because they feel they cannot afford to raise them, infants are still at developmental risk, and many children still lack a permanent family environment.[191] Even the most favorable statistics put present levels of domestic adoption at only 1,355 per year, which leaves close to 8,000 children abandoned, without permanent homes.[192] This does not include those 49,000 who are institutionalized or in revolving foster care.[193] The new laws, as they stand now, harm the very recipients the government set out to protect. Romania, in its decision to ban intercountry adoptions, violated the basic rights of these children set forth in the UNCRC – the right to develop fully, to protection from harmful influences and to participate fully in a family.[194] Romania, thus, denied thousands of orphaned and abandoned children the opportunity to grow up in permanent families, free from the harms of institutional life.

191. *Good Impulses, supra* note 10.
192. Thomas, *supra* note 107; Smith Address, *supra* note 22.
193. Thomas, *supra* note 107; Smith Address, *supra* note 22.
194. UNCRC, *supra* note 84, pmbl.