For the Best Interests of the Children: Why the Hague Convention of Intercountry Adoption Needs to Go Farther, as Evidenced by Implementation in Romania and the United States

Elisabeth J. Ryan
FOR THE BEST INTERESTS OF THE CHILDREN: WHY THE HAGUE CONVENTION ON INTERCOUNTRY ADOPTION NEEDS TO GO FARTHER, AS EVIDENCED BY IMPLEMENTATION IN ROMANIA AND THE UNITED STATES

Elisabeth J. Ryan*

Abstract: International adoption is a common occurrence in today's society. In order to address the dangers linked with international adoption such as baby trafficking, the members of the Hague Conference on Private International Law produced the Hague Convention on Intercountry Adoption in 1993, setting forth a minimum base of standards that every ratifying government must abide by, placing the best interests of the child above all other considerations. The United States, via the Intercountry Adoption Act of 2000, is well on its way to fully realizing the Hague Convention mandates. Romania, however, has struggled to care for its children and subsequently imposed an international adoption ban. This Note argues that the Hague Conference members need to amend the Hague Convention in order to implement assistance for countries that may struggle with its mandates. It also argues that, in order to avoid more nuanced problems in implementation, the Hague Convention should clarify its vague language. Finally, it should include appeals and enforcement procedures so that conflicts between two countries over an adoption proceeding can be dealt with by a third party.

INTRODUCTION

On December 26, 2004, a tsunami devastated the coasts of Indonesia, India, Sri Lanka, Thailand, and seven other countries in Southeast Asia; it killed an estimated 216,000 people. As media images of the tragedy deluged the Western world, adoption agencies began

---

* Elisabeth J. Ryan is the Senior Articles Editor for the Boston College International & Comparative Law Review. This Note is for her cousin Lily.

fielding calls from concerned families eager to open their homes to children orphaned by the disaster.\textsuperscript{3} As well-meaning as such people were, however, international adoptions in times of crisis are completely unrealistic, as well as extremely ill-advised.\textsuperscript{4} Initially, intercountry adoptions in the United States depend not only on the law of the child’s originating country but also on the law of the receiving family’s state, and federal immigration law.\textsuperscript{5} The process can take several years of paperwork, investigation, home study, and other administrative matters.\textsuperscript{6} Additionally, there are extensive restrictions on who can adopt children as well as which children can be adopted.\textsuperscript{7} The financial expense also can be enormous, averaging $10,000-$30,000 without any major obstacles.\textsuperscript{8}

However impractical the rush of adoption interests may be after a disaster such as the 2004 tsunami, it is not a new phenomenon, and it arises most every time a political crisis or national disaster brings images of forlorn children to the forefront.\textsuperscript{9} In particular, after Romanian Communist dictator Nicolae Ceausescu was overthrown and executed in December 1989,\textsuperscript{10} popular television shows such as ABC’s “20/20”\textsuperscript{11} and CBS’s “60 Minutes”\textsuperscript{12} broadcasted horrifying images of thousands of children living in orphanages marked by grossly inhumane conditions.\textsuperscript{13} The result of the graphic media coverage was a deluge of calls to adoption agencies from people wanting to rescue the suffering children.\textsuperscript{14}

\textsuperscript{7} See e.g., Lewin, supra note 6, at 296–304; Hubing, supra note 5, at 666–73.
\textsuperscript{8} Bartholet, supra note 5, at 190.
\textsuperscript{9} See Agrell, supra note 3.
\textsuperscript{11} See Hubing, supra note 5, at 657 n.3, 658 n.9.
\textsuperscript{12} See Bartholet, supra note 5, at 200 n.44.
\textsuperscript{13} Id. at 201; Agrell, supra note 3.
\textsuperscript{14} Agrell, supra note 3.
But while times of political and social crises tend to peak interest in (and provide extensive media coverage of) international adoptions, such adoption is a common and everyday practice among dozens of nations.\textsuperscript{15} Countries involved in the increasing instances of such international adoptions have expressed concerns such as who can adopt children, which children can be adopted, and what constitutes the best interests of such children.\textsuperscript{16} The countries have also faced additional fears about baby selling on the black market, either to people desperate for a child, or more sinsterly, to people looking to traffic children into slave labor, prostitution, or pornography.\textsuperscript{17}

Almost 20,000 girls under the age of sixteen are sex slaves in Cambodia; 200,000 children in West and Central Africa are enslaved into forced labor, and between 18,000–20,000 individuals (which includes adults and children) are trafficked into the United States every year.\textsuperscript{18} As recently as November 2004, the British press reported that undercover investigators in Romania took mere minutes to find parents willing to sell their babies outright for as little as 500 Euros (approximately $663).\textsuperscript{19}

This threat of child trafficking is especially acute in the tsunami-ravaged countries.\textsuperscript{20} The Indian government instituted a ban on all international adoptions beginning on January 5, 2005, after widespread concerns that adoption amidst the tsunami rebuilding efforts might provide a cover for snatchng children in order to force them into cheap labor in factories or into the sex trade.\textsuperscript{21} Additionally, such children faced enormous trauma during and after the disaster, and uproot-

\textsuperscript{15} See Lewin, supra note 6, at 291.

\textsuperscript{16} See Hubing, supra note 5, at 666–68.


\textsuperscript{20} See, e.g., \textit{Call For Adoption Ban, supra note 17}.

ing them to face a new family and surroundings so quickly would only add onto that stress and psychological damage.\textsuperscript{22}

To address all the concerns surrounding international adoption, sixty-eight countries convened in 1993 to draft the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention),\textsuperscript{23} the first treaty establishing minimum standards in international adoption procedures.\textsuperscript{24} Despite this major step to regulate intercountry adoptions, however, the Hague Convention falls far short of ensuring the best interests of children involved in international adoptions.\textsuperscript{25}

Part I of this Note discusses the general history of international adoption, with particular focus on the development of the Hague Convention on Intercountry Adoption, the status of children in Romania, and the status of international adoption in the United States. Part II focuses on the major aspects of the Hague Convention, as well as the failure of Romania to implement the Hague Convention, and the United States’ imminent success in doing so. Part III argues that the Hague Convention signatory countries should take a more active role in ensuring that the Hague Convention is carried out where it is most needed, specifically in countries like Romania. It also highlights the need for the Hague Convention to be amended in order to clarify certain aspects of language, as well as institute an appeals process so that countries like the United States can fully benefit from the Hague Convention.

I. HISTORY AND BACKGROUND

A. Competing Viewpoints on the Merits of International Adoption

The United States and other wealthy, Western, industrialized nations with low birthrates and relatively small numbers of children in need of homes take in the largest number of internationally adopted children.\textsuperscript{26} These children are adopted from poor countries with high birthrates and huge numbers of homeless or institutionalized chil-

\textsuperscript{22} See Komandjaja, supra note 21.
\textsuperscript{24} See id. intro, 32 I.L.M. at 1134.
\textsuperscript{25} See Bartholet, supra note 5, at 194–95.
\textsuperscript{26} Id. at 181.
Wealthy countries have seen a decrease in domestic adoptable children due to the availability of abortion, contraception, family planning education, and a reduced stigma against single parenting. In contrast, the home countries of internationally adopted children tend to be marred by political strife, war, and often devastating levels of poverty. Stark political and economic differences create a virtual supply-and-demand economy of children, but controversy nonetheless rages over the practice of international adoption.

Critics condemn international adoption as exploitative, imperialistic, and detrimental to children because of the separation from their home culture and society. Supporters of international adoption, however, stress that the practice provides the only realistic opportunity for many children to have a permanent home and family. Both supporters and opponents rely on the best interests of the children to back up their views and arguments.

B. History of the Hague Convention on Intercountry Adoption

To address specific problems with international adoption—namely the creation of legally binding standards, a system of supervision to ensure observation of those legal standards, and communication and cooperation between authorities in both countries involved in any particular adoption—the Hague Conference of Private International Law (Hague Conference) produced the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption in

---

27 Id. at 182.
28 Id. at 181.
29 See id. at 182.
30 See Crystal J. Gates, Note, China’s Newly Enacted Intercountry Adoption Law: Friend or Fool?, 7 Ind. J. GLOBAL LEGAL STUD. 369, 376 (1999) (explaining that framing the international adoption debate in terms of supply-and-demand reduces the humanity of the children involved); Jacqueline Bhabha, Moving Babies: Globalization, Markets and Transnational Adoption, 28 FLETCHER F. WORLD AFF. 181, 182–83 (2004) (noting that it is more of a demand-driven economy, as the ample “supply” of children would exist independently).
31 Bartholet, supra note 5, at 183; see Kathleen Ja Sook Bergquist, International Asian Adoption: In the Best Interest of the Child?, 10 TEX. WESLEYAN L. REV. 343, 347 (2004); Hubing, supra note 5, at 663–66.
32 See Bartholet, supra note 5, at 182.
33 Hubing, supra note 5, at 660.
34 See Bartholet, supra note 5, at 182.
35 See id. at 182, 197.
36 See id. at 184.
May 1993. Participating in the deliberations were almost all thirty-eight Hague Conference Member States and thirty invited non-member states, chosen particularly because of their role in international adoption. Overall, the Hague Convention sought to establish that any international adoptions are in the best interest of the child, above everything else.

The Hague Convention marked the first major development of international minimum standards in intercountry adoption procedures. All states that sign the Hague Convention show an intention to ratify it, though no further action is necessary; those that do ratify the Hague Convention are then legally bound to apply it to their domestic and international laws.

Just four years earlier, in 1989, the United Nations adopted the Convention on the Rights of the Child (CRC). The main philosophy of the CRC is that society has an obligation to meet the fundamental needs of children. These obligations include not only basics like health care and education, but also a range of social, political, and civil rights for all children. The CRC has reached almost universal ratification, an unprecedented status for a human rights treaty.

The CRC is purposely neutral, however, on adoption in general. Several traditionally “receiving” countries in international adoption, such as the United States, had lobbied for language that would have obligated all countries to take “appropriate measures to facilitate permanent adoption of the child.” Such language would seem to be harmonious with the rest of the document, which places a great deal of emphasis on the role of the family as the “fundamental group of

---

38 Hague Convention, supra note 23, intro., 32 I.L.M. at 1134.
39 See Sargent, supra note 37, at 355.
40 Hague Convention, supra note 23, intro., 32 I.L.M. at 1134.
41 Sargent, supra note 37, at 354.
44 Id.
45 Id. at 4.
46 Id. at 14.
47 Countries in which foreign children tend to be adopted are known as “receiving” countries; countries from which children tend to be adopted are known as “sending” countries. See Bartholet, supra note 5, at 186.
society and the natural environment for the growth and well-being of all [society’s] members and particularly children.\textsuperscript{49} The UN member states, however, rejected language that would have explicitly cemented an obligation for nations to facilitate adoption because adoption was not the sole option for providing children with families.\textsuperscript{50} Additionally, some drafters emphasized that adoption frequently contravened the best interests of the child, and thus would have been inconsistent with the objective of the document to protect the rights of the child.\textsuperscript{51}

The Hague Convention on Intercountry Adoption proved to be a more detailed consideration of dissenters’ objections to the CRC’s failure to facilitate international adoption.\textsuperscript{52} The Hague Convention addressed the need for legal processes to crack down on threats like falsification of documents, abduction and sale of children, and unregulated organizations essentially running the adoption process.\textsuperscript{53} In the most basic sense, the agreement recognized a need for a minimum set of international standards governing international adoptions—rules that each participating state could examine, adopt, abide by, and be confident that other ratifiers were doing so as well.\textsuperscript{54}

\textbf{C. History of Child Welfare in Romania and the Country’s Role in International Adoption}

In few countries has the plight of orphans been as tragic or as publicized as in Romania.\textsuperscript{55} During Nicolae Ceausescu’s rule of Communist Romania beginning in 1944, he forced every woman to bear five children while simultaneously banning birth control and abortion,\textsuperscript{56} resulting in tens of thousands of unwanted babies being left in state institutions run by a government in which corruption was insidious.\textsuperscript{57} Since Ceausescu’s overthrow in 1989, approximately 30,000 Romanian children have been adopted worldwide,\textsuperscript{58} including some 8,300 by Ameri-

\begin{itemize}
  \item \textsuperscript{49} See CRC, supra note 42, pmbl.
  \item \textsuperscript{50} See Rios-Kahn, supra note 43, at 14.
  \item \textsuperscript{51} See id.
  \item \textsuperscript{52} See id. at 15.
  \item \textsuperscript{53} Id.
  \item \textsuperscript{54} See id. at 15–16.
  \item \textsuperscript{55} See Bartholet, supra note 5, at 200–01.
  \item \textsuperscript{57} See Noelle Knox, \textit{Orphans Caught in the Middle}, USA TODAY, May 18, 2004, at D1, available at 2004 WL 58556956.
  \item \textsuperscript{58} Romania: New Law Hinders Adoptions by Foreigners, ANSA-ENG. NEWS SERV., Jan. 6, 2005, available at 1/6/05 ANSA 12:03:00 [hereinafter \textit{Romania: New Law}].
\end{itemize}
An estimated 40,000 children, however, still remain in orphanages. After the media exposed the squalid conditions of Romania’s orphanages and institutions to the outside world, the country’s authorities undertook a supposed major overhaul to improve the lives of children.

Significant financial contributions from foreign governments and various non-governmental organizations allowed immediate superficial developments. The government made visible improvements to the physical institutions, including carpeting, televisions, and toys. While these improvements certainly contributed to better living conditions for children in the immediate sense, they proved to be short-lived and addressed public relations more than the root of the problem. Abject poverty, government mismanagement, and the lack of any coherent long-term strategy to improve the living standards of Romanian citizens remained serious problems. The Bucharest-based Institute for Researching the Quality of Life reported in 1993 that only 10.3% of Romanian children lived in decent conditions, while a staggering 56.6% lived in poverty.

The severe economic difficulty of Romanian citizens may have been the primary reason that many children were abandoned by their families to orphanages, but numerous other factors also contributed. These include an increase in mothers under the age of twenty, ethnic origin (in particular, Roma families have had high birth rates, extremely low income, and high rates of delinquency), and limited access to any form of family planning. The Romanian government structure also contributed to high rates of abandonment due to a lack of social services and a policy in the first years after 1989 that encouraged institutionalization of children.

---

59 Knox, supra note 57.
60 Romania: New Law, supra note 58.
62 See id. at 104.
63 Id.
64 See id. at 99.
65 See id. at 100.
66 Lataianu, supra note 61, at 100.
67 See id.
69 Lataianu, supra note 61, at 101.
70 Id. at 101.
The newly democratic Romanian government repealed the law that prohibited abortion almost immediately after the overthrow of 1989, leading some to expect that the number of abandoned babies would decrease significantly in the coming years.\textsuperscript{71} By 1994, however, the number of children residing in institutions had actually surpassed 1990 figures by 15\%.\textsuperscript{72} When Romania was still under Communist control, the government required children to leave residential care at the age of eighteen, providing them with state jobs and housing, even though most of them lacked any employment qualifications.\textsuperscript{73} But after the Communist collapse, such children had virtually no chance of finding a job and being able to live on their own.\textsuperscript{74} Thus, most of them simply remained in institutions well after their eighteenth birthdays, despite the requirements of the law.\textsuperscript{75} 

The post-Ceausescu government initially encouraged international adoption, which contributed to a decrease in institutionalized children in the first years of the 1990s.\textsuperscript{76} But then the government abruptly passed legislation severely limiting international adoptions, thus contributing to the startling rise in institutionalized children as shown in the 1994 figures.\textsuperscript{77} 

But by the mid-1990s, external events brought new changes to Romania.\textsuperscript{78} In 1993, the government signed an Association Agreement aimed at allowing it to become part of the European Union (EU).\textsuperscript{79} In order to bring membership into force, however, the EU placed four conditions on Romania, including recognition of democracy and human rights.\textsuperscript{80} The EU Commission Opinion on Romania’s Application for Membership declared that the condition of children in the country was a human rights priority.\textsuperscript{81} 

To this end, Romania became one of the first three countries to sign and ratify the Hague Convention in 1994.\textsuperscript{82} Romania’s dual

\textsuperscript{71} See id. at 102.
\textsuperscript{72} Id.
\textsuperscript{73} See id. at 103.
\textsuperscript{74} Lataianu, supra note 61, at 103.
\textsuperscript{75} Id.
\textsuperscript{76} See id.
\textsuperscript{77} See id.
\textsuperscript{78} See id. at 112.
\textsuperscript{79} Id.
\textsuperscript{80} See Lataianu, supra note 61, at 112. The other conditions were a functioning market economy, a capacity to compete within the EU market, and an ability to adhere to the political, economic, and monetary aims of the EU. Id. at 112–13.
\textsuperscript{81} Id. at 113, 114.
\textsuperscript{82} Sargent, supra note 37, at 355.
commitment to the Hague Convention and to the EU’s requirements that children’s rights be prioritized seemed to be in harmony. But the goals eventually clashed, and pressure from the EU resulted in a ban rendering international adoption practically impossible.

D. History of International Adoption in the United States

The United States is the destination for nearly half of all internationally adopted children. Intercountry adoption was virtually nonexistent until the aftermath of World War II, when members of the U.S. armed forces returned home with tales of children orphaned in the war-ravaged countries of Germany, Italy, Greece, and the rest of Europe. These orphans were largely white and “first-world,” leading Americans to open their homes, willing for the first time to provide a compassionate home for children victimized by world events.

International adoption gained true widespread acceptance in the United States after the Korean War when U.S. GIs returned home having fathered stigmatized children overseas with Korean women. Some 38,000 Korean children were adopted in the United States from 1953–1981. In 1996, however, the Korean government (cementing a trend in policy that began in the 1970s) banned all international adoptions of Korean children by foreigners.

Presently, most foreign-born children adopted in the United States are from China. Due to the official Chinese government policy of one child per family, thousands of Chinese babies—overwhelmingly female in a culture that values males over females—are abandoned each year, resulting in crowded institutional orphanages. The implications of the Hague Convention are particularly relevant to the United States be-

83 See Lataianu, supra note 61, at 107; Sargent, supra note 37, at 355.
84 See, e.g., Romania: New Law, supra note 58.
85 Hubing, supra note 5, at 660 (stating that out of estimated 20,000 international adoptions each year, nearly half involve U.S. citizens as the adoptive parents).
86 See id. at 661.
87 See id. at 344.
88 See id. at 343; Hubing, supra note 5, at 662.
89 Hubing, supra note 5, at 662.
90 See id.
91 Id.
92 Gabriela Marquez, Comment, Transnational Adoption: The Creation and Ill Effects of an International Black Market Baby Trade, 21 J. Juv. L. 25, 29–30 (2000); see China’s Unspoken Shame, supra note 17.
cause of the country’s extensive involvement in the practice of international adoption.\textsuperscript{93}

II. Discussion

A. Major Aspects of the Hague Convention

The most basic and vital purpose of the Hague Convention is to ensure that intercountry adoptions are made “in the best interests of the child.”\textsuperscript{94} Significantly, it recognizes, for the first time in an international agreement, that international adoption may itself be in the best interest of the child.\textsuperscript{95} The Hague Convention states that every child should grow up in a family environment, and that international adoption may be the only way to achieve this end for some children.\textsuperscript{96} Thus, the Hague Convention not only provides an avenue to ensure that international adoptions are safe and legal, but it also implicitly encourages international adoption over less beneficial alternatives such as home-country institutionalization or even domestic adoption.\textsuperscript{97}

The Hague Convention’s regulation of international adoption requires each ratifying country to undergo major internal changes in their international adoption processes.\textsuperscript{98} Because these changes encourage smooth and accountable procedures, they represent a clear endorsement of international adoption.\textsuperscript{99} The Hague Convention requires that each state party create a Central Authority to oversee all intercountry adoptions involving that state.\textsuperscript{100} Considering the time and resources required to institute these changes, international adoption necessarily takes a prominent place in the state’s social and political consciousness.\textsuperscript{101}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{93} See Hubing, supra note 5, at 660.
\item \textsuperscript{94} See Hague Convention, supra note 23, pmbl.
\item \textsuperscript{96} See Hague Convention, supra note 23, pmbl.
\item \textsuperscript{97} See id., art. 1.
\item \textsuperscript{98} See id. arts. 6–13. Some of these changes are setting up a Central Authority, communicating with other countries’ Central Authorities, and accrediting and monitoring adoption agencies. Id.
\item \textsuperscript{99} See id. Even though the Hague Convention never explicitly states this proposition, it is clear that, taken as a whole, the Convention endorses the practice of international adoption. See id.
\item \textsuperscript{100} Hague Convention, supra note 23, arts. 6–13.
\item \textsuperscript{101} Cf. Rios-Kohn, supra note 43, at 27 (noting that many countries do not actually have the resources to institute the changes).
\end{itemize}
\end{footnotesize}
The Central Authority’s duties are to ensure day-to-day compliance with the Hague Convention’s overall goal of serving the best interests of the children. The duties include preventing improper financial gain in connection with an adoption, collecting and preserving information about each child and prospective adoptive parent(s), and facilitating the goal of adoption. To facilitate these operations, the Central Authority may delegate some responsibilities to other public authorities or other bodies. Once accredited, these bodies may only operate on a non-profit basis, must be staffed by people qualified to work in international adoption, and are under the supervision of the Central Authority with respect to operation and finances.

More specifically, the Central Authority for the country of the prospective parent(s) must determine eligibility and prepare a comprehensive report about the applicant(s). The Central Authority of the child’s home country must also determine adoptability and prepare a parallel report on the child. Each Central Authority must review the other’s report and agree on each specific adoption before it takes place. These requirements are significant in international adoption, as they facilitate detailed communication between each involved country and ensure from the outset that an adoption can proceed. This eliminates the danger that a prospective parent may not meet the requirements or standards of the child’s home country, and thus be rejected after the investment of significant time, money, and emotion in the process.

Further, each Central Authority must take all necessary steps to ensure that the child can leave his or her home country and subsequently be able to enter and permanently reside in the parental country. Again, the fact that the Central Authorities are required to ensure emigration and immigration for the child eliminates the possibility

---

102 See Hague Convention, supra note 23, pmbl., art. 6.
103 Id. art. 8.
104 Id. art. 9(a).
105 Id. art. 9(b).
106 Id. art. 9.
107 Id. art. 11.
108 Hague Convention, supra note 23, art. 15.
109 Id. art. 16(1)(a).
110 See id. art. 17.
111 See id. art. 17.
112 Cf. Bartholomew, supra note 5, at 186–90 (describing the negative implications of the current restrictive immigration laws in the United States).
113 Hague Convention, supra note 23, art. 18.
that an almost-complete adoption will be halted in the last step due to conflicting or misunderstood laws between parties.\textsuperscript{114}

The Hague Convention’s requirements for the creation and duties of each Central Authority thus significantly streamline the process of international adoption and ensure full disclosure of information and compliance with each country’s laws.\textsuperscript{115} These basic, practical requirements advance the Hague Convention’s goal of facilitating international adoption in the child’s best interests.\textsuperscript{116} Even though these are only minimum requirements, their implementation raises serious questions about their enforceability and practicality.\textsuperscript{117} Romania’s experience demonstrates those difficulties.\textsuperscript{118}

B. Romania’s Failed Efforts to Comply with Both the Hague Convention and EU Membership Requirements

In 1997, the Romanian government created the Department for Child Protection (DCP), with the goals of (1) creating a comprehensive, country-wide plan to monitor children’s rights and (2) developing internal legislation that would bring Romanian law into line with other countries.\textsuperscript{119} When the Romanian government began to undertake reforms in 1997, 98,872 children resided in institutions.\textsuperscript{120} Of these children, more than half had two known parents, but they were placed in institutions along with actual orphans because they had had no contact with either parent for at least six months.\textsuperscript{121} The DCP implemented a new philosophy for institutions (renamed “placement centres”) ostensibly to recognize and observe the rights of every child, to provide a familial atmosphere for children, to integrate the center as a part of the local community, to train staff professionally, and to reduce the number of children living in residential care.\textsuperscript{122}

\textsuperscript{114} See Bartholet, supra note 5, at 186–90.

\textsuperscript{115} Compare Hague Convention, supra note 23, arts. 6–22 (focusing, as a whole, on simplifying and centralizing international adoptions), with Lewin, supra note 6, at 292–319 (setting out the currently complex and intricate process of international adoption in the United States).

\textsuperscript{116} See Hague Convention, supra note 23, art. 1(a).


\textsuperscript{118} See infra notes 119–69 and accompanying text.

\textsuperscript{119} See Lataianu, supra note 61, at 107.

\textsuperscript{120} Id. at 108–09.

\textsuperscript{121} See id. at 109.

\textsuperscript{122} Id.
Despite these admirable and well-intentioned goals, implementation has been difficult.\textsuperscript{123} The decentralization meant that local authorities were responsible for funding, resulting in vast differences between institutions across the country that depended on local financing.\textsuperscript{124} The local authorities also disagreed on the priority to be given to child welfare reform in their respective budgets.\textsuperscript{125} Universities only re-established degree programs in social work and therapy training in 1990, thus hindering the goal of professionalized staff—arguably one of the most important aspects of the reform, as it sought to provide trained social workers, nurses, and teachers.\textsuperscript{126} The need for individuals specialized in these areas thus exceeded the supply, which was worsened by the fact that salaries in institutions were very low.\textsuperscript{127}

In view of the fact that Romania was one of the first to ratify the Hague Convention, the DCP could logically have been structured as Romania’s Central Authority.\textsuperscript{128} The country ignored this aspect of the Hague Convention, however, and arguably ignored the overall goal of facilitating international adoption at all, by proposing the relatively drastic measure of de-centralizing orphanage and institutional care for children, essentially leaving control to local authorities.\textsuperscript{129}

Thus, while Romania was focused on satisfying the European Union’s mandate that children’s rights be made a priority, it failed to facilitate international adoption procedures as part of these rights.\textsuperscript{130} Romania essentially disregarded the obligations it had pledged to respect by signing the Hague Convention.\textsuperscript{131} Rather than recognize international adoption as an integral part of developing a child welfare program, Romania solely concerned itself with satisfying the EU’s requirements of having an adequate domestic child care system.\textsuperscript{132}

Due to the dire status of institutionalized children in Romania, the Romanian government, with the apparent support of the EU, may have

\textsuperscript{123} Id. at 111.
\textsuperscript{124} See id.
\textsuperscript{125} See Lataianu, supra note 61, at 111.
\textsuperscript{126} See id. at 101, 111.
\textsuperscript{127} Id. at 111.
\textsuperscript{128} See id. at 107 (describing that the DCP had originally been conceived to comply with the Hague Convention but failed in actuality because one of its central tenets was decentralization).
\textsuperscript{129} See id. at 108, 111.
\textsuperscript{130} See id. at 112–19 (describing the multiple changes that the Romanian government made to its child welfare system, none of which complied with the Hague Convention).
\textsuperscript{131} See Sargent, supra note 37, at 365–66.
\textsuperscript{132} See Lataianu, supra note 61, at 115 (offering an example of a rushed action focusing only on meeting EU requirements).
viewed overhauling its internal child welfare program as the most important step in its human rights compliance project. This view, however, was shortsighted. Both the Romanian government and the EU should have recognized that the obligation to comply with the Hague Convention was not a separate, external step to be dealt with later but a means of enhancing the welfare of Romania’s children as a whole.

Perhaps if Romania and the EU had explicitly recognized international adoption as an integral aspect of improving children’s welfare, the program would have had a better chance at success. Instead, because of the virtual ban on international adoption officially imposed in 2005, the goals of the Hague Convention have not been met.

In 1997 and 1998, the EU Commission praised Romania’s progress and implementation of de-centralization and improved forms of care. The EU status report noted encouraging evidence that more children were being re-integrated into their families or adopted by foster parents. In 1999, however, the annual report bluntly stated that living conditions in all child care institutions had seriously deteriorated in only a year, and that the institutions’ basic infrastructure, hygiene, medical care, nutrition, and general assistance were unacceptable.

The report mandated that the Romanian government give top priority to child protection and take back primary responsibility from local authorities to ensure the welfare of children in residential institutions. The report explicitly stated that the government needed to improve food, medical services, clothing, heating, and staff.

Yet the EU failed to note that a comprehensive system for international adoption could greatly help Romanian orphans. Perhaps the EU Commission felt that a government that was incapable of providing

133 See id. at 112–14.
134 See id. at 115.
135 See id. at 112; see also Bartholet, supra note 5, at 200–01 (emphasizing that the real focus should be on getting children out of institutions and into families).
137 See Hague Convention, supra note 23, pmbl., art. 1; Romania: New Law, supra note 58.
138 See Lataianu, supra note 61, at 113.
141 Id. at 16.
142 Id.
143 See id.
such basics as clean facilities and adequate food for children could not implement an additional program.\textsuperscript{144} It is more likely, though, that the EU simply failed to emphasize the important role of international adoption in improving the lives of children by removing them from substandard institutional care and into the homes of loving families, as the Hague Convention had emphasized several years earlier.\textsuperscript{145}

Regardless, with the admonishment jeopardizing its EU membership bid, the Romanian government created a new agency, the National Agency for the Protection of the Child’s Rights.\textsuperscript{146} The Agency did adopt new goals for child welfare—improving parental responsibility, discouraging abandonment, supporting families in difficulty, and bringing greater transparency to adoption.\textsuperscript{147} While this new agency could have functioned as a Central Authority under the Hague Convention, the government again failed to specifically address international adoption, thus failing to take the Hague Convention objectives fully into account.\textsuperscript{148}

The 2000 EU Commission report finally addressed the adoption issue, expressing particular concern that Romania’s legislation governing adoption practices allowed considerations other than the best interest of the child to influence adoption decisions.\textsuperscript{149} The Romanian government responded to this negative report by placing its children’s agency directly under the Secretary General, which the EU Commission subsequently praised as an important development in dealing with children’s issues.\textsuperscript{150} Almost immediately afterwards, however, Romania suspended all intercountry adoptions.\textsuperscript{151}

Unfortunately, the EU Commission praised this moratorium as “a mechanism to end practices that were incompatible with Romania’s international obligations.”\textsuperscript{152} Instead of recognizing that international

\textsuperscript{144} See id. at 15–16.
\textsuperscript{146} Lataianu, supra note 61, at 114. This agency was created within just two months of the EU report. Id.
\textsuperscript{147} See id. at 116.
\textsuperscript{148} See id.
\textsuperscript{151} See id.
\textsuperscript{152} See id.
adoption could have provided a welcome alternative to the lives many children faced in Romanian institutions, the EU focused on the reduction in opportunities for child trafficking and other abuses.\textsuperscript{153} While these are legitimate concerns, of course, the EU could have encouraged a system to regulate them within a fluid system of adoption, rather than closing off the benefits of adoption in favor of none at all.\textsuperscript{154} The moratorium was intended as a temporary measure to allow the Romanian government to institute new procedures of international adoption.\textsuperscript{155}

Yet, even before legislative reforms could be seriously considered, Emma Nicholson, the European Union’s special envoy to Romania, harshly criticized the country for its persistent abandonment of children, child abuse and neglect, child trafficking, and particularly, international adoption’s role in contributing to these dangers.\textsuperscript{156} Nicholson determined in 2004 that Romania was simply not respecting the moratorium that it had imposed on itself three years earlier.\textsuperscript{157}

When, in February 2004, the Italian government announced publicly that Romania had sent 105 children to its country under dubious pretexts, the EU issued a warning to Romania to halt all international adoption in violation of the moratorium or face an end to its EU membership bid and a loss of all financial aid.\textsuperscript{158}

In light of this criticism, Italian officials reversed their initially negative stance, defending the 105 adoptions by Italian families as humanitarian and in the best interests of the children.\textsuperscript{159} But these adoptions were only part of the picture.\textsuperscript{160} Romania may have sent as many as 1000 adoptees abroad in contravention of the 2001 ban, although only Italy spoke openly, thus allowing the EU to take a clear stand

\begin{flushright}
\textsuperscript{153} See id.
\textsuperscript{154} See id. at 24–25 (noting that the EU favored no adoptions until they could be in the best interests of the child).
\textsuperscript{155} See Sargent, supra note 37, at 370.
\textsuperscript{157} See Evans-Pritchard, supra note 156.
\textsuperscript{158} See id.
\end{flushright}
against Romania’s membership if the adoption system was not cleaned up.\textsuperscript{161}

In response, Romania passed legislation in June 2004 that replaced the apparently ignored moratorium with, in effect, an outright ban on all international adoptions of Romanian children.\textsuperscript{162} The government passed the legislation in the face of opposition by the United States, which favored a lifting of the moratorium and staunchly opposed a permanent adoption ban.\textsuperscript{163} The U.S. ambassador to Bucharest described the law as a “tragedy,” as it would bar thousands of families from legitimately adopting some of the 40,000 orphans in Romania thereby providing them with a high standard of living within the United States.\textsuperscript{164} Nonetheless, the law came into force on January 1, 2005.\textsuperscript{165} The United States is still fiercely fighting the law—in November of 2005, Rep. Chris Smith of New Jersey introduced legislation in the House of Representatives that urged Romania to reform its adoption policies in order to allow international adoption for institutionalized children.\textsuperscript{166} And, indeed, the ban has left thousands of Romanian orphans—many of them infants under the age of two—in an indefinite institutional limbo.\textsuperscript{167}

In essence, Romania has ignored the obligations it assumed upon ratification of the Hague Convention.\textsuperscript{168} The EU has assisted this abrogation by supporting a ban on international adoption, when it should have, and could have, helped Romania develop an honest and effective system of international adoption looking to the best interests of children.\textsuperscript{169}

\textsuperscript{161} See id.
\textsuperscript{162} Ian Traynor, Romania Bans Adoptions in Other Countries, Guardian (Eng.), June 16, 2004, at 17, available at 2004 WL 75688211.
\textsuperscript{163} See id.
\textsuperscript{165} Adoptions: Romania Confirms Draconian Measures, ANSA-Eng. News Serv., Jan. 15, 2005, available at 1/15/05 ANSA 14:03:00.
\textsuperscript{168} See Sargent, supra note 37, at 355.
\textsuperscript{169} See 2001 Regular Report, supra note 150, at 24–25.
C. Hague Convention Implementation in the United States

In stark contrast to Romania’s inaction on its Hague Convention responsibilities, the United States has taken significant steps to implement the treaty. The United States signed the Hague Convention on March 31, 1994, but it has not yet ratified it. The Department of State is in the process of readying implementation as of March 2006, and will presumably ratify the Hague Convention upon completing implementation.

When the United States does ratify the Hague Convention, its readiness to implement it should be far better than that of Romania. Romania hastily ratified the Hague Convention without any implementation measures in place, and the social and political atmosphere surrounding the treatment of children and adoption is radically different from that of the United States. One obvious difference between the two countries is the fact that the United States is a “receiving” country for international adoption, whereas Romania is a “sending” country. The primary focus of the United States is thus not in facilitating adoption of its children but in preparing prospective parents to adopt children internationally.

The United States began its preparation for Hague Convention implementation in 1998, under President Clinton. Within two years, Congress passed The Intercountry Adoption Act of 2000 and authorized the United States to officially ratify the Hague Convention. The Intercountry Adoption Act (IAA) provides for implementa-

---

170 See Sargent, supra note 37, at 372–77.
173 Compare Lataianu, supra note 61, at 107–08 (describing the ongoing problems that Romania had with its child welfare system), with Lewin, supra note 6, at 292–319 (describing the current U.S. process of international adoption that is, though complicated, fully in place and part of the U.S. legal system).
174 See Lataianu, supra note 61, at 112–14; Lewin, supra note 6, at 322; Sargent, supra note 37, at 355.
175 See Bartholet, supra note 5, at 186, 201.
176 See Thompson, supra note 117, at 446.
177 See HC and IAA Background, supra note 172.
179 See HC and IAA Background, supra note 172.
tation of all the major Hague Convention requirements. It designates the Department of State as the Central Authority, with the Secretary of State responsible for ensuring that the Central Authority functions in compliance with the Hague Convention.

The IAA resolves many of the major obstacles that prospective U.S. parents had previously faced in the process of international adoption. These obstacles include unclear and narrow definitions about who qualifies as an adoptable “orphan,” complex immigration procedures, and varying state-specific adoption laws.

Without the Hague Convention’s mandate of a Central Authority with specific duties to ensure streamlined immigration procedures, the United States probably would not have implemented federal legislation like the IAA. Traditionally, adoption is governed specifically by individual states. Immigration procedures, on the other hand, are within the jurisdiction of the federal government, and so federal legislation was necessary to govern international adoptions.

The IAA, as of March 2006, is yet to be fully implemented, though in February 2006, the United States took a significant step towards implementation by finalizing the rules governing the accreditation of adoption agencies. The IAA can be expected to have, along with the Hague Convention itself, a dramatic and welcome impact on U.S. procedures, as compared to the current immigration process for foreign-born adoptees in the United States.

Currently, unless the Citizenship and Immigration Service (formerly the Immigration and Naturalization Service) grants a child entering the United States either status as a citizen or as a Legal Permanent Resident, a child cannot enter and thus cannot reside in the

---

180 See id.; supra notes 37-55.
182 See id. §§ 101(a)(1), 102.
183 See Bartholet, supra note 5, at 187–90.
184 See id. at 187–88.
185 See Lewin, supra note 6, at 294–307.
186 See Hubing, supra note 5, at 690.
187 See Bartholet, supra note 5, at 195.
188 See Lewin, supra note 6, at 292.
189 See id.
191 See Lewin, supra note 6, at 292–307.
192 See id. at 291.
country with his or her adoptive parents.\textsuperscript{193} A child who is a foreign national and is adopted in his or her home country by a U.S. citizen or citizens is not currently automatically entitled to emigrate to the United States, nor is he or she entitled to naturalization as a U.S. citizen.\textsuperscript{194} The adoptive parents must petition to have the child designated as an orphan.\textsuperscript{195} Under U.S. law, the child must be under age sixteen, with parents who have died, abandoned the child, or are incapable of caring for him or her.\textsuperscript{196}

Though this definition of orphanage seems comprehensive and simple, if the child’s own country of origin defines an “adoptable” child differently, the United States might deny entry or citizenship to a child who was legally adopted in his foreign home country but does not meet all the requirements of an “orphan” under U.S. law.\textsuperscript{197} For example, some foreign countries permit a sole parent to “release” a child for adoption, but the United States requires that such release be irrevocable and specifically note that the child is to emigrate to the United States.\textsuperscript{198} The United States further requires evidence that a sole parent is unable to care for the child’s basic needs, measured by the local standard in the home country.\textsuperscript{199} Thus, if the child has two known parents (in a married or familial relationship) who wish to surrender the child because of inability to provide him or her with basic care, the United States will not consider that child an orphan and thus will not permit the child to emigrate to the United States.\textsuperscript{200} Similarly, the United States will consider a child abandoned if two parents have unconditionally given him or her up to a state-run orphanage but not if the birth parents have “surrendered” the child to prospective adoptive parents.\textsuperscript{201}

The IAA specifically addresses these complex issues by requiring, before the adoption takes place, that the Central Authority be responsible for ensuring that a particular child will be able to emigrate legally to the United States.\textsuperscript{202} The Central Authority, working directly with its counterpart authority in the child’s country of origin, will be

\textsuperscript{193} See id. at 292.
\textsuperscript{194} Id.
\textsuperscript{195} See id.
\textsuperscript{197} See Lewin, supra note 6, at 300–04.
\textsuperscript{198} See id. at 301.
\textsuperscript{199} Id.
\textsuperscript{200} Id.
\textsuperscript{201} See id. at 302–03.
\textsuperscript{202} See 42 U.S.C. § 301.
able to clarify that country’s laws and rules for qualifying children as “adoptable,” and thus ensure that each adoption by a child outside of the United States will comply with U.S. immigration laws. Further, the IAA radically simplifies the final process by requiring that any adoption finalized in another country—which necessarily must take place under the Central Authority—will be recognized as a final, valid adoption for all purposes of federal and state law. This eliminates the unnecessary barrier between an adoption and a child’s ability to live with his or her legal parents in the United States.

In sum, the United States, as a result of all its preparation and its prominent participation in international adoptions, should be able to implement the Hague Convention with relative ease. Existing structures and procedures will be altered to simplify the process and provide centralized accountability, as the Hague Convention envisioned in its overall goal of facilitating international adoptions for the best interests of children. The United States has fully embraced the Hague Convention and readied its laws and processes accordingly. This is diametrically opposed to Romania’s complete failure to do the same.

III. Analysis

A. Problems with the Hague Convention, As Seen by the Situation in Romania

While the Hague Convention represents a significant step towards ensuring minimum standards in regulation of international adoption, it does not go far enough. Romania quickly signed and ratified the treaty, pledging acceptance of its theory and requirements. The Romanian government, however, never made significant steps towards any sort of implementation. More importantly, the government never seemed to embrace the basic premise of the Hague Convention that

---

203 See Hague Convention, supra note 23, arts. 17, 18.

204 See 42 U.S.C. § 301(2)(b).

205 See Lewin, supra note 6, at 292–94.


207 See Hague Convention, supra note 23, pmbl., art. 1(a); Preparations, supra note 206.

208 See generally 42 U.S.C. § 14901–14954; Preparations, supra note 206.

209 See Bartholet, supra note 5, at 291.

210 See id. at 194–95; Sargent, supra note 37, at 378–80.

211 See Sargent, supra note 37, at 355, 380.

212 See id. at 380.
international adoptions can serve the best interests of children.\textsuperscript{213} As a ratifier of the Hague Convention, Romania continues to have a legal obligation to abide by its terms.\textsuperscript{214}

The European Union is in a unique position to ensure that Romania abides by these obligations.\textsuperscript{215} Since its initial application to enter the EU, Romania has demonstrated its willingness to follow the EU’s recommendations and requirements.\textsuperscript{216} But while nineteen of the EU’s twenty-five member states have signed the Hague Convention,\textsuperscript{217} the EU’s support of a virtual outright ban on international adoption in Romania misinterprets the proposition at the heart of the Hague Convention.\textsuperscript{218} Although the EU has correctly mandated that Romania ensure child welfare and rights as a condition of its admission, its focus on the conditions of institutionalized children and a ban on international adoption means that the EU is effectively only addressing a fraction of the whole problem.\textsuperscript{219}

Institutionalized children unquestionably need a clean, healthy, and supportive environment,\textsuperscript{220} but the EU should recognize that the goal should be to have as few children in institutions as possible.\textsuperscript{221} This can be achieved by four means: preventive measures to reduce the number of abandoned children;\textsuperscript{222} efforts to reunite children with their families;\textsuperscript{223} domestic adoption;\textsuperscript{224} and international adoption.\textsuperscript{225} By foreclosing the option of international adoption, Romania, with the support of the EU, is effectively keeping more children in institutions than need to be.\textsuperscript{226} By focusing on the threat of child trafficking, the EU is seeing only the negative potential of international adoption and is ignoring its positive potential.\textsuperscript{227} The EU should exert its con-
siderable power over Romania by shifting its position in favor of the ban on international adoption to a full and comprehensive effort to put a workable system of international adoption into place. Only by the EU initiating a move in this direction will the children of Romania be given a full opportunity to "grow up in a family environment, in an atmosphere of happiness, love and understanding," as the Hague Convention implies is their fundamental human right.

The members of the Hague Conference can help facilitate this change by publicly supporting the European Union to change its position. Because Romania has pledged its allegiance to the Hague Convention and yet has failed to recognize its obligations even minimally, the Hague Conference members should be obligated to help rectify the situation. A public declaration by the member states would demonstrate solidarity with each other, saying that they are invested in the realization of the Hague Convention, regardless of whatever difficulties a particular country may encounter in its implementation.

Additionally, UNICEF, the United Nations Children’s Fund, would be in a powerful position to advocate for this position. UNICEF has staunchly advocated that children unable to remain in and be raised by their natural family should be placed in alternative family settings rather than institutional care. It has acknowledged international adoption as the best alternative in certain situations and has strongly supported the Hague Convention’s focus on ensuring that such adoptions proceed in the best interests of the child. With the support of a major, internationally recognized children’s advocacy organization, a potential EU quest to carry out the best interests of Romania’s children by requiring the country to institute a workable system of international adoption would have a good chance of success.

228 See Bartholet, supra note 5, at 210; cf. 2000 Regular Report, supra note 149, at 20; 2001 Regular Report, supra note 150, at 24–25 (demonstrating that the EU wields considerable power over Romania because of the country’s membership bid, and that Romania is thus willing to act on the EU’s suggestions).

229 See Hague Convention, supra note 23, pmbl.

230 See generally Hague Convention, supra note 23.

231 See generally id.

232 Cf. Bartholet, supra note 5, at 194–95 (demonstrating that implementation of the Hague Convention might be uneven across countries and that many countries may struggle with its mandates).

233 See Rios-Kohn, supra note 43, at 27.


235 See id.

236 See Rios-Kohn, supra note 43, at 27.
The Hague Conference should also consider further amending the Hague Convention to institute implementation assistance.\textsuperscript{237} By including non-member states in drafting the Hague Convention, the Hague Conference recognized the special role that some countries play in international adoption.\textsuperscript{238} These countries, like Romania, represent largely “sending” countries in international adoption proceedings, yet they also tend to have the most unstable or ill-equipped governments, making implementation of the Hague Convention exceedingly difficult.\textsuperscript{239} For the Hague Convention goals to be realized, each country must domestically institute its requirements.\textsuperscript{240} While it is, of course, a fundamental principle of international sovereignty that each country determine how to govern and institute international treaties independently, the Hague Convention should be amended to provide for a committee to develop a plan that would guide and assist these countries in realizing the Hague Convention requirements.\textsuperscript{241}

B. Problems with the Hague Convention as Evidenced by the United States

Clearly, a country like the United States is able to institute the requirements of the Hague Convention and easily adhere to its broad, overall goals and procedures.\textsuperscript{242} Once the United States officially ratifies the Convention and brings the IAA into full effect, however, its international adoption procedures could highlight the Hague Convention’s smaller, more nuanced problems.\textsuperscript{243}

The Hague Convention lacks definitions of certain terms that could result in serious disputes.\textsuperscript{244} Most significant, and potentially most disputative, is the Hague Convention provision stating that “[t]he recognition of an adoption may be refused in a Contracting State only if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child” (emphasis added).\textsuperscript{245} Without a definition of what might be “manifestly contrary” to public policy, the provision allows wide discretion for a country to define its own stan-

\begin{itemize}
  \item \textsuperscript{237} See id. at 26–27.
  \item \textsuperscript{238} See Hague Convention, supra note 23, intro., 32 I.L.M. at 1139.
  \item \textsuperscript{239} See Rios-Kohn, supra note 43, at 27.
  \item \textsuperscript{240} See Bartholet, supra note 5, at 194–95.
  \item \textsuperscript{241} See Thompson, supra note 117, at 466–67.
  \item \textsuperscript{242} See id. at 457.
  \item \textsuperscript{243} See id. at 462–67.
  \item \textsuperscript{244} See id. at 463–66.
  \item \textsuperscript{245} See Hague Convention, supra note 23, art. 24.
\end{itemize}
Yet the inclusion of the qualifying word “manifestly,” rather than simply “contrary to public policy,” seems to set up a heightened standard. Additionally, the phrase “taking into account the best interests of the child” adds to this sense that the Hague Convention is restricting a country’s total discretion to define its own terms. The Hague Convention, however, includes no review or appeals process for adoption cases rejected by one country on public policy grounds. Thus, the addition of the qualifying and seemingly restrictive phrases may have no force whatsoever; if a country decides to reject an adoption on the grounds that it is contrary to public policy, the prospective adoptive parents and the other contracting country have no means of redress.

Questions also remain about what adoptions may be considered contrary to public policy. Presumably, the categories could include inter-racial adoption, inter-religious adoption, inter-ethnic adoption, as well as adoption by single people, same-sex couples, or people over or under a certain age.

In the U.S. courts, a long standing principle of international law is that a foreign country’s law that merely differs from that of the United States does not make it automatically contrary to public policy. Presumably, this applies to international adoption as well—mere incompatibility of laws does not translate into a situation “manifestly contrary to public policy.” Instead, “[t]here must be something which offends by shocking moral standards, or is injurious or pernicious to the public welfare.” In the United States, courts rarely find foreign adoptions “repugnant,” but when they do, it is usually

---

246 See Thompson, supra note 117, at 463–64.
248 But see Thompson, supra note 117, at 464–65.
249 See id. at 466–67.
250 See id.
253 See Bartholet, supra note 5, at 204–05.
254 See Hubing, supra note 5, at 667–68.
255 See id. at 668–70.
258 See Hague Convention, supra note 23, art. 24; Seymour, supra note 257, at 393.
259 See Seymour, supra note 257, at 393 (quoting In re Schultz Estate, 348 P.2d 22, 28 (Or. 1959)).
those that fail to mimic U.S. notions of the nuclear family, thus primarily impacting single parents and same-sex couples.\textsuperscript{260} Currently, Florida is the only state that specifically bans same-sex couples from adopting children.\textsuperscript{261} Other states, such as Nebraska and Ohio, effectively ban same sex couples from adopting by prohibiting “second parent” adoptions by gay individuals in same-sex relationships.\textsuperscript{262} Thus, same-sex couples who jointly parent adopted children must choose only one of them to become the legal adoptive parent.\textsuperscript{263} The child has no legal rights to government benefits if the non-adoptive parent dies or is disabled, and that parent has no legal right to parent the child if the adoptive parent is incapacitated or dies.\textsuperscript{264}

Some countries, such as China, specifically prohibit same-sex couples from becoming adoptive parents.\textsuperscript{265} China classifies homosexuality as a psychiatric disease, and the country’s laws only recognize families as those with married parents of the opposite sex.\textsuperscript{266} The Hague Convention would presumably allow China to classify an intercountry adoption by same-sex couples as “manifestly contrary to public policy.”\textsuperscript{267} The United States position would not be as clear, however.\textsuperscript{268} The Central Authority might grant same-sex couples status (or deny such status) as qualified parents based on the laws of their home state.\textsuperscript{269} It would have to determine if legally married same-sex couples from Massachusetts should be granted special consideration,\textsuperscript{270} or whether they should be treated exactly like a same-sex Florida couple that is expressly pro-

\textsuperscript{260} See id. at 394.
\textsuperscript{263} See Biskupic, supra note 262.
\textsuperscript{264} See id.
\textsuperscript{267} See Hague Convention, supra note 23, art. 24.
\textsuperscript{268} See Hubing, supra note 5, at 668–71.
\textsuperscript{269} See id. at 689–90.
hibited from adopting by state law. To resolve these conflicting issues, the Central Authority might look to the federal Defense of Marriage Act, which could arguably show that families with same-sex parents are contrary to U.S. public policy. Because adoption law is so deeply and traditionally entrenched within individual state law, the Central Authority would probably have to make its determinations of parental acceptability based on such state laws. The United States is implementing a single Central Authority within the federal government, even though the Hague Convention would have allowed for Central Authorities in each individual state in the country. This choice establishing uniformity, however, is contravened if the same people, going through the same evaluation and application process, can be granted acceptable parental status by residing in Massachusetts but denied such status when residing in Florida. Initially, the Central Authority should adhere to home-state laws for these determinations. These issues, however, are sure to arise almost immediately after the Central Authority is instituted under the State Department, perhaps forcing the federal government to more closely examine the issue of same-sex parenting.

Another issue that the Central Authority in the United States will face is how to interpret the Hague Convention requirement that no one may “derive improper financial or other gain” from intercountry adoptions. That Article goes on to state that “[o]nly costs and expenses, including reasonable professional fees of persons involved in the adoption, may be charged or paid,” but this qualification does little to define what “improper financial or other gain” and “reasonable professional fees” mean exactly. Presumably, the provisions are vague so as to allow the country and its Central Authority flexibility to determine definitions on their own, but costs in intercountry adoptions can vary by tens of thousands of dollars. In some countries, bribes thinly veiled as “gifts” are commonplace. A serious issue could arise over...

271 See Miller, supra n. 261.
273 See Lewin, supra n. 6, at 292.
274 See Hague Convention, supra n. 23, art. 6.
275 See id.; see also Waddell, supra n. 261; Abraham & Klein, supra n. 270.
276 See Lewin, supra n. 6, at 292.
278 See Hague Convention, supra n. 23, art. 32(1).
279 See id. art. 32(2).
280 See Bartholet, supra n. 5, at 190.
whether these gifts remain acceptable under the Hague Convention if they are not so large as to constitute “improper” gain, or if the fact that they are unofficial, yet tacitly required, payments make them forbidden given the overall Hague Convention goal of putting international adoption under regulated oversight.282

The U.S. Central Authority should mandate a clear policy that no payments outside of professional fees should be involved in international adoptions in any way.283 Because all international adoptions must go through the Central Authority, it has the power to accredit those outside adoption agencies that deal with the day-to-day processes of each individual adoption.284 The Central Authority thus has the power to monitor the exact rates that each agency charges over the course of the adoption.285 The Central Authority also has power to institute an adverse action against an accredited agency and remove its accreditation, which could presumably be based upon excessive fees.286

The Central Authority should make a clear policy available to all prospective adoptive parents that any fees above and beyond those charged by the monitored agency are completely unacceptable.287 The Central Authority should ensure that prospective parents have an open avenue of communication with their home Central Authority—particularly when they are actually in the process of adopting in a foreign country—for reporting any suspected illegal demands or expectations of payment.288 Because the U.S. Central Authority will have worked closely with the Central Authority of the child’s home country

282 Id. Harvard Law School professor Elizabeth Bartholet, writing about her personal experience as a parent trying to adopt a child in Peru, says of her apprehension about a particular social worker’s reputation for harshness towards foreign adoptive parents:

No one knows for sure why [she has removed several children from the adoptive parents], but some suspect that it was because she felt she had not been appropriately treated. Does this mean they failed to provide a “gift” that she felt entitled to? It is illegal to bribe public officials in Peru . . . so it seems genuinely dangerous to think of offering anything to a social worker. But the bureaucratic and judicial systems traditionally operate on the premise that gifts will be given to smooth the way; a refusal to proffer the expected gift can be seen as niggardly or hostile, and it poses a very real risk that whatever it is you want will simply not happen.

Id.

283 See Hague Convention, supra note 23, art. 32(2).


286 See 42 U.S.C. § 204.

287 See Hague Convention, supra note 23, art. 32(2).

288 See id. art. 33.
in instituting the adoption in the first place, the U.S. Central Authority should address each specific reported abuse immediately with the other country’s Central Authority.289 Only this sort of swift, firm communication between Central Authorities will ensure that prospective parents are not taken advantage of and that no individual or agency receives any sort of undue financial gain from the adoption.290

These two major issues concerning public policy and financial matters highlight the need for the Hague Convention to further define the vague terms within its provisions, as well as provide some appeals or enforcement procedures.291 Additionally, the Hague Convention should be amended to include some sort of implementation assistance to aid “sending” countries like Romania in setting up a Central Authority to enable them to fully participate in monitored international adoption procedures.292

### Conclusion

While the Hague Convention represents a significant step towards ensuring that all international adoptions are governed by certain minimum standards, keeping the best interests of the child paramount, the Hague Convention falls short in two significant respects. First, the Hague Convention’s regulations are most needed in countries like Romania, where large numbers of institutionalized children are in dire need of stable families and thus could benefit greatly from a regulated system of international adoption. The Hague Convention, however, is least likely to be effectively instituted in such countries because the same political and economic strife that results in large numbers of children in need also inhibits the government’s ability to undertake such extensive structural changes. Thus, the Hague Conference member states need to either establish committees focused on helping countries actually implement the Hague Convention’s mandates, or they need to work closely with the EU and other strong political forces to institute a realistic implementation. Second, for countries like the United States that are fully capable of realizing the broad Hague Convention goals, the Hague Conference members need to amend the Hague Convention to clarify certain language provisions. Most notably, the members need to clear up exactly what countries may classify as contrary to their

289 See id. art. 7.
290 See id. art. 32(2).
292 See Sargent, supra note 37, at 380.
public policy, and—more importantly—they need to allow for some sort of appeals or review process when one country blocks an adoption on this basis that is otherwise in the child’s best interests. Additionally, the states need to issue clear guidelines about what constitutes prohibited financial gain in the context of adoptions. If the Hague Convention develops on both these wide-reaching and smaller-scale levels, it truly will be a document that fosters the best interests of the children by facilitating international adoption.