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Difficulties Implementing the Hague Convention on the Protection of Children and Co-Operation in Respect of Intercountry Adoption: A Criticism of the Proposed Ortega's Law and an Advocacy for Moderate Adoption Reform in Guatemala

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DIFFICULTIES IMPLEMENTING THE HAGUE CONVENTION ON THE PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION: A CRITICISM OF THE PROPOSED ORTEGA'S LAW AND AN ADVOCACY FOR MODERATE ADOPTION REFORM IN GUATEMALA

Katherine Sohr†

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I. INTRODUCTION

International adoption and its practices pose difficult legal and ethical complexities for the international community. International adoption¹ is a prevalent practice, offering a mutually beneficial situation for adoptive families and orphaned children. It creates an opportunity for adoptive parents in one country to provide a permanent family for an orphaned child residing in another country. The number of United States citizens adopting internationally has increased each year,² with 21,895 children adopted from various countries in 2005.³ From 2002 through 2005, the United States Department of Homeland Security's Citizenship and Immigration Services (CIS) issued the most visas to orphans adopted from the top four sending countries,⁴ namely, China, Russia, Guatemala, and South Korea.⁵

In recent years, the international community has focused on international adoption through the drafting and establishment of the Hague Convention for the Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague

¹ International adoption is frequently called intercountry adoption. For the purposes of this Comment, these terms will be used interchangeably to refer to the process of adoptive parents of one country adopting a child of another country.

² U.S. Dep't of State, Immigrant Visas Issued to Orphans Coming to the U.S., http://travel.state.gov/family/adoption/stats/stats_451.html (last visited Feb. 27, 2006) [hereinafter Immigrant Visas]. The number of immigrant visas issued to orphans coming to the United States from the top 20 countries of origin totaled 21,843 in 2004. *See id.* This reflects an increase from 2003, when 20,443 visas were issued. *See id.*

³ *Id.*

⁴ For the purposes of this Comment, *sending country* refers to a child's birth country or country of origin; *receiving country* refers to the country into which the child is being adopted and will become a citizen, and where at least one adoptive parent is a citizen.

⁵ Immigrant Visas, *supra* note 2. In 2005, 7,906 visas were issued for children from China, 4,639 from Russia, 3,783 from Guatemala, and 1,630 from South Korea. *Id.* In 2004, the following numbers of visas were issued to children residing in these countries: 7,044 to children from China, 5,865 to children from Russia, 3,264 to children from Guatemala, and 1,716 to children from South Korea. *Id.* In 2003, the statistics are as follows: 6,859 to children from China, 5,209 to children from Russia, 2,328 to children from Guatemala, and 1,790 to children from South Korea. *Id.* Similarly, in 2002, the statistics are: 5,053 to Chinese orphans, 4,939 to Russian orphans, 2,219 to Guatemalan orphans, and 1,779 to South Korean orphans. *Id.*

Convention).⁶ The Hague Convention seeks “to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child,”⁷ as well as “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.”⁸ The third objective of the Hague Convention is “to secure the recognition in Contracting States of adoptions made in accordance with the Convention.”⁹

Both member and non-member states to the Hague Conference on Private International Law (Hague Conference)¹⁰ are allowed to participate in the Hague Convention, through the drafting stages, as well as by becoming a signatory to, acceding to, and ratifying the Convention.¹¹ As of April 2005, sixty-seven states contracted to the Hague Convention.¹² The international community at large has recognized the importance of international adoption and has focused its energies on creating a more efficient, stable, and ethical system of adoption through the co-operation of Hague Convention states. The international community recognizes the “best interest of the child”¹³ as the central standard for international adoptions.

The Hague Convention provides a lens through which to view the legal and ethical issues involved in international adoption, as well as a general consensus on the best approach to

⁶ Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134, 1139 [hereinafter Hague Convention].

⁷ *Id.* at art. 1(a).

⁸ *Id.* at art. 1(b).

⁹ *Id.* at art. 1(c).

¹⁰ The Hague Conference refers to the Permanent Bureau of the Hague Conference on Private International Law, which proposed the subject of international adoption on January 19, 1988 to the Special Commission on General Affairs and Policy of the Conference. See G. Parra-Aranguren, *Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* (HCCH Publ'ns 1994), available at <http://hcch.e-vision.nl/upload/exp133e.pdf>.

¹¹ *Id.* See also HCCH Status Table 33: Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=69 (last visited Oct. 17, 2005) [hereinafter HCCH Status Table].

¹² See HCCH Status Table, *supra* note 11.

¹³ Hague Convention, *supra* note 6, at art. 1(a). See also Parra-Aranguren, *supra* note 10 (explaining that the Hague Convention took many ideas from the Convention on the Rights of the Child (CRC)).

these issues as decided through years of deliberation and efforts in the drafting of the final Hague Convention.¹⁴ The Hague Convention also recognizes the importance of the adoption triad—the child, the biological family, and the adoptive family.¹⁵ Although the Hague Convention is only binding on signatory states, it provides both signatory and non-signatory countries a framework for establishing efficient safeguards for international adoption in order to protect the best interests of children in need of homes.

This Comment addresses the international adoption practices in Guatemala under the current notarial system and the reforms proposed by Law Initiative 3217 (Ortega's Law).¹⁶ The new reforms will be discussed in light of the Hague Convention's requirements, while recognizing that Guatemala has not adapted its adoption process to meet the Convention's requirements.¹⁷ Although Guatemala acceded to the Hague Convention in March 2003, "on August 13, 2003 the Constitutional Court ruled that the accession of Guatemala to the Hague Con-

¹⁴ See Parra-Aranguren, *supra* note 10. This Explanatory Report contains helpful background information regarding the drafting process and the comments made by individual countries regarding various provisions. It provides a good reference for understanding the many levels of discussion and deliberation involved in creating the final version of the Hague Convention and allows the reader to understand the complexities involved in creating an acceptable Convention, which reflects the cultural and legal concerns of the many countries that participated in the drafting. Both sending countries and receiving countries participated in the drafting, providing important insight into the concerns shared by both sides of the international adoption spectrum. This Report sets the general background for how the Hague Convention establishes intercountry cooperation.

¹⁵ Hague Convention, *supra* note 6, at 1139 (The Preamble to the Convention states that the Convention is "[d]esiring to establish common provisions to this effect, taking into account the principles set forth in international instruments, in particular the United Nations Convention on the Rights of the Child, of 20 November 1989, and the United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (General Assembly Resolution 41/85, of 3 December 1986)."). See also Parra-Aranguren, *supra* note 10.

¹⁶ See Law Initiatives Presented by Representative Jorge Luis Ortega and Companions (Feb. 17, 2005) (Guat.), <http://www.focusonadoption.com/pdfs/TRANS LATION%20INICIATIVA%203217%202-05.pdf> [hereinafter Law Initiatives].

¹⁷ See Press Release, U.S. Dep't of State, Implementation of the Hague Convention on Intercountry Adoption (Feb. 15, 2006) [hereinafter Dep't of State Press Release].

vention . . . was unconstitutional.”¹⁸ Despite this ruling, this Comment discusses how the proposed Ortega’s Law attempts to implement Hague Convention standards in reforming the Guatemalan adoption process.

Although Ortega’s Law is seemingly a positive step toward reform and implementation of the “best interest of the child” standard,¹⁹ it ultimately fails to establish the methods for successful implementation of such reforms to the adoption system. For example, Ortega’s Law suggests implementing and managing state-run child welfare systems to provide birth mothers with resources and services to raise their children rather than having the birth mothers relinquish their children for adoption due to poverty.²⁰ However, Ortega’s Law provides unrealistic goals with inadequate financial resources, which would place an enormous burden on an already poor country.²¹ Therefore, this Comment argues that despite its outward appearance as a positive step toward adoption reform, Ortega’s Law will negatively impact the lives of many Guatemalan children who are waiting to find permanent homes.

Many children awaiting adoption likely will be trapped for years in state-run orphanages while the new reforms are put into place.²² Unfortunately, as children get older, their chances for adoption decrease and their potential for developmental de-

¹⁸ Press Release, International Adoptions in Guatemala Hague Convention Ruled Unconstitutional (Sept. 12, 2003) (on file with author) [hereinafter Guatemala Press Release].

¹⁹ Hague Convention, *supra* note 6, at art. 1(a).

²⁰ See Law Initiatives, *supra* note 16, at art. 6 (stating that “the situation of poverty or extreme poverty does not constitute sufficient motive for placing a boy, girl or adolescent for adoption”).

²¹ Although Ortega’s Law provides that “the National Adoption Rectory (the Central Authority) will depend financially on the Procuraduría General de la Nación (PGN),” it does not explain where the PGN will obtain these extra financial resources. See *id.* at art. 21; see also Guatemala Adoptive Families Network, Current Status of Guatemalan Adoptions, <http://www.guatefam.org/current.htm> (last visited Oct. 24, 2005) [hereinafter Current Status].

²² Note that many Guatemalan children currently reside in orphanages. However, the process of obtaining an abandonment decree and adopting these children through the judicial process can be extremely long. For this reason, many families do not consider this channel for adoption, opting to adopt through the notarial system. See *infra* note 28.

lays and emotional difficulties increases.²³ The proposed reforms create a potential system for entrapping many children eligible for adoption in a process that likely never will succeed due to the economic difficulties of implementation.²⁴ Ortega's Law, therefore, does not achieve the globally desired goal of providing for international adoption, which is in the "best interest of the child."²⁵

Part II of this Comment addresses the current Guatemalan adoption system, the proposed Ortega's Law, and a general overview of the various proponents and opponents of the law. Part III discusses background principles of the Hague Convention, including the United States' planned ratification and participation, and the general impact of the Hague Convention on American adoptions. Part IV addresses the problems of implementing the Hague Convention from both the receiving and sending countries' perspectives. In particular, it criticizes the requirement that poverty-stricken sending countries completely revamp their adoption systems without financial means for such reforms. This section also analyzes problems faced by other sending countries²⁶ in implementing Hague Convention reforms and compares them to the system of reform in Guatemala proposed under Ortega's Law.

Part V advocates for adoption reform in Guatemala with an improved balancing of the current needs of their children. This Comment criticizes the proposed Ortega's Law as being an inefficient means of protecting the children by failing to provide financial resources and realistic time frames for such large scale adoption reforms. This Comment argues that a more moderate approach to adoption reform, using attorneys as non-accredited persons as allowed by the Hague Convention,²⁷ is a better alter-

²³ See Dana E. Johnson, *Adoption and the Effect on Children's Development*, in *EARLY HUMAN DEVELOPMENT* 68, 39-54 (Elsevier Science Ireland Ltd., 2002), available at http://www.med.umn.edu/img/assets/17664/Adoption_Effects.pdf.

²⁴ See, e.g., Reports on Romania for Year 2004: Human Rights Report, Children, http://www.usembassy.ro/US_Policy/2004_HRR.html [hereinafter Reports on Romania] (providing Romania as an example of such a country where a moratorium was put in effect during lengthy child reform efforts).

²⁵ Hague Convention, *supra* note 6, at art. 1(a).

²⁶ Romania's specific situation will be discussed in Part IV of this Comment.

²⁷ See Jennifer Degeling and Carlotta Alloero, *A Discussion Paper on Accreditation Issues*, Aug. 2005, available at http://www.hcch.net/upload/wop/ado_pd03e.pdf.

native for Guatemala. Allowing international adoption attorneys to participate substantially in the reform process by permitting these attorneys to perform the functions of “non-accredited persons,” as suggested by the Hague Convention, would be the most practical and helpful solution to improving the adoption procedure while allowing intercountry adoptions to continue through a similar process as is currently in place.

II. THE GUATEMALAN ADOPTION SYSTEM AND THE PROPOSED LAW

A. *The Guatemalan Adoption System*

International adoptions in Guatemala currently are processed primarily through a notarial system of law, involving the interaction of facilitators, attorneys, and governmental actors.²⁸ Birth parents contact the facilitator or attorney directly to relinquish a child for adoption.²⁹ United States adoption professionals work directly with these attorneys in receiving referrals for children available for international adoption. United States adoption workers provide the Guatemalan attorneys with a completed dossier for each adoptive family waiting for a child referral.³⁰ Once a family receives a referral³¹ and decides

²⁸ See International Adoption Guatemala Sheet, maintained by the Bureau of Consular Affairs, U.S. Dep’t of State, http://travel.state.gov/family/adoption/country/country_389.html (last visited Oct. 15, 2005) [hereinafter International Adoption Guatemala Sheet]. See also Jennifer Banks, Note, *The U.S. Legal Market for Guatemalan Children: Suggestions for Slowing the Rapid Growth of Illegal Practices Plaguing International Child Adoptions*, 28 SUFFOLK TRANSNAT’L L. REV. 31 (2004). Please note that many children also reside in orphanages. However, the procedure for adopting children in such orphanages is very long because of the need to obtain an abandonment decree and there are very few children adopted from such institutions. See Sara Dillon, *Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption*, 21 B.U. INT’L L.J. 179, 251-52 (2003).

²⁹ See International Adoption Guatemala Sheet, *supra* note 28.

³⁰ All United States parents go through a home study process with a qualified adoption agency or social worker. The home study process is one in which adoptive families learn about international adoption. It involves an evaluation of the family’s readiness to adopt, educating the family about issues pertaining to international adoption (medical risks, developmental delays, attachment issues, etc.), and providing information regarding the adoption procedure of each country. During the home study process, families are required to submit an I-600A form, home study, and supporting documentation to the United States Citizenship and Immigration Services (CIS) for pre-approval to adopt internationally. Families are fin-

to proceed with the adoption, the parents grant power of attorney to the Guatemalan attorney.³² Therefore, "[i]n most cases the attorney represents the birth parent[s], the adopting parent, and the child[ren] in the Guatemalan Government proceedings."³³ Proponents of adoption reform suggest this creates a conflict of interest for the Guatemalan attorney and produces an atmosphere susceptible to coercion, fraud, and profitable arrangements for the attorneys and facilitators.³⁴

The Guatemalan attorney must prove to the United States Embassy in Guatemala that the child referred to the adoptive couple is eligible for adoption under the United States definition of a legal orphan.³⁵ As proof, the attorney must provide the CIS office in Guatemala with the "consent of the birth mother to the adoption, her birth certificate and a notarized copy of her 'cedula' (national identification card), and the hospital records of the birth," as well as the results of an HIV test performed on the birth mother.³⁶ The Embassy then performs a DNA test on the birth mother to verify that the child has not been stolen and relinquished by a false birth mother.³⁷ The Embassy further

gerprinted through the federal system. See International Adoption Guatemala Sheet, *supra* note 28, at Part IV. CIS grants its approval by issuing the I-171H form. Families authenticate their dossiers at the Guatemalan Consulate or Embassy, after which the dossier is ready for submission to the attorney and the family begins waiting for a referral.

³¹ A referral of a child includes medical and developmental information regarding the child, information regarding his/her birth history, and a picture of the child. Often times in Guatemala, a picture of the birth mother is available. It is a common recommendation of adoption practitioners to advise adoptive parents to review the referral with an international adoption medical specialist before accepting the referral and proceeding to the finalization stages of the adoption. The medical specialist plays an important role in advising clients about any potential physical or mental health risks based on the referral information, or on developmental risks associated with adopting a child residing in an orphanage or in foster care. See University of Minnesota International Adoption Clinic, <http://www.med.umn.edu/peds/iac/>. See also Laura A. Nicholson, *Adoption Medicine and the Internationally Adopted Child*, 28 AM. J. L. & MED. 473 (2002). See generally Orphan Doctor, <http://www.orphandocor.com> (last visited Nov. 19, 2006).

³² See International Adoption Guatemala Sheet, *supra* note 28.

³³ *Id.* at Part I.

³⁴ See generally Banks, *supra* note 28.

³⁵ Legal orphan is defined in the Immigration and Nationality Act. 8 U.S.C.A. §1101(b)(1)(F) (West 2006); see also International Adoption Guatemala Sheet, *supra* note 28.

³⁶ International Adoption Guatemala Sheet, *supra* note 28, at Part IV(B)(2).

³⁷ *Id.*

provides for occasional interviewing of the birth mother to ensure she has freely relinquished her rights.³⁸ This extensive process stems from the “high incidence[s] of corruption and civil document fraud in Guatemala.”³⁹ Upon successful completion, the Embassy approves the birth mother’s consent and grants the “consentimiento” (irrevocable release signed by the birth mother).⁴⁰

The Guatemalan attorney then applies for the child’s passport.⁴¹ The attorney also applies for clearance from a family court social worker to proceed with the adoption case.⁴² After receiving this clearance from the court and ensuring the United States adoptive family has received CIS approval,⁴³ “the attorney submits the case for review by the Guatemalan Solicitor General’s Office (*Procuraduría General de la Nación* [PGN]),” which grants approval for the adoption.⁴⁴ PGN approval begins the adoptive family’s legal responsibility.⁴⁵

Following approval by the PGN, the Guatemalan attorney submits the final documentation, along with the I-600 form,⁴⁶ to

³⁸ See *id.*

³⁹ *Id.*; see, e.g., Facilitator Banned by US Embassy, <http://www.guatadopt.com/archives/000261.html> (last visited Nov. 19, 2006) (providing an example of known corruption, stating: “This is to inform all involved in Guatemalan adoptions that effective today, Mr. Athanasios Kollias, aka Athanase Thomas Collias, Athanasios Thomas, Thomas Collias, has been banned to act as facilitator in the submission and/or processing of I-600 (Petition to Classify Orphan as an Immediate Relative) applications before the U.S. Citizenship and Immigration Services at the American Embassy in Guatemala.”).

⁴⁰ See International Adoption Guatemala Sheet, *supra* note 28, at Part IV(B)(2).

⁴¹ See *id.* at Part IV(C).

⁴² See *id.* at Part IV(B)(1)(a) (stating that a child is eligible for adoption when “a sole and surviving parent [is] unable to care for the child . . . and must in writing irrevocably release the child for adoption and emigration to the United States” or when a child has been abandoned).

⁴³ See *id.* at Part IV(2) (stating that DNA testing of birth mother and DNA match between birth mother and child is required in order to obtain CIS approval).

⁴⁴ This approval is commonly referred to as the “protocol” or “escritura.” *Id.* at Part I, IV(C)(1).

⁴⁵ See *id.*

⁴⁶ The I-600 form is the “Petition To Classify Orphan As an Immediate Relative.” This is the United States approval for American parents to bring their adopted children into the United States following the finalization of an intercountry adoption. See I-600: Petition to Classify Orphan As an Immediate Relative, <http://www.uscis.gov/portal/site/uscis> (follow “Immigration Forms” hyperlink; then follow “Petition to Classify Orphan As an Immediate Relative” hyperlink) (last visited Nov. 19, 2006).

the United States Embassy for the scheduling of a visa interview.⁴⁷ Most frequently, the visa is the final approval the adoptive parents need to bring the child into the United States. Once the child's immigrant visa is issued and a visa medical exam takes place, the child is free to travel to the United States for permanent residence, having satisfied both Guatemalan adoption laws and United States immigration laws.⁴⁸

The current notarial system shows the attorney's prominent role in the Guatemalan adoption process. The attorney is responsible for referring a child to a United States agency, working to obtain the birth mother's consent, and arranging for DNA testing of the birth mother through the United States Embassy.⁴⁹ The attorney also bears the responsibility of obtaining the child's passport and a birth certificate with the adoptive family's name, getting approval by the social worker to process the adoption case, and submitting the final documentation to the PGN for finalization of the adoption in the Guatemalan courts.⁵⁰

Without the attorney, the current process is unworkable. However, this system has been susceptible to corruption and bad adoption practices,⁵¹ arguably due to the attorney's prominent role in dealing directly with all parties—particularly, birth parents and the United States adoption agencies working on behalf of the adoptive families. There is an inherent conflict of interest for attorneys working on behalf of birth parents, who are relinquishing their parental rights, and adoptive families, who are working toward creating a family through this relinquishment.

B. *The Proposed Ortega's Law*

Law Initiative 3217 ("Ortega's Law"), initially presented to the Guatemalan Congress on February 17, 2005,⁵² advances radical changes to the international adoption practices in Gua-

⁴⁷ The visa interview appointment notice is commonly referred to as a "pink slip." See International Adoption Guatemala Sheet, *supra* note 28, at Part IV(C)(1).

⁴⁸ See *id.* at Part IV.

⁴⁹ See *id.*

⁵⁰ See *id.*

⁵¹ See *id.*; *supra* note 39 and accompanying text.

⁵² See Law Initiatives, *supra* note 16.

temala by replacing the current notarial process with new judicial procedures that rely primarily on new government agencies and social services. The objective of Ortega's Law is to regulate "adoption and its judicial, notarial and administrative process."⁵³ In his speech to the Guatemalan Congress, the proponent, Representative Jorge Luis Ortega, stated the motivation for the law:

In effect, for Guatemalan society, 'International Adoption' has been converted into a synonym for the illegal sale and trafficking of children and until this time there has not been a legislative response that duly regulates this institution in order to impede the frequent and uncontrolled abuses that have converted a child into a[n] object of trafficking, violating in this way his human rights.⁵⁴

His opening remarks referenced the worldwide problem of trafficking and illegal adoption practices and noted the Hague Convention's "objective . . . to prevent kidnapping, the sale or the trafficking of children."⁵⁵

Although Guatemala has not constitutionally acceded to the Hague,⁵⁶ the language of the proposal follows the require-

⁵³ *Id.* at art. 1.

⁵⁴ *Id.* at Exposition of Motives. Other legislative proposals have been put forth but never passed into law. *See, e.g.,* Valladeres Law, available at http://www.guatadopt.com/documents/Valladeres_English.pdf.

⁵⁵ *See* Law Initiatives, *supra* note 16, at Exposition of Motives.

⁵⁶ Guatemala's ratification of the Hague Convention was deemed unconstitutional. *See* Guatemala Press Release, *supra* note 18. *See also* Banks, *supra* note 28, at 44-45 (explaining that a group of attorneys led the constitutional challenge through two objections: that "Guatemala never signed the Hague Convention before purportedly ratifying it, rendering the ratification invalid and leaving accession the only means to approve the treaty" and that "Guatemalan Congress exceeded its authority in granting the President the power to accede because accession is not a presidential power enumerated in the Guatemalan Constitution"). *But cf.* HCCH Details, http://www.hcch.net/index_en.php?act=status.comment&csid=767&disp=resdn (last visited Jan.16, 2006) (reporting the official statement of Sept. 3, 2003 from the depositary of the Hague Convention finding Guatemala's accession valid). The depositary stated:

[T]he depositary of the Hague . . . has the honour to acknowledge receipt of the Secretary General's letter of 21 August 2003 regarding the accession of Guatemala to the Convention, in which was mentioned the decision of the Constitutional Court of Guatemala that Decreto 50-2002, by which the Congress of the Republic gave its approval of the Convention, was unconstitutional [sic] in forma total. The depositary declares that the instrument of accession of Guatemala was received on 26 November 2002. The instrument was accepted. . . . [I]n accordance with Article 46, the

ments of the Hague Convention, noting in the proposed reforms both the objectives and requirements of the Hague Convention.⁵⁷ Ortega's Law also makes reference to the Convention on the Rights of the Child (CRC), to which Guatemala is a signatory. The proposal notes Guatemala's commitment under the CRC to allow an adoption system that meets the "best interest of the child" standard.⁵⁸

Under Ortega's Law, a National Adoption Rectory (Rectory) would be created as the Central Authority to "regulate the material of adoption and [to] be the institution in charge of overseeing the faithful completion of the administrative process of all the adoption files."⁵⁹ The Rectory would fulfill the Hague Convention's requirements for creating a competent central authority for the regulation of international adoptions.⁶⁰ The initiative specifies that the "Rectory is a technical institution, with functional independence, that has as its primordial end determining adoptability from a biological, psychological, social and legal point of view of the boy, girl or adolescent subject to be adopted and the suitability of the adoptive parents."⁶¹ The proposal plans that the PGN will finance the Rectory.⁶²

The Rectory's responsibilities include twenty-six enumerated functions under Article 26,⁶³ including preventing of undue material benefits for adoption participants,⁶⁴ maintaining files

Convention entered into force and shall remain valid in the relations between Guatemala and the other Contracting States with effect as of 1 March 2003.

Id. See also Dep't of State Press Release, *supra* note 17 (stating that Guatemala is a party to the Hague Convention but has not yet conformed to its standards).

⁵⁷ See Law Initiatives, *supra* note 16.

⁵⁸ See *id.* Also note that the CRC is noted in the Preamble to the Hague Convention. Under the CRC, "the child's best interest shall be a primary consideration in all actions concerning children," non-discrimination is crucial, as well as the view of an older child regarding his/her adoption. See Permanent Bureau, Prel. Doc. No. 2 of Aug. 2005, Draft *Guide to Good Practice Under the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption: Implementation*, 2.1 (Aug. 2005), available at http://www.hcch.net/upload/wop/ado_pd02e.pdf [hereinafter *Guide to Good Practice*].

⁵⁹ See Law Initiatives, *supra* note 16.

⁶⁰ See *Guide to Good Practice*, *supra* note 58.

⁶¹ See Law Initiatives, *supra* note 16, at art. 21.

⁶² See *id.*

⁶³ See *id.* at art. 26.

⁶⁴ See *id.* at art. 26(b).

and national registries regarding adoption participants,⁶⁵ and ensuring that proper consent is given for relinquishment.⁶⁶ In his opening remarks, Representative Ortega made clear that “the Rectory will not form part of the Judicial Organization but rather will be an administrative entity” and that all controversies will be referred to the courts.⁶⁷

Article 28 describes a Multidisciplinary Team (Team) that would assist the Rectory in providing professionals to ensure the “best interest of the child” goal is met.⁶⁸ The Team would consist of professionals, including social workers, psychologists, and doctors.⁶⁹ The Team would be responsible for counseling all parties involved in the adoption, preparing a child study report, opining about the adoptive applicants’ suitability, and preparing a final report for the Rectory on the “suitability of the adoptive parents, the adoptability of [the child and] the empathy between the adoptee and the adoptive parents.”⁷⁰

The proposal states that “the Secretariat of Social Wellbeing of the Presidency (Secretariat) is in charge of looking out for boys, girls, and adolescents in the state of adoptability, that enter in the nurseries, homes, or substitute families of the State.”⁷¹ While maintaining its current responsibilities, the Secretariat would carry additional tasks of preparing a child study, keeping a register of all children, and “maintain[ing] a register and monitoring of the private entities that are dedicated to the care” of children waiting to be adopted, as well as “authoriz[ing], supervis[ing], control[ing], and sanction[ing] the private entities.”⁷² The delineated responsibilities under Ortega’s Law mirror the guidelines for adoption reform as proposed by the Hague Convention.⁷³

Article 6 of Ortega’s Law provides: “The situation of poverty or extreme poverty of the parents does not constitute sufficient

⁶⁵ See *id.* at arts. 26(c)-(d), (f)-(k).

⁶⁶ See *id.* at art. 26(q).

⁶⁷ *Id.* at Exposition of Motives.

⁶⁸ See *id.* at art. 28.

⁶⁹ See *id.*

⁷⁰ *Id.* at art. 30.

⁷¹ *Id.* at art. 31.

⁷² *Id.* at arts. 32(c)-(d).

⁷³ See Hague Convention, *supra* note 6.

motive for placing a boy, girl or adolescent for adoption.”⁷⁴ Through this statement, the proposal implies that if poverty is a factor in a birth parent’s choice to relinquish parental rights, the state will provide alternative choices to relinquishment for the birth parent. It seems to promote the creation of domestic social services to aid poverty-stricken birth families in supporting their children rather than relinquishing them for adoption.⁷⁵ The proposal, however, simply states “[t]he National Adoption Rectory will depend financially on the . . . [PGN],”⁷⁶ but does not make any reference to how the PGN will fund the development of these social services. Significantly, Guatemala is a poor country.⁷⁷

As specified in the Hague Convention, the proposal lists specific prohibitions against any party (including birth parents and facilitators) receiving a profit or payment for relinquishing rights to a child.⁷⁸ It allows for adoption by married individuals, “single people of recognized honorability,” and step-parents of a child.⁷⁹ The proposed law greatly limits the role of the at-

⁷⁴ Law Initiatives, *supra* note 16, at art. 6.

⁷⁵ Many Guatemalan birth mothers live in poverty or extreme poverty. See Banks, *supra* note 28. In addressing which children satisfy the orphan definition, the United States website notes that “[t]he DHS Board of Immigration Appeals has ruled that an inability to care for the child would be demonstrated when the parent is destitute by Guatemalan standards and cannot provide the child with the nourishment and shelter necessary for subsistence consistent with the local standards of the child’s place of residence.” International Adoption Guatemala Sheet, *supra* note 28, at Part IV(B)(1)(a).

⁷⁶ Law Initiatives, *supra* note 16, at art. 21.

⁷⁷ See Bureau of Democracy, Human Rights, and Labor Guatemala Country Reports on Human Rights Practices 2003 (Feb. 25, 2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2003/27900.htm> (stating that “[a]pproximately 57 percent of the total population and 72 percent of persons in rural areas lived in poverty Foreign aid is an important part of national income. . .”).

⁷⁸ See Law Initiatives, *supra* note 16, at art. 10(a). Other prohibitions preclude biological parents relinquishing their rights for adoption by a specific family and prevent adoptive parents from using the adoptive child in organ trafficking. See *id.* at arts. 10(b)-(c). Interestingly, the United States Information Agency published a report in 1996 attempting to dispel the worldwide rumors that adoptive parents adopt children to sell their organs. Organ trafficking has never been confirmed and is viewed by many as a myth perpetuated by opponents to international adoption. See United States Information Agency, *The “Baby Parts” Myth: The Anatomy of a Rumor*, May 1996, http://usinfo.state.gov/media/Archive_Index/The_Baby_Parts_Myth.html.

⁷⁹ Law Initiatives, *supra* note 16, at art. 12(b). A prior proposal restricted adoptive families to “a man and a woman united in marriage” and to single applicants in exceptional cases. The preclusion of single adoptive families except in

torney in the adoption process, which is a radical change from the extensive involvement of attorneys under the current notarial system. Proponents to the law feel the changes will safeguard children by providing an organized system that reduces the risk of corruption.⁸⁰ The proposal seems to comply with Hague Convention standards.

Opponents to the proposed law, including adoption attorneys, are concerned with the difficulties regarding its implementation and the potential constitutional challenges to the law under the Guatemalan Constitution.⁸¹ Professional adoption advocates also have expressed concerns with the proposed law, as a letter from Joint Council on International Children's Services (JCICS) to the Ambassador of Guatemala, H.E. Guillermo Castillo, indicates:

JCICS understands that the law has been read twice and the third reading is scheduled for the end of the month.⁸² We are concerned about the lack of sufficient funding required to successfully support such proposed reforms; the tens of thousands of children currently in private care and how this bill will impact their future care; the lack of clarity of who can adopt; and the sensationalist claims in the legislation that equates international adoption to child trafficking.⁸³

Similarly, an organization of Guatemalan lawyers and adoption agencies established the Asociacion de Defensores de Adopcion

rare circumstances would be a major change in Guatemalan law and a topic of controversy by international adoption advocates, including Joint Council on International Children's Services (JCICS) as evidenced in their letter to the Guatemalan authorities. See Letter from Joint Council on International Children's Services (JCICS) to H.E. Guillermo Castillo, Ambassador of Guatemala (Oct. 24, 2005), available at <http://jcics.org/Guatemala.htm> [hereinafter JCICS Letter].

⁸⁰ See Law Initiatives, *supra* note 16.

⁸¹ See also Current Status, *supra* note 21 (The provisions which may pose constitutional questions "include the ban on singles, the possible elimination of attorneys from the process or portions of it, and the restriction of choices for birth families.").

⁸² In Guatemala, the process of passing a proposal into law involves three readings by the legislature. Upon the third reading, the legislature either votes the proposal into law or votes against it. Other proposed adoption reforms have made it through the second reading as well. Interestingly, the proposals do not get through a third reading, but rather fade. This seems to have occurred with Ortega's Law, as the proposal never had its third reading. See JCICS Letter, *supra* note 79. See also Valladeres Law, *supra* note 54.

⁸³ See JCICS Letter, *supra* note 79.

(ADA) and “advocated [for] some systemic changes to answer charges that the system is open to unethical practices and is ‘insufficiently transparent.’”⁸⁴ In the United States, Focus on Adoption was organized to raise money to support ADA’s efforts.⁸⁵ The Guatemalan Adoptive Families Network also relayed concerns:

PGN does not have a track record of handling adoptions smoothly. If this change results in additional . . . bureaucracy, or makes it more difficult for mothers who want to place their children to enter the system, it could easily be counterproductive despite its good intentions, as frequently happens with adoption reform legislation. The law does not appear to offer any additional resources to PGN to perform the duties it would acquire.⁸⁶

This concern seems to have a strong basis based on Guatemala’s history of political instability, the lack of financial resources for such reforms, and the difficulties implementing similar changes in other poor countries.⁸⁷

III. BACKGROUND HAGUE PRINCIPLES AND RATIFICATION BY THE UNITED STATES

The Hague Convention’s final version was “approved by 66 nations on May 29, 1993”⁸⁸ after being first addressed on January 19, 1988.⁸⁹ The Convention became effective May 1, 1995.⁹⁰ The topic of international cooperation regarding international adoption was taken up by the Seventeenth Session after the

⁸⁴ See Current Status, *supra* note 21 (The ADA “was formed by a core group of lawyers who blocked the implementation of the Hague [C]onvention on adoption by appealing to the Guatemalan Supreme Court and pointing out ways that the Hague implementation was not consistent with the Guatemalan constitution”).

⁸⁵ See generally Posting on behalf of Susana Luarca, Attorney at Law, Asociacion Defensores de Adopcion (ADA), 2005: A Very Positive Year for Guatemala Adoptions, to <http://www.guatadopt.com/archives/000333.html> (Dec. 22, 2005, 08:18 a.m.).

⁸⁶ See Current Status, *supra* note 21.

⁸⁷ Romania will be discussed in Part IV of this Comment.

⁸⁸ Hague Convention on Intercountry Adoption and the Intercountry Adoption Act of 2000: Background, available at http://travel.state.gov/family/adoption/convention/convention_2290.html [hereinafter Hague Background].

⁸⁹ See Parra-Aranguren, *supra* note 10, at 1 (stating that international adoption “was submitted . . . by the Permanent Bureau of the Hague Conference on private international law to the Special Commission on general affairs and policy of the Conference”).

⁹⁰ See Hague Background, *supra* note 88.

preceding session decided the topic to be of great importance.⁹¹ The Seventeenth Session also decided that both Hague member and non-member states should participate in the discussions.⁹² Many of the non-member states were sending countries, and their participation was crucial to successful discussions and progress in creating a workable multilateral treaty for intercountry adoption.⁹³ The Commission emphasized three reasons for focusing on international adoption during the Seventeenth Session:

- i) that intercountry adoption had become a worldwide phenomenon involving migration of children over long geographical distances and from one society and culture to another;
- ii) the complex human problems [resulting from this increased practice and] . . . manifold complex legal aspects; and
- iii) the insufficient existing domestic and international legal instruments, and the need for a multilateral approach.⁹⁴

After five years of deliberation and drafting stages, the final version of the Hague Convention was completed in 1993.

The United States became a signatory to the Hague Convention on March 31, 1994⁹⁵ and continues to pass legislation in order to meet the Convention's requirements and move toward ratification. Both Houses of Congress passed the Intercountry Adoption Act of 2000 (IAA) in September 2000.⁹⁶ President Clinton signed the IAA on October 6, 2000.⁹⁷

IAA requires the State Department to oversee the accreditation process of agencies or approved persons participating in international adoption and to report annually to Congress on the progress of the United States Central Authority (USCA).⁹⁸ According to the IAA, the State Department and Department of Homeland Security are to create a registry to regulate all

⁹¹ See Parra-Aranguren, *supra* note 10, at 2.

⁹² See *id.*

⁹³ See *id.*

⁹⁴ *Id.* at 2-3.

⁹⁵ See Hague Background, *supra* note 88.

⁹⁶ See *id.*

⁹⁷ See *id.*

⁹⁸ See Summary of Provisions of the Intercountry Adoption Act of 2000 (IAA), available at http://travel.state.gov/family/adoption/convention/convention_2308.html. See also Bureau of Consular Affairs, *How will the United States Implement the Hague Convention*, Apr. 2005, available at http://travel.state.gov/family/adoption/convention/convention_2313.html [hereinafter U.S. Hague Implementation].

Hague Convention adoptions.⁹⁹ The State Department also will establish a central authority, the USCA,¹⁰⁰ to fulfill the Hague Convention requirement that each participating country has a central authority in charge of intercountry adoption.¹⁰¹ The USCA is required to provide adequate safeguards for the adoption processes and to establish "channels of communications between authorities in countries of origin of children and those where they live after adoption."¹⁰²

On November 23, 2003, the Intercountry Adoption Reform Act of 2003 (ICARE) was introduced to Congress by Senator Nickles.¹⁰³ In his introduction, Senator Nickles expressed the two goals of the ICARE bill. The first goal was to recognize "that foreign adopted children of American citizens are to be treated in all respects the same as children born abroad to an American citizen."¹⁰⁴ The second goal of the ICARE bill was "to consolidate the existing functions of the federal government relating to foreign adoptions into one centralized office located within the Department of State. Currently, these functions are performed by offices within the Department of Homeland Security and the Department of State."¹⁰⁵

In short, the ICARE bill is intended to enable the United States to implement the goals of the IAA of 2000. ICARE seeks "to establish an Office of Intercountry Adoptions within the Department of State, and to reform United States laws governing intercountry adoptions."¹⁰⁶ The head of the Office of Intercountry Adoption, as proposed by the ICARE bill, is the Ambassador at Large for Intercountry Adoptions who shall be appointed by the President and report directly to the Secretary of State.¹⁰⁷ The Ambassador at Large would be responsible for relaying to the Secretary of State information needed to prepare parts of

⁹⁹ *Id.*

¹⁰⁰ U.S. Hague Implementation, *supra* note 98.

¹⁰¹ Hague Convention, *supra* note 6, at art. 6(1).

¹⁰² Parra-Aranguren, *supra* note 10.

¹⁰³ See Intercountry Adoption Reform Act of 2003, S. 1934, 108th Cong. (2003). See also Statement of Senator Don Nickles Intercountry Adoption Reform Act, available at http://www.jcics.org/Adoption_Legislation.htm [hereinafter Nickles Statement].

¹⁰⁴ Nickles Statement, *supra* note 103.

¹⁰⁵ *Id.*

¹⁰⁶ ICARE Act of 2003, S. 1934, 108th Cong. (2003).

¹⁰⁷ See *id.* at tit. I, sec. 101(b)(1)-(2).

“the Human Rights Reports that relate to the abduction, sale, and trafficking of children”¹⁰⁸ and assisting the Secretary of State in creating an annual report regarding intercountry adoption.¹⁰⁹

Under the ICARE bill of 2003, the Office of Intercountry Adoptions has six enumerated functions: (1) to approve adoptive families; (2) to determine if a child is adoptable; (3) to assist families and to provide timely processing of adoption applications; (4) to assist the Ambassador at Large with policy development “regarding child protection and intercountry adoption;” (5) to act as the central authority and to assist the Secretary of State in carrying out central authority functions; and (6) “to perform administrative functions . . . including legal functions and congressional liaison and public affairs functions.”¹¹⁰ Six divisions within the Office of Intercountry Adoptions will perform each of the above-referenced duties.¹¹¹ Also, the ICARE bill provides that funding for the Ambassador at Large and the Office of Intercountry Adoptions shall be provided by the Secretary of State.¹¹²

In 2004, the ICARE bill of 2004 (S.3031) was introduced to Congress incorporating certain changes as suggested by adoption advocates and professionals, including Joint Council on International Children’s Services (JCICS).¹¹³ Congress has yet to approve or pass the bill into law. However, if it is passed into law, the United States’ ratification of the Hague Convention

¹⁰⁸ See *id.* at tit. I, sec. 101(b)(3)(E)(i).

¹⁰⁹ See *id.* at tit. I, sec. 101(b)(3)(E)(ii) (specifying that the reports shall include “a description of the status of child protection and adoptions in each foreign country,” the number of intercountry adoptions by American citizens under both Hague and non-Hague states, the number of American children being adopted by citizens of other countries, the number of disruptions from Hague states, the time frame for adoptions, a list of accredited agencies and persons and those banned from intercountry adoptions, adoption fees, and recommendations for improvements to the intercountry adoption process).

¹¹⁰ See *id.* at tit. I, sec. 101(e)(1)-(6).

¹¹¹ See *id.* at tit. I, sec. 101(d)(1).

¹¹² *Id.* at tit. III, sec. 301.

¹¹³ See Intercountry Adoption Reform Act of 2004, S. 3031, 108th Cong. (2004). See also Changes to ICARE (S. 3031), available at [http://www.jcics.org/ICARE%20Changes%20\(S%203031\)%20-%2012-7-04.doc](http://www.jcics.org/ICARE%20Changes%20(S%203031)%20-%2012-7-04.doc). Also, some criticize the bill as being too vague and as a preliminary step to United States Hague implementation. See Focus on Adoption: Public Policy and Education: Intercountry Reform Act of 2003 (“ICARE”), available at <http://www.focusonadoption.com/educate1.shtml>.

will likely follow. The planned ratification date for the United States is 2007.¹¹⁴ Once the United States ratifies the Hague Convention, all adoptions between the United States and Hague signatories must comply with Convention standards.

The United States has spent many years preparing for the implementation of the Hague Convention through passing the IAA of 2000 and by proposing several versions of the ICARE bill to Congress. The United States also will have to accredit agencies or other adoption professionals. The United States joined the Convention in 1994 and expects to ratify it in 2007. Even for the wealthiest of countries, implementation of the Hague Convention takes time and resources.

IV. IMPLEMENTATION OF THE HAGUE CONVENTION

A. *The United States: An Example of Implementation Through the Eyes of a Receiving Country*

The United States has devoted and continues to devote much Congressional time, energy, and research into the implementation of the Hague Convention's objectives for an efficient system of intercountry adoption that is in the "best interest of the child."¹¹⁵ One major impact of the Hague Convention on the United States and other receiving countries is the dedication of such resources to re-delegating already existing procedures to various government offices, primarily through centralizing the responsibilities to a central authority. Once the USCA or its equivalent is established by law in the United States, adoptive families in the United States likely will see slowdowns with processing of paperwork, as such slowdowns typically accompany any restructuring. Instead of submitting certain visa paperwork to the Department of Homeland Security's Citizenship and Immigration Office,¹¹⁶ the adoptive families will likely submit the information to the USCA under the leadership of the

¹¹⁴ See Dep't of State Press Release, *supra* note 17.

¹¹⁵ Hague Convention, *supra* note 6, at art. 1(a).

¹¹⁶ At the current time, adoptive parents submit the I-600A and I-600 petition forms through the Department of Homeland Security's Citizenship and Immigration Office because the adoptive children are categorized as immigrants to the United States. However, through the proposed changes as delineated through ICARE 2003 and 2004, adopted children will be treated as children born abroad to United States citizens. Therefore, internationally adopted children will no longer be considered immigrants and will no longer be required to have their visa applica-

Secretary of State.¹¹⁷ Adopted children also will be given valid United States passports under the proposed ICARE law¹¹⁸ and, therefore, adoptive parents will not need to apply for a passport after bringing their children to live in the United States.

However, another potential impact of the Hague Convention on adoptive families is the increased cost of adopting from Hague Convention countries. Adoption practitioners and agencies will experience increased costs in order to meet the Hague requirements and these costs will likely be transferred to the adoptive families through adoption fees.¹¹⁹ In this respect, adoptive families will be required to choose between Hague participating countries and non-participating countries which may be more financially feasible. At the current time, intercountry adoption is very expensive and is a realistic concern for many adoptive families.¹²⁰

From an adoption practitioner's point of view, the Hague Convention reforms pose difficulties, particularly with the accreditation requirements. Smaller agencies may encounter difficulties financing the detailed accreditation procedure and, therefore, may not be able to continue placing children from Hague Convention sending countries.¹²¹ Practitioners may continue to work in non-Hague Convention countries, which will not have the desired Convention safeguards in place. Also, many of the non-Hague Convention sending countries are those where coercion and fraud are known to have existed.¹²² These countries have not ratified the Hague for various reasons, per-

tions processed through the Department of Homeland Security. See ICARE Act of 2003, S. 1934, 108th Cong. (2003). See also Nickles Statement, *supra* note 103.

¹¹⁷ See ICARE Act of 2004, S. 3031, 108th Cong. (2004).

¹¹⁸ *Id.*

¹¹⁹ See Amy Grillo Kales, Note, *The Intercountry Adoption Act of 2000: Are Its Laudable Goals Worth Its Potential Impact on Small Adoption Agencies, Independent Intercountry Adoptions, and Ethical Independent Adoption Professionals?*, 36 GEO. WASH. INT'L L. REV. 477, 492-93 (2004).

¹²⁰ International adoption costs vary, ranging from \$7,000 to over \$30,000. See National Adoption Information Clearinghouse, *Costs of Adopting: A Factsheet for Families*, June 2004, http://naic.acf.hhs.gov/pubs/s_cost/s_costs.pdf.

¹²¹ See Grillo Kales, *supra* note 119.

¹²² See Evan B. Donaldson Adoption Institute Comments to the State Department on Proposed Regulations to Implement the Intercountry Adoption Act and Hague Convention, Docket No. State/ AR-01/96, Dec. 15, 2003.

haps including the financial difficulties of implementing the changes required by the Hague Convention.¹²³

B. *Guatemala: An Example of Implementation Through the Eyes of a Sending Country*

The situation in Guatemala is an important one for American families adopting internationally. Guatemala is the third largest sending country for American adoptive families, with the United States in 2005 issuing 3,783 immigrant visas for Guatemalan orphans coming to the United States.¹²⁴ Two options exist for the future of intercountry adoptions in Guatemala and the impact on these adoptions by American parents. If Guatemala constitutionally accedes to the Hague, ratifies the Hague,¹²⁵ and passes Hague-friendly legislation like Ortega's Law, this will have a huge impact on the trend of American adoptions. Implementation of the changes will take a long time. The uncertainty of these changes and their impact on the adoption process will likely lead many American families to adopt elsewhere,¹²⁶ consequently leaving many Guatemalan children permanently without homes.

However, if Guatemala does not ratify the Hague in a constitutional manner and if it does not pass Hague-friendly legislation (such as Ortega's law), then the intercountry adoption process will likely continue as it is for the time being. The notarial adoption process will continue without the Convention's safeguards in place, with the risk of corruption and coercion of birth mothers known to exist in Guatemala.¹²⁷ The hard work

¹²³ See Caeli Elizabeth Kimball, Article, *Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, 33 DENV. J. INT'L L. & POL'Y 561, 572 (2005). See also Kelly M. Wittner, Comment, *Curbing Child-Trafficking in Intercountry Adoptions: Will International Treaties and Adoption Moratoriums Accomplish the Job in Cambodia?*, 12 PAC. RIM L. & POL'Y J. 595, 617 (2003).

¹²⁴ See Immigrant Visas, *supra* note 2. See also *supra* text accompanying note 5.

¹²⁵ Although Guatemala acceded to the Hague, it was deemed unconstitutional. See Guatemala Press Release, *supra* note 18. See also *supra* text accompanying note 56.

¹²⁶ During times of uncertain political changes and adoption reform in various countries, adoptive parents may choose to adopt from another country or run the risk of encountering a moratorium. See, e.g., Reports on Romania, *supra* note 24.

¹²⁷ See, e.g., *supra* note 39 (providing an example of known corruption).

in drafting the Hague Convention to protect against such abuses will not impact a country such as Guatemala. Ironically, the Hague Convention was created to help countries like Guatemala, where such safeguards are most needed to protect the thousands of children in need of permanent adoptive families.

Guatemala's accession to the Hague Convention in March 2003 was ruled unconstitutional in August of the same year.¹²⁸ However, the successful constitutional challenge seemed to revolve around the method of acceding to the Hague Convention through an overstepping of Presidential power,¹²⁹ rather than the country's actual ability to accede constitutionally to a multilateral treaty such as the Hague Convention. It is unclear whether or not accession to a multilateral treaty is constitutionally permissible under Guatemalan law through a different channel. If Guatemala tries to accede to and ratify the Hague Convention again, there are potential constitutional challenges the opponents to the bill, namely the attorneys currently involved in the international adoption practices, may have, such as challenges to the right to make a living as guaranteed by the Guatemalan constitution.¹³⁰

Interestingly, the status of Guatemala regarding the Hague Convention and Guatemala's ratification of the Convention is unclear. Its accession to the Hague Convention was deemed unconstitutional by the Guatemalan courts. However, the Hague organization accepted Guatemala to the treaty. The United States recognizes Guatemala as a Hague signatory that does not yet have its procedural requirements in place.¹³¹ With this ambiguity, it is unclear how the United States' ratification of the Hague Convention, expected in 2007, will affect American families adopting from Guatemala.

Without constitutionally joining the Hague Convention, Guatemala's proposed Ortega's Law may be a negative step in its adoption reform. Ortega's Law mimics the requirements of the Hague Convention by creating a Central Authority designed to centralize the adoption process and minimize the opportunity for fraudulent documents, coercion of birth mothers, and other

¹²⁸ See Guatemala Press Release, *supra* note 18.

¹²⁹ See Banks, *supra* note 28. See *supra* note 56 and accompanying text.

¹³⁰ See *id.*

¹³¹ See Dep't of State Press Release, *supra* note 17.

unethical child trafficking issues.¹³² However, as noted in the United States Bureau of Public Affairs Note on Guatemala, Guatemala is an extremely poor country with a history of political volatility.¹³³ Although under Ortega's Law the PGN is stated as the funding source for the National Adoption Rectory,¹³⁴ the reality is that the PGN will not be able to afford providing such resources to create an entirely new social welfare system while also undertaking the main role as the central authority for the newly designed adoption system.¹³⁵

Completely altering a system of adoption from the current notarial system to the proposed system under Ortega's Law provides unrealistic goals for an impoverished country. The goals are not to alter or to improve an already existing system but to completely redesign both the adoption system and the child social welfare system.¹³⁶ Arguably, Guatemala already has some mechanisms in place for placing children through the judiciary. The institutionalized children requiring abandonment certificates are adopted through this channel. However, such adoptions are infrequent, for it takes years for the PGN to grant abandonment decrees.¹³⁷

Although many of the changes proposed under Ortega's Law theoretically sound hopeful, realistically the financial and administrative burdens may create a potentially grave situation for the orphaned Guatemalan children and no solution for birth families who cannot care for their children.¹³⁸ The effects of similar adoption reform in other sending countries lend historical context for predicting that radical adoption reform in Guatemala will have negative short-term effects on the children the law is designed to protect.

A main problem of the Hague Convention's reforms involves funding, requiring poverty-stricken sending countries, including Guatemala, to completely revamp their adoption sys-

¹³² See Law Initiatives, *supra* note 16, at Exposition of Motives.

¹³³ See generally Bureau of Western Affairs, Background Note: Guatemala, Nov. 2005, available at <http://www.state.gov/r/pa/ei/bgn/2045.htm> [hereinafter Guatemala Background Note].

¹³⁴ See Law Initiatives, *supra* note 16, at art. 21.

¹³⁵ See generally Guatemala Background Note, *supra* note 133.

¹³⁶ See Law Initiatives, *supra* note 16, at Exposition of Motives.

¹³⁷ See *supra* notes 22 and 28.

¹³⁸ See Banks, *supra* note 28.

tems without financial means for such reforms. Romania provides a good example of how well-intended adoption reforms ultimately lead to ineffective child welfare systems and lack of opportunities for orphaned children to find permanent families. Romania was one of the first three countries to ratify the Hague Convention, along with Mexico and Sri Lanka, on May 1, 1995.¹³⁹ The resulting entrapment of thousands of children in orphanages, not given the opportunity for intercountry adoption, has existed due to “[a] moratorium on adoptions by the Romanian government [that] has been in place since October 2001.”¹⁴⁰ A moratorium effectively bans adoptions from a certain country due to concerns over child welfare systems. In June 2004, the United States Embassy acknowledged:

[T]he prior Romanian legal framework did not always protect the best interests of children, creating opportunity for corruption The United States . . . has made recommendations to the Romanian government on how to improve its adoption procedures The United States has reiterated to the Romanian Government [its] strong support for sound domestic and intercountry adoption procedures, and that a child’s best interest should be the fundamental principle of any adoption legislation. The United States believes that permanent family placement is preferable to foster care or institutionalization in meeting a child’s best interest.¹⁴¹

Unfortunately, existing corruption in Romania led to fraudulent adoptions.¹⁴² Because of the unveiling of such corruption,

¹³⁹ See Hague Background, *supra* note 88.

¹⁴⁰ International Adoption: Update on Romanian Moratorium on International Adoptions, June 10, 2004 (on file with author).

¹⁴¹ *Id.*

¹⁴² See 151 CONG. REC. E2538-03 (2005) (statement of Rep. Smith) [hereinafter Smith Speech]. Representative Smith criticized a recent Romanian law restricting adoptions to biological grandparents. Referring to corruption which existed and infiltrated the adoption system and criticizing the lack of progress in addressing the problems, he stated:

During Romania’s first decade of post-communist transition, the corruption which plagued Romania’s economy and governance also seeped into the adoption system. There is no question that corruption needed to be rooted out. The U.S. Government and the U.S. Helsinki Commission have been steadfast in our support of Romania’s efforts to combat corruption and to promote the rule of law and good governance. I strongly disagree, however, with supporters of the current ban on intercountry adoption who allege that it was a necessary anti-corruption measure. There are many

Romania needed to reform its child welfare system. Due to political changes, political opposition, uncertainty regarding intercountry adoption, and lack of financial resources to adequately fund a dramatic change of the adoption system, little progress was made for many years in terms of revamping the adoption system in order to meet the Hague Convention requirements.¹⁴³ In June 2004, the Romanian government entered "Law 273/2004 . . . into effect . . . [which] banned intercountry adoptions by anyone other than grandparents."¹⁴⁴ This law became effective in January 2005.¹⁴⁵ As U.S. Secretary Maura Harty noted at a Congressional hearing:

Romania is a party to the Hague Convention on Intercountry Adoption, and has therefore agreed to certain international standards and principles, one of which is that intercountry adoption is a legal option for children who cannot find permanent placement in their country of origin. However, the Romanian Government's current adoption law, by effectively closing this option, runs directly counter to this principle.¹⁴⁶

indications that corruption has been used as a hook to advance an ulterior agenda in opposition to intercountry adoption. In the context of Romania's desire to accede to the European Union, unsubstantiated allegations have been made about the fate of adopted children and the qualifications and motives of those who adopt internationally. Romanian policy makers chose to adopt this law against intercountry adoption in an effort to secure accession despite the fact, as stated in H. Res. 578, that there is no European Union law or regulation restricting intercountry adoptions to biological grandparents or requiring that restrictive laws be passed as a prerequisite for accession to the European Union.

Id.

¹⁴³ H. R. Res. 578, 109th Cong. (2005) (stating "following the execution of Romanian President Nicolae Ceausescu in 1989, it was discovered that more than 100,000 underfed, neglected children throughout Romania were living in hundreds of squalid and inhumane institutions;" international adoption proved to be a crucial option for many of these children, "between 1990 and 2004, United States citizens adopted more than 8,200 Romanian children, with a similar response from Western Europe"). See also Smith Speech, *supra* note 142 (stating that "[t]he legacies of Ceausescu's rule continue to haunt Romania and, when coupled with widespread poverty, have led to the continued abandonment of Romania's children").

¹⁴⁴ Maura Harty, U.S. Embassy Statement on Inter-Country Adoptions in Romania, Sept. 14, 2005, available at http://www.usembassy.ro/fwww/Documents/Harty_09142005_2.html [hereinafter Harty Statement].

¹⁴⁵ Smith Speech, *supra* note 142.

¹⁴⁶ Harty Statement, *supra* note 144.

Although Romania was one of the first countries to ratify the Hague Convention,¹⁴⁷ the adoption reform has not progressed at an acceptable pace and has not met the “best interest of the child” standard.¹⁴⁸ The most recent legislation limited intercountry adoptions to grandparents, leaving “hundreds of cases that were in process . . . pending . . . [and, combined with] an increasing rate of child abandonment in hospitals (5,000 in 2003 and 2,500 by June [2004]) strained government resources,”¹⁴⁹ leaving approximately 26,600 children remaining in institutions.¹⁵⁰

In late November 2005, H. Res. 578 was introduced by Mr. Smith of New Jersey and was referred to the Committee on International Relations.¹⁵¹ The bill was to encourage the House of Representatives to do the following: support the Romanian government in improving “the standard of care and well-being of children in Romania;”¹⁵² encourage the Romanian government to complete the pending cases of intercountry adoptions when Law 273/2004 came into effect;¹⁵³ encourage changes to the Romanian “child welfare and adoption laws to decrease barriers to adoption, both domestically and intercountry, including by allowing intercountry adoption by persons other than biological grandparents;”¹⁵⁴ encourage cooperation between the Secretary

¹⁴⁷ See Hague Background, *supra* note 88.

¹⁴⁸ Hague Convention, *supra* note 6, at art. 1(a). See also Harty Statement, *supra* note 144.

¹⁴⁹ Reports on Romania, *supra* note 24.

¹⁵⁰ *Id.* (stating that “[l]iving conditions have improved in most [Romanian] childcare institutions in recent years. More than half of the 106,000 children in public care were placed with families (extended family, foster care), while the number of children remaining in residential care (including special schools) dropped to 26,600. In practice, children below the age of 2 were no longer placed in institutions, but were instead placed with foster parents or extended families”). Cf. H. R. Res. 578, 109th Cong. (2005) (stating different statistics that also exhibit the need for reformed child welfare services; “there are approximately 37,000 orphaned or abandoned children in Romania today living in state institutions, an additional 49,000 living in temporary arrangements, such as foster care, and an unknown number of children living on the streets and in maternity and pediatric hospitals” and also that “United Nations Children’s Fund (UNICEF) reported in March 2005 that more than 9,000 children a year are abandoned in Romania’s maternity wards or pediatric hospitals”).

¹⁵¹ H. R. Res. 578, 109th Cong. (2005).

¹⁵² *Id.* See also Smith Speech, *supra* note 142.

¹⁵³ H. R. Res. 578, 109th Cong. (2005).

¹⁵⁴ *Id.*

of State and the Administrator of the United States Agency for International Development and the Romanian government;¹⁵⁵ and encourage "the European Union and its member States [to] not impede the Government of Romania's efforts to place orphaned or abandoned children in permanent homes in a manner that is consistent with Romania's obligations under the Hague Convention."¹⁵⁶

Funding for existing social welfare reforms and creating new ones take a toll on sending countries whose financial resources are already lacking. Sending countries tend to be poor, leading to the need, in the first place, for intercountry adoption as a viable option for children. As in Romania, the potential for unsuccessful adoption reform exists in Guatemala due to the financial burden that Ortega's Law or similar adoption reform would have on the already impoverished country. Although the need to reform known corrupt adoption practices is of utmost importance,¹⁵⁷ the method of such reform must take into account the existing adoption system, the proposed changes, and the realistic implementation of such reforms. The Convention's burden on sending countries to implement its goals is perhaps the main criticism of a well-intended, well-drafted, and otherwise potentially successful multilateral treaty.

V. THE PROPOSED GUATEMALAN CHANGES AND THE EFFECT ON THE ADOPTION SYSTEM

Adoption reform is important to prevent abuses of birth parents and children, particularly in countries such as Guatemala where such shortcomings in the adoption system have existed. The Hague Convention attempts to create a model aimed

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* See also Dillon, *supra* note 28, at 250 and fn. 233 (noting the situation leading to the Romanian moratorium: "[F]orces in the European Parliament, notably Baroness Emma Nicholson, parliamentary rapporteur for Romania, demanded that Romania greatly improve its child welfare system in order to become eligible for European Union ("EU") membership. The story is complicated by . . . [the Baroness'] apparent dislike of intercountry adoption generally").

¹⁵⁷ Also, some suggest the known corruption is overstated and that the private notarial adoption system maintains safeguards to protect against abusing the adoption system through coercion and fraud. See Hanna Wallace, *Update: Guatemala: After months of being closed, adopted families may now travel to Guatemala for their children*, Oct. 1, 2003, available at <http://www.rainbowkids.com/2003/10/news/guatopens.shtml> [hereinafter Wallace, Update].

at eliminating adoption abuses and assuring all adoptions occur in the "best interest of the child."¹⁵⁸ Implementation of the Hague Convention's requirements proves difficult for both sending and receiving countries. Non-Hague adoptions also provide an option for many adoptive families, where costs are seemingly lower because systems are already in place and do not need to meet Hague standards. However, non-Hague adoptions do not provide the Convention's procedural safeguards to ensure all intercountry adoptions meet the "best interest standard."

Adoption reform in Guatemala must balance the desire to improve the system and the current needs of the children to be placed in a permanent family environment. The proposed Ortega's Law does not accomplish this balancing. Ortega's Law inefficiently protects children by proposing to completely extinguish the current private notarial system and replace it with a judicial system.¹⁵⁹ Importantly, the Law fails to provide adequate financial resources and realistic time frames for completely transforming the system.¹⁶⁰

With 3,783 Guatemalan children being adopted by American citizens alone in 2005,¹⁶¹ a great number of children would be negatively impacted by such a tremendously radical change in adoption proceedings. There are more moderate ways of protecting against fraud and coercion while also protecting the child's right to finding a permanent family than the reforms proposed by Ortega's Law. Guatemalan adoption attorneys currently assist birth mothers in placing their children in foster care settings before an intercountry adoption is finalized.¹⁶² This function is important in the current adoption and child welfare systems. State-run institutions currently exist; however, most of the children adopted do not come from these institutions, as the bureaucratic procedures for obtaining an abandonment decree delay these adoptions for years.¹⁶³

¹⁵⁸ Hague Convention, *supra* note 6, at art. 1(a).

¹⁵⁹ See Wallace, Update, *supra* note 157.

¹⁶⁰ See Law Initiatives, *supra* note 16.

¹⁶¹ Dep't of State Press Release, *supra* note 17. See also Immigrant Visas, *supra* note 2.

¹⁶² See Banks, *supra* note 28.

¹⁶³ See Guatemala (Feb. 2003), available at <http://ethicanet.org/item.php?recordid=Guatemalappaper&pagestyle=default> [hereinafter Guatemala]. See also Dillon, *supra* note 28, at 251-52.

One alternative to Ortega's Law includes allowing Guatemalan adoption attorneys to work as non-accredited persons under an accredited body and creating a Central Authority through which to filter all intercountry communications—essentially, transforming the current notarial process into one that mirrors the ideals suggested by the Hague Convention. The Hague Convention provides under Article 22 the following:

The functions of a Central Authority . . . may be performed by public authorities or by bodies accredited under Chapter III, . . . [and that] [a]ny Contracting State may declare . . . that the functions of the Central Authority under Articles 15 to 21 may be performed . . . subject to the supervision of the competent authorities of that State . . . by bodies or persons who – *a*) meet the requirements of integrity, professional competence, experience and accountability of that State; and *b*) are qualified by their ethical standards and by training or experience to work in the field of intercountry adoption.¹⁶⁴

Therefore, under this provision, competent “persons” may provide adoption services. Under Article 10, however, the Hague Convention provides that certain “bodies” may be accredited, rather than permitting individuals to be accredited.¹⁶⁵ Guatemala could establish a Central Authority, such as the PGN, as suggested in the Ortega Law proposal. Accreditation of an organization, such as ADA, would provide a mechanism for attorneys to work under this body. Allowing attorneys to perform as non-accredited persons could greatly improve the transition to compliance with Hague requirements.

Concerns exist with private adoption systems, where opportunity for fraud and abuses exist. Jennifer Degeling's accreditation paper suggests that a country consider the following factors when determining whether or not to use accredited bodies: “past practice, efficiency of existing arrangements, or availability of public resources to conduct intercountry adoptions.”¹⁶⁶ To lessen the potential for known abuses, similar considerations as

¹⁶⁴ Hague Convention, *supra* note 6, at art. 22.

¹⁶⁵ *See id.* at art. 10.

¹⁶⁶ *See* Degeling & Alloero, *supra* note 27, at 3.1(a).

those used for accreditation should be used to determine which persons can act in a "non-accredited" capacity.¹⁶⁷

In Guatemala, the first factor of past practices weighs both in favor and against the use of attorneys as non-accredited persons. The thorough involvement of attorneys in the adoption process, the high number of adoptions processed in recent years and, therefore, the attorneys' familiarity with the adoption procedures weigh in favor of their involvement.¹⁶⁸ However, the corrupt practices of some attorneys, the goals of the Hague Convention to prevent child trafficking and corrupt practices,¹⁶⁹ and the requirement that accredited bodies have non-profit motives¹⁷⁰ may weigh against this suggestion. Importantly though, if attorneys must meet certain standards to act as non-accredited individuals,¹⁷¹ as is recommended, these requirements would theoretically prevent corrupt attorneys from being permitted to participate in the adoption process in the first place. The required standards, therefore, would reduce the risk of a continuation of some of the known abuses of the Guatemalan adoption system.

The second suggested factor, "efficiency of existing arrangements,"¹⁷² weighs in favor of the continued use of attorneys. As evidenced by the statistics, most children adopted internationally from Guatemala are placed through the notarial system. Some critics argue this trend may stem from the corrupt practices of attorneys, leading to the children residing in institutions not being adopted.¹⁷³ However, some argue that there are other reasons so many intercountry adoptions occur through the notarial system. Reasons supporting the notarial system adoptions include the comparatively short time frame and

¹⁶⁷ See Hague Convention, *supra* note 6, at arts. 22(2)(a)-(b) (stating bodies must "meet the requirements of integrity, professional competence, experience and accountability" and be "qualified by their ethical standards and by training or experience to work in the field of intercountry adoption").

¹⁶⁸ See Part II of this Comment for detailed information regarding the attorney's current involvement in the adoption process.

¹⁶⁹ Hague Convention, *supra* note 6, at art. 1.

¹⁷⁰ *Id.* at art. 11(a) (stating "[a]n accredited body shall . . . pursue only non-profit objectives according to such conditions and within such limits as may be established by the competent authorities of the State of accreditation").

¹⁷¹ See *id.* at art. 22.

¹⁷² Degeling & Alloero, *supra* note 27, at 3.1(a).

¹⁷³ See Guatemala, *supra* note 163.

smooth process as compared with adopting a child residing in an institution and the good care the child receives pre-placement.¹⁷⁴ Arguably, the notarial system is in important ways efficient by placing children in permanent families quickly and at a young age.

The third factor, the "availability of public resources,"¹⁷⁵ is also a main reason weighing in favor of using the accreditation framework to allow Guatemalan adoption attorneys to work as non-accredited persons. Because Guatemala is a poor country, the fulfillment of all Hague Convention requirements by the government and through public resources is unlikely. Importantly, the Hague Convention requires under Article 35 that "[t]he competent authorities of the Contracting States shall act expeditiously in the process of adoption."¹⁷⁶ As evidenced by Romania and other countries with insufficient financial resources, the entrapment of children in institutions without opportunities for adoption results in part from an inadequate distribution of responsibilities and scarce resources. Using non-accredited attorneys in Guatemala may provide a viable alternative.

The Hague Convention does not allow private adoptions between contracting states. As commented in the accreditation paper, private adoptions by "their very nature . . . means that the competent authorities in each Contracting State are excluded from the process [and] [s]uch adoptions are therefore not in accordance with the Convention and an Article 23 certificate of compliance cannot be issued."¹⁷⁷ At the current time, the notarial system in Guatemala is a form of private adoption. However, using attorneys as non-accredited persons, through a body accredited by the Central Authority, provides for the involvement of public authorities, thereby transforming the notarial process into one permitted under the Hague Convention.

Allowing Guatemalan adoption attorneys to act as non-accredited persons provides that the attorneys would work in cooperation with an accredited body within Guatemala. This would improve the adoption procedure by adding a safeguard

¹⁷⁴ See Grillo Kales, *supra* note 119.

¹⁷⁵ Degeling & Alloero, *supra* note 27, at 3.1(a).

¹⁷⁶ Hague Convention, *supra* note 6, at art. 35.

¹⁷⁷ Degeling & Alloero, *supra* note 27, at 8.7.

for overseeing the licensing of those eligible to participate in adoption without affecting the procedure in place. In this way, intercountry adoptions would continue through a similar process as is currently in place. Children in need of homes would not be held for unnecessarily long periods of times in institutions or foster care while the bureaucratic components of the reforms were put into place.

Importantly, the Hague Convention provides the ideal framework for intercountry adoption, but does not provide adequate assurances of smooth and functional implementation in countries, particularly in the sending countries who face an insurmountable hurdle of costly implementation. As Sara Dillon criticizes:

The Hague Convention does not set down a corresponding list of demands designed to prevent children from languishing in orphanages. It does not state that countries should avoid creating unnecessary bureaucratic hurdles to adoption before institutionalization has caused real developmental damage. In this sense, even the Hague Convention emphasizes the dangers of unethical adoption over the damages of no adoption at all, and fails to provide a proper balance between the two poles of this human rights dilemma.¹⁷⁸

The need for balancing reforms and the continuing needs of children to find permanent families is crucial to successful improvements in the Guatemala intercountry adoption system. The need for Guatemalan children to find permanent families will not cease while government bodies delegate responsibilities from one body to another and, certainly, this need does not cease with a complete reformation of an adoption system. Rather, as is evidenced by Romania,¹⁷⁹ there is a clear danger that switching from a notarial system to a judicial system in Guatemala will trap many children in institutional living.

Critics of the current Guatemalan notarial system of adoption comment that most children adopted internationally are not the children institutionalized and in most need of homes, but rather that most intercountry adoptions occur through Guatemalan attorneys and the private notarial adoption system.¹⁸⁰

¹⁷⁸ Dillon, *supra* note 28, at 213-14.

¹⁷⁹ See Part IV of this Comment.

¹⁸⁰ See Guatemala, *supra* note 163. See also Dillon, *supra* note 28, at 213-14.

However, a dichotomy of thought exists regarding the cause and effect of such statistics:

[T]here are currently thousands of children living in institutions in Guatemala. The detractors of private adoptions correctly note that the majority of children adopted do not come from public institutions. However, while some opine that the availability of children outside orphanages causes there to be less 'demand' for children living in institutions, it can also be argued that the problems within the public adoption system force families who do wish to adopt to use the private system . . . [T]he suggestion that direct and private adoptions be eliminated to favor the children in institutions does nothing to address the serious concerns . . . that abandonment decrees can take up to seven years to obtain. The suspension of all direct and private adoptions, in the absence of an immediately instituted public adoption program that works to move children into permanent homes quickly will only result in hundreds, perhaps thousands, more children being institutionalized in a country where virtually no services exist to aid them.¹⁸¹

Currently, intercountry adoptions may occur through the judicial framework, for example for abandoned children from state-run institutions.¹⁸² The notarial process led by Guatemalan attorneys results in the permanent placement of orphaned children. The bureaucratic hurdles present for adopting through the judicial system create disincentives for families to adopt Guatemalan children through this channel.¹⁸³

Similarly, the efforts that would be required for implementing the changes of Ortega's Law could be channeled toward improving the methods of placing children through the judicial system. Guatemala must first improve its current problem of placing children living in institutions before it can handle overtaking all adoptions. Guatemalan authorities must first improve the system of obtaining abandonment decrees and significantly reduce the time required to get such decrees, thereby encouraging judicial adoptions, before it can handle all adoptions through the judicial system.

¹⁸¹ Guatemala, *supra* note 163. See also Dillon, *supra* note 28, at fn. 239.

¹⁸² Dillon, *supra* note 28, at 213-14.

¹⁸³ See Guatemala, *supra* note 163. See also Dillon, *supra* note 28, at 213-14.

VI. CONCLUSION

The proponents of Ortega's Law must look at the current system and the system's downfalls and rectify these before overtaking the tremendous role of processing all adoptions through the judiciary. Proponents of children must look at the current realities of adoption in Guatemala and keep an open-mind when proposing reforms that balance the needs of the children and the needs for reform. By allowing adoption attorneys to work as non-accredited persons and by gradually adjusting the child welfare system to reflect Hague Convention ideals, the opportunity for corruption within the system will decrease while simultaneously affording children awaiting permanent families a sufficient chance for adoption and, thereby, truly meet the "best interest of the child" standard.