

**Center for Adoption Policy
168A Kirby Lane
Rye, New York 10580
United States**

August 15, 2005

Commission on Security and Cooperation in Europe
The Honorable Sam Brownback, Chairman
The Honorable Christopher H. Smith, Co-Chairman
234 Ford House Office Building
Washington, DC 20515

Re: International Adoption of Children in Romania

Dear Sirs:

We write to you as Executive Directors of the Center for Adoption Policy ("CAP") in anticipation of the upcoming September hearing during which the Helsinki Commission intends to examine adoption issues in Romania.

CAP is an independent, not-for-profit organization dedicated to researching, educating and advising governments, lawyers and other participants involved in the process of finding a family for every unparented child. CAP is not affiliated with, nor does it receive any funding from, any adoption agency. As part of its mission, CAP monitors and analyzes legal developments applying to inter-country adoption in countries that are signatories to the Hague Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoption ("the HCIA"), with particular focus on Europe. Romania is of particular interest to CAP given the number of abandoned and unparented children in this country.

Over the past four years, CAP has followed closely the development by the Romanian Government of an adoption policy and the drafting of new adoption legislation.

CAP submitted several sets of written comments to the Romanian National Authority of Child Protection and Adoption as well as to the Blue Ribbon committee that drafted the new adoption legislation in Romania, at the invitation of the DFID member of the working group. CAP also made its research and comments available to the United States Embassy in Bucharest, and to the Prime Minister of Romania.

The focus of our research and comments was to ensure that the proposed legislation served the best interests of the children in Romania in compliance with Romania's obligations under international human rights treaties and under the HCIA. Needless to say, the final text of the adoption law as it relates to international adoption was a major

disappointment. As noted by Chairman Brownback, the new legislation “limits international adoption to the grandparents of the Romanian child – effectively ending international adoption.”¹

As we participated in the drafting process for the new adoption law, we noted that the texts became increasingly unfavorable to and restricting of international adoption. Ultimately, we believe that the Romanian Government was the subject of considerable pressure from European Union representatives who played an instrumental role in the accession negotiations process. Using the political desire of the Romanian Government to join the European Union as promised in 2007, these individuals conflated international adoption and child trafficking into two major and connected issues. They pressured the Government to draft a law that best served these individuals’ anti-international adoption agenda and not the best interests of the children as would have been done by a law that allowed international adoption with appropriate safeguards. We attach for your consideration an article we wrote for the Wall Street Journal Europe.

Aside from political considerations, it is CAP’s view that the current legislation is in violation of Romania’s obligations under the United Nations’ International Convention on the Rights of the Child and hence in violation of Romania’s commitment to respect human rights under Guiding Principle VII of the Helsinki Final Act. The current legislation is also in violation of Romania’s obligations under the HCIA.

Specifically, the new Romanian law on adoption - by effectively eliminating international adoption - fails to comply with the hierarchy of solutions for the care of abandoned and unparented children that results from the UN Convention on the Rights of the Child ("UNCRC") and is equally established by the HCIA.

The UNCRC

The provisions of the UNCRC relevant to adoption include:

Article 20(3)

“Such [alternative] care [to be ensured by the state] [for a child temporarily or permanently deprived of his or her family environment] shall include, inter alia, foster placement, kafalah of Islamic law, adoption, or if necessary, placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.”

Article 21

“States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

¹ Sam Brownback, Winds of Change in Romania?, Congressional Record, Proceedings and Debates of the 109th Congress in Session, March 15, 2005, Vol. 151 No. 31.

- (a) ensure that the adoption of a child is authorized only by competent authorities [...];
- (b) recognize that inter-country adoption may be considered as an alternative means of the child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
- (c) ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
- (d) take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it; [...]"

The ambiguous wording of Article 21, combined with the focus placed in Article 20 on the continuity of a child's upbringing in his or her domestic environment, had led some to argue that the UNCRC gave preference to *any* domestic solution, including long term care in domestic institutions, over inter-country adoption. However, UNICEF in an official statement released on January 15, 2004 unequivocally rejected this reading and provided its own interpretation of Articles 20 and 21.²

UNICEF states that the first priority, in implementation of the right of every child to know and be cared for by his or her family, is to enable families needing support to care for their own children and to assist them to that effect. However, for "children who cannot be raised by their own families, an appropriate *family environment* should be sought in preference to institutional care, which should be used only as a last resort and as a temporary measure. Inter-country adoption is one of a range of care options which may be open to children and for individual children who cannot be placed in a permanent family setting in their countries of origin, it may indeed be the best solution. In each case, the best interests of the individual child must be the guiding principle in making a decision regarding adoption."

This Statement removes any ambiguity as to the hierarchy of care solutions for children under the UNCRC. Among the possible solutions of care for unparented children, institutions come last, after any form of alternative appropriate and permanent family care has been considered. This interpretation by UNICEF is also consistent with the views of the Committee on the Rights of the Child (CRC Committee). In its Concluding Observations following its review of the second report submitted by Romania under Article 44 of the Convention,³ the CRC Committee recommended that Romania "place children in institutions only as a measure of last resort and as a temporary measure; [...]; expedite the adoption of the revised law on adoption and ensure that this new legislation is in full conformity with the Convention and other international standards, in particular, the Hague Convention on [Inter-country Adoption]; [...]; explore ways to encourage national adoption so that recourse to inter-country adoption becomes a measure of last resort."

² Statement available at www.unicef.org/media/media_15011.html

³ CRC/C/15/Add.199 (March 18, 2003).

In considering the best interests of the child, the UNCRC, as interpreted by UNICEF, thus ranks possible care solutions in the following order:

1. Family of origin;
2. Suitable permanent family in the country of origin;
3. Inter-country adoption;
4. Domestic foster-care (non-permanent family environment);
5. Institutional care

The current Romanian legislation effectively eliminates inter-country adoption and thereby prefers domestic foster care and institutional care over inter-country adoption, in violation of Articles 20 and 21 of the UNCRC as interpreted by UNICEF and the CRC.

The HCIA

The HCIA in its Preamble recognizes that a child should grow up in "a family environment" (paragraph 1) and that if the child cannot remain in the care of his or her family of origin (paragraph 2), "intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin" (paragraph 3).

These provisions are interpreted in the Explanatory Report on the HCIA (hereinafter the Report).⁴ The Report states that "[t]he third paragraph of the Preamble, in referring to permanent or suitable family care, does not deny or ignore other child care alternatives, but highlights the importance of permanent family care as the preferred alternative to care by the child's family of origin" (emphasis added) (paragraph 43). The Report goes on to explain that the final wording of paragraph 3 of the Preamble amended the initial draft wording that read "a child who cannot in any suitable manner be cared for in his or her country of origin". The amendment (and hence the current wording of paragraph 3 of the Preamble) aimed to "ensure that a child should always be placed in a family rather than in an institution or in any kind of environment other than a family" (paragraph 45). This principle is repeated again in the Report at paragraph 46 which reads: "the idea behind [the final wording of paragraph 3 of the Preamble] is that the placement of a child in a family, including in intercountry adoption, is the best option among all forms of alternative care, in particular to be preferred over institutionalization".

The HCIA in Article 4 confirms the principle of the subsidiarity of intercountry adoption stating that an intercountry adoption shall take place only if the competent authorities of the state of origin "[...] (b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests." The Report directly refers to the comments made in explanation of the third paragraph of the Preamble as applying to Article 4 (see paragraph 102). Hence Article 4 of the HCIA does not change the hierarchy of preferred solutions established in the Preamble. The Report further clarifies

⁴ This Report drawn up by G. Parra-Aranguren provides an authoritative interpretation of the HCIA as it is based on the very work of the Conference and the members drafting the Convention. The Report is available at www.hcch.net/e/conventions/exp133e.html.

that, despite the subsidiarity principle, "there was consensus [among the drafters of the Convention] that, in certain circumstances the best interests of the child may require that he or she be placed for adoption abroad, even though there is a family available in the State of origin, for instance in cases of adoption among relatives, or of a child with a special handicap and he or she cannot adequately be taken care of" (paragraph 123).

Thus, the HCIA, as interpreted by the Report, clearly provides that intercountry adoption can only be subsidiary to placement of the child in the birth family and placement in a permanent or suitable domestic family. Because of the Report's statement that the HCIA highlights the "importance of permanent family care as the preferred alternative to care by the child's family of origin" (emphasis added), it is CAP's view that intercountry adoption should not be subsidiary to placement in foster families or substitute families that lack the desired permanency. Furthermore, in CAP's view, there is no doubt that under the HCIA as interpreted by the Report, intercountry adoption may not be subsidiary to placement in a domestic institution or any kind of environment other than a family.

It had been argued by some that in the process of reforming its laws on adoption and children protection with a view to meeting the criteria for EU accession, Romania was not required to follow the hierarchy of solutions established by the HCIA because the HCIA is not part of the EU *acquis communautaire*. Rather, it was argued that Romania was required to comply with the provisions of the UNCRC, which is part of the *acquis communautaire*, and this convention was interpreted by the same commentators as making intercountry adoption subsidiary to any domestic solutions (including domestic institutions). In CAP's view, the unequivocal statement of UNICEF clarifying Article 21 of the UNCRC changed that picture completely. UNICEF made it clear that there is no conflict or contradiction between the provisions of the UNCRC or the HCIA with regard to the place of inter-country adoption among the alternative care solutions for unparented children. Under either Convention, intercountry adoption is only subsidiary to a permanent family in the child's country of origin (whether his biological family or an adoptive family) and cannot be subsidiary to institutionalized or long term foster care in the country of origin.

Furthermore, the current legislation has a dramatic effect on the situation of one of the most neglected, destitute and abused group in the Romanian population: the Roma children. As your Commission is well aware, there is a continued strong anti-Roma racist feeling in Romania and members of the Roma minority are the subject of blatant discrimination.⁵ A significant number of the children abandoned in Romania are of Roma ethnic background (from one or both parents).⁶ These children often remain in

⁵ See e.g., Sam Brownback, The Decade of Roma Inclusion, Congressional Record, Proceedings and Debate of the 109th Congress, April 4, 2005, Vol. 151, No. 24; and Sam Brownback, Racist Manifestation in Romania Deserve Government Response, Congressional Record, Proceedings and Debate of the 109th Congress, May 12, 2005, Vol. 151, No. 62.

⁶ In its 2005 Report on "The Situation of Child Abandonment in Romania", UNICEF notes that most of the mothers (in the sample studied) who have abandoned their children in medical institutions (maternity wards and pediatric/recovery wards) are of Roma ethnic origin. In the UNICEF study, 56.7% of the mothers in the study sample who abandoned their children were Roma. The Study further notes that the

hospitals or are placed in other institutions in less than adequate conditions. Given the persistent prejudice in the Romanian population against the Roma, and the fact that this is an economically disadvantaged group, it is very unlikely that these children will be adopted by a Romanian family. International adoption would then be the only hope to give these children a chance to grow up in a permanent family they can call their own. By effectively eliminating international adoption, the new legislation condemns the abandoned Roma children to long term institutionalized care or at best, long term foster care placement. This perpetuates the discrimination in the Romanian society against the Roma minority as these children will remain second class citizens, deprived of an adequate education and the nurturing family environment to which they are entitled.

Thus, to comply with its commitment under Guiding Principle VII of the Helsinki Final Act, CAP believes that Romania should restore international adoption to its just position in the hierarchy of solutions for unparented children. CAP wholeheartedly agrees with Chairman Brownback's request that the Romanian Government revise its existing law to allow the resumption of international adoption with appropriate safeguards.⁷

We hope you will find this information useful. We remain at your disposal for any questions.

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Diane B. Kunz

over-representation of mothers of Roma ethnic origin abandoning their children is obvious if it is taken into account that this ethnic group makes up less than 10% of the general population. Pages 67-68. The UNICEF Report is available at www.unicef.org/romania/child_abandonment_CD.pdf

⁷ Sam Brownback, Winds of Change in Romania?, Congressional Record, Proceedings and Debates of the 109th Congress in Session, March 15, 2005, Vol. 151 No. 31

From the Wall Street Journal Europe

A One-Woman War Against Intercountry Adoption

By DIANE KUNZ and DIANE REESE

February 4, 2005

Almost fifteen years ago the plight of Romania's abandoned children shocked the world. The crazed schemes of dictator Nicolae Ceausescu had doomed hundreds of thousands of children to a life in orphanages which were little more than warehouses. Spurred by televised images of caged children, and tales of AIDS spread among children in state care through forced blood transfusions, the world rallied to help these smallest victims of totalitarian excess. Financial aid and personal volunteers flowed into the country. Thousands of children were given permanent families by people who saw them as citizens of the world in need of nurturing homes, not as property of a sovereign state.

Time passed, and the world's attention turned to new, more immediate crises. With the spotlight removed, the children once again became pawns in a political process.

Today an equally dire fate awaits Romanian children whose birth families cannot care for them. It comes not at the hands of an evil ruler but because of the machinations of self-proclaimed human rights advocates. The result is the same: children condemned to a life without a family of their own.

The Romanian government has one major political aim, to join the European Union. Romania is scheduled to achieve this goal in 2007, but only if it meets the conditions set forth by the European Union and by the European Parliament's Committee on Romania. Until recently, that committee was chaired by Emma Nicholson, Baroness of Winterbourne.

Lady Nicholson has been conducting a one-woman war against intercountry adoption (ICA), using Romania's application to join the EU as her nuclear weapon. Her view is that ICA is a cover for child trafficking and is also beneath the dignity of member states of the EU. She has yet to prove her allegations, which does not stop her from continually making inflammatory charges. These are inherently suspect as Lady Nicholson has made it clear that she believes that there is no such thing as good ICA.

Lady Nicholson has stated: "It was a mistake from the beginning to assume that for a child, a foreign adoptive family is better than the family which can not care for him. This is totally false."

Following her own logic, in 2001 Lady Nicholson pressured the Romanian government into declaring a moratorium on all ICA. Her justification was that Unicef supported such

a ban because it viewed that ICA was not a preferred alternative under the United Nations Convention on the Rights of the Child (UNCRC).

In January 2004, Unicef clarified its position on ICA, stating that ICA was preferable to home-country institutionalization -- and undercutting Lady Nicholson's anti-ICA platform. Those of us who believe that every child should have a family of his or her own rejoiced.

But Lady Nicholson struck back as soon as the Unicef statement became public. Using the excuse that Romania had made too many exceptions to the ICA moratorium, she told the Romanians in no uncertain terms that their application to the EU was in grave trouble. She could no longer claim that Unicef opposed ICA. Instead, Lady Nicholson stated that Romania's corrupt judiciary and legal practices legitimized her opposition to ICA.

Lady Nicholson's power in large part stemmed from her position as chair of Romania's EU application committee, a post she held until September 2004. Although she was then replaced by Pierre Moscovici as committee chair, she was promoted to vice president of the Foreign Affairs Committee of the European Parliament, and Liberal Party adviser to Mr. Moscovici.

Her leverage in Bucharest remains enormous. She has promised EU aid for the orphanages/foster homes that will be needed to care for the tens of thousands of children she intends to keep penned up in Romania. Think of it: The Romanians get to make progress on their EU application and she provides jobs as well.

On June 15 of last year, the Romanian Parliament, caving in completely to Lady Nicholson, passed a bill that totally banned ICA except in cases of biological grandparents living abroad. This became law on Jan. 1, 2005.

While the U.S. administration of President George W. Bush has publicly and privately intervened to try to keep ICA alive in Romania, there are no new carrots to offer Romania to offset the blessing of EU membership that Romania so clearly craves. Unfortunately, the best interests of children are easily subsumed to a larger agenda. Institutionalized children have no seat on the committees that negotiate treaties among nations.

Will the world stand silent while Romania's abandoned children are sentenced to a life without families of their own? Three weeks ago, a killer wave abruptly ended the lives of thousands of children in its wake. We have seen an enormous outpouring of concern, generous grants of time and money by the international community. The knowledge that an early warning system could have saved many lives has generated vows of "never again."

We are sounding the alarm for institutionalized children, in Romania and elsewhere. Their numbers exceed those killed in the recent tsunami tragedy. Dooming them to lives

without families is a preventable tragedy, in plain sight of those who have the will to keep looking when the media frenzy has moved on.

ICA may not save every abandoned child the fate of institutionalization, but it will save some children. For those it is the same as receiving the life-bestowing miracle of having ten extra minutes to flee the tsunami to higher ground. It is our obligation to ensure that the right to grow up in a family is preserved for the most vulnerable members of society.

Dr. Kunz and Ms. Reese are co-directors of the New York-based Center for Adoption Policy.

Note: for a PDF version of the article as it appeared in print, please see http://www.adoptionpolicy.org/pdf/WSJE_CAP.pdf