

**UNICEF, Guatemalan Adoption, and the Best Interests of the Child:
An Informative Study**

Presented by:



**Families
Without
Borders™**

November, 2003

Preface

Families Without Borders has compiled this information packet to educate the public about the process of intercountry adoptions from Guatemala and to specifically refute claims made by UNICEF that the process does not protect the best interest of the children. UNICEF has been very active in their opposition to intercountry adoptions from Guatemala, and in doing so has grossly misrepresented many aspects of the Guatemalan legal process of adoptions. Regrettably, this misrepresentation has been propagated in the media where there appears to have been little attempt to independently research or verify UNICEF's claims.

In this document we have attempted to provide the following:

- an overview of the UNICEF position on intercountry adoption
- an accurate description of the adoption process in Guatemala
- a critique of the documents UNICEF uses to support their position
- a copy of a petition supporting Guatemalan adoptions that currently has over 6000 signatures
- and finally some examples of the many ways adoptive families attempt to "give back" to causes that benefit the people of Guatemala through donations of their time, energy, and money.

The information in this packet was researched, compiled, written, and edited by Families Without Borders. We are an informal coalition of adoptive parents and prospective adoptive parents who support intercountry adoptions – from Guatemala and elsewhere – and oppose UNICEF's philosophy towards, and efforts to curtail, intercountry adoption. Families Without Borders seeks to protect the rights of children around the world to find forever families through legal intercountry adoption. Our objective is to educate people about intercountry adoptions and advocate that they be conducted in a safe, ethical environment where children are not victimized by bureaucrats, unethical professionals, or misguided advocacy organizations such as UNICEF. Our web site, <http://www.familieswithoutborders.org/>, has further information about our group, its mission, and additional documentation in support our position. We will welcome any questions you might have about the information in this packet or the role of UNICEF in intercountry adoptions, so please feel free to contact us at: info@familieswithoutborders.org.

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CHAPTER 1

Introduction

In response to what we feel is the extremely misguided position UNICEF has taken toward intercountry adoption, Families Without Borders has conducted a critical analysis of the UNICEF position as it relates specifically to intercountry adoption from Guatemala. We have researched each of the concerns and accusations UNICEF has expressed regarding Guatemalan adoptions, and have compiled the information in this packet and on our web site (<http://www.familieswithoutborders.org/>). As a result of our research, we conclude that UNICEF's position on intercountry adoption is based on overly idealistic theories that neither address nor protect the welfare of "unwanted" children in Guatemala and that the current legal process of intercountry adoption provides protections for the children, birthmothers, and adoptive parents involved in the adoption process.

This document begins with a statement by UNICEF representative Ms. Sang Nguyen in response to concerns that have been raised about the UNICEF position on intercountry adoption. This letter is typical of UNICEF responses to those who have contacted them with concerns regarding their position on intercountry adoptions. A brief response to the five major UNICEF positions represented in this statement is provided, directing the reader to additional information in the packet.

In Chapter 2 we provide a sketch of the social and economic context of Guatemala and an explanation of why in-country placement is not possible for most of the adoptable children there. This is followed by a brief description of the adoption process, an explanation of the Notarial ("extra-judicial") adoption process that is standard in Guatemala, and a comparison with the judicial process UNICEF favors. We provide specific documentation that further explains those parts of the adoption process that UNICEF cites as their main points of concern. These documents include clarification of the Notary's role in the "extra-judicial" adoption process; the use of DNA analysis to verify the parentage of relinquished children; and an explanation of the costs associated with the adoption process that disputes UNICEF's claim that there is "undue financial gain." This section also summarizes the legal checks and balances in the existing Guatemalan adoption system and concludes with an explanation of the current legal status of adoptions in Guatemala.

In Chapter 3 we provide detailed analyses of the principal documents UNICEF uses to support their position. These documents include the Convention on the Rights of the Child, which guides the principles of UNICEF; the report of the UN Special Rapporteur on child trafficking, child pornography, and child prostitution in Guatemala; the UNICEF-sponsored report on adoptions in Guatemala written by ILPEC, and the 1999 European Parliament Resolution on Intercountry Adoptions in Guatemala. In this section we also explore the way UNICEF has created and perpetuated a very biased and negative perspective of Guatemalan intercountry adoption in the media, and finally links between UNICEF and Casa Alianza, the Latin American branch of Covenant House, which is very outspoken against intercountry adoptions in Guatemala.

Finally, in Chapter 4 we provide a positive viewpoint on the impact of Guatemalan adoptions. We have included a position statement that affirms the positive aspects of intercountry adoptions from Guatemala, and which has been endorsed by over 6000 people. We also explore ways that adoptive families have contributed to Guatemala because of their close connection to the country and its people resulting from the adoption of their Guatemalan-born children.

UNICEF claims "we want nothing more than to see all the children of the world grow up in safe, secure, and loving homes, and live to their full potential." UNICEF supports achieving this goal through intercountry adoption only for abandoned or orphaned children (i.e. not for those children relinquished by their birthparents), and only when all possibilities for placement in their birthcountry have been exhausted. The policies and rhetoric of UNICEF reflect an over-riding goal to keep children in their countries of birth. Families Without Borders also would like nothing more than for all the world's children to grow up in safe, secure and loving homes, and have every opportunity to reach their full potential. Rather than keeping children in their birthcountry, however, *we believe that the over-riding goal should be for children to be raised in loving, permanent families without unnecessary delays, regardless of the location.* As the name of our group reflects, we believe political and cultural borders should not be barriers to children finding forever families. Intercountry adoption sometimes provides the only viable option to reach this goal when a birthmother is unwilling or unable to care for her child and chooses to make an adoption plan, and when the social structure is inadequate or unavailable to care for this child in his native country.

We ask that you consider the information that we have compiled. If you agree that UNICEF's vision for intercountry adoption is detrimental to the welfare of children whose birthmothers are unwilling or unable to care for them, we ask you to make your views known to UNICEF. Please let UNICEF know that you would expect to see their efforts redirected to their traditional missions that directly benefit the lives of many children, help to decrease child mortality and reduce poverty. Particularly, projects such as vaccinations, provision of safe water sources, proper nutrition, and education of all children stand out as missions that provide a great deal of benefit for children and their communities.

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UNICEF Statement on Guatemalan Intercountry Adoption

From: SNguyen@unicefusa.org

Subject: UNICEF and Inter-country adoption

Date: Thu, 28 Aug 2003 15:49:46 -0400

Dear Sir,

Thank you for taking the time to express your concerns regarding UNICEF's position on inter-adoption. As you may know, it is certainly a most complex and emotional issue. I understand your concerns regarding our policy; however I want to clarify our position and help you to understand that we want nothing more than to see all the children of the world grow up in safe, secure, and loving homes, and live to their full potential.

UNICEF is not involved in any campaigns to put an end to inter-country adoptions in Guatemala or elsewhere. While UNICEF does not strictly oppose international adoption, we believe that international adoption should be considered only when the child cannot be suitably cared for in his/her home country. If a child has been abandoned, biological parents or extended family should be located. If that is not possible, placement for the child with a foster or in-country adoptive family should be looked into. When all other options have been exhausted, inter-country adoption should be considered.

By adhering to this policy and practice UNICEF seeks to ensure that governments protect children, that they ensure that the best interest of each child is central to the adoption process, and that they enforce the use of an appropriate, transparent, and consistent legal framework to manage international adoptions. While a good many international adoptions are completed in good faith, increasing commercialization and the lack of adequate safeguards are resulting in criminal abuses including trafficking in, abduction, and sale of children.

In Guatemala, two parallel systems for processing international adoptions are in use, the judicial and extra-judicial, both are legal under Guatemalan law. The first is managed by the Guatemalan judiciary and meets the standards outlined above, as well as the standards set forth in the United Nations Convention on the Rights of the Child (ratified by Guatemala in 1990) and the Hague Convention on Inter-Country Adoption. The second system is extra-judiciary and is managed chiefly by lawyers who benefit financially from the adoption transactions they are processing. The extra-judiciary system is unfortunately open to serious abuse.

For example, under the judicial procedure, the adoption is overseen by an independent judge, fulfilling the role of State oversight. The judge, among other responsibilities, ascertains the origin of the child, verifies the mother's motive for giving her child up for adoption, and approves the fitness of the adoptive parents on the basis of a socio-economic report. Only 1 percent of international adoptions in Guatemala are carried out under the judicial procedure.

The remaining 99 percent are handled under the extra-judicial procedure, in which the process of international adoption is managed almost entirely by the private sector through specialized lawyers, and is not subject to oversight by the State. This means that those parties with most interest in seeing the adoptions go forward are both judge and jury in the process.

Ultimately, the extra-judicial approach is so lacking in transparency that it is impossible to determine, with certainty, the origin of the child, under what conditions the child was given up for adoption, whether or not

the lawyer is involved in facilitating the trafficking of children, whether his fees represent "improper financial gain," or whether the character witnesses for the adoptive parents are even known to these parents. In addition, the procedure does not require any follow-up of the child in the country where he or she will be living.

Under this system it is impossible to ensure that the best interest of the child is being served. It is for this reason that UNICEF has recommended that receiving countries insist that all international adoptions from Guatemala by their citizens be handled through the judicial process, and give preference for adoption of children in institutions who have obtained their certificate of abandonment.

Abuses of the Guatemalan system are not in any way the fault of prospective adoptive parents, whose sincere intentions are not in question. Certainly the many loving parents who are seeking to adopt from Guatemala would want to know definitively that the child they are adopting is truly in need of a family, is really unwanted by his or her biological parents, and has been willingly surrendered for adoption without any money changing hands. Responsibility for preventing such abuses lies with the appropriate Guatemalan authorities.

I hope that I have been able to clarify UNICEF's position on international adoption from Guatemala and why this issue requires special vigilance. Should you have further questions or concerns, please do not hesitate to contact me.

... If you would like further information, kindly provide me with your mailing address. We would like to send you a copy of the Convention of the Rights of the Child, which defines important criteria for the protection of children's rights in the case of both national and inter-country adoption; a few New York Times articles illustrating some of the abuses that occur with private international adoption; and a notice from the U.S. Department of State regarding Guatemalan Adoptions.

Thank you for your interest in the world's children.

Sincerely,
Sang Nguyen

Families Without Borders Response to UNICEF Positions on Guatemalan Intercountry Adoption

UNICEF Position 1: Every effort should be made to keep the child in his biological family and within his ethnic group. If this is not possible, adoption should preferably be by Guatemalan parents, then by foreigners residing in Guatemala, and as a last resort by foreign parents.

We believe that Guatemalan birthmothers should continue to have the right to make specific adoption plans for their children, as provided for in the Notarial adoption process. We believe that the suitability of prospective adoptive parents should not be based solely, or even primarily, on their country of residence. As long as an adoption plan is made without coercion, the adoption process is conducted legally, and the adoptive parents have demonstrated their fitness to be parents, then such an adoption plan should be permitted.

We respect the ability of a birthmother to evaluate whether placement within her family is a viable, legitimate option for her child. Many birthmothers apparently have concluded that it is. In fact, it is not uncommon in Guatemala for family members to take over the care of relatives' children through a system of "informal adoptions." While we fully support and celebrate any birthmother's decision to place her child within her family, we strongly oppose any government requirement that would force her to notify family members of her plans to place her child for adoption. This breach of her privacy is unacceptable, and could result in her being disowned by her family, defamed within her community, and even physically harmed by those who disapprove of her actions. We believe that such forced notification violates the woman's parental and civil rights.

In cases where a birthmother has NOT made an adoption plan (for example, through relinquishing her child to the care of an hogar (private children's home), through abandonment, or through court

termination of parental rights due to abuse or neglect), we agree in principle with UNICEF's prioritization of preferred adoptive parents, but would temper it as follows:

Family adoptions: When a family member is willing to adopt the child and has the concurrence of the birthmother, that family member should be required to meet certain basic fitness standards designed to ensure that the child will be in a safe and supportive home. Such standards should include screening for criminal activity, particularly involving domestic violence, child abuse and child exploitation.

National adoptions: While numbers of Guatemalan national adoptions are likely underreported due to the informal nature of many in-family adoptions, the fact remains that domestic adoption is not common in Guatemala. For the past few years, efforts by the international adoption community (primarily agencies and attorneys) to promote and increase the numbers of domestic adoptions have been unsuccessful. These efforts have included offers to provide the legal work involved in adoptions free of charge. There is no strong Guatemalan "culture" of adoption, and while educational efforts could help, the endemic poverty combined with high fertility rates will continue to impair most Guatemalan citizens' ability to raise additional children. While in theory we would not fault UNICEF-funded education aimed at popularizing national adoption, we believe that funding needs for other relief programs are so overwhelming (for example, providing food and basic medical care to the Guatemalan children who live in dire poverty) that such a program of adoption education must be given relatively low priority.

One specific issue in national adoption that we CANNOT support is the practice of placing children on a national adoption waiting list for a prescribed length of time before they can become eligible for intercountry adoption. In countries where such a registry exists, the end result is that children languish in orphanages for a year or more before being placed in loving homes, if they are given this opportunity at all. We suggest that such a system is far from being in a child's best interest. To the extent that priority is granted to citizens and residents, we believe that it is the prospective parents who should be placed on a waiting list, not the children. It is critically important that children be placed as promptly as possible into a suitable, permanent family situation.

Intercountry adoption: We strongly object to UNICEF's characterization of intercountry adoption as a "last resort." This language suggests to children who have been adopted internationally, that their situation is highly undesirable. In practice, this characterization severely limits the possibility of children finding a stable, loving home with many opportunities that would otherwise be unavailable to them, simply because that home is in another country.

UNICEF Position 2: International adoption should be reformed because it has become a profit-making enterprise that has led to the commercialization of children.

A great deal of UNICEF's agenda focuses on the economic aspects of international adoption. UNICEF has been critical of the fees paid to Guatemalan attorneys to process adoption cases – insisting that any potential for economic gain leads to the commercialization of children. We believe that the goal of ethical adoptions can be, and in most cases has been, achieved while allowing attorneys to provide constitutionally-protected legal services for adoptions in Guatemala. Reasonable and ethical compensation can and should be paid for services provided by the attorney, Notary, foster family (or private children's home), translators, etc. A description of the allocation of adoption fees is provided in Chapter 2. These services, as well as other necessities such as medical check-ups, diapers, formula and clothing for the several months that the child remains in Guatemala would otherwise need to be funded by the government.

We further believe that UNICEF fails to recognize and preserve in their "reforms" the positive effects of the current attorney-based system on the health and well-being of the children. Many attorneys, when approached by a pregnant woman seeking to make an adoption plan for her child, will provide prenatal care and make arrangements for a safe hospital delivery. Attorneys provide personalized foster care and ensure that the child receives adequate nutrition, loving attention and medical care, and sometimes facilitate ongoing communication between the child, adoptive parents, foster families and/or birthmothers. We believe these initiatives are in the best interest of the children.

We feel that it is important to acknowledge that this so-called "profit-making enterprise" is compatible with both Guatemalan adoption law and U.S. immigration law. These laws prohibit unethical practices such as coercion of birthmothers, and the government entities charged with upholding them provide an extensive system of checks (see Chapter 2). Adoptions must receive the approval of the Family Court social worker

under judicial supervision, the Guatemalan Attorney General's office, and the U.S. Embassy (see description of adoption process in Chapter 2).

While UNICEF questions the use of intermediaries in the adoption process and the fees that they are paid, ultimately, the amount intermediaries are paid for their services really is not the key issue. The basic concern is whether financial means unduly influences intermediaries to act in a way that is illegal or against the best interest of the child. Of utmost concern in relinquishment adoptions is whether the birthmother was coerced. Birthmother coercion can and should be battled by proper laws, policies and punishments along with effective law enforcement by both Guatemalan authorities and U.S. Embassy officials. In Guatemalan adoptions, current preventive measures include the continual involvement of the birthmother throughout the 4 to 12 month paperwork process, during which she is repeatedly given the opportunity to rescind her consent. She is interviewed by a court-supervised social worker who explores her reasons for relinquishing the child to ensure that she has freely decided to make an adoption plan. A complete description of the process is available in Chapter 2. Legal avenues currently exist to punish offenders with fines, imprisonment and nullification of the adoption in process.

These current safeguards appear to be effective, despite unsubstantiated allegations by UNICEF that suggest otherwise. After reviewing 90 randomly selected cases in 1999 as part of the ILPEC paper, *UNICEF was unable to identify a single case in which a biological parent was forced or paid to relinquish her child.* In past years, the U.S. Embassy conducted random investigations intended to detect cases of coercion. Because their audits found no evidence of such practices, the U.S. Embassy now conducts its random investigations on a much smaller scale, but continues to investigate any cases that appear suspicious (such as multiple relinquishments by the same birthmother).

UNICEF Position 3: The current laws established for intercountry adoptions in Guatemala do not create a transparent adoption process that provides a clear knowledge of the child's origin.

Chapter 2 of this information packet contains a detailed explanation of the existing intercountry adoption process in Guatemala. As you will note, the process currently includes an interview with the child's birthmother and a social history study conducted by a neutral third-party, a secure DNA study of the birthmother and potential adoptive child, four separate occasions over a period of several months where the birthmother affirms her intent to relinquish, and a thorough investigation into the background of the prospective adoptive family. Along with a specialized attorney (the Notary), two separate Guatemalan government institutions – the family court and the Attorney General's Office – oversee this process, as do the United States Embassy and Bureau of Citizenship and Immigration Services (formerly INS). The current Notarial Process, which is sometimes described as "extra-judicial" because the matter is not finalized before a Judge, was created by the Guatemalan Constitution to efficiently address non-litigious matters and is an integral part of Guatemala's judicial system. We note with great concern that UNICEF literature emphasizes that most Guatemalan adoptions are "extra-judicial" in such a way as to imply that they are illegal when, in fact, it is a legitimate and constitutionally recognized process.

The current system effectively identifies any "misrepresentation" of the child's origins, and provides the advantage of providing the child with a social history of his birthfamily. Since DNA testing was instituted for Guatemalan adoptions by the U.S. BCIS in 1998, fewer than 0.6% of adoptions of Guatemalan children initiated by U.S. families have been denied due to "negative" DNA matches. Such a low rate of negative matches suggests that claims of widespread child trafficking are inaccurate, and also demonstrates that the few truly illegal cases are identified. The procedure for DNA testing is described in Chapter 2. In addition, relinquished Guatemalan children have the benefit of knowing their exact birth date, their birth location, their birthmother's name, and some basic information about their birth family and the circumstances of their birth and relinquishment. Family medical information remains limited, primarily because family members cannot afford medical care. This information, and the benefits it provides to adopted children, would be unavailable and unattainable if birthmothers were forced to abandon their children anonymously rather than make affirmative adoption plans.

UNICEF generally promotes centralization of adoption under the government to improve the "transparency" of the process and to eliminate potential corruption. We believe that government centralization is not the "one-size-fits-all" solution that UNICEF claims. For adoption reform through centralization to have a beneficial effect, many factors must be taken into consideration, including the country's political and social culture, its available resources, the pervasiveness of government corruption, and the extent to which reform is a response to actual problems rather than to hypothetical ones. Positive change to adoption policy requires preservation of the best elements of the existing system, and

incorporation of reforms that address actual and specific problems. Changes must be implemented in a planned and methodical manner that tolerates minimal disruption of children's lives.

Of particular concern in Guatemala is the lack of government funding for children's social services. There are no government-funded orphanages at this time, and the government has not indicated any willingness to allocate funds for this purpose. We question the advisability of shifting responsibility for the care of relinquished children to an unfunded government bureaucracy with little or no experience in providing social services.

The questions that need to be answered are: Are the current legal safeguards (described in Chapter 2) inadequate in the law, or do problems arise because of insufficient enforcement? Should the government perform all adoption-related functions, or should its primary role be robust oversight? Government bureaucrats are not necessarily free from the corruptive influences of power or money, and can also become disillusioned to the point of apathy and negligence. We believe that adequate and effective governmental oversight and enforcement would be much more effective than direct government control in ensuring an ethical, legal process that considers the lives, care, and future of the children involved.

Ironically, one of the least transparent parts of the Guatemalan adoption process is a government function -- the review and approval of the adoption by the Attorney General's office. These reviews remain secretive and unpredictable, and documents often are rejected for reasons that appear spurious and random. While Guatemalan law requires a review and decision by the Attorney General's office within 3 working days, adoption files routinely spend weeks to months "under review" even with no indication of genuine problems.

UNICEF Position 4: All private adoptions should be suspended to favor placement of the large number of older, institutionalized children.

We vehemently disagree with any proposal that pits one child's best interest against that of another. We would, however, support devoting additional financial resources to the care of older children awaiting adoption so that they will be better able to transition to family life someday. We support education campaigns aimed at informing potential adoptive parents of the unique rewards and challenges of adopting older children. We support in-country or intercountry summer sponsor programs, such as those for older children in Russian orphanages, whereby children spend a summer outside of the institutional environment, to help many who are eligible for adoption find a forever family. The majority of older children who reside in Guatemalan hogares are not legally available for adoption, partly because of the legal and financial burden that having a child's abandonment certified by the court places on the hogar. To this end, we support legislation that would streamline the process whereby abandoned children are declared eligible for adoption, and support government funding for that process. We would welcome UNICEF's participation in organizing and funding such programs.

It is unfortunate that UNICEF's sweeping condemnation of intercountry adoptions in Guatemala and elsewhere also adversely affects the mostly older children who reside in the more than 300 privately funded hogares in Guatemala. Hogares are the private children's homes that local and international charities have established to care for children whose needs are ignored by the government due to the lack of government-funded orphanages and social programs for children and families. Most children in hogares have been abandoned, and many are toddler and school aged. In order for the children to become eligible for either national or intercountry adoption, the hogar must sponsor and finance the years-long legal process to obtain a certificate of abandonment. This process is designed to locate any relatives who are willing to take care of the child. Some hogares are involved in a small number of adoptions each year, either through birthmother relinquishments or through the abandonment process. For most of the hogares that do offer adoptions, the fees charged for these few adoptions help finance the care of all the remaining children. In the absence of the fees, these hogares may not be able to continue to file for certificates of abandonment or even care for the children.

We do not support elimination of relinquishment adoptions as a means of encouraging adoptions of certain other children. In fact, choosing a direct relinquishment adoption likely reflects a birthmother's desire to avoid placing her child in an orphanage.

UNICEF has suggested that the "popularity" of private adoptions among Guatemalan birthmothers is evidence of birthmother coercion and "child trafficking". We have previously addressed the issue of birthmother coercion. As for "child trafficking," we strongly object to UNICEF's linking of intercountry adoption and "child trafficking," including their practice using the terms interchangeably and researching

both in the same reports. This, along with their inflammatory rhetoric regarding children as “exports” due to intercountry adoption, is intolerable and is neither accurate NOR in the best interest of the children. Child trafficking involves people illegally and immorally, and often violently, removing children from their homes and placing them with people who intend to use children for such illegal and morally corrupt commercial purposes as slave labor or prostitution. Intercountry adoption involves adoptive parents who have spent months going through invasive approval processes, additional months or years of waiting for a child, all in the hopes of having a daughter or son to love and care for and birthmothers who freely and with concern for the wellbeing of their children choose to relinquish their care to another family. THESE ARE NOT THE SAME PEOPLE AND THEY DO NOT HAVE THE SAME INTENTIONS. It is reprehensible that UNICEF attempts to link them.

UNICEF Position 5: Children should not be relinquished for adoption due to poverty.

We agree that a primary goal for humanitarian and social aid should be the elimination of poverty, so that every family has sufficient resources to raise all of the children born into it with a basic level of nutrition, medical care, shelter, etc. However, we do NOT agree that family planning options, including the ability to make adoption plans, should be legally available only to those who are not living in poverty.

There are a few troubling elements to this UNICEF position. First is the implication that a poor woman should not have the right to make the same family planning choices as a woman who is not poverty-stricken. This is a heinous form of discrimination. If a woman has determined that she is unable to parent her child and is deprived of the right to make an adoption plan, the only alternative she has is to abandon the child, thereby exposing the child to harm, depriving the child of his birth family and birth date information, and relegating the child to at least a year in an institution while an abandonment process, if commenced at all due to the economic constraints, is completed.

Second, eliminating poverty does not eliminate all factors that lead birthmothers to choose adoption. The U.S. has extensive, though not foolproof, social services providing food, housing and medical care to poor children, yet tens of thousands of children are placed for adoption each year. Children are placed voluntarily for adoption for dozens of reasons: poor mental or physical health of the parent, stigma attached to illegitimate births, rape, incest, parental substance abuse, young age of the birthmother, abandonment by the birthfather and rejection of the child by a subsequent boyfriend or husband, etc.

We invite and encourage UNICEF to fund social programs in Guatemala that will help to reduce poverty and will provide women with more choices rather than fewer. UNICEF's assistance in this regard is very much needed in Guatemala. Unfortunately, extreme poverty is a fact of life for 30% of the population and there are few, if any, government programs to assist these families. Even private humanitarian aid is reaching only a small minority of the many needy families. Further, Guatemala currently does not have any significant programs in place to assist the poorest families. In 2000, public spending on social protection (assistance and insurance) was 1.8% of the GDP, while it is estimated that 8.4% is the minimum *annual* cost of closing the poverty gap, and most of the recipients of government assistance were in the wealthier urban areas rather than the poor rural regions of Guatemala (World Bank, 2001).

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CHAPTER 2

The Social and Economic Factors Leading to Guatemalan Intercountry Adoption

Guatemala provides one of the least supportive environments for children's development across Central America due to the high percentage of Guatemalan families living in poverty and the lack of public welfare, education, and social service programs. The innumerable challenges faced by children growing up in Guatemala reflect the dire social and economic context of a country still feeling the effects of a thirty-six year civil war. Guatemala has the region's highest infant, childhood, and maternal mortality rates, highest malnutrition rates, and lowest average birth weights. Following are some social and economic statistics about Guatemala that illuminate the reasons why Guatemalan children—the majority being indigenous—are relinquished for intercountry adoption:

Economic Factors (World Bank, 2002)

- Over half of all Guatemalans – 56% or about 6.4 million people – live in poverty. The percentage of people living in poverty in Guatemala is higher than in any other Central American country;
- There is a large disparity of wealth in Guatemala. A disproportionate share of the poor and extreme poor are indigenous people who live in rural areas. Over 81% of the poor and 93% of the extreme poor live in the countryside. Three quarters of all rural residents live in poverty and one quarter of those live in extreme poverty. Although Guatemala's indigenous people represent 43% of the population, they claim less than one quarter of the total income and consumption in the country;
- Sixty-eight percent of children under six (about 1.7 million) live in poverty;
- Over 3 million children in Guatemala suffer from malnutrition. This rate of 50% is higher than any other Latin American country and is among the worst in the world.

Social Factors

(Commission on Human Rights, 2000; Human Rights Watch, 1997; World Health Organization, 2000; World Bank, 2002; ILPEC, 2000)

- Guatemala's civil war, which officially ended in 1996, resulted in 34,000 refugees and 1 million internally displaced persons, half of whom are children;
- Guatemalan women have the highest fertility rate in all of Latin America, averaging 4.8 births per woman. This rate is higher in poor rural areas (averaging 6 births) than in the city. The U.S. birth rate is 2.07 per woman;
- An average of 52 Guatemalan children under age five die each year for every 1,000 live births, compared to 16 per 1,000 in Costa Rica, 34 in El Salvador, 44 in Honduras, 48 in Nicaragua, and 8 in the United States;
- Life expectancy in Guatemala (65 years) is the lowest in Central America and significantly lower than the average of other Latin American countries (70 years) and industrialized nations (78 years);
- Guatemala has one of the highest illiteracy rates in Latin America reaching nearly 30 percent. Only 6% of Guatemalan children graduate from high school;
- Guatemala's 1995 National Survey on Maternal and Infant Health found 50 percent of children under age five who reach adolescence suffer from chronic malnutrition that leads to stunted growth;
- The number of sex crimes alleged before the Judicial Body has reached close to 11% of the total number of criminal acts, thereby making sexual assaults one of the most frequently occurring crimes in Guatemala;
- There is a large population of children who make their homes on the streets of Guatemala. Estimates for the number of street children range from 1500-5000 on any particular day. The vast majority of these children live on the streets due to abuse or abandonment by their parents.

Twenty to 30 percent of street children are females and 65 percent of all the street children in Guatemala City are between the ages of 10 and 17; 3 percent are under 10. It is reported that 64 percent of female street children have suffered sexual abuse by family members. If adoption is no longer an option in the future and private orphanages are forced to close due to lack of funding, the numbers of street children would be expected to increase greatly;

- The police estimate that over 2,000 girls and boys are exploited in over 600 brothels in Guatemala City alone;
- Elementary education in Guatemala is not accessible to many of the poor and rural families. Although attendance in school is technically required, families must provide uniforms and supplies for their children. Many poor families cannot afford these expenses. In addition, many school-aged children are required to work to help support the family. This leads to an illiteracy rate of 30% in the cities, and over 50% for indigenous populations in rural areas.

As seen through these statistics, the children of Guatemala face more economic and social hardships than those in any country in Latin America. Although almost 70% of Guatemalan children live in dire poverty, there exist no child welfare programs, no child care for working mothers, and no public health care system to support their developmental needs. Currently, 30,000 children per year die of preventable childhood diseases in Guatemala. In addition, there are over 30,000 children - not eligible for adoption - who live in private, licensed children's homes that receive a significant percentage of their donations from adoption agencies and adoptive parents.

The number of children relinquished each year for intercountry adoption in Guatemala is a minute percentage (0.125%) of the children whose health and lives are at risk every day due to the conditions in which they are living. In the fiscal year 2002, 2,219 children were brought to the United States through international adoption (Department of State, 2003). Reviewing the statistics above, one can understand that the confluence of extreme poverty, high birth rates, and the total absence of social support services for children and families in Guatemala, leads many birth mothers to choose intercountry adoption as the best option for their children's well-being and future.

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Scarcity of Domestic "National" Adoption in Guatemala

Under Guatemalan law, no distinction exists between formal adoption of Guatemalan born children by citizens of Guatemala (domestic adoptions) and intercountry adoptions. Based on this, and on the small number of formal domestic adoptions in Guatemala, UNICEF asserts that the current Notarial system favors international adoption because the high lawyer's fees make it impossible for most Guatemalan families to adopt through the private system. According to UNICEF, the lack of opportunity to be adopted into a Guatemalan family infringes on the right of the adopted child to remain in his/her country of birth.

Families Without Borders has evaluated the diverse views regarding domestic adoptions in Guatemala in light of the social, political, and economic status quo. Although statistics do clearly show that only a small percentage of formal adoptions in Guatemala are domestic adoptions, we find no evidence to conclude that children who are being adopted internationally could realistically have joined families in Guatemala.

We found that there is evidence to refute the assumption – implicit in the UNICEF position – that many families in Guatemala are willing to adopt through the formal adoption system but cannot afford to do so. In 1999, a coalition of adoption attorneys in Guatemala created an association named "Centro Notarial de Adopciones Gratuitas," which offered to provide adoption services at no cost for Guatemalan families. In the two years that this organization operated, not a single Guatemalan family used its services, despite newspaper advertising, and an office opened to the public eight hours a day, five days a week for the entire first year of the program. If attorney fees indeed were prohibiting Guatemalan families from adopting, surely one must expect that at least one family would have taken advantage of this service.

Our social analysis indicates that adoption of an unrelated child is not something readily considered or accepted in Guatemalan culture. First, Guatemalan society unfortunately has deep-rooted ethnic prejudices against those with an indigenous bloodline. Implicit in this is a de-facto caste system that has

created a very rigid social structure. Nearly all of the Guatemalan children who are adopted internationally are at least in part indigenous and from the very lowest social class. Indeed many claim that affluent Guatemalans prefer to adopt internationally from countries like the Ukraine and Russia where the children have lighter skin tones and European features. Unfortunately, statistics and other data on intercountry adoptions by Guatemalans are not available to support or refute this claim.

Adoptions in the US in the 1950s provide a model for understanding the current Guatemalan culture of domestic adoption. At that point in time, most couples in the US married and started families at a younger age than they do today. In addition, adoption was not something commonly discussed or considered by the mainstream. Many of the families who did adopt chose to keep silent about it, often hiding it even from the adopted child, since popular culture did not view the adoptive family on an equal level with the biological family. In addition, very few Caucasian-American families in the 1950s would have even considered adopting an African-American or biracial child. This scenario has many similarities to the current situation in Guatemala today, and helps illustrate why few Guatemalans who have the means to adopt would consider adopting an indigenous child.

The statistics on formal domestic adoptions in Guatemala do not even come close to reflecting the number of Guatemalan children who are being raised domestically by parents who are not their biological parents. Many, if not most, domestic “adoptions” in Guatemala are unofficial and take place outside of the private and judicial adoption systems. These adoptions are never registered with the government or any other entity, and therefore it is impossible to estimate how many occur annually. What we do know is that both sides of the international adoption debate admit that such adoptions are common in Guatemala as well as in other countries. These adoptions take many forms, but in general the adoptive parents are family, close friends, or members of the birthparents’ community. In some such “adoptions”, the newborn child’s birth certificate is issued with the adoptive parents listed as the biological parents through one of several non-legal methods. For example, the birthmother may give birth in the hospital registered under the adoptive mother’s name, or a doctor may knowingly submit the birth certificate with the adoptive parents’ names listed instead of the biological parents. Another, perhaps more common practice is for a family to simply assume responsibility for the child with no formal or legal relationship in place and to raise the child as a member of their family.

The socio-cultural realities of Guatemala suggest that the cost of legalizing adoptions in Guatemala has very little to do with the low rate of formal domestic adoptions and lead to the conclusion that the overwhelming majority of children who leave Guatemala through intercountry adoption would not have been adopted domestically. Adoption is not a viable option for most of the Guatemalan population simply because the birth rate is so high (34.27 births/1000 population*), and many already are struggling to survive and to provide adequate care for their biological children. Because of prejudice and the rigid social and economic class system, Guatemalans who have the economic means to raise additional children typically are not willing to provide loving homes for the children currently being adopted internationally.

* Source CIA World Factbook 2002
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Description of Guatemalan Adoption Process (Notarial, U.S. Adoptive Families Only)

Relinquishment is the most common form of adoption to the U.S. from Guatemala. A birthmother decides that she wishes to relinquish her child for adoption, and signs the child’s care over to a lawyer or a children’s home. Some birthmothers make this decision during pregnancy; others may decide after they have cared for their child for some time. While Notarial relinquishment adoptions are a private (or “extrajudicial”) legal matter between the birthmother and the adoptive family assisted by a Notary and attorney, such adoptions are subjected to rigorous and extensive review and approval by certain courts and governmental agencies including the Guatemalan Family Court, the Procuraduría General de la Nación (PGN – the Guatemalan Attorney General’s office), and by the U.S Embassy and Department of Citizenship and Immigration Services (CIS). When a birthmother gives her consent for the adoption of her child before a Notary, she is exercising a civil right, which is protected by the Constitution. The role of the Notary is explained in detail in the next section of this document. In a relinquishment adoption, the birthmother must appear a minimum of four separate times — over a period of weeks to months—to give her unconditional

consent to relinquish her child for adoption and to confirm her identity. She can withdraw her consent without consequence at any time until the adoption deed is signed at the end of the process. The four assertions of consent occur before a Notary:

- To transfer custody to the attorney/hogar and request that child be placed for adoption
- Immediately following the interview with a social worker from Family Court (attorney not present)
- At the time of DNA sample collection (attorney not present)
- At the point of the final adoption deed

Additional interviews and investigations can be required by the Family Court, the PGN, and the US Embassy/BCIS at their discretion.

Abandonment adoptions occur when a child has been abandoned by his/her biological family or when parental rights have been terminated due to neglect or abuse. In abandonment adoptions, a Court of Minors judge is charged with determining whether the child truly is abandoned, which can take from 6 months to more than seven years. The court conducts an extensive search for family members who may wish to accept custody of the child. If family members are not located, or are unable or unwilling to assume the child's care, the judge issues a Certificate of Abandonment (COA). After a COA is issued, an abandonment adoption proceeds through most of the same steps as a relinquishment adoption.

Adoption Procedures*:

1. *Relinquishment:* A woman who wishes to place her child for adoption contacts a Notary (directly or through an intermediary), authorizes an attorney to pursue an adoption, and assigns the attorney custody of her child with her Express Consent. The birthmother provides evidence of her identity to the attorney through her birth certificate, cedula (official photo identification card), and thumbprint, and provides records of the child's identity and birth (hospital records, birth certificate). Copies of this information become part of the case file. The attorney places the child in foster care or a privately run orphanage (hogar).
2. *Medical Examinations:* The child has a basic physical examination by a pediatrician, and receives any required immunizations. The birthmother is also examined by a physician, and blood is drawn for HIV, hepatitis and syphilis testing.
3. *Referral:* The attorney or adoption agency refers the child to the (prospective) adoptive family with the following information: the child's and birthmother's names, basic social and medical data (as available), and typically a photo of the child, his/her birth certificate, and the results of the birthmother's blood tests.
4. *Power of Attorney:* The adoptive family accepts the referral and assigns Power of Attorney (POA) to the Guatemalan attorney to permit him/her to act on their behalf during the adoption process. Under Guatemalan law the same attorney may represent the interests of the birthmother and child, and the adoptive family in the adoption procedure, with the exception of during the relinquishment.
5. *Registration of Documents:* The attorney registers the adoptive family's POA with the Archivo de Protocolo, and the family's completed dossier, translated into Spanish, is verified by the Minister of External Relations
6. *Family Court:* The attorney submits the adoption file (dossier and POA of the adoptive family; child's and birthmother's identity and medical documentation; birthmother's signed Express Consent) to Family Court, and petitions the court to assign a social worker to investigate the case. The Family Court social worker reviews the dossier, schedules appointments with the birthmother and foster family, interviews the birthmother, and may visit the child in foster care or the orphanage. During the interview with the birthmother, the social worker explains that: (a) the adoption is irrevocable, (b) she will lose the patria potestas and guardianship of her child, and (c) she may never see the child after the adoption is final. The social worker asks the birthmother the reason for her decision to relinquish her child, and determines if the birthmother has voluntarily, freely, definitively, and irrevocably granted her express consent for her child to be adopted. She also determines that the relinquishment decision has not been made in exchange for remuneration. The social worker writes a report that summarizes the facts of the case and attests to the birthmother's reasons for deciding that she cannot parent the child. In most cases, the social worker recommends that the Family Court judge approve the adoption. The court reviews the

social worker's report and makes its recommendation. The birthmother appears before the Notary and signs her second consent to place her child for adoption.

7. *U.S. Embassy – DNA Testing:* The US Embassy has required DNA testing since October 1, 1998, for all relinquishment adoptions of Guatemalan children by U.S. citizens. After reviewing the adoption case file, the US Embassy authorizes DNA testing of the birthmother and child to confirm their biological relationship. The DNA process is as follows:
 - The attorney presents several certified documents, photos, and medical test results to the U.S. Embassy.
 - The Embassy reviews the file and gives approval for the DNA testing, which is carried out by authorized medical personnel and analyzed by an approved laboratory in the U.S., under strict chain of custody procedures.
 - The birthmother and child are escorted to one of the two Embassy-approved doctors where their identities are verified and saliva samples are collected for DNA analysis. The child's thumbprint is taken and put into the adoption case file. To verify the child's identity, U.S. Embassy personnel compare this thumbprint to those taken when the birth was registered or when the birthmother signed custody of the child to the attorney. The birthmother's identity is verified through her original cedula (photo identification card), a photocopy of which was entered in the adoption case file at the time the birthmother relinquished custody of the child to the attorney. The birthmother's thumbprints are also taken. A polaroid photograph is taken of the birthmother holding the child on her lap and is attached to the DNA file. The birthmother and foster mother sign forms attesting to their identities, and the birthmother signs her consent for the DNA analysis.
 - The laboratory sends a copy of the DNA test results (with photos) directly to the U.S. Embassy in Guatemala, and to the adoptive parents and adoption agency.
 - The U.S. Embassy reviews the test results and verifies the authenticity of all supporting documents. If all documents are in order, and the child meets the provisions of immigration as an orphan, the U.S. Embassy/CIS provides the attorney with the Consentimiento (consent form), which is required before the PGN will authorize the Notary to prepare the final adoption decree.
8. *PGN Review and Approval:* The attorney submits the adoption case file and a petition for approval of the adoption to a Notarial officer of the PGN. A PGN Notary reviews all documents in the case file and, at his/her discretion, may independently investigate one or more aspects of the case. PGN may reject the file (issue a previo) any number of times for a wide variety of reasons that range from serious (e.g., irregularities in the birthmother's or child's identity documents) to minor (e.g., minor spelling errors, expired US notary seals). The attorney for the birthmother and adoptive family corrects the problem and resubmits the case to PGN. Ultimately, the PGN typically concurs with the Family Court's recommendation and issues its approval for the adoption to proceed.
9. *Adoption Decree:* A Notary then prepares the final adoption Protocolo or deed, and meets with the birthmother for her to sign her final consent to the child's adoption. The executed Protocolo is filed with the Archivo de Protocolo. At this point, the child is legally the child of the adoptive parent(s) under Guatemalan law.
10. *Civil Registry and Passport:* The attorney presents the required documents to record the adoption at the Civil Registry where the child's birth was recorded, and requests that a new birth certificate be issued to reflect the adoption, and to change the child's surname to that of the adoptive family. The attorney then takes all documents including the new birth certificate and applies for the child's Guatemalan passport. The child is again fingerprinted to affirm his/her identity.
11. *U.S. Embassy – Final Approval and Visa:* The attorney presents the case file with the child's passport and new birth certificate to the U.S. Embassy. The Embassy again evaluates the file and, if all documentation is in order, issues a "Final Document Approval." After the attorney receives this approval, the adoptive parents and child appear at the US Embassy for final verification, and an embassy official then issues a visa for the child's entry into the U.S.

* These steps take place in the approximate order listed, but the exact order (especially of pre-Family Court steps) can vary from case to case.

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The Adoption Process in Guatemala: The Role of the Notary

The majority of adoptions in Guatemala are performed through the Notarial process that allows direct relinquishment of children by their birthmothers to a specialized attorney, the Notary. UNICEF claims that adoptions completed under the Notarial process are "extra-judicial" and somehow less rigorous than adoptions that are finalized before a judge. The role of the Notary as an official presiding over adoptions in Guatemala is often confusing, since it is very different from the legal system in the U.S. Therefore, we would like to take this opportunity to explain the role of the Notary as it relates to intercountry adoptions in Guatemala.

Along with an academic degree, a law graduate from a Guatemalan law school receives two professional titles: "lawyer" and "Notary." In his role as a lawyer, the attorney is responsible for litigation and legally representing individuals. The responsibilities of the Notary include drafting deeds, contracts, and handling such non-litigious issues as estate probates, estate planning, adoptions, and corporate matters. Every Notary has a "Protocolo," which is the collection of deeds and is sold only to Notaries at the Ministry of Public Finances. A Notary in Guatemala has "public faith" which allows him/her to authenticate signatures and documents, and signifies that official documents and statements from the Notary are genuine. A Notary is held to the same high standards of ethical conduct as Guatemalan public officials and is convicted of a criminal offense and automatically disbarred if he/she is found to be guilty of fraud. Notaries were empowered by Guatemalan law in 1974 to oversee non-litigious cases in order to decrease the backlog of cases waiting to be tried in the Guatemalan Family Courts. As a result, Notaries play a significant role in Guatemalan formal domestic and intercountry adoptions. The previous section provided a description of each step of the intercountry adoption process in Guatemala. The following discussion highlights the Notary's legal role throughout this process.

The Specific Tasks of the Notary:

For each adoption case, a presiding Notary is contracted to oversee the case through the four-to-twelve plus month process. The Notary generally either works in partnership with a particular attorney or is hired by the attorney for Notarial services for a specific case.

- (1) The first official duty of the Notary is to instruct the birthmother of the consequences of her consent to the adoption, including the fact that the adoption will be irrevocable and her child, if adopted, will leave Guatemala to reside in another country. Then, the birthmother declares under oath in front of the Notary that she is the mother of the child she is relinquishing for adoption. Her deposition and consent for the adoption are recorded in an act and signed both by the Notary and the birthmother.
- (2) The Notary reviews all documents in the adoptive families' dossier and adds several Guatemalan documents including the birth certificates of the child and of the birthmother, the medical certificate of the child, and a copy of the certificate of the national identification document of the birthmother (Cedula) to create a file. Everything in this file is recorded in an act that is signed by the lawyer on behalf of the adoptive parents, and by the presiding Notary. This act is then presented to the Ministry of External Relations to have the Guatemalan consul's signature authenticated.
- (3) After all documents are legalized and translated, the Power of Attorney (POA) must be recorded in the "Protocolo" of the presiding Notary. The Notary then files a certified copy of the recording, with a copy of the POA and its translation, with the Registry of Power of Attorneys of the Archives of Protocolos, at the Justice Supreme Court.
- (4) The next step is for the Notary to present the file to the Center for Distribution of Files of the Judiciary in Guatemala City, which randomly distributes the cases among the six Family Courts. Once the adoption is approved by the Family Court, the Notary obtains a second deposition from the birthmother ratifying her consent to release her child for adoption and confirming her identity.
- (5) After the file exits Family Court, the Notary presents the file to the "Procuraduría General de la Nación" (PGN), the equivalent of the U.S. Attorney's General's Office.
- (6) Before the PGN can issue an adoption approval, the Notary must present the results of a DNA test of the birthmother and child that confirms their biological relationship. The birthmother signs her third

consent to place her child for adoption in front of the Notary on the day that the DNA samples are collected.

(7) After the PGN approves all documentation in a file, the Notary completes a “Notarial deed of adoption” that is signed by the birthmother, the lawyer on behalf of the adoptive parents, a translator if the birthmother does not speak Spanish, and a witness if the birthmother is illiterate. It is at this point that the birthmother signs her final consent for the adoption in front of the Notary and the final adoption decree is written and issued. This finalizes the adoption in Guatemala and concludes the role of the Notary.

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Judicial Adoption Process in Guatemala

Similarities with “Extrajudicial” Adoption Process

All adoptions in Guatemala, whether they are domestic or intercountry, judicial or Notarial, follow the same major steps. First, prospective adoptive parents are screened to determine their ability to provide a home to a child, and the age and health status of the child they are willing to, or capable of, parenting is determined (i.e., an older child, one with disabilities, or a healthy infant). A match is then made between the prospective adoptive parents and a child who is available for adoption – either through relinquishment or abandonment.

Next, the case is assigned to a Family Court (there are six in Guatemala City alone, and more in other jurisdictions). The presiding judge in the family court assigns a social worker to each case. The social worker conducts an interview with the birthmother or hogar director (in abandonment cases) to determine the eligibility of the child for adoption. In addition, she either interviews the prospective adoptive parents directly (domestic adoption) or reviews a certified socioeconomic homestudy that has been conducted by a licensed social worker in the adoptive parent’s country (intercountry adoption). The Guatemalan social worker submits a sworn statement that outlines her professional assessment of a particular adoption file and either recommends the adoption be allowed to proceed or determines that it should not.

If the social worker recommends that the adoption be approved, the judge then signs a document verifying the report and the case is submitted to the Office of the Attorney General (PGN) for review. The job of the PGN is to ensure that all of the laws of the country have been followed in the adoption process and that the necessary paperwork is in place for the adoption to be finalized.

Once the PGN renders a positive decision, an adoption decree is ordered. The adoption decree is then issued and filed by a Notary. Finally, a new birth certificate, indicating the new surname of the child (that of the adoptive parents), is issued by the Civil Registry. These steps are identical in all formal adoptions from Guatemala.

Differences between Judicial and “Extrajudicial” Adoption processes:

The Judicial adoption process differs from the Notarial system at three steps. First, the judge is presented with the prospective adoptive parents and the child and makes the formal “match” between the two parties rather than a private attorney, although a private attorney may present both parties to the judge and suggest that they be “matched”. Second, after the adoption is recommended by a court-appointed social worker, the family court judge then presents the case to the PGN for their review. In the Notarial system the Notary would present the case to the PGN. Finally, it is the family court judge who orders the adoption decree to be issued by a Notary (same person who would issue the decree in the Notarial adoption process) after the approval of a case by PGN rather than the private attorney. All other steps in the process are the same.

Why is the Judicial Adoption process not used more frequently?

The judicial process is used infrequently because, since Family Court judges are responsible for cases other than adoptions, including domestic child custody, and other child welfare issues, they are unable to process cases as efficiently as an attorney who specializes in adoptions. In fact, the adoption function of the Notarial system was introduced into the Constitution specifically to allow the Family Court judges to devote sufficient time to their other important duties and responsibilities. Because the Notarial system is used for the majority of adoptions, adopted children are able to join their permanent families more expeditiously and the court systems are able to focus on their other crucial judicial responsibilities, including the processing of cases of child neglect and abuse.

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DNA Testing: How It Was Implemented and Why

Prior to instituting mandatory DNA testing in 1998, the U.S. State Department was responsible for overseeing the investigation of the orphan-status for all Guatemalan children adopted by U.S. citizens. While the State Department was in control of this process, the orphan-status investigation included a lengthy interview of the birthmother as well as a review of all requisite documents including the birthmother's and the child's birth certificates. In a few cases, DNA testing was also completed to verify the relationship between the birthmother and child. If the State Department approved an adoption following this investigation, they issued a signed Birthmother Consent form, which is required for the finalization of all U.S.-Guatemalan adoptions. While pre-approval of emigration is not required by the Guatemalan government, the State Department and the Procuraduría General de la Nación (PGN) had an unofficial agreement that the PGN would only issue final adoption approvals for cases where Birthmother Consent forms had been completed and signed by State Department officials. This agreement continues to the present day between the U.S. Department of Citizenship and Immigration Services (CIS) and PGN.

In 1998, control of the adoption process was transferred from the State Department to the INS (Immigration and Naturalization Services)/CIS. Several factors led the INS/CIS to institute mandatory DNA testing for all Guatemalan orphans immigrating into the United States. INS/CIS officials determined that in most cases the birthmother interviews were time consuming and did not provide information other than that found in documents available to them, which included the report of the Guatemalan social worker. As the number of adoption cases increased, the INS/CIS personnel became increasingly unable to complete birthmother interviews in a timely manner. Additionally, U.S. adoption agencies and Guatemalan attorneys were pressing the INS/CIS to institute mandatory DNA testing for all cases to disprove charges by UNICEF, Casa Alianza, and others that Guatemalan children were being kidnapped and illegally "trafficked" for adoption. In response to the convergence of these factors, INS discontinued the routine practice of interviewing birthmothers, and instituted mandatory DNA testing for all U.S.-Guatemalan adoptions.

Currently, INS/CIS interviews birthmothers only in a randomly selected subset of relinquishment adoption cases, or when something in the adoption file appears to be irregular. Under these new procedures, CIS issues Birthmother Consent Forms after review of the DNA test results and all legal documentation included in an adoption file. Since the implementation of mandatory DNA testing in 1998, the INS/CIS has reported that DNA has failed to prove maternity in only a very low percentage (less than 1%, approximately 8 out of 2,200) of cases. In all instances where the DNA test results do not prove maternity, the CIS initiates an investigation of the case and the child is immediately disqualified for adoption.

The DNA process is strictly controlled to ensure the identities of both the birthmother and child, and to prevent any fraudulent test results. Some of the measures taken to ensure the integrity of the process include:

- The attorney is required to present approximately 14 documents to the Embassy when requesting authorization to complete the DNA test. These documents include all civil documents of the birthmother, the baby's birth certificate, the license for the doctor present at the child's birth, photos of the birthmother and child at the time of the child's birth, and results of HIV and Syphilis tests on the birthmother. The Embassy reviews the case and either provides the attorney with the DNA testing approval form or initiates an investigation if they have any concerns about the legal standing of any of the documents.
- There are only two doctors in Guatemala who are certified by the U.S. Embassy and allowed to take DNA samples. The samples—two swabs inside each cheek from birthmother and child—are taken by the doctor or a member of his medical staff, placed directly in a container, and sealed such that any tampering would be obvious. The seal is signed and registered, and cannot be opened until the sample vial is accepted at the U.S. lab for analysis. The sample is either sent out immediately by courier or stored in a locked container in the doctor's office. If there is any indication of tampering, the sample is immediately discarded. During the DNA test, the birthmother is required to produce her cedula (identification card that includes her photo) to the doctor. Prior to the DNA test, the Notary presents a copy of the entire adoption file to the doctor which includes a copy of the child's birth certificate and the copy of the birthmother's cedula

presented at the initial relinquishment of the child. The doctor and the Notary compare these documents to verify that the birthmother and the woman present at the DNA testing are the same person. The child's guardian is also required to produce her cedula or passport at the DNA exam.

- An official photograph is taken by the staff at the DNA test showing the child in the arms of his/her birthmother. This DNA photograph is compared to the photograph taken for the Guatemalan passport and the U.S. immigration visa (at the end of the adoption process) to ensure that the same child is represented in each.
- The DNA samples are shipped to one of three approved labs in the U.S. for analysis. The lab sends the DNA results (with the official DNA photos taken at the testing site) to the U.S. Embassy in Guatemala, and sends copies to the adoptive parents and the adoption agency.
- The U.S. Embassy reviews the DNA test results and all documentation (photos, cedula etc.). They either issue a Birthmother Consent Form or initiate an investigation into the case depending on their assessment of the documentation presented and the DNA test results.

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Fees Paid by US Families: Where Do They Go

U.S. families pay fees for the various services provided in Guatemala throughout the process of their adoptions (the country fee). These fees range from \$15,000-\$20,000 and cover such expenses as foster care for the children, medical care for the birthmothers and children, legal representation for the birthmothers, children, and the adoptive families, facilitator services, and various mandatory clerical services and processing fees. It has often been misrepresented by UNICEF and others have often asserted erroneously that U.S. families pay to their Guatemalan attorneys represent pure profit to the attorneys. This is far from the truth. As seen below, the fees paid by U.S. families cover a wide range of services rendered throughout the course of a US-Guatemalan intercountry adoption. The net country fee paid to Guatemalan attorneys is allocated to cover the following expenses:

- Social workers and medical professionals in Guatemala who are employed to counsel birthmothers and provide prenatal and medical care prior to a baby's birth, services that are legal in Guatemala and are provided free of charge by the attorney even if the birthmother changes her mind;
- Legal services including: 1) the birthmother's appearance before a Notary on four occasions to declare her decision to relinquish her child for adoption (note: sometimes the Notary is paid a fee for services, and sometimes he is a partner with the adoption attorney); 2) the collection of extensive documentation for BCIS approval of DNA testing and immigration visa, and for the PGN audit. This may require several trips to the birthmother's village to get certified documents; 3) filing costs for family court and PGN; and 4) charges for official registration of the Power of Attorney and birthmother relinquishment papers. A facilitator may be hired to assist in collecting documentation and arranging appointments for the birthmother;
- Sworn translation and certification of all documents in the adoption file;
- Foster and medical care for the child, including well-child visits and immunizations, during the course of the adoption, which can range from a period of 3 months to more than a year. Most attorneys and agencies do not charge families per month, but instead, have a flat fee. In addition, if a birthmother changes her mind the attorneys must still pay for the foster care and medical care that is delivered prior to the birthmother's decision to terminate the adoption proceedings. Further, the attorneys assume all financial risks for the children's medical care even in cases where the children have serious and costly medical conditions that may require specialized medical care for many months (and sometimes over a year) before the child is healthy enough to be referred to an adoptive family;
- Travel expenses for the birthmother on several occasions including her appearance at the DNA testing, her interview with the Family Court social worker, and her appearance to sign the final adoption decree;

- Attorneys' office expenses (overhead) including rent, telephone service for frequent long-distance and international calls, fax machines, computers with internet access, courier service and employees including administrative assistants, escorts for adoptive families to U.S. Embassy visa appointments (required by U.S. Embassy), and assistants to gather documents and present paperwork to the U.S. Embassy. Finally, most agencies add a percentage to their country fees in order to cover their communication expenses with Guatemala. These include costs associated with frequent telephone calls to Guatemala, shipping expenses for documents sent from the US to Guatemala, and supervision of any Guatemalan staff members employed by the agency (e.g., administrative office assistants and adoption facilitators).

Given the numerous expenses that are drawn from the country fee U.S. families pay their attorney to facilitate their adoption in Guatemala, the resulting "net fee" for the attorneys is usually under \$4,000 per case, which may be split between two attorneys if the Notary acts as an equal partner. This is definitely **not** the \$20,000 profit per adoption that is often misquoted by UNICEF and the press.

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Legal Checks and Balances in Guatemalan Intercountry Adoptions

The legal framework of the adoption process in Guatemala is designed to prevent illegal activities, such as presentation of children for adoption by people other than birthparents, coercion of birthmothers, and emigration of the "wrong" child after the adoption process. In order to ensure that adoptions proceed in a legal manner, a system of checks and balances has been established. The checks and balances in the adoption process are contained in the overarching system that provides a separation of powers in the workings of the Guatemalan government. This document addresses critics' allegations that the Guatemalan adoption process is prone to specified illegal activities by reviewing the extensive checks and balances in place to prevent them.

Preventing the Adoption of Abducted Children. Those who oppose the current legal practice of intercountry adoption in Guatemala frequently claim, without substantiation, that children are stolen from their homes and families in Guatemala and "sold" for illegal intercountry adoption. However, there are many safeguards in place that prevent this from happening, including:

- First and foremost, Guatemalan law strictly prohibits the abduction of children for any purpose. Therefore, if child abduction is suspected or alleged, Guatemalan law requires that the kidnapers be formally charged and prosecuted.
- DNA studies are conducted in all relinquishment adoption cases where children are adopted by U.S. families. The level of accuracy of the DNA analysis prevents even a blood-relative from presenting a child as her own, guaranteeing that every child is relinquished by his birthmother. The DNA samples are taken by one of two doctors certified by the U.S. Embassy and the samples are sealed at the office, preventing the submission of a DNA sample (cheek swab) from anyone other than the woman who is presented as the birthmother at the test site. These studies have been conducted for the majority of intercountry adoptions since 1998 (when the U.S. instituted this requirement). Any case where the DNA analysis does not prove maternity is immediately withdrawn from processing (i.e., the child is no longer available for adoption) and submitted for investigation by the legal authorities in Guatemala.
- During the DNA testing an official photograph is taken of the birthmother with the child she has placed for adoption. This photograph is compared with the photos taken of the child for his Guatemalan passport and U.S. immigration visa to ensure that the same child is represented in each case.

Preventing the "Wrong Child" from Emigrating from Guatemala. Those opposed to intercountry adoption in Guatemala allege that a "stolen" child can be substituted after an accomplice mother and her child have completed the process of DNA testing, social worker interview, etc. Several safeguards currently exist to prevent this type of fraud:

- It is illegal to abduct a child or to sell any human being in Guatemala. Anyone caught violating the law is subject to formal charges and prosecution.

- In intercountry adoption, photographs are sent to the adoptive parents when they accept the referral of a particular child, and normally at regular intervals throughout the process. Many adoptive families also visit the child in Guatemala prior to the finalization of the adoption. Therefore, the adoptive parents would certainly notice if the child they have been presented to bring home were different from the child whose pictures they have received and the child they have visited over the lengthy course of the adoption process.
- An official photograph is taken of the child in the arms of his birthmother by the staff at the DNA sampling centers. U.S. immigration officials compare the DNA photograph to the photograph taken for the Guatemalan passport and the U.S. immigration visa to verify that the same child is represented in each. Immigration officials also view the child in person during the visa interview.

Determining That There is No Coercion Involved in Relinquishment Decisions. The framework of the Guatemalan adoption process provides a large number of safeguards to ensure that birthmothers are not relinquishing their children against their will or under duress. These include:

- The process of adopting a Guatemalan child takes place over a period of several months (4-6 on average). During this time the birthmother must reassert her consent to relinquish the child on four different occasions—original consent at the start of the process; second consent during social worker interview; third consent during DNA testing; and fourth and final consent after PGN approval has been issued to finalize the adoption. Notably, two of these consents are given without the attorney present: one is given after the interview with the social worker (a public official) and one is given during the DNA sampling. Neither the attorney nor the Notary is present during the social worker interview. These occasions provide sufficient opportunity for the birthmother to voice any objections and minimize the possibility of direct coercion by the attorney or Notary handling the adoption process. If, at any time during the adoption process, the birthmother requests that her child be returned to her, it is done immediately and the adoption process is terminated. This, in fact, occurs in a small percentage of the adoption cases initiated each year.
- The birthmother is interviewed by a court-appointed social worker who is sworn to uphold the law and ethics of her profession. In that interview it must be established that the birthmother has relinquished her child freely and without pressure or payment from others; that she understands the consequences of her baby being adopted by foreign parents; and that she has been informed of her rights to terminate the procedure at any time. The personal situation that has led her to relinquish her child also is investigated in this interview.
- The U.S. embassy also conducts random interviews of birthmothers who have relinquished their children. It is reported that 5% of birthmothers are interviewed in this manner. In addition, if there is any question of illegal activity or coercion arises, the U.S. embassy will automatically require a detailed investigation of the case. For several years before the U.S. began requiring DNA testing for all relinquishment cases, a U.S. Embassy official interviewed every birthmother whose child was being adopted by U.S. citizens. Those interviews rarely discovered any evidence of wrong doing and were replaced by the more accurate and less subjective DNA testing.

Preventing Collusion Between Parties to Perpetrate Illegal Adoptions. UNICEF has made claims that there are extensive “child trafficking” networks in Guatemala that involve doctors, nurses, social workers, attorneys, Notaries, orphanages and judges. In reality, however, the relationships between and among these professionals represent appropriate and legal interactions required in the course of maternal care and adoption processing. For instance, attorneys and Notaries may share a professional practice specializing in adoption law, and medical professionals may refer women who express an interest in adoption to the proper resources. However, UNICEF attributes a sinister quality to these routine professional relationships, alleging that these professionals regularly violate the law by conspiring to arrange illegal adoptions, typically of stolen or purchased babies, at great profit. However, the Guatemalan system of adoptions is organized in such a way that the involvement of professionals (social workers, PGN attorneys, judges) in any sort of collusion with a particular attorney is highly unlikely and would be extremely difficult to maintain.

- When an adoption case is submitted to Family Court in Guatemala City, it is assigned randomly to one of the six Family Courts in that department (district). Therefore, it is currently highly unlikely that an attorney can guarantee that his cases will be processed by a specific Family Court judge as would be needed for such a “network” to exist.

- There are multiple social workers conducting birthmother interviews and social studies in each of the Family Courts, and these professionals occasionally are rotated between courts and to other assignments. The social worker is assigned to a particular case by the presiding judge in the Family Court. The Judge is responsible for the oversight of the social worker and can reject or reassign a case if he finds the social worker's report inadequate. This again decreases the likelihood that an attorney and a social worker could form a conspiracy to arrange illegal adoptions.
- Once the social worker has submitted the report of her investigation to the Family Court judge with a recommendation that the adoption proceed, the adoption file is then submitted to the PGN for a final review. There are ten attorneys who process adoption files at the PGN office. Each case is assigned randomly to one of those attorneys. If the case is determined to have errors in documentation or requires further evidence, a previo (a request for additional information that must be satisfied for the adoption to be completed) is issued by the reviewing PGN attorney. Once the conditions of the previo have been satisfied, the case is returned to the same attorney in PGN. The random assignment of files within PGN precludes any attorney from establishing an inappropriate professional relationship with a PGN attorney.
- After the PGN attorney recommends approval of the adoption file, it is then reviewed and signed by the Sub Procurador (assistant attorney general) in charge of the adoption division. This individual is responsible for overseeing the attorneys in PGN and has final veto or approval power over each case. This individual has to affix his signature on all previos and approvals.
- Finally, staff members at the U.S. Embassy review the file as part of the immigration requirements and will require any additional information (official translations, additional documents, a birthmother interview) they deem necessary to satisfy any concerns they may have about a particular case.

Therefore, a conspiracy to "traffic children" on a regular basis in adoptions processed in Guatemala City would require the participation of the attorney and Notary processing the case, six Family Court judges, at least 12 social workers (assuming at least 2 social workers in each of the 6 Family Courts), 10 PGN attorneys, the Sub Procurador of the PGN, and all of the staff at the U.S. Embassy to guarantee that illegal adoption cases would be approved. This level of collusion is implausible given the level of oversight at each step in the process.

Preventing One Government Office from Acting Outside of the Law. The checks and balances of the adoption system are set within the broader context of a government with a separation of powers. The balance of power within the Guatemalan government is similar to that of the U.S.; it has Executive, Legislative and Judicial branches supported by a Constitution and laws. Each of these branches has authority for different processes, and the involvement of each is required to alter the adoption process.

- Adoption is an institution that is protected by the Constitution of Guatemala.
- There are laws that have been passed to eliminate abduction or sale of children, falsification of documents, incorrect birth registration, etc. Accordingly, any activity that results in the illegal adoption of a child, coercion of a birthmother, or sale of a child is illegal in Guatemala.
- The process of Voluntary Jurisdiction, which regulates the Notarial adoption system, is also codified. Notaries are held to a strict code of conduct, and violations of this code, including falsification of documents, are punishable by disbarment and a jail sentence.
- Any attorney suspected of illegal activities is subject to prosecution by the PGN under the law.
- Any PGN attorney suspected of illegal activities is subject to criminal charges punishable by disbarment and a jail sentence.

Summary. Of course, no system can ever be completely immune to abuse. However, the current system of adoption in Guatemala contains extensive and effective safeguards. Children are voluntarily relinquished by a biological parent, the origins of that child (relationship to person relinquishing) are scientifically proven, the identity of the child is verified at the end of the process, as is the continued intent of the birthmother to relinquish her child for adoption. It is estimated that fewer than 5% of adoption cases presented to the U.S. Embassy for visa approval are denied. Further, the majority of denied cases involve situations where the children will not qualify for visas under the U.S. definition of the term "orphan" (e.g., a child cannot qualify as an "orphan" for U.S. immigration purposes if his birthmother is married) rather than instances of adoption fraud.

It is difficult to see how the UNICEF-backed proposed regulations that require children to remain available for placement within Guatemala in State-run orphanages for a period of several months, or that require a Judge (rather than a Notary) to order the final adoption deed (as described in detail in the section of this packet on the Current legal status of adoptions) would improve the integrity of adoptions above the level that presently exists in the Notarial adoption system. Instead of insisting on the passage of a whole new set of laws and regulations, simply ensuring that the current laws are stringently enforced would virtually guarantee that no incidence of illegal adoption escapes notice and prosecution.

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Current Legal Status of Adoptions in Guatemala

The discussion that follows provides a brief overview of UNICEF's role in Guatemalan intercountry adoption matters, a summary of the recent difficulties in Guatemalan adoptions, a review of the current legal status of adoptions in Guatemala, and an outline of the restrictive adoption law UNICEF currently promotes within Guatemala.

1. UNICEF's Role

UNICEF was instrumental in the recent de-facto suspension of intercountry adoptions in Guatemala, a period characterized by gross violations of existing Guatemalan laws and constitutional protections.¹ It is our understanding that Ms. Gladys Acosta, UNICEF representative to Guatemala, has expressed UNICEF's endorsement of Guatemala's attempted accession to the Hague Convention on Intercountry Adoption and has indicated that UNICEF representatives are extremely active in promoting and developing adoption laws within Guatemala. This role appears confirmed by Ms. Carol Bellamy, UNICEF's Executive Director, who has stated that UNICEF "recommended that the country consider the Hague Convention" and that UNICEF has "provided support to develop a National Law on Adoptions, currently under discussion in the Guatemalan Congress, whose aim is to ensure that both the Hague Convention and the Convention on the Rights of the Child are fully reflected in national law. This law reflects the understanding contained in both documents that the best interests of children are served by helping them to stay within their extended families and communities, and that national adoption is preferable to inter-country adoption. UNICEF is also assisting the Central Adoption Authority – whose existence is mandated by the convention – to disseminate the new law and train those involved in adoption proceedings to implement it." (personal correspondence from C. Bellamy, July 2003).

Numerous legal challenges in defense of the practice of intercountry adoption in Guatemala were initiated during the period of attempted Hague Convention implementation. Without exception, the courts upheld every legal challenge heard against the illicit tactics employed by those who oppose the legal system of adoptions in Guatemala. In fact, the Constitutional Court, Guatemala's highest court, clearly and decisively ruled that Guatemala's attempted accession to the Hague Convention on Intercountry Adoption violated the Constitution, and was therefore illegal. Despite the consistent and definitive rulings of the Guatemalan courts during this time, UNICEF and others remain committed to the severe restriction of intercountry adoption. It is alarming that UNICEF, an organization that professes great respect for the rule of law, continues to support and promote activities that the Guatemalan judicial system has repeatedly confirmed are in violation of Guatemala's laws and Constitution.

1. De-Facto Suspension of Intercountry Adoptions - March 5th through September 12th, 2003

In August of 2002, Guatemala attempted to accede to the Hague Convention on Intercountry Adoption, under pressure from several sources, including UNICEF. The attempted accession to the Hague Convention was cause for immediate concern for a variety of reasons. First and foremost, it was widely agreed that the attempted accession to the Hague Convention was in violation of the Guatemalan Constitution, and challenged the balance of power in Guatemala and the integrity of its Constitution. While Guatemala certainly has the right to implement the laws and regulations it sees fit, the Convention was not entered with the approval of the requisite sectors of the Guatemalan government. As discussed in greater detail below, the attempts to accede to the Hague Convention and later attempts to implement

¹ The Guatemalan PGN maintains (and UNICEF would likely support this view) that there was no official suspension of adoptions in Guatemala. However, the PGN/Central Authority neglected to process a single "post-March 5th" adoption case from March 5th until well after September 12th, notwithstanding repeated court orders to do so. The PGN reluctantly resumed processing only after the Constitutional Court's ruling on the accession to the Hague Convention was officially published on September 12th. To date, processing by the PGN remains slow and erratic.

new procedures based on the Hague Convention contravened both existing Guatemalan law and the Constitution. When legal challenges to the constitutionality of Guatemala's accession to the Hague Convention on Intercountry Adoption were filed, the prudent course of action would have been to defer any change in adoption procedures until the legal issues were clarified through the court system. Unfortunately this was not the path taken and it was announced that the Hague Convention would take effect in Guatemala on March 5, 2003 and the Guatemalan Procuraduría General de la Nación (PGN) would be designated the Central Authority in Guatemala. This raised a second concern, that the Guatemalan Congress had not previously developed the requisite implementing legislation prior to the entry of the Hague Convention into force.² Instead, the PGN/Central Authority announced that it would develop new Hague-compliant procedures that would apply retroactively to all adoptions initiated after March 5. This decision was problematic because the PGN/Central Authority has no legislative authority to develop new laws or new procedures that are not based on existing law. Nevertheless, the Central Authority (which eventually became a separate entity from the PGN) acting outside of the law published new legal procedures for adoptions on July 1, 2003. As a result, the PGN and Central Authority began systematically rejecting all adoption files initiated between the dates of March 5 and July 1, 2003 for failing to meet the requirements of the Hague Convention - even though these requirements were not yet developed and could not become law until approved by the Guatemalan Congress. Publication of the PGN/CA's new adoption procedures prompted a second set of legal challenges by Guatemalan attorneys since the PGN/CA has no legal authority to mandate changes to Guatemalan law.

The PGN/Central Authority assured the U.S. government that all relinquishment adoption cases initiated prior to July 1, 2003 would be processed. Subsequently, and as recommended by the U.S. Department of State, U.S. citizens struggled to comply with the "new procedures" published by the PGN/Central Authority, in spite of the continuing controversy and the legal challenges filed by adoption advocates in Guatemala. Eventually, however, it became clear that no "post-March 5th" adoption cases were being processed. To further complicate matters, the new rules announced by the Central Authority on July 1 were in clear violation of existing Guatemalan law. These "rules" promulgated sweeping changes, including: (1) precluding adoptive parents from having appropriate legal counsel; (2) removing children from the security of their existing foster families and placing them instead in orphanages³; (3) preventing Notaries from accepting new relinquishment cases; and (4) disrupting matches between adoptive parents and children that had been in place since March 5. As a result, many families turned to the Guatemalan legal community for assistance.

Recursos de Amparo (Appeals for Protection)

U.S. families began to request that attorneys working on their behalf in Guatemala file recursos de amparo (i.e., appeals) with the Guatemalan Court of Appeals. Several of the amparos were filed on the grounds that, even if the attempted accession to the Hague Convention was determined to be constitutional in Guatemala, it should not apply to U.S. citizens since the U.S. would have third party status with respect to the Convention. Other appeals were filed on the grounds that the PGN/Central Authority had no legislative authority to develop rules or procedures that deviated from existing Guatemalan law. In all, over 100 amparos were filed and every amparo heard by the courts was upheld. The Appeals Court even granted adoption advocates the right to pursue criminal complaints against those involved in obstructing the legal adoption process, including PGN officers. The overwhelming judicial support for the positions expressed in the amparos should have been sufficient to establish the impropriety of the UNICEF-endorsed initiatives. Nevertheless, adoptions remained stalled at the PGN/Central Authority in direct defiance of the Appeals Court rulings. Finally, however, the constitutional challenges to the attempted accession to the Hague Convention on Intercountry Adoption were settled by Guatemala's highest court.

2. Current Status - Constitutional Court Rules Hague Convention Accession Unconstitutional

In order to fully appreciate the brief and controversial history of the Hague Convention on Intercountry Adoption in Guatemala, a bit of background on the Hague is essential. While the brief overview of the

² This approach is in stark contrast to that of the U.S. Although the U.S. was an active participant in developing the Hague Convention and signed it in 1994, this country has still not ratified the Convention. Rather, the U.S. has spent almost a decade developing the appropriate implementing legislation and regulations and will not ratify the Convention until the requisite regulations are finalized. By contrast, Guatemala elected to implement the Convention and then develop the implementing legislation.

³ The PGN/Central Authority identified four specific orphanages it would utilize for this purpose. One of the orphanages identified, Elisa Martinez Children's Home, was severely criticized in the ILPEC Report commissioned by UNICEF as being "depressing and unhealthy" and displaying "many limitations, both in terms of materials and planning, as well as in physical infrastructure."

Hague Conference that follows may seem academic, it is critical to understanding the legal status of the Hague Convention in Guatemala.

The Hague Convention on Intercountry Adoption

The term “Hague Conference on Private International Law” refers to an intergovernmental organization whose objective is “to work for the progressive unification of the rules of private international law.”⁴ The principal method used to achieve this goal is the negotiation of multilateral treaties, known collectively as Hague Conventions. Explicit procedures apply through which a country can become a Party to a Hague Convention. While signing a Convention may indicate a State’s intention to become a Party to the Convention, merely signing a Convention does not oblige a State in any way. In order to become a Party to a particular Convention, a State must either ratify or accede to the Convention. While the difference between ratifying and acceding to a treaty may seem trivial, the distinction is significant in the arena of international law. Generally, countries have a clear process of ratification that is dictated by their internal laws and reserve “ratification” for treaties that they were involved in negotiating and developing. By contrast, countries “accede” to treaties that they were not involved in negotiating.

According to the Hague Conference’s terminology, ratification is generally reserved for “Member States” exclusively.⁵ A relevant exception permits non-Member States that participated in the Seventeenth Session to ratify the Hague Convention on Intercountry Adoption. Other States wishing to become a Party to the Hague Convention on Intercountry Adoption must accede to the Convention. States that are already Parties to the Convention may formally oppose accession by a non-Member within a specified timeframe.⁶

Since Guatemala is neither a Member State nor a non-Member State that attended the required Seventeenth Session,⁷ Guatemala is not permitted to ratify the Hague Convention on Intercountry Adoption according to the relevant Hague Conference regulations. Therefore, the only method by which Guatemala could become a Party to the Hague Convention on Intercountry Adoption was by accession. In August of 2002, the Guatemalan President attempted to accede to the Hague Convention on Intercountry Adoption; a power that the Guatemalan constitution does not grant to the executive branch. The far-reaching effects of this ill-advised and illegal course of action threatened not only the well-being of the children caught in the middle of the adoption controversy, but also the integrity of Guatemala’s Constitution and legal system.

Guatemalan Constitutional Court Rules Hague Convention Accession Unconstitutional

With respect to international treaties, the Guatemalan President only has the power “to celebrate, to ratify and to denounce” a treaty. The President is not authorized to accede to any treaty. Therefore, a constitutional challenge was filed in December of 2002 with respect to the attempted accession on the grounds that the President had no legal authority to accede to the Treaty and that the Congress’ approval of this accession was unlawful. On August 13, 2003, the Constitutional Court of Guatemala, Guatemala’s highest court, clearly and decisively ruled that the accession to the Hague Convention was unconstitutional. As a result, any and all Hague-related procedures and agencies in Guatemala were rendered illegal (i.e., the Central Authority and any “new procedures” mandated by the PGN/Central Authority). As a result of this decision, the Central Authority was dismantled in early September of 2003 and the PGN advised the U.S. Department of State that it would resume processing cases using the Notarial system (i.e., the “pre-Hague” law) as soon as the decision was officially published. In addition, the Guatemalan Embassy to the U.S. announced that the PGN had significantly increased the legal staff

⁴ Article 1 of the Statute of the Hague Conference.

⁵ States which have participated in one or more of the earlier Sessions of the Conference may become Members States by accepting the Statute of the Hague Conference on International Private Law. Other States must be admitted by vote: admission is decided upon by a majority of Member States voting on a proposal made by one or several of them.

⁶ It is important to note that several Member States (including Canada, Germany, the Netherlands, Spain and the United Kingdom) in fact formally objected to Guatemala’s ill-conceived attempt at accession. It is our understanding that this is the first time any State has entered such an objection in the history of the Hague Convention.

⁷ There are 62 Member States: Albania, Argentina, Australia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Chile, China, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Israel, Italy, Japan, Jordan, Republic of Korea, Latvia, Lithuania, Luxembourg, The former Yugoslav Republic of Macedonia, Malaysia, Malta, Mexico, Monaco, Morocco, Netherlands, New Zealand, Norway, Panama, Peru, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Suriname, Sweden, Switzerland, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela, Yugoslavia. The non-Member States that participated in the Seventeenth Session were: Albania, Belarus, Benin, Bolivia, Brazil, Bulgaria, Burkina Faso, Colombia, Costa Rica, El Salvador, Ecuador, Haiti, Holy See, Honduras, India, Indonesia, Kenya, Republic of Korea, Lebanon, Madagascar, Mauritius, Nepal, Panama, Peru, Philippines, Russian Federation, Senegal, Sri Lanka, Thailand and Viet Nam.

in charge of adoption matters to expedite the approval process. The decision was published on September 12, 2003 and the PGN has resumed processing. However, processing has been slow and erratic.

3. Recent Legal Appeal Calling for Suspension of Intercountry Adoption

On October 10, 2003, Mr. Sergio Morales, the Guatemalan Procurator of Human Rights and former UNICEF consultant, filed a legal appeal that called for the immediate suspension of international adoptions. Mr. Morales asserts that the Constitutional Court ruling left a void in the adoption legislation because the Hague Convention eliminated the Notarial adoption system in Guatemala. Thus, Mr. Morales argues, there is no legal adoption process in place and any adoption currently being processed is therefore illegal. Mr. Morales has requested that adopted children be prevented from leaving the country unless they have the authorization of the Central Authority and demands that the Guatemalan Congress pass a "Hague-compliant" adoption law within 30 days. Mr. Morales also expressed his concern regarding 1,500 children whose adoption cases were allegedly approved by the PGN without supervision within 10 days of the Constitutional Court's ruling.

Mr. Morales' claims and demands are erroneous and frivolous for several reasons:

1. The Central Authority was an agency that was created in conjunction with Guatemala's illegal accession to the Hague Convention, and never approved any intercountry adoption cases. The Constitutional Court's decision ruled the Central Authority illegal and it subsequently was dismantled. Mr. Morales should realize that no adoptions could possibly be approved under the provisions of his appeal. Applying this standard is simply an attempt to block all intercountry adoptions in Guatemala.
2. Despite Mr. Morales' claims to the contrary, the Notarial system of adoption was not dismantled and it is, in fact, one of two legal adoption processes firmly in place in Guatemala, the second being the "judicial" adoptive process. Further, the Notarial process is protected by Guatemala's constitution (see Chapter 2 for a detailed summary).
3. Mr. Morales demands that the court compel Congress to pass a "Hague-compliant" adoption law in Guatemala. This is ludicrous – the court system of Guatemala is independent of, and has no power to compel the Congress to pass any specific legislation. Furthermore the Hague Convention is not in effect in Guatemala. Although this would not preclude the Guatemalan Congress from implementing a law that theoretically complies with the Hague Convention it is a matter of debate exactly what constitutes a "Hague-compliant" adoption law. The law Mr. Morales and UNICEF support (commonly called the Valladares Law after the Senator who proposed it) is an extremely restrictive adoption law that is far more limiting than anything required by the Hague Convention.
4. On October 1, 2003, the Guatemalan newspaper Prensa Libre reported that the PGN had approved 1,500 adoption cases within 10 days of the Constitutional Court's decision. The PGN, by contrast, reported to the U.S. Department of State that they had received only 200 cases for processing. Both claims are false. Before the Constitutional Court ruling, estimates indicated that roughly 200 pre-March 5th cases and 1,200 post-March 5th case files were active for U.S. adoptions of Guatemalan children. Since the finalization of the constitutional court ruling on September 12, Mr. Roy Hernandez, Director of the U.S. Bureau of Citizenship and Immigration Services (formerly INS) in Guatemala estimates that only 100 cases have been approved and that most of those approved were pre-March 5th cases. It is unfortunate that Mr. Morales is choosing to propagate this misinformation.

On October 30, 2003, Guatemala's Constitution Court rejected this poorly-disguised attempt by Mr. Morales and others opposed to adoption to pressure the Guatemalan Congress to pass an extremely restrictive adoption law.

4. Looking Forward – Proposed Valladares Law Seeks to Obstruct Intercountry Adoption

The adoption law currently under consideration by the Guatemalan Congress and supported by UNICEF is the National Law on Adoption which was submitted by congressional Deputy Carlos Mauricio Valladares de Leon and is commonly called the "Valladares Law." UNICEF has been extremely vocal in criticizing the current adoption system in Guatemala, alleging time and again that the system is subject to abuse. As discussed in greater detail in other sections of this packet, UNICEF's allegations appear to be based principally on the highly controversial ILPEC and UN Special Rapporteur's reports published in 2000. It is unclear how UNICEF believes the changes proposed by Valladares will eliminate the alleged abuses. It is clear, however, that the Valladares provisions could effectively eliminate intercountry adoption in Guatemala.

According to this UNICEF-advocated legislation, a birthmother would be required to live with her baby for the first ninety days after delivery before being permitted to relinquish her child to the State. At best, this is a cruel requirement to impose upon a woman who has made the difficult decision to place her child for adoption. At worst, this requirement could lead to disastrous consequences such as increased child abandonment, developmental delays in the children due to malnutrition, death from natural causes, and infanticide. Under this proposed legislation, no birthmother would be allowed to make an adoption plan for her child that specifies a preference for intercountry adoption; rather, the State would have the power to decide what happens to the child after relinquishment. The State would be obligated to offer the child first to any living blood relative in Guatemala and next to any non-relative living in the birthmother's community.⁸ If no one in the birth mother's extended family or community agrees to parent the child, a national placement must be sought for the child. This approach is in keeping with UNICEF's position that a child should only be placed with an adoptive family residing in a different country as a last resort and only when all local options have been fully exhausted. Unfortunately, we feel that the proposed regulations would lead to greater institutionalization of children with very little possibility for increases in national adoption placements.

The proposed law would establish two phases to the adoption process: an administrative phase and a judicial phase. The administrative phase alone is a very lengthy process. For instance, a period of 8-11 months is allowed to pass before the abandonment decree required for the administrative phase is issued.⁹ In addition, no time limits are provided in the proposed law regarding the amount of time that can be spent on the search for a national placement.¹⁰ In addition, in the case of an intercountry adoption, a period of 4-7 months is allowed for an investigation of the adoptive family.¹¹ A child could therefore be required to spend upwards of 12-18 months in a State-run orphanage during the administration phase before the judicial phase of an adoption could be initiated. This seems an especially cruel requirement given the rarity of formal in-country adoption in Guatemala and the critical developmental period represented by the first three years of a child's life. Even more alarming is the fact that there is currently no government welfare system in place to provide for children in need, including state funding for orphanages. Children waiting for permanent homes currently live either in private, licensed foster homes or private, licensed children's homes (known as hogares). These children receive no support from the Guatemalan government; rather, they are supported directly by prospective adoptive parents (after a match has been made) or via a humanitarian aid network whose funds come principally from adoption-related donations. If the proposed legislation is passed, the children would be placed in the care of the State which does not currently fund childcare in any way and has no apparent plan to do so in the future (i.e., the UNICEF-supported proposed legislation contains no provisions for the funding of childcare).

UNICEF does not appear to be concerned with the child welfare crisis that would certainly result from the Valladares law and other restrictive adoption reform legislation before the Guatemalan congress. When asked to comment on the inadequate alternative support systems for thousands of children who would be denied permanent families if intercountry adoption were closed following this restrictive legislation, Ms. Gladys Acosta, UNICEF representative to Guatemala, stated, "To take care of the unwanted children is not the concern of UNICEF, but of the local government. UNICEF only has to take care that Guatemala passes laws that the international community expects, to fulfill the international treaties that Guatemala has accepted to become a party" (S. Luarca, May 15, 2003 [sumarilu@yahoo.com], available at: http://www.guatadopt.com/archives/cat_asociacion_defensores_de_la_adopcion_updates.html).

5. Conclusion

The Constitutional Court of Guatemala has provided a reprieve by ruling that the accession to the Hague Convention on Intercountry Adoption was unconstitutional, and therefore void. However, UNICEF continues to aggressively lobby the Guatemalan Congress to pass extremely restrictive adoption laws, which if implemented, will likely have disastrous consequences on the health and well being of thousands of needy children and their birthmothers. Unfortunately, UNICEF has demonstrated no regard for the integrity of Guatemala's Constitution and legal system. Instead, UNICEF ignores the real issue of what is

⁸ This requirement, which originates in the UNICEF interpretation of the CRC (see appropriate section of this packet), is particularly severe considering that many birthmothers in Guatemala do not publicize their pregnancies to avoid potential abuse and/or the stigma associated with unwed pregnancy.

⁹ Title 5, Articles 20 and 21 of the Proposed Valladares Law. Please note that having the children reside in State-run orphanages would represent a detrimental shift from current conditions in Guatemala where many children receive highly personalized care in foster homes and small private children's homes (i.e., hogares).

¹⁰ Title 5, Article 17 of the Proposed Valladares Law.

¹¹ Title 5, Article 18 of the Proposed Valladares Law.

best for the adoptable children of Guatemala while becoming involved in legal strategies to eliminate this valuable option. The proposed adoption legislation that UNICEF supports would violate the civil rights of birthmothers by eliminating their right to choose how and where their children will be parented, and would undermine the welfare of these children by forcing them to spend a crucial developmental period of their lives, if not their entire lives, in an institution.

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CHAPTER 3

Interpretations of the Convention on the Rights of the Child

UNICEF often cites the Convention on the Rights of the Child (CRC) to support its condemnation of intercountry adoption. The CRC is an international treaty that was adopted by the United Nations on November 20, 1989 and entered into force in Guatemala on September 2, 1990. The objective, as the name suggests, is to guarantee certain rights to children. These rights are presented in a total of 54 articles, the majority of which address the standards of care to which a child is entitled. Additional topics discussed in the CRC include the duty of the state to protect a child's right to an identity, and issues related to child labor, education, and other civil liberties like freedom of speech and religion. Article 21 (and the last section of Article 20) relate specifically to adoption. The CRC is broad in scope and purpose, and many aspects are open to interpretation by individual countries and agencies.

The UNICEF official position statement on intercountry adoption begins as follows: "The Convention on the Rights of the Child, which guides UNICEF's work, clearly states that every child has the right to know and be cared for by his or her own parents, whenever possible. Recognising this, and the value and importance of families in children's lives, UNICEF believes that families needing support to care for their children should receive it, and that alternative means of caring for a child should only be considered when, despite this assistance, a child's family is unavailable, unable or unwilling to care for him or her. For children who cannot be raised by their own families, an appropriate alternative family environment should be sought... Inter-country adoption is one of a range of care options which may be open to...individual children who cannot be placed in a permanent family setting in their countries of origin." S. Nguyen, UNICEF spokesperson, 10/24/03).

Clearly, UNICEF has based its position on intercountry adoption around its interpretation of the CRC. We feel that UNICEF's interpretation of this internationally acclaimed treaty, especially as it relates to intercountry adoption, is restrictively and unnecessarily narrow. Therefore, we have included a brief analysis of the CRC as it is written (literal interpretation) and discuss several key points related directly to the UNICEF interpretation of the CRC and its potential effects on innocent children.

A Literal Interpretation of the CRC

(1) The definition of "family"

The CRC preamble sets out certain premises. These include "Convinced that the family, [i]s the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children..." and "Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding." These statements do not define the term "family" and in no way differentiate a biological family with membership based upon a genetic link, from an adoptive family with membership based upon love and acceptance.

(2) No prohibition of relinquishment

The decision of a woman to relinquish her child for adoption is not one that is made lightly. Article 9 of the CRC provides that "State Parties shall ensure that a child shall not be separated from his or her parents against their will..." which in no way prohibits separation through relinquishment if it is the will of the (birth)parents.

Likewise, Article 14 specified that "States Parties shall respect the rights and duties of the parents, and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child." This provides that the (birth) parents have the right to choose direction for their child until he or she is capable of exercising her rights, as long as the best interest of that child is the basic concern.

(3) How Nationality and Culture are acquired

The CRC makes many declarations about a child's right to an identity. Article 7 states "the child...shall have the right from birth to a name, the right to acquire a nationality and the right to know and be cared for by his or her parents." In addition, the preamble brings attention to "the importance of the traditions and cultural values of each people for the protection and harmonious development of the child." The CRC clearly indicates that the child has the right to "acquire" a nationality, but does not necessitate that a child is born into that nationality. Similarly, it does not state that the culture in which the child is raised must be identical to that of his birth, otherwise emigration of a biological family to another country would

be in violation of the CRC. Instead there is a provision that the child be educated for the “development of respect for...the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own” (Article 29c) and that “due consideration 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 20-3). None of these provisions preclude intercountry adoption, but rather state that continuity of ethnic and cultural background should be given due consideration. Education about the country of origin to develop a respect for a child’s birth culture can be fostered in a variety of ways for children who leave their birth country through intercountry adoption (e.g., books and cultural artifacts in the home, visits to a child’s birth country, attending cultural celebrations, forming relationships with other people from the child’s birth country).

(4) Provisions on Adoption

The main position on adoption is provided in CRC Article 21, which asserts that: “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:

- (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child’s status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counseling as may be necessary;
- (b) Recognize that inter-country adoption may be considered as an alternative means of 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;
- (e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.”

These requirements are fulfilled in the current system of adoption in Guatemala. *(A) All adoptions must be carried out under the law of the country and with the consent of the birthfamily.* Guatemalan law clearly sets forth the requirements and procedures for adoption and, through the Family Court and Procuraduría General de la Nación, monitors all adoptions. A court-appointed social worker determines that the birthmother understands the consequences of relinquishing her child and consents to his or her adoption. *(B) Suitable domestic placement is not available in the country of origin.* Before relinquishing a child, a birthmother has decided that she is unable or unwilling to care for the child – and cannot or does not wish to place her child within her family or community. She cannot responsibly relinquish care of the child to the State because Guatemala has no social programs capable of providing suitable care for her child. An “unwanted” child simply cannot be cared for by the Guatemalan government in a suitable manner. *(C) The same regulations are in place for national and intercountry adoptions.* This is the case in Guatemala (see Chapter 2, section on domestic adoptions). *(D) There should be no “improper financial gains” resulting from the placement of a child for adoption.* This is probably the section of the article that is most open to interpretation, since nowhere is the term “improper financial gains” defined by the CRC. In the section of this packet entitled “Fees” (chapter 2) we have detailed how the fees the adoptive families pay for the facilitation of their adoptions provides compensation for the professional services of an attorney, legal fees associated with the adoption process, and care for the child during the process. It is our position that there are no “improper” financial gains associated with intercountry adoption from Guatemala, but rather fees appropriately paid for services rendered by professionals and caregivers. We also contend that the fees are commensurate with the level of services rendered, and are consistent with the compensation such professionals could expect for similar services unrelated to adoption. *(E) Agreements between Guatemala and the various countries that accept placement of its adopted children are particular to each interaction.* It should be noted that, because of the emigration and citizenship issues involved in each “receiving country” the government of that country is involved in the oversight of intercountry adoptions. For instance, in cases where Guatemalan children are adopted by

U.S. parents, the child must qualify as an orphan by the definition of the BCIS, the DNA match between birthmother and child must be approved by the Embassy, the Embassy can interview the birthmother in cases where there is question about her motivation for relinquishment, as well as in a small proportion of randomly selected cases. Most states also require a post-placement visit and report by a licensed social worker within several months of the completion of the adoption.

The UNICEF interpretation of the CRC

(1) Questionable hierarchy of rights

Under the terms of the CRC, a country that provides proper care and a permanent family to all of its children would have no motivation for children to be adopted internationally unless to a biological family member. In instances where all rights granted to children by the CRC cannot be met fully, the Convention does not provide a means to prioritize rights nor specify which shall be met at the expense of another. For instance, can the right to be raised with continuity of their cultural and linguistic background (provided in Article 20-c) be sacrificed in order to provide the inherent right to life, survival and development (provided in Article 6)? The UNICEF interpretation apparently denies the very real probability that all rights cannot be met simultaneously, and in doing so fails to address the situation that exists in Guatemala, which is not in a position to provide even basic care to all children who are in need of a permanent home. UNICEF works to severely limit intercountry adoption in a large part because it impinges on the right of a child to grow up with his birthparents and live in his birth country – even in a case such as Guatemala where the child’s basic needs are not being met and his survival, health, and well-being are demonstrably at extreme risk. In doing so, UNICEF has demonstrated that it believes that a child’s right to remain with his “own” (biological) parents is more important than the child’s “basic” human rights of survival, adequate nutrition, medical care, shelter, and education.

Article 3 (2-3) indicates “States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities” and Article 18 (2) asserts “States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.” Article 24 maintains “State parties recognize the right of the child to the enjoyment of the highest attainable standards of health.” These facilities and services are not provided by the government of Guatemala, and therefore are not available to the children. There is inadequate state medical care, no facilities or services in place to care for children, and the few institutions that are government sponsored (like the Hogar Elise Martinez described in the ILPEC report) are inadequate and even dangerous for the children residing there. Yet UNICEF’s statements never acknowledge that adequate care of “unwanted” children, as specified in the CRC, is not currently provided by the government of Guatemala.

From a logical and humanitarian perspective, it is impossible to argue that it is in the best interest of the child to suffer an increased risk of malnutrition, illiteracy, and even death in his home country rather than to grow up with adequate medical care and access to education in a loving family abroad. This is, amazingly enough, the net effect of UNICEF’s interpretation of the CRC.

We concur with the CRC that domestic placement – in a country where socioeconomic conditions and social services are capable of providing a child with health care, education, and a good chance of survival – would be preferable to intercountry adoption. However, we assert that international adoption may sometimes represent a relinquished or abandoned Guatemalan child’s only realistic chance at a stable family life and such basic amenities as food, shelter, education and health care. We further assert that this position is logical, humane, and entirely consistent with the CRC.

(2) Only biological families count

One of the major assumptions of UNICEF’s interpretation is that the CRC references to the “parent” or “family” do not include those relationships formed through legal adoption of a child. As we have explained, nowhere in the CRC does it state that “parent” or “family” are intended to refer only to biological relationships. Thus when the CRC mentions the rights of the child in manners that involve a parent or family, it may be interpreted to include those families created through international adoption. In fact, the statement in the preamble to the CRC “[r]ecognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding” underscores the importance of international adoption in countries like Guatemala, rather than disavowing it. The UNICEF restriction of the term “parent” to refer only to

birthparents unnecessarily limits the options available to children. This position is demonstrated in the UNICEF official position statement on intercountry adoption “The Convention on the Rights of the Child, which guides UNICEF’s work, clearly states that every child has the right to know and be cared for by his or her own parents, whenever possible. Recognising this, and the value and importance of families in children’s lives... alternative means of caring for a child should only be considered when ... a child’s family is unavailable, unable or unwilling to care for him or her” (E. Trowbridge, UNICEF spokesperson, 10/24/03). It is clear that for UNICEF, “parents” and “family” refer only to those individuals with a genetic relationship and that adoptive parents and families are not considered the child’s “own” or holding the same importance in the children’s lives.

(3) The State, and not the birthparent, should decide who should raise a child

The relinquishment of a child is no small matter and is conceivably one of the most difficult decisions someone could ever make. According to various records and reports, the primary reason cited for relinquishments in Guatemala is the inability to provide adequate care for a child, usually compounded by other social factors. In fact, in order for an adopted child to be eligible for an orphan visa to enter the US, the birthmother must be unmarried or widowed and unable to provide for the child at the poverty level of her country.¹² Therefore, by definition, relinquished Guatemalan children being adopted by U.S. citizens are destitute even by Guatemalan standards. Article 27 of the CRC addresses this in its second section: “The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child’s development.” A question arises when the biological parent, in full accordance with this provision, determines that her best “ability” to “secure” these conditions for her child is provided by the legal practice of relinquishment and adoption. This is undeniably a reality for many birthmothers in Guatemala today.

The rights and responsibilities of parents as specified in the CRC include the right to decide to not parent a child, and the right to choose who will parent that child. It is assumed in the CRC and in the law, that the birthparent will have the best interest of the child in mind when assessing her options for adoption placement. In apparent conflict with the CRC, UNICEF asserts that the state, and not the birthparent, should decide who should be allowed to raise a child, including whether the child should be raised domestically or be adopted internationally. They cite Article 21 (b) which states that intercountry adoption should be considered only if a child cannot be placed in a foster or adoptive family or cared for in a suitable manner within the country of origin. In fact, the UNICEF interpretation appears to consider institutionalization in the child’s birthcountry “suitable” and therefore preferable to intercountry adoption. We believe that the state should strive to provide suitable internal alternatives to intercountry adoption. However, under the CRC it is the right and responsibility of the birthparents to support the rights of their children and make life choices that optimize their children’s growth and development, which may include relinquishing them for intercountry adoption.

(4) The culture of the child’s birth must be preserved

UNICEF interprets several provisions in the CRC to mean that it is in the best interest of each child to maintain the cultural identity into which they were born, as if this were a biological inheritance. For instance, Article 30 states “In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.” Guatemala is certainly a State with a large indigenous “minority” (approximately 43% of the population), and most children who are relinquished for adoption are at least partly of indigenous origin. However, we do not feel that intercountry adoption constitutes a violation of the rights provided in this article, or the CRC. Growing up in one’s birth country does not guarantee that these rights will be available to children. There are many examples of where these rights have been ignored in various regions of the world. For instance, the Kurdish people in Northern Iraq and Turkey have been persecuted for their attempts to practice their cultural heritage and language. Cuba utilizes its control over the media and free speech to ensure that children are raised with a desired philosophy. And in Guatemala, the rights of the indigenous people to maintain their cultural heritage and language are major components of the 1996 Peace Accords and the message of Nobel Prize winner Rigoberta Menchu.

¹² http://travel.state.gov/adoption_guatemala.html, accessed 11/11/03

Summary

The intention of the CRC is to guarantee that children not be denied such basic human rights as the right to life, liberty and the pursuit of happiness. Unfortunately, none of these rights can be assured for thousands of children whose parents are unable or unwilling to raise them in Guatemala. Given the socioeconomic climate of Guatemala, intercountry adoption is undoubtedly often in the best interest of children whose birthparents decide that they are unable to parent them.

As with any broad international treaty, there are many ways to read and interpret the Convention on the Rights of the Child. When analyzed with an open, logical view it is clear that facilitating intercountry adoption can help to protect rather than jeopardize the rights of children who are born into desperate circumstances. We feel that the UNICEF interpretation of the CRC is unrealistic, short sighted occasionally contrary to the basic intent of the Convention.

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Interpretation of Latin American Institute for Education and Communication Study on Adoption and the Rights of the Child in Guatemala

UNICEF commissioned the Latin American Institute for Education and Communication (ILPEC) to conduct a study of the Guatemalan adoption system. The resulting report, "Adoption and the Rights of the Child in Guatemala" was released in 2000. According to the report "[t]he ultimate goal is to work towards ensuring that the process of child adoption always be a matter of final recourse" (p. 2). Although seriously flawed, the report is still utilized by UNICEF to justify their position regarding intercountry adoption.

This report is quite controversial for several reasons. First, the research methods used do not meet accepted academic standards. Second, the report uses sensationalized language and lacks the objectivity expected from any legitimate research report. Third, there are many instances of factual errors. Finally, the data presented in the report do not support the conclusions.

Overview of the ILPEC Report

The ILPEC report examines many aspects of domestic and intercountry adoption in Guatemala. It portrays a chronically poverty-stricken nation with severely limited social services or government aid for its citizens. The report introduces the state of affairs in Guatemala, "[t]his overall situation of poor education, unemployment/ underemployment and [sexual] violence encourages the day-to-day births of unwanted children. Given [this,] many children have such limited possibilities for development and continue to face an ever more uncertain and dismal future" (p. 2). The report acknowledges that the government of Guatemala has been ineffective at providing alternatives for women who face an unwanted pregnancy or for the children who they cannot provide with adequate care. "...Guatemala is a country where two-thirds of its population live in extreme poverty and the State has never enacted family protection policies... [L]aws and procedures that facilitate the formal declaration of abandonment, thus giving the child a chance to develop under the care of an adoptive family, also do not exist" (pp. 2-3).

The report summarizes the adoption process in Guatemala and analyzes 90 adoption cases selected from files under review by the Office of the Attorney General of Guatemala (PGN). The cases represented were mostly intercountry adoptions and were conducted under the Notarial relinquishment process. The report describes "[adoption] system characteristics" in Guatemala and the laws and norms governing adoption, and compares the adoption process in Guatemala with that in other Latin American countries such as El Salvador and Honduras.

The report describes the adoption processes overseen by the government of Guatemala as incredibly inefficient and potentially harmful to the children. For example, it can take the governmental Court of Minors up to 7 years to issue an abandonment decree that allows an abandoned child to be adopted. A description of the government institution that was visited during the study, the Elisa Martinez Children's Home, demonstrates the Guatemalan government's lack of attention for children in state protective custody. The home "displays many limitations, both in terms of materials and planning, as well as in physical infrastructure. It does not have occupational programs [nor an adoption program] for the children (the children were observed to be unoccupied, watching television, or just lying on the floor in empty rooms) and the building's conditions are depressing and unhealthy" (p. 25). The study concludes "it is urgently necessary that the Magistrate for the Minors, in compliance with [the law], assume its

responsibility with respect to the supervision of children's homes and orphanages operating in the country, so that their operations can be properly regulated" (p. 25).

One major conclusion of the study was that greater transparency and regulation of Notarial adoptions is required to protect children from potential illegal activities. However, ILPEC uncovered no evidence of children being stolen, kidnapped, or involuntarily relinquished, and the only criminal activity described in the report (in a case not directly investigated in this study) involved parties whose crimes had been detected and prosecuted. The care of children residing in private group and foster homes was found to be far superior to those residing in institutions under the custody of the state. There was no evidence that adopted children lived anywhere but with loving, caring, and able families. The major concerns presented in the report relate to (1) the higher proportion of intercountry adoptions than national adoptions; (2) the fees charged for the Notarial adoption process; and (3) the difficulties and timelines inherent in adopting a child that is the ward of the state.

This report ultimately reaches the unsubstantiated conclusion that, the Notarial system of international adoptions should be ended immediately and no new adoptions should be permitted until a centralized state-run system is legislated in accordance with the UNICEF interpretation of the Convention on the Rights of the Child and the Hague Convention on Intercountry Adoption. This conclusion is in spite of a desperate need for permanent families for "unwanted" children and a severe lack of public welfare and child protection services provided by the Guatemalan government. The report ignores the fact that the Notarial system of adoptions is provided for and protected by the Guatemalan constitution. It also offers no suggestions on how to care for the children who currently find permanent homes through intercountry adoption, and suggests that birthmothers should not be able to make adoption plans to relinquish their children for intercountry adoption. These conclusions contravene Guatemala's constitution and laws, the civil liberties of Guatemalan birthmothers, and are not supported by the evidence presented.

Faulty Research Methods Are Used in the ILPEC Report

The ILPEC research methods do not meet the universally accepted academic standards for the execution and publication of quantitative and qualitative research. The most egregious problems with the research methods and the presentation of the results in the ILPEC report include: 1) the absence of a clear and comprehensive description of the methodology used in the study; 2) the presentation of empirical data is interspersed with the authors' interpretation of the results; 3) the practice of drawing conclusions from limited data and then generalizing these conclusions to the entire data set; 4) the absence of proper attribution of information to particular sources or the relative representation of group data (i.e., who are "the social workers" and how many were interviewed to obtain a general statement?); 5) the lack of alternative explanations for the findings; and 6) the omission of any discussion of the limitations of the ILPEC research study.

Problem #1- Inadequate Explanation of the Research Methods Used. The researchers do not provide the reader with a description of the methods used in their research study. For example, the reader is never provided with a clear description of what actually comprised the data set used in the ILPEC study (e.g., is the data comprised of transcripts of conversations and meetings? researchers' field notes? written records and documents? second hand stories?); what specific methods were used to analyze the data (e.g., case study methodology? quantitative analysis? thematic or pattern coding?); or the sample sizes from which important conclusions were drawn (e.g., how many social workers were interviewed by ILPEC? What percentage of these social workers claimed that birth mothers were paid? What is the percentage of the total number of social workers were interviewed by ILPEC? How many jaladores were documented in this specific study and by whom?). The serious problems with the inadequate explanation of the research methods can be seen in the following excerpts from the ILPEC report:

- "According to information from Guatemalan couples who wanted to adopt, there are many obstacles that prevent them from doing so, mainly, the high costs associated with the adoption process and the fact that some institutions prefer contracting adoptions only with those who pay in U.S. dollars" (p. 17). *How was this information obtained (interviews, documents, hearsay)? If interviews were conducted, how were prospective domestic adoptive couples located? How many Guatemalan couples made these statements? Did ILPEC verify that the reported obstacles actually exist?*
- "According to information obtained from the social workers, they feel that the majority of mothers (98%) feel certain that they wish to put their child up for adoption and that they express little

affection towards the child” (p. 21). *How many social workers made these statements and did any disagree with these claims? Were these social workers directly interviewed by ILPEC? Is the 98% figure provided an estimate or based on actual data collection?*

- “Presently, there exists a sector of middlemen or ‘jaladoras’ who act as intermediaries in the trafficking of children, actively seeking out pregnant women in the markets, parks, buses, or among groups of street girls and offering them sums of up to Q. 5,000.00 for their future baby. They propose the caretakers for the children and contract the [N]otaries and agents necessary for completing the legal documentation. It is estimated that the [N]otaries and agents provide their written witness for the sum of US\$ 2,000, which includes being present in the Migration Office where the child’s passport is issued and in the Embassy so as to deliver the documents required to obtain the visa. In addition, some attorneys ‘go hunting’ in towns within the interior of the country, seeking out young women of scarce resources who are experiencing grim economic situations... All of this was confirmed during the course of this study (1999) through interviews with social workers, judges and directors of orphanages and children’s homes” (p. 49). *Why are the empirical data not presented to support these findings? How were the data collected? How many interviews were completed? Where are the statements/transcripts from these various people to show how all of these claims were “confirmed during the course of this study”?*

Problem #2- No Separation of Data from Interpretation. In all research, whether the methodology used is qualitative or quantitative, the raw “data” (statistics, interview transcript excerpts, ethnographic field notes) should be presented separately from the interpretation, discussion, and analysis of the data. Unfortunately, the ILPEC report never separates the reporting of facts and empirical data from interpretive judgments, hypotheses, and conclusions. The following excerpts from the report highlight this error:

- “The majority of names given to the children to be delivered for adoption, such as Misrael Alexander, Angeli Damaris, André, Josías Daniel, Sacha, Enxo, Alexis Michell, Carla Samantha, Keyli Elisa, Noah Jospeh, Alian and Melisa, are different from those commonly chosen in Guatemala. This suggests the notion that the mother actually does not decide her child’s name, but that it is instead selected by others who could be the prospective adoptive parents, attorneys or intermediaries. In summary, it affirms the idea that in many cases, Guatemalan children are earmarked for adoption before even being born” (p. 50). *No representative data were collected by ILPEC in this study that would allow for a responsible analysis of the relationship between children’s birth names and the process of relinquishing children for adoption. ILPEC’s listing of random names (without further evidence) does not “affirm” their subjective judgment that “Guatemalan children are earmarked for adoption before even being born.”*
- “The high international demand for children and the poverty experienced by most Guatemalan families has created a situation where the processing of adoptions occurs according to the ‘laws of supply and demand,’ effectively resulting in the trafficking of children. Robert Brown, director of an adoption agency in the United States, pointed out that ‘Guatemala is one of the few countries in the world –if not the only one—in which the legal possibility exists of formalizing an adoption without mediation by a judicial resolution’ (Revista Domingo, Prensa Libre, October 5, 1997, p. 10)” (p. 48). *ILPEC never presents evidence to support the conclusion that the “laws of supply and demand” result in the trafficking of Guatemalan children. Further, the quote from Robert Brown (the data provided in this excerpt) does not provide any evidence to support the subjective and unsubstantiated conclusions ILPEC makes about child trafficking in Guatemalan adoption.*
- “In the second case, the children’s home named “Vida Nueva” (New Life) located at 1a avenida ‘A’ 2-44, Zona 2 was visited by an interviewer accompanied by United Nations official Mrs. Ofelia Calcetas. At the time of the visit, the employees contacted the Director who indicated that he would not authorize the entrance of the U.N. official. Throughout the attempted visit, the Home’s staff exhibited a certain degree of apprehension. It seems [emphasis added] that this home had obtained the protection of certain authorities from the Minor’s Courts, who took advantage of their positions to remove children from other homes and place them in this home. It can be inferred [emphasis added] that they do this in order to guarantee the number of children in residence required for international adoptions, all of which are processed by the Director of the Institution who is an attorney” (p. 25). *The data provided in this section is that the director of Vida Nueva would not allow the study team or UN Special Rapporteur to enter this hogar. The remainder of*

the paragraph provides supposition without evidence. The language used here, "it seems," and "it can be inferred," is highly subjective. Further, there is no information presented about Vida Nueva that leads to an objective conclusion of coercion and fraud. Thus, these conclusions are based solely upon subjective guessing and fail to meet the standards for responsible analysis and reporting of empirical research.

Problem #3- Conclusions are Generalized to Entire Data Set. The ILPEC report makes generalized statements and sweeping claims based on single statements and second-hand information. While there is nothing wrong with presenting single case data in a research report, it is inappropriate and irresponsible to generalize the findings from a single case to all 90 cases in the study as seen in the excerpt below:

- “The interviews performed by the social workers during the hearings of the Family Courts of those cases analyzed indicated that 99% of the mothers do not admit having received money in exchange for the child. However, it was mentioned that in one Family Court hearing, a mother commented on “how rapidly the money I received evaporated into thin air.” One percent of the mothers admitted that the lawyers had helped them purchase things for their child, and out of fear of having to return the money if they change their minds, they proceed to ratify their earlier decision to surrender their child. With respect to this issue, it is necessary to point out the difficulty in obtaining reliable information about the extent to which the biological mother has received a significant economic benefit for agreeing to surrender her child, precisely since they have been well trained by the lawyers to always provide the same answer: “No money was received” or “The attorney only provided a little practical assistance” (p. 21). *Although 99% (n=89 cases) of the mothers stated that they received no money for surrendering their child, the declaration from one woman that her lawyer helped her purchase things for her child led to a generalized conclusion in the ILPEC report that it is difficult to obtain “reliable information” from all birth mothers about the “significant economic benefits” they receive. Nowhere in the report does ILPEC define the “things” this one mother received from her lawyer and whether they constituted a “significant economic benefit” for her. ILPEC makes sweeping generalizations about all 90 mothers based on the testimony from one individual in the sample.*

Problem #4- No Identifying Information to Place Statements and Conclusions in Context. Throughout the report, there is no information identifying which individuals make specific statements and how many people are represented by certain conclusions. For example, individuals are neither listed by name or pseudonym which is problematic because there is no way of knowing if one person (social worker, judge, birth mother) makes the majority of claims presented in the report or if they come from a variety of sources. Further, direct quotations are not used so the reader has no way of determining the accuracy of the authors’ interpretations and conclusions. Finally, the authors often make claims based on the testimony of groups of individuals but they do not provide any information about the identity of these individuals or about the sample size of these “groups.”

- “According to conversations carried out with adoptive parents, judges, and social workers in charge of Children’s Homes in Guatemala, national adoption has not been favored due in large part to the fact that too many requisites are demanded, thereby making these procedures quite complicated. It was also said that social workers impose obstacles for national requests. . . .” (p. 7). *How many parents, judges, and social workers participated in these conversations? Who made these claims? Precisely how were the claims stated? How many people said that social workers pose obstacles for national requests?*
- “Officers from all of the various offices and agencies (especially the Embassies and the Family Courts) believe that the mothers do generally receive some economic benefits despite their denials of the same” (p. 22). *Which officers made these statements? How many officers made these statements? What specifically were their statements? Quotations or paraphrasing of the officers’ statements are essential for readers to verify the authors’ claims.*

Problem #5- Alternative Explanations are Not Considered. The ILPEC report is filled with claims made to support the conclusion that the intercountry adoption process is inherently flawed and fraudulent. Towards this end, data are presented and interpreted from a singular lens to support these claims. However, as seen below, alternative explanations—that contravene the ILPEC conclusions—exist to explain the study’s findings.

- “Throughout this study, it was found that institutionalized children do not generally have access to the opportunity of a new family through adoption. This is due in part because the lawyers have created their own mechanisms to ensure that children become directly delivered to them. At the same time, it is true that adoptive families prefer children younger than one year of age, something quite infrequent on the part of those children who are institutionalized” (p. 25). *Contrary to the ILPEC conclusion, the primary reason that the majority of institutionalized children in Guatemala are not eligible for adoption is because they lack certificates of abandonment which are expensive and can take up to seven years to obtain.*
- “... ‘they [birthmothers] express themselves with the same clichés.’” *The mothers typically state that either their relatives do not know that they were pregnant, that they do not have the means to support another child, that the child’s father left them when he learned of the pregnancy, that they already have too many children, that the child was unwanted, or that the child was a result of rape.*” (p. 21). *The ILPEC report fails to consider the very real and pervasive problems of poverty, unwed motherhood, sexual assault, and unwanted pregnancies that face many women in Guatemala as a contributor to relinquishments and rather characterizes the responses as “cliché”.*

Problem #6- No Discussion of the Shortcomings of the ILPEC Research Study. Nowhere in the ILPEC report do the authors discuss the limitations of their research design and study. For example, the readers of the report are not told that some of the information reported was not obtained first hand by the ILPEC research team. Instead, several of the conclusions in the report were based on second-hand information gleaned from non-objective sources including Casa Alianza.

Additionally, the study uses UNICEF as a source for its conclusions (e.g., “Due to the considerable number and particular characteristics of international adoptions of Guatemalan children, it can be said that adoption has become transformed into a business with lucrative profits in dollars, thus losing in the process its character as a social institution which offers protection to children, Cadena, Ramón, UNICEF, 1994”) (p. 48). This lends itself to serious questions of research objectivity and points to the distinct possibility that a third party was commissioned by UNICEF to conduct a study with specific predetermined conclusions.

Lack of Objectivity and Use of Sensationalized and Misrepresentative Language

Throughout the course of the ILPEC report, a lack of objectivity is evident. One example of this is that the report provides ten “case studies” of adoptions not directly related to the study (e.g., not included in the 90 files researched), and each includes some allegation of bureaucratic or criminal impropriety, leading the reader to believe that every adoption is tainted in some respect. The report actually states “the ultimate goal is to work towards ensuring that the process of child adoption always be a matter of final recourse” (p. 2). This is quite different than an assessment to determine that the laws and procedures protect the best interest of the children available for adoption through relinquishment or abandonment by their families.

The introduction of the report sets the tone for the paper. Without any evidence to support the claim anywhere in the document, the report begins with the statement: “This [combination of extreme poverty and lack of family protection policies] has contributed to a situation where the *sale of children has turned into a way of life for many* [emphasis added], especially when so many families lack economic resources and are unable to find any alternative solution or assistance for addressing their most pressing needs” (p. 3).

Likewise, the careful use of sensationalized language in the ILPEC report leads the reader to believe that criminal and unethical practices are part of the standard process of adoption in Guatemala. One example of this sensationalized language is the manner in which the report equates the matching of needy children with permanent families abroad with a business transaction. “The high international demand for children and the poverty experienced by most Guatemalan families has created a situation where the processing of adoptions occurs according to the ‘laws of supply and demand’, effectively resulting in the trafficking of children” (p. 48). The sentence could just as easily have been written, “There are many families who wish to adopt a child and in Guatemala extreme poverty has created the need to find permanent families for many children. As such, a system is in place to match children with loving families in other countries.” Another example is the repeated misrepresentation of the creation of an adoption plan by birthmothers experiencing an unwanted pregnancy as being the production of children for adoption.

Yet another example is the depiction of the use of “photolistings” of waiting children by adoption agencies. This strategy is often used by agencies to find permanent placement for children who, for reasons such as age, medical condition, etc, might be more difficult to place. However, the report states: “The web pages advertise the availability of children for adoption, indicating their characteristics such as age, sex, ethnic background and the conditions of their biological parents, just as the characteristics of any commercial product would be presented” (p. 57).

Factual Disparities

The ILPEC report does not provide any substantial empirical evidence of a dominant environment of corruption surrounding adoptions in Guatemala. However, there are many factual disparities and omissions of relevant information in the report.

ILPEC repeatedly targets the role and intentions of the Notary in adoption. It depicts the character of the Notarial attorney in Guatemala as being self-interested and mercenary, without concern for the birthmothers, children, or adoptive parents involved in the adoption process. It only makes brief mention of the fact that laws creating the Notarial system were instituted due to the inefficiency of the Court of Minors due to lack of resources and equitable wages. An obvious omission in the report is a description of the legal code of conduct to which Notarial attorneys are held. The ethical standard for Notaries is identical to that of judges and includes criminal charges and penalties for any breach of that standard. As such, the role of Notarial attorney is an essential part of the Guatemalan legal and judicial system and provides competent legal authority equivalent to that of a judge, without causing a financial and resource drain on an already troubled public system. ILPEC omits the legal responsibilities of the Notarial attorney and the participation of the office of the Attorney General (PGN) in the final approval of all adoptions and makes the false claim that “no competent legal authority participates in the adoption process” (pp. 3, 57).

Another misleading statement in the report is the claim that in PGN “there exists no firsthand verification of the motives for which she [the birthmother] sought to surrender her child and to ratify her decision” (p. 39). While the PGN attorney reviewing an adoption case is not required to interview a birthmother to determine her motivation for relinquishment, they do review an interview/social study conducted by a court-appointed social worker and approved by a judge in the family court. Therefore, although the statement is technically correct (the PGN attorney does not obtain this information first-hand), it leads the reader to assume that a competent analysis of the motivation of birthmother relinquishment is not a formal part of the Notarial adoption process – an assumption that is completely false. (*see Chapter 2 for more detail on the adoption process*).

Conclusions are Incongruous with Findings

This study openly admits that there are many needy children in Guatemala in dire need of permanent loving homes. It also admits that the government has no means of either providing care for the children in its custody or aid for birthparents who are unable or unwilling to care for their children; and that adoptive parents are able to provide economic, physical, and emotional support for these children. The study clearly recognizes that the judicial system of adoption in Guatemala is incapable of handling cases in a timeframe that serves the best interest of the children. In addition, the UNICEF interpretation of the Convention on the Rights of the Child, which is a foundation for the ILPEC conclusions, provides that intercountry adoption is a viable option when the country of birth is unable to offer a safe, loving environment for a child. Despite these facts, the study proceeds to recommend that the legal adoption system - which is providing good, loving families for children in need - be ended, leaving the futures of these children in the hands of an incapable government.

The report goes on to claim that the proposed elimination of Notarial relinquishment adoptions is necessary “so as to favor the large number of institutionalized children” (p. 56). However the majority of the children in institutions are not available for adoption because they do not have a completed certificate of abandonment. Also, families that are prepared to bring a young child into their home may not be prepared to instead adopt an older child who has suffered from years of institutionalization. In addition, it is either implying that a closedown will result in no new children being born in need of a permanent family, or that all children born into need should have to “do their time” in an institution prior to becoming eligible for adoption. In this respect, ILPEC and UNICEF seem to be commercializing the process by instituting a “first in, first out” supply chain management system common in commercial ventures. In other words, the number of Guatemalan children living in violation of their fundamental rights to proper care and an adequate environment would only increase under the course of action recommended in this study.

Analysis of the ILPEC findings

While the research methods used in the ILPEC study were inadequate according to academic standards, its analysis of the Guatemalan legal adoption process did indicate some areas for improvement, such as the streamlining of the judicial cases heard by the Court of Minors to expedite the issuance of certificates of abandonment for institutionalized children. The findings did not, however, indicate widespread misconduct in the private, Notarial system that would enable any child to be adopted against the wishes of the birthparents, cause a child to be exposed to an improper or unsafe environment, or in any way have their future well-being jeopardized. To the contrary, the report found that relinquishments were voluntary and 99% of the women interviewed reported no offer of financial gain for placing their children for adoption; the level of care during the adoption process was excellent with children being cared for in private homes or small private children's homes, and that the adoptive parents are well educated, secure, loving people.

Based on the evidence presented in the ILPEC study, it would have been logical to recommend some areas for reform in the current adoption process, and a long-term goal of improving the social systems in Guatemala and streamlining the judicial and abandonment processes so that more children could find permanent homes. The Guatemalan government has enacted some reforms that would logically arise from an objective analysis of the ILPEC data. Most relevant of the procedural changes are the mandatory DNA testing for all cases (required as of September 2002 for all relinquishment cases) and eliminating the ability of lawyers to select a specific family court for the processing of their cases. Unfortunately, the ILPEC report has been used inappropriately by UNICEF to depict the legal process of adoption as a commercial venture filled with danger for needy children.

The report ignores the fact that many of the situations it decries as problematic are already illegal under current Guatemalan law, and can result in criminal prosecution. Instead of taking the logical step of recommending increased enforcement of the established laws, ILPEC chooses to place more authority in the hands of an ineffective governmental system and remove the only realistic avenue open for "unwanted" Guatemalan children to fulfill their potential and live in an environment that does protect their fundamental rights.

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Comments on Report of UN Special Rapporteur

In July of 1999, Ms. Ofelia Calcetas-Santos, the United Nations Special Rapporteur on the sale of children, child prostitution and child pornography, spent ten days in Guatemala to investigate allegations of child trafficking and child pornography/prostitution. The report from this visit was published by the UN in January 2000 and has been used since that time by UNICEF in reference to intercountry adoptions from Guatemala.

However, in an interview with Duncan Campbell of The Guardian, London which was published on June 13, 2000, Ms. Calcetas-Santos admitted that she did not have sufficient time nor funding to obtain documentation for the allegations of wrong-doing in her report. The article states. "However, the sweeping nature of the UN report has been attacked and Ms. Calcetas-Santos herself admits it had to be researched in great haste... She [Hannah Wallace, chair of Guatemalan caucus of the Joint Council on International Children's Services] said many of the claims made were anecdotal and without any statistical basis. The effect of stopping international adoption in other Latin American countries has meant that 'the orphanages are filled and more and more children are abandoned anonymously.' In response to these criticisms, Ofelia Calcetas-Santos, the lawyer who compiled the UN report, said from her home in Manila that because of time and money constraints she had only been able to spend 10 days working in Guatemala for her research and that her task included investigating not only the sale of children but also child prostitution and pornography. Because of this she stated that she could give *no statistical evidence* [emphasis added] to back up her suggestion that legal adoptions were 'the exception rather than the rule.' She said that 'many of the adoptions are legal under certain circumstances...I am not trying to knock down adoptions if all things are observed.'"

Even though the author of the report has verified that its conclusions were not based on appropriate statistical evidence, UNICEF continues to cite this report widely in their claims against intercountry adoption from Guatemala—without ever disclosing the author’s caveats about the veracity of her data. For this reason, it is important to describe some of the most egregious examples of misinformation published in the UN Special Rapporteur’s report.

1. “Ninety-five per cent of the adoptions of Guatemalan babies are intercountry; it is reported that Guatemala is the fourth largest ‘exporter’ of children in the world” (point 12 page 5).
 - This statement omits the fact that the majority of domestic “adoptions” in Guatemala are informal, and therefore are not legalized nor recorded by the Attorney General’s office.
2. “Of course, some adoption proceedings are completely legal. In these cases the child is surrendered freely by the mother, or both parents, or the child has been declared abandoned. However, according to the information obtained, legal adoption appears to be the exception rather than the rule. Since huge profits can be made, the child has become an object of commerce rather than the focus of the law. It would seem that in the majority of cases, international adoption involves a variety of criminal offences including the buying and selling of children, the falsifying of documents, the kidnapping of children, and the housing of babies awaiting private adoption in homes and nurseries set up for that purpose” (point 13, page 6).

There are several misrepresentations in this one statement.

- First, every adoption of a Guatemalan child by a foreign citizen is checked by multiple agencies and is certified as legal by the Office of the Attorney General (PGN) of Guatemala, as well as the embassy of the destination country. The nature of the relinquishment of each child is verified by a Guatemalan court-appointed social worker through interviews with the birthmother to determine that her decision was not coerced. Therefore, the claim that “legal adoption appears to be the exception rather than the rule” is patently incorrect (see the section on legal checks and balances and the steps in the process of a Guatemalan adoption for more detail).
 - Second, the issue of fees associated with intercountry adoption is unrelated to the legality of the process. Each step in the adoption process is costly, including the filing of all documents, having legal representation, and care of the child. Adoptive parents are aware of the fees and what they are used for when entering into intercountry adoption. It is not the child that is being paid for, but the legal representation and private care and medical expenses during the adoption process. The details of the fees associated with the adoption process are presented elsewhere in this document.
 - Third, any activity associated with buying and selling of children is against the law of Guatemala and can be processed criminally if discovered.
 - Fourth, in 1994 Canada began requiring DNA matches for all adoptions of Guatemalan children by Canadian citizens. The UK followed suit. In September 1998 the US began requiring DNA matches for all adoptions from Guatemala as a way to streamline paperwork and dispel allegations of kidnapping of children for the purpose of international adoption. As of September 12, 2002, DNA testing was required by the PGN of Guatemala for the finalization of all relinquishment adoptions. Therefore, it was highly unlikely that children could be kidnapped and sold for adoption in 2000 when this report was written (since over 70% of adopted children entered into the US), and it is impossible today.
 - Finally, one of the benchmark features of adoptions from Guatemala is the level of the care received by children during the adoption process. Children are raised in private foster homes (no more than 2 foster children allowed per home) or in small private children’s homes where, in most cases, they are provided with excellent care. This is not illegal, and is actually used as a standard for other adoption processes in other countries. However, the above statement implies that the use of private foster care is a criminal offense. This is incorrect.
3. “A network of nurseries, foster homes, temporary homes, and foster families has been created. The number of children sent to State homes in favour of private homes has declined considerably in consequence” (point 14, page 6). “It is likewise reported that the lawyers handling adoptions,

in collusion with others, also operate houses where children who are stolen or purchased are cared for while awaiting finalization of the intercountry adoption. These are known as 'casas cunas' (cot or crib houses) but are often derisively referred to as 'casas de engordeza' (fattening houses)" (point 29, p. 9).

- The availability of foster care and small private children's homes is a great benefit to the children of Guatemala, including those who are not adoptable. Currently, there are no state-funded orphanages in Guatemala. There are approximately 350 privately funded children's homes or orphanages (hogares), a limited number of which conduct adoptions to provide permanent placement for the needy residents.
 - It is contemptible that these few homes that provide care for waiting children (paid for by the prospective adoptive parents) are referred to as fattening houses because they provide adequate nutrition and medical care to children who would otherwise be suffering from malnutrition and possibly preventable childhood diseases.
4. "The Special Rapporteur was informed that the first postponement of the entry into force of the [Children and Adolescents'] Code was made at the request of the then President of the Supreme Court; since that time, there have been allegations that his wife is one of the lawyers involved in the trafficking of babies" (point 22, page 7).
 - This statement refers to the attorney Lic. Susana Luarca (formerly de Umaña) who was accused of using "undue influence" to get her adoption cases reviewed by PGN quickly. The charges, which were levied by Bruce Harris, director of Casa Alianza (a UNICEF supported organization), were dropped due to lack of evidence. Ms. Luarca filed slander charges against Mr. Harris which have yet to be resolved. There has never been any evidence produced to support claims of undue influence or "baby trafficking" in this, or any other, case of a Guatemalan intercountry adoption.
 5. "The person wishing to adopt gives the lawyer a power of attorney for the lawyer to locate a child or to do the legal work if a child has already been identified" (point 25, page 8).
 - The Power of Attorney (POA) is filled out only after the child has been legally relinquished by his/her birthmother or has a completed certificate of abandonment. The POA, which identifies the attorney, adoptive parents, birth mother, and child by name and official identification numbers, is then officially registered with the courts of Guatemala. There is no Power of Attorney filed for a lawyer to locate a child (see the section of this packet on the Guatemalan adoption process for more detail).
 6. "She [the UN Special Rapporteur] was interested in examining allegations of the sale of children, regardless of the purposes of the transaction. She stressed that she considered the sale of a child to be inherently abhorrent even where the intentions were most noble, as it violated the human rights of the child and reduced the child to an object of trade and commerce" (point 30, page 9).
 - We absolutely agree with the Special Rapporteur that the sale of children is abhorrent and needs to be punished wherever it is uncovered. However, we believe that the author, and the report, confuse the money paid for services necessary to complete the adoption with the sale of a child. We have already stated that the selling of children is illegal and immoral and should not be tolerated. However, it is only reasonable to expect to pay for the legal process associated with months of work by two attorneys and the care of the child. The payments made for the adoption process are absolutely NOT equivalent to the sale of children. A detailed description of the fees associated with adoptions can be found in Chapter 2 of this document.
 7. "According to the information received networks of (usually female) recruiters, hired by lawyers, pay rural midwives approximately US \$50 to register the birth of a non-existent child, using a false name for the birthmother. Upon payment of approximately another US \$50, another woman "becomes" the mother and is given a baby – usually stolen – and told to take the baby to Guatemala City and give it up for adoption. The woman signs the notary's documents giving up

'her' child and the baby is placed in a foster environment, preparatory to adoption proceedings" (point 31, page 9).

- The scenario described here is impossible with the requirement for a positive DNA match between birthmother and relinquished child. At the time that the report was written, DNA was required for adoptions by Canada, the UK, and the U.S. (representing the vast majority of adoptions from Guatemala). Currently DNA testing is a Guatemalan requirement for all relinquishment adoptions. In order for a positive "match" in DNA, there must be 99.89% certainty that the birthmother has parented the child, and not even a blood relative would pass this stringent test. Further, photographs are taken of the child at the time of DNA testing, and compared with the photograph of the child on the passport and for the visa to ensure that it is the same child in all cases.
 - If there is a mismatch in the DNA, then the adoption process is halted immediately and the child is placed in the custody of the court of minors. In short, there is no way that stolen children can be legally adopted.
8. "There are notaries and lawyers who buy babies while they are still in the mother's womb. The purchase is arranged by the lawyers and [N]otaries either personally or through agents and middlemen. Even the birth takes place under the supervision and care of the notary" (point 33, page 9).
- First, an adoption plan can be made before a baby has been born, but an unborn child cannot be relinquished for adoption. It is not uncommon for birthmothers to contact attorneys during their pregnancy to express their wishes to relinquish a child after its birth. Sometimes attorneys provide these birthmothers with prenatal care, nourishment, and medical services (including delivery of the child in a hospital) before the child is born.
 - However, no mother is required to relinquish her child nor pay back these services if she changes her mind either during the pregnancy or at any time throughout the adoption process after the child is born. For several years every birthmother relinquishing a child to be adopted by U.S. or Canadian citizens was interviewed by representatives from the adoptive parents' embassy. After hundreds of interviews were conducted with little to no evidence of coercion or fraud, they determined that investigations into each adoption case were unnecessary.
 - The provision of prenatal care is legal, and provides a benefit to the birthmother and her unborn child. It is not equivalent with purchasing an unborn child.
9. "Another means of procuring babies for international adoption is allegedly by tricking or drugging illiterate birth mothers into putting their thumbprint on blank pieces of legal paper which are subsequently filled in to read as a consent to adoption of the baby" (point 35, page 9).
- This scenario is highly unlikely. First, the thumbprint of an illiterate birthmother must be verified by a witness under oath.
 - Second, the birthmother must assert her decision to relinquish her child for adoption on four different occasions (see description of adoption process) including twice when the attorney is not present (DNA test and Social worker interview). These assertions come over a period of several months, in different locations, and with different individuals present.
 - Therefore, a single incidence of drugging a birthmother would not result in a completed adoption.
10. "It is reported that one such clinic [which provides free check-ups and will facilitate adoptions] is in the same building as a lawyer handling adoptions" (point 44, page 11).
- It is absurd to draw a connection between a lawyer who handles adoptions and a medical clinic that facilitates adoptions, based solely on address. There is no evidence in this report that the lawyers have accepted referrals from the clinic in the same building, nor of any wrongdoing.

11. "National adoption seems to be quite straightforward and does not pose any threat to children. More problematic is intercountry adoption. The lack of clear guidelines either by way of legislation or by way of policy coupled with vested economic interests have created a host of complex issues which make even an objective discussion very difficult. The Special Rapporteur is convinced that trafficking of babies and young children for intercountry adoption exists in Guatemala on a large scale" (point 90, page 21).
- This statement is quite confusing. The process for national adoption and international adoption is identical under Guatemalan law. The only difference is that intercountry adoption cases are subject to an additional layer of scrutiny by the embassy of the country of the adoptive parents.
 - Therefore, it is difficult to understand how the less stringent process could be straightforward without posing any threat to children, while the one with more regulations and checks results in large scale trafficking of babies.
 - This conclusion large scale trafficking of babies and young children for intercountry adoption was drawn without any evidence or convincing argument supporting the claim provided in the remainder of the report.
12. "The decision whether an adoption will be handled through lawyers/notaries or family courts is ostensibly made by the person who is putting the child up for adoption. In actuality, however, it is the lawyer handling the adoption who makes the decision, which is almost always private adoption because the lawyer has greater control and stands to make more money. In her conference at Hogar Rafael Ayau, one of the four orphanages to which the Government sends abandoned and other needy children, the nuns running the orphanage suggested that only 1 in 30 adoptions are processed through these orphanages as judicial adoptions. The rest are done privately through lawyers. The nuns complained that the parents are being discouraged by the lawyers from giving their children to the orphanages. Parents also prefer to go to the lawyers because the lawyers give them money" (point 91, page 21).
- A detailed description of the Notarial system of adoption is available elsewhere in this document. It is true that the vast majority of adoptions (domestic and intercountry) are handled through the private Notarial system. In fact, the constitution of Guatemala was revised to provide this option because it is so successful in comparison with the judicial system (which takes much longer while the children are institutionalized). The attorney's fees are not contingent on whether the adoption is conducted through the judicial or Notarial system, although most attorneys use the Notarial system exclusively as the judicial system delays the integration of the child into his permanent family.
 - Second, this statement indicates that *all* children that the Government declares as abandoned are sent to only four private (religious) orphanages, implying that these institutions are overcrowded and underfunded. It is reasonable that adoptive parents would wish to provide their soon-to-be-children with private foster care during the adoption process rather than having them placed in an overcrowded institution, and would probably require little encouragement from their attorneys to make this decision.
 - Finally, it is understandable why the nuns would prefer to have children who are in the adoption process housed in their orphanages as the fees that the adoptive parents pay for the care of their soon-to-be-child could be used to subsidize the expenses associated with raising the children who are not available for adoption. In fact, the vast majority of children living in orphanages are not available for adoption because of the costs and time associated with obtaining official decrees of abandonment. Many of the small private children's homes are able to provide a good living environment to unadoptable children through the fees and donations provided by adoptive parents.
13. "The best interests of the child put up for adoption are rarely considered in the whole process. Under most arrangements the biological parent does not have any say in who will become the child's adoptive parent. The notary/lawyer chooses the adopters, and he/she is highly unlikely to give the child to a family in Guatemala, where the adoption procedure would only cost about Q3,000 (about US\$ 300). He or she would prefer to give the child to a foreign couple who may be

willing to pay as much as US\$ 25,000. Thus, the best interest of the child is totally ignored, and the adoption becomes purely a business transaction” (point 92, page 21).

- By definition an adoption must be carried out for the best interest of the child. The birthmother chooses an intercountry or domestic adoption for her child, however the match with an adoptive family cannot be made until after the birthmother has formally relinquished the child. Therefore, limited information on the precise family who will raise her child is initially available to the birthmothers. However, the birthmother is able to revoke her relinquishment at any point in the adoption process until the final protocols is signed upon review of the case by PGN. She is also informed of the adoptive family by the attorney and at the social worker interview. Therefore, if she does not find the referred family acceptable, she could revoke her relinquishment.
 - As for the prices quoted, a detailed discussion of fees related to adoption is provided elsewhere in this packet. However, the report implies that the attorney is paid “up to \$25,000” to facilitate the adoption. This is inaccurate. The average cost of an adoption is closer to \$20,000 and only about \$1,500 is the take-home pay for the attorneys after putting in 6-9 months (average) work to complete the adoption case. Again, it is the adoption process that costs money, not the child. Paying for the care of a child and legal expenses associated with adoption does not undermine the best interest of the child.
 - It is true that a child who is relinquished for adoption is unlikely to find placement with a family in Guatemala. However, this is not due to the preference of the attorney, nor the relative fees associated with each type of adoption. Rather, there are very few families within Guatemala who are willing to adopt the children with questionable paternity who are relinquished by single indigenous women. As discussed in the section on social and economic factor influencing adoption, there is no culture of adoption within Guatemala, and the society is rife with racism extended towards indigenous peoples. In fact, there was a law office set up specifically to facilitate adoptions of relinquished and abandoned children within Guatemala. The services were provided free of charge for any domestic adoption. In the year since the office was opened and the services publicly advertised there was not a single family that came forward to take advantage of the service and adopt a waiting child. However, there are sufficient numbers of waiting prospective adoptive parents overseas that matches can be made quickly and the children can find loving permanent homes.
14. “The cursory participation of the family courts and the Office of the Attorney-General in private or extrajudicial adoptions does not provide any effective control over the proceedings. In her dialogue with the association of lawyers involved in adoptions, the lawyers maintained that the whole process is subject to rigid control by the Government because they have to pass through not only the family courts but also the Attorney-General's Office. However, meetings with the family courts and the Attorney-General's Office revealed that while the family court assigns the case to a social worker, it does not supervise the social worker in the conduct of the case. Likewise, the Office of the Attorney-General simply reviews the documents presented to it and cannot look into how the papers were obtained. The role of the Attorney-General's Office is only to ensure that the documentary requirements are complied with; they do not go beyond the paperwork” (point 93, page 21).
- Neither the court-appointed social worker nor the Attorney General's office (PGN) is compelled nor required to approve any adoption case. It is not unusual for the attorney in PGN who reviews a file to require additional documentation, revision of existing documents, or even interviews with the birthmother if they deem it appropriate. If the motives of the birthmother or the possibility of coercion arises in the social worker interviews, an investigation will be carried out and the adoption will not be approved. Similarly, if PGN suspects a problem with any documentation they will conduct an investigation and have the right to deny any adoption.
 - Also, anyone suspected of facilitating fraud in adoption cases (attorneys, facilitators, social workers, etc) are subject to criminal charges including fines and imprisonment. Any notary convicted of falsification of documents is immediately disbarred.
 - Both judicial and Notarial adoptions are subject to the same rigid controls by the Guatemalan government. As you can see in descriptions elsewhere in this packet, the only difference

between judicial and Notarial (“extrajudicial”) adoptions is that the final adoption deed in a Notarial adoption is written and filed by the Notary. In a judicial adoption the final adoption deed is drawn up by a Notary, signed by a judge, then filed by the Notary (see section of this packet on Judicial Adoptions for further detail). Further, in intercountry adoptions the Embassy of the “receiving country” will investigate documents, attorneys, and interview birthmothers if there is any question of impropriety in the adoption process. This adds another level of safeguards to the adoption process.

15. “Since the children in the orphanages are mainly abandoned children, the orphanages have to go to minor’s court to get the required declaration of abandonment. The process takes years, and very often when they get the declaration the child involved is no longer considered adoptable. Lawyers dealing with private adoptions, however, are able to get a declaration of abandonment for babies before they are even born” (point 94, page 22).
 - It is regrettable that the issuance of a Certificate of Abandonment by the Court of Minors takes such a long time. This is obviously not in the best interest of the children since they live in orphanages during the time that the COA is in process, if it is available at all. If the abandonment process were streamlined in a manner similar to Notarial adoptions, it is likely that many more of the 20,000 children currently living in orphanages would find permanent homes.
 - However, the statement that declarations of abandonment are available for unborn children is absolutely false. Since abandoned children normally have no known birthparent, or the birthparents have died, it is impossible for this to take place prior to the birth of the child. Also, the purpose of the investigation leading to a certificate of abandonment is to locate a relative of the child who is willing and able to raise the child, it is not to make them available for adoption. The legal process surrounding the abandonment decree takes a minimum of several months, and often several years, to complete.
16. “The adoption procedures are not very transparent. When done through lawyers, there is no check on the origins of a child and no follow-up or monitoring of the procedure. The adoption may well be legal in that it is in keeping with the law, but it may be accompanied by irregularities. The lawyers take advantage of ‘voluntary jurisdiction’ whereby it is not necessary for the judge to be involved in the adoption procedure. It is reported that 99 per cent of adoptions are through lawyers and notaries and of these, 95 per cent are intercountry adoptions” (point 96 page 22).
 - The process of adoptions itself is very transparent (see a brief description of the adoption process in this packet). The origin of every child relinquished for adoption is checked by the social worker, and through DNA testing. Follow-up on the adoption is often a requirement of the country or state of the adoptive parents. For example, in many states in the US, adoptive families are required to have licensed social workers meet with the family on at least one occasion after the child has been adopted. The social worker writes a summary of the child’s health and well-being and collects photos of the child to document his/her developmental status.
 - “Voluntary jurisdiction” is the term associated with the Notarial system of adoptions, which is completely legal and not suspect. The process has been streamlined and does not require children to wait for long periods (sometimes years) in an orphanage while the adoption process is being conducted, making it much more desirable than the judicial system of adoption for the welfare of the children.
17. “In private adoptions, where the mother gives her child directly to a lawyer, it is very difficult to verify the origin of the child. The social worker often does not pay home visits owing to lack of time, or because the social worker acts in connivance with the lawyer. ...She was also told that some lawyers handle up to 15 adoptions a month using the same social worker. Social workers are part of the staff of the family court, but in adoption proceedings the social workers act on their own responsibility and under oath and are not subject to the supervision of the courts” (point 98, page 22).
 - Verification of the origins of each relinquished child has been covered earlier, and is essential for the successful completion of an adoption. A particular family court (there are 6 in

Guatemala City alone, and more in other jurisdictions) is assigned at random to each case submitted, and presiding judge in that court then assigns a social worker for each case. There are several social workers assigned to each court. Therefore, routine collusion between an individual social worker and the attorneys would be unlikely because the random assignment of courts and social workers would preclude all cases for one attorney being assigned to the same social worker.

- The social worker conducts a detailed interview of the birthmother where she testifies under oath as to her personal history and the circumstances of her pregnancy and her life circumstances leading her to the relinquishment of her child. The foster mother or hogar director is also interviewed, and a home study of the adoptive family (conducted by a licensed social worker in their country) is reviewed.
- The social worker is under oath, as are the judges and Notaries, to conduct her responsibilities in accordance with the law. Violation of that oath can result in criminal charges and is equivalent to “court supervision.”

18. “Adoption proceedings can be initiated anywhere in the country. Women recruited in the provinces are instructed by the lawyers to go to Guatemala City to give birth as it is much easier for the lawyers to control the adoption proceedings and to conduct irregular practices in the capital. Family courts in the provinces have better facilities to verify the child's origins and home situation. Lawyers also want to be sure that the mothers are readily available when the time comes for them to affirm to the court or to an embassy their consent for their child to be adopted” (point 99 page 23).

- Again, these statements are misleading. All of the paperwork for an adoption (such as the POA, birthmother relinquishment papers, etc) is generally filed in, or just outside, of Guatemala City. If an attorney were to initiate adoption proceedings in rural areas, he would be required to travel extensively to that area to submit all paperwork, be available for social worker interviews, etc. Plus, the DNA testing and PGN processes must take place in Guatemala City. The desire to conduct the entire adoption process in one location has to do with efficiency rather than “ease in conducting irregular practices.”
- The family court procedure for adoptions is the same in all parts of the country, and so there is no advantage to filing the adoption in one area over another – except rural courts generally can process things faster since, unlike Guatemala City, they generally do not have a backlog of cases.
- Also, having the birthmother available to sign the paperwork required during the adoption process is only sensible, and not sinister as implied by the statements above. If a birthmother disappears in the middle of an adoption process, then that process cannot be completed and the child will be considered abandoned and placed in an orphanage. It is in the best interest of the child for the birthmother to remain available throughout the adoption process.

19. “Intercountry adoptions are much preferred to national adoptions. As previously explained, lawyers handling adoptions almost always opt for intercountry adoption. Below are some other reasons why there are generally fewer possibilities for national adoption:

- (a) Most Guatemalans cannot afford the high cost of adoption;
- (b) Many local adoptions are informal arrangements between relatives and are not formal adoptions per se;
- (c) Some local adoptions are not registered as adoption at all but, by falsifying documents, as normal births;
- (d) The high birth rate in Guatemala means that comparatively few Guatemalan couples are childless;
- (e) Guatemalan couples wanting to adopt generally have more stringent requirements for the children they want to adopt, for example, the colour of the hair and eyes, the ethnic origin, etc.;
- (f) Guatemalans rarely adopt publicly; they prefer clandestine adoption not only because it is cheaper but also because they do not want people to know that the child is not really theirs by birth. Thus, the statistics do not really reflect the true picture” (point 100, page 23).

- This point explains why domestic adoption in Guatemala is not a realistic option for the placement of all the needy and unwanted children. It would seem that this point would argue the necessity of intercountry adoption in providing permanent homes for adoptable children of Guatemala.
 - In point 92 there is a statement that domestic adoptions are inexpensive (costing only \$300) and therefore Guatemalan attorneys prefer handling intercountry adoptions, however in this point she states that domestic adoptions are too expensive.
20. In spite of this suggestion in this report “The Institute [for Family Law of Guatemala] considered that the system of adoption should continue as it is - handled by lawyers who know the procedure - because to transfer control to the State would encourage corruption and lessen the possibility of children finding a family. This concern was also raised by the representative of the United States Embassy, who considered that despite the many weaknesses of the current system, a transferral of full control of adoption procedures to State authorities would not rid the system of corruption and personal financial gain, and might have the effect of keeping more children in orphanages.” (point 105, page 24), the report illogically recommends: “Adoptions should be carried out only by State bodies...” (point 112b, page 25).
- It is disheartening that the reputable advice of members of the Institute for Family Law and the U.S. Embassy that centralization of the adoption process under the government of Guatemala would only result in more difficulties for the needy children has been disregarded by the Special Rapporteur in her recommendations.
21. “When the certificate of abandonment is being examined, poverty should not be accepted as a reason for a woman to give up her child. Every effort should be made to keep the child in the family and within its ethnic group. If this is not possible, adoption should preferably be by Guatemalan parents, then by foreigners residing in Guatemala, and as a last resort by foreign parents” (point 112g, page 25-26).
- It is illogical that poverty is not an acceptable reason for a woman to relinquish her child for adoption. This reasoning would require that a woman who states that she cannot provide sufficiently for her child due to extreme poverty and would choose adoption in order to provide that child with a better life, should be prevented from doing so. How can that be in the best interest of the child? We absolutely agree that governmental and societal programs should strive to reduce or eliminate poverty so that it is no longer a reason for relinquishment, but that is not the current reality of Guatemala. Chapter 2 presents information on the socioeconomic conditions that lead many Guatemalan birthmothers to relinquish their children for adoption. There is no government sponsored social service program to assist poor birthmothers to raise their children, so disallowing poverty as a legitimate reason for relinquishment is, in effect, condemning those children to a life of malnutrition, disease, hard labor, and for 20% of them, death before the age of five.
 - It is a constitutional right of any birthmother, regardless of her financial situation, to make an adoption plan for her child.
 - The hierarchy of placement of a child within family, community, and country is covered in the section of this packet on the Convention on the Rights of the Child.

In conclusion, we find that the UN Special Rapporteur’s report makes extreme recommendations based on no concrete evidence. The document contains a multitude of inaccuracies and fallacies, some of which have been discussed in this rebuttal document. This, coupled with the author of the report’s admission that she had neither sufficient time or funding to collect documentation or statistical evidence to support her claims or recommendations, leads us to conclude that: 1) this report is unreliable and dangerous to the needy children of Guatemala who await permanent homes, and 2) the lack of methodological rigor and accuracy reflected in this report unquestionably render it inappropriate for use as a resource by UNICEF or any other government agency in discussions of Guatemalan intercountry adoption.

Response to: January 13, 1999 European Parliament Resolution “On the illegal trafficking of babies coming from Guatemala.”

Overview:

This resolution was written in response to: (1) concern elicited by unspecified reports that “illegal methods of adoption [were] still common practice in Guatemala;” (2) the number of orphaned and abandoned minors was high; and (3) the number of “people willing to give their children up for adoption for economic reasons” had increased. The resolution is based on the foundation of the UN Convention on the Rights of the Child and the Hague Convention on Intercountry Adoption (*see sections on CRC and Current Legal Status of Adoptions in this document*). It is important to keep in mind that there have been many changes in official adoption policy since this resolution was drafted nearly five years ago. For instance, in 1999 there was not yet a general requirement for a positive DNA match between biological parents and children in relinquishment adoption cases, although it had already been enacted by the U.S., Canada, and the U.K. Despite the significant changes in the Guatemalan adoption system since the resolution and the lack of continued concern expressed by the parliament, UNICEF continues to cite this resolution in its arguments against intercountry adoption.

Comments on specific portions of the resolution:

Some portions of the resolution are admirable. It “recognizes the important role played by legal international adoptions” and “calls upon the Guatemalan government to prosecute those involved in the illegal trafficking of babies and children.” We completely agree that the enforcement of existing laws that protect children from abuse and kidnapping in Guatemala is essential and certainly in the best interest of the children.

Other portions of the resolution are problematic as they do not take into account the cultural and socioeconomic context of Guatemala, and even call for Guatemala to violate its own constitution. For instance, it calls on members “to bring sustained pressure to bear on the Guatemalan government to...ratify the Hague Convention on Intercountry Adoption...and to put into effect the Juvenile and Adolescent Code which will reflect the Guatemalan obligations under the UN Convention of the Rights of the Child.” Guatemala did attempt to accede to the Hague Convention on Intercountry Adoption in 2003. What followed was six months of chaos as Guatemala attempted to centralize adoptions without the funding, requisite preparation or a firm policy. For the first time in history, five countries objected to the accession of another country to the Hague Convention because of the inadequacy of the proposed implementation. This dubious distinction was bestowed upon Guatemala (*see section of this packet on the Current Legal Status of Adoptions*). While the Hague Convention was in effect there were reports of increased numbers of child abandonment, maternal suicide, infanticide and women leaving the country to give birth in a nation where their children might have a better chance of being adopted. On September 1, 2003, the magistrate of the Constitutional Court of Guatemala signed a decision declaring the accession of Guatemala to the Hague Convention illegal because the President of Guatemala does not have the constitutional authority to accede to any international treaty of which Guatemala is not a member nation. Therefore, under the Constitution of Guatemala, it cannot become a part of the Hague Convention on Intercountry Adoption no matter how much pressure is brought to bear by outside organizations. Parts of the proposed Juvenile and Adolescent Code are incompatible with the constitution of Guatemala, preventing it from being enacted. Also, this code is not mentioned in the Convention on the Rights of the Child, nor is it a stated requirement of signatory nations.

The resolution also “calls on the Member States to ensure that only public bodies or organizations accredited by the state which are non-profit making are permitted to act as intermediaries in adoption procedures.” However, the role of the notary in adoptions is protected under the Constitution of Guatemala. Since adoption is a non-litigious matter, there is no requirement for adoptions to be processed completely by the court system. The Constitution allows specialized attorneys (called Notaries) to process such civil matters as adoptions, marriages, and wills, and it protects the rights of professionals, including Notaries, to practice (*see Chapter 2*). It is pointless for the European Parliament to put pressure on the government of Guatemala to violate its own constitution. The resolution also does not take into account that not all governments have sufficient monetary or human resources or social service infrastructures to provide adoption services through public bodies, or to accredit all organizations offering adoption services.

There are also several items in the resolution that are unrelated to the intercountry adoption process. This includes a call to investigate an anti-defamation lawsuit brought against Casa Alianza director Bruce

Harris. The resolution mistakenly claims that the case concerned Mr. Harris speaking out against intercountry adoption. In reality, the suit resulted from false charges of undue influence and child trafficking made by Mr. Harris against an attorney who was legally facilitating intercountry adoptions (Lic. Susana Luarca). The charges that had been brought against this attorney were dismissed in court. Despite this fact, Mr. Harris has managed to evade standing trial for this defamation for five years by fleeing Guatemala to live in another country.

Recent communications by the European Parliament on the situation in Guatemala:

In the five years since this Resolution was published, we have found no further publications of the European Parliament that mention concerns about intercountry adoption from Guatemala. Currently, the concerns of the European Parliament regarding Guatemala are strictly related to the implementation of the 1996 Peace Accords, reduction of poverty, and establishment of the rights of indigenous peoples. One resolution on Guatemala dated 9 April 2003, raises concerns over the 1996 Peace Accords in that “their implementation is at a standstill or being reversed, in the area of both agriculture and human rights, especially the rights of indigenous peoples; ...violations of human rights are on the increase and the justice system is deteriorating further, since the present government has not provided the necessary resources;...[the European Parliament] expresses its concern at the continuing discrimination against indigenous and peasant women ...in political decisions and economic, social and cultural activities.”

In July 2003, the EU's relations with Guatemala were described as follows.¹³ “Regarding the rule of law and respect for human rights, crime and corruption remain a crucial challenge ...the overall human rights situation has deteriorated and there are increased signs of the participation of clandestine groups in illegal activities linked to military intelligence, the justice system, and the civil police force.” They point out that “From the social point of view, poverty is still a major problem for more than half of the population; almost 25% of the population lives in extreme poverty. The per capita GDP is increasing too slowly to improve significantly poor people's standards of living. Moreover, social indicators are among the worst in Central America in terms of social public expenditure, access to health and to basic services, education, child and maternal mortality rates, distribution of wealth and land. Indigenous peoples, who constitute 48% of the population – one of the highest rates in Latin America – suffer from strong racial, social, economic and cultural discrimination. Seven indigenous people out of ten are poor and live on the margins of the society.” In May 2003, “the EU decided to reorient its co-operation with Guatemala towards contributing to accelerate the implementation of the Peace Accords in sectors where reforms have been the weakest or unsatisfactory.”

These most recent documents on the relations between Guatemala and the EU do not mention intercountry adoption. If anything, they underscore the desperation of the current situation, especially with respect to discrimination of indigenous women and apparent remilitarization of the country. The poverty and social conditions experienced by many of the birthmothers who have chosen intercountry adoption for their children are not improving, and the government is not supporting initiatives to assist these families. This returns us to the statement from the CRC and the 1999 resolution that state “...the UN Convention on the Rights of The Child only recognises inter-country adoption as an alternative if the child can not be cared for in a suitable manner in his home country...” The more recent EU resolutions demonstrate the likelihood that suitable care cannot be found for many indigenous children in Guatemala, and therefore intercountry adoption must remain a strong and viable alternative for the best interest of these children.

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Guatemalan Adoptions in the Media

In justifying its position on intercountry adoption from Guatemala, representatives of UNICEF frequently refer to media coverage of this issue. While it is true that intercountry adoptions from Guatemala have been the target of a great deal of unfavorable press recently, the majority of negative information in these reports is provided by UNICEF, Casa Alianza, or one of the reports that have been critiqued elsewhere in this packet (e.g., UN Special Rapporteur report, ILPEC report).

¹³ full report available at: http://europa.eu.int/comm/external_relations/guatemala/intro/

Interestingly, if you conduct an online search of newspaper archives, it is unlikely that you will find many hits by looking for “UNICEF + intercountry adoption.” However, the number expands exponentially when the search is conducted with the terms “UNICEF and child trafficking.” This is indicative of the rhetoric that is used in interviews and press releases provided by UNICEF spokespeople.

For example, a recent newspaper article telling the story of one adoptive family provides such a quote. “Guatemala is the third biggest *exporter* of babies, behind China and Russia, Ironside said. He [Alfred Ironsides, UNICEF spokesperson] added that *lawyers essentially buy and sell babies in Guatemala, as opposed to special courts that abide by the law when placing orphans in foster homes*” [emphasis added].¹⁴ The rhetoric used by the UNICEF representative depicts the adoption process as a business transaction where a child is a commodity to be bought, sold, and exported. Ironside also depicts the legal system of private Notarial adoptions as illegal by stating that courts uphold the law, and attorneys do not. We have already addressed this fallacy in the Role of the Notary and Fees sections of this packet.

Another article, published in the National Post in 1999, quotes “In Guatemala, you can talk of a ‘network’ of traffickers in babies,” said Hector Dionicio, legal director of Casa Alianza.”¹⁵ However, such a “network” has never been corroborated by any legal authority. In spite of this lack of evidence, representatives of Casa Alianza continually make statements to the press that deliberately misinform the public through spurious, exaggerated, and unsubstantiated claims about the Guatemalan adoption process. Casa Alianza and its collaboration with UNICEF in its anti-intercountry adoption efforts are discussed in the “Casa Alianza” section of this packet.

An October 2000 report in the Christian Science Monitor provides interviews with representatives from Casa Alianza, UNICEF, and government and adoption lawyers. A tone of anti-adoption bias prevails as illustrated in the following three excerpts from the article: (1) “But the skyrocketing adoptions figures, coupled with mounting reports of cases in which mothers are either offered money, recruited, coerced, or even robbed of their children has unleashed a public backlash that Guatemala’s prolific adoption rate is nothing more than trafficking in children. Some allege adoption is a multimillion-dollar-a-year business [says Hector Dionicio of Casa Alianza].” (2) “They say the root of the problem does indeed lie in Guatemala’s adoption laws, deemed unique by the United Nations Children’s Fund (UNICEF) and permitting private adoptions with little state oversight. According to a recent UNICEF report on adoptions, fully 99 percent of adoptions in Guatemala are processed this way.” (3) And, finally, in response to a statement by Juan Francisco Flores, a government attorney, that the adoptions are legal under the Guatemalan system the UNICEF stated: “‘We don’t know which adoptions are legal and which are not,’ says Elizabeth Gibbons, UNICEF’s representative in Guatemala. ‘The legal system is so intransparent that legal adoptions go through, and so do illegal ones.’”¹⁶ Again, these statements from Casa Alianza and UNICEF insinuate that private Notarial adoptions in Guatemala are operating illegally, that the system is not “transparent” and there are not proper legal checks and balances in place to prevent illegal adoptions. We have already demonstrated in the sections describing the adoption process, the role of the Notary, and legal checks and balances in this packet that these assertions are false. First, children who are kidnapped cannot be offered for international adoption due to the DNA testing requirement. Second, the rate of adoptions from Guatemala is only high in comparison to Latin American countries that have centralized the adoption system, not in comparison to its population size, fertility rate, or poverty rate. Third, the Notarial system of adoption is neither “unique” to Guatemala, nor without state oversight. Several other Latin American countries have a legal system that is similar to the Notarial system of Guatemala. Further, as detailed in the description of the adoption process provided in this packet, each Notarial adoption case is reviewed by a court-appointed social worker in the Family Court system, then reviewed again by the Office of the Attorney General (PGN). Either of these official state offices may reject any adoption case, require further documentation, or initiate an investigation. Also, in intercountry adoption the entire case is reviewed again by the Embassy of the country to which the child will emigrate. Finally, the Notarial system of adoptions is “transparent” and completely legal under the provisions of the Guatemalan law and Constitution.

¹⁴ K. Karol, 6/23/03, the Oakland Press, Crackdown on Adoptions Stymies Couple.

¹⁵ G. Thompson, 7/29/99, National Post, Baby snatchers who thrive on poverty: Infants born to desperate mothers in Guatemala are ‘adopted’ to affluent homes in the U.S. and Canada.

¹⁶ C. Elton, 10/17/00, Christian Science Monitor, Adoption vs. trafficking in Guatemala.

While UNICEF has generated a significant amount of negative publicity, it is important to note that not all of the media reports on the Guatemalan adoption system are unsympathetic. For example, on September 1, 2003 an editorial in the Guatemalan newspaper Siglo Veintiuno was published in support of the Constitutional Court's decision to suspend the accession of Guatemala to the Hague Convention on Intercountry Adoption. A translation of the article reveals "The Constitutional Court decided to suspend the accession of the government of Alfonso Portillo to the Hague Convention in relation to adoptions. It is a wise decision, one that favors those who should benefit: the children who are adopted, in the first place, and soon, their adoptive parents...But the [N]otarial process of adoption – of Voluntary Jurisdiction – is not free of state supervision, according to the Decree 54-77. The critics of international adoptions insist that there is no transparency. There may be some cases of illegal adoption, but the ones transacted by notaries and supervised by the embassies of the countries of destination, are all perfectly legal... With the decision of the Constitutional Court, the children are the biggest winners, as it should be."¹⁷

It is, not surprisingly, the few troubled cases that receive the most media coverage, both within Guatemala and overseas. For the most part, the thousands of children who have found their forever homes through intercountry adoption and live happy, uncomplicated lives remain unheard. We absolutely agree that, in the few cases of illegal or unethical practices that happen in intercountry adoption each year, the law should be upheld and the perpetrators should be punished. However, the prevalence of negative publicity in the popular press can be almost entirely attributed to the continual stream of misinformation propagated by representatives of Casa Alianza and UNICEF. These organizations regularly quote each other, and even themselves, to provide "evidence" in support of their attempts to halt adoptions from Guatemala. In referring people to media coverage on Guatemalan adoptions to support their position that major upheaval is required, UNICEF is merely quoting itself again, since virtually all of the negative reports originate with UNICEF itself.

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Casa Alianza Shares the Position of UNICEF on Intercountry Adoption

As you have seen in the statements on Guatemalan adoptions in the media, there are two main sources that are quoted in articles that provide a negative impression of intercountry adoptions from Guatemala. Virtually all of the negative quotes on the subject have been linked to UNICEF, Casa Alianza, or the troubled documents we have discussed previously.

One of the more confusing alliances in relation to intercountry adoptions in Guatemala, has been between Casa Alianza, the Latin American branch of Covenant House, and UNICEF. The active campaigning of Casa Alianza to severely limit intercountry adoptions and to impose unworkable regulations on the process is surprising, and illogical given the stated mission of the organization. Casa Alianza works to assist children living on the streets due to abandonment, abuse, or poverty, and they serve over 2000 children each year through residency, community service, and outreach programs.¹⁸ It is difficult to reconcile the mission of this charitable organization with a position on intercountry adoptions that would result in increasing the numbers of unwanted and abandoned children in the country.

In Covenant House's 2002 Annual Report, UNICEF is listed as a corporate contributor to the organization, but it is not one of the top donors.¹⁹ UNICEF also has provided funding directly to Casa Alianza for specific programs, however it provides little for the daily operation. There are also links to UNICEF web pages on the Covenant House and Casa Alianza web pages.²⁰ Although UNICEF and Casa Alianza may not have any official relationship, we feel that it is appropriate to include a brief analysis of Casa Alianza's positions in the UNICEF packet because of their partnering and representation of the same viewpoint in media coverage about adoptions from Guatemala.

While there may be no official relationship between Casa Alianza and UNICEF or the Guatemalan government, there are several points that show a strong informal connection.

¹⁷ editorial, 9/1/03, Siglo Veintiuno, Una sabia decisión a favor de los niños

¹⁸ Covenant House 2002 financial report, available at: http://www.covenanthouse.org/about_fin_ar_2002.pdf, accessed October 31, 2003

¹⁹ *ibid*, accessed October 31, 2003

²⁰ Links to UNICEF are provided on http://www.covenanthouse.org/about_event_advote.html, and <http://www.casa-alianza.org/EN/human-rights/illegal-adop/press/index02.shtml> both accessed October 31, 2003

1. Casa Alianza was one of the groups that requested the UN Special Rapporteur, Ms. Calcetas-Santos, to investigate the “network of child trafficking” in relation to intercountry adoptions in Guatemala. The inaccuracies in the resulting report are described previously in this packet (section on UN Special Rapporteur report). Casa Alianza and UNICEF both use references from this report to support their claims of widespread illegal intercountry adoption in Guatemala (for example, see the Casa Alianza web page at: <http://www.casa-alianza.org/EN/human-rights/illegal-adop/press/index02.shtml> which paraphrases the report extensively).
2. Casa Alianza also “assisted” Calcetas-Santos in interviewing parents who claimed to have had their children abducted for intercountry adoption, and those who had “lost and recovered” their children.²¹ One such parent, represented in litigation by Casa Alianza, claimed that his son was stolen and sold for intercountry adoption. Gustavo Tobar subsequently recanted his testimony, agreeing that his son had been abandoned prior to the adoption.²²
3. An unsubstantiated (and frankly ludicrous) claim that children have been adopted for the purpose of organ trafficking was publicized by Bruce Harris and Casa Alianza, and subsequently published in the UNICEF-sponsored ILPEC report, and the amparo filed by Sergio Morales, (Director of the Department of Human Rights in Guatemala). The claim of organ trafficking was originally publicized in a film created in collaboration with Bruce Harris of Casa Alianza, who is described as “a vocal and persistent advocate of the story.”²³ This claim was repeated by ILPEC in their statement, “The dispositions of the Civil Code do not establish the necessity for “follow-up” of a child who is adopted by a foreign family residing abroad, thereby running the risk that child adoption can be utilized by adoptive parents for exploitative purposes (prostitution, trafficking of organs, etc.)”²⁴ The rumor resurfaced in October 2003, when the Guatemalan Procurador, Sergio Morales, claimed that it was necessary to suspend international adoptions because there were no regulations in place to ensure that children weren’t maltreated, used for organ trafficking, or prostitution.²⁵ It should be noted that this rumor has been independently investigated by WHO, Doctors Without Borders, and others; all of whom have found no evidence of Latin American organ trafficking.
4. Casa Alianza Guatemala signed an agreement in early 2003 with the Human Rights Procurador (PDH), Sergio Morales, to document the number of violent deaths of children the country, demonstrating recent collaborations between Casa Alianza and the Guatemalan government. Sergio Morales filed an appeal to the court systems to stop intercountry adoptions from Guatemala and prevent all adopted children from leaving the country on October 12, 2003. That appeal, which included a statement about internationally adopted children being used for organ trafficking as described above, was denied on October 31, 2003.²⁶
5. Casa Alianza Guatemala has a formal cooperation agreement with the Attorney General's Office in Guatemala (PGN). Under this agreement, Casa Alianza agrees to cooperate in the investigations regarding situations affecting the children of Guatemala, including claims of trafficking of children.²⁷ To date, no investigations of child trafficking arising from a claim by Casa Alianza have resulted in a conviction.

In their role as a child advocacy organization, Casa Alianza has taken the positions of UNICEF on intercountry adoption to heart. For example, they follow the UNICEF policy of encouraging countries to ratify the Hague Convention on Intercountry Adoptions and adjust their national laws to reflect this treaty. “At Casa Alianza we believe it is fundamental that countries study and ratify The Hague Convention on Inter Country Adoptions and that they revise their individual legislation related to adoptions so establishing greater controls over them.”²⁸ Casa Alianza also proclaims that the Convention on the Rights of the Child, cited by UNICEF and explained previously in this packet (see section on CRC) must

²¹ UN Official to Investigate Child Trafficking in Guatemala, *El Diario La Prensa*, July 16, 1999.

²² Cierran un caso de adopción. *Prensa Libre*. October 24, 2002.

²³ S. Fraser, 1994. *World View Magazine*

²⁴ ILPEC report, page 11.

²⁵ Procurador advierte que rechazo deja vacío legal: CC niega petición de suspender adopciones. *Siglo Veintiuno*. Oct. 31, 2003.

²⁶ *ibid.*

²⁷ <http://www.casa-alianza.org/EN/human-rights/illegal-adop/docs/indexdoc.shtml>, accessed October 31, 2003

²⁸ <http://www.casa-alianza.org/EN/human-rights/illegal-adop/>, accessed November 5, 2003

be upheld in order for the human rights of children to be served. To review briefly, CRC articles 21 and 8 dictate that intercountry adoptions should only be considered when no family or domestic placement can be found; that no “improper financial gain” shall result from adoption placement; and that the child has a right to maintain his identity, nationality, and family. “Here then, [in the CRC articles] we find the goals which surround the concept of adoption, goals and guidelines which guarantee a family the right to all of their children.”²⁹ These are the same interpretations of the CRC articles defended by UNICEF (see CRC section of this packet).

According to their web site, “Casa Alianza has been working since 1996 to expose, denounce and investigate “illegal” adoption in Guatemala.”³⁰ They include as “illegal” any adoption of a child who has not been abandoned or orphaned (e.g. all relinquishment adoptions), and situations where children reside in private homes supervised by attorneys during the adoption process (the system of foster care). In their mission to investigate such practices, Bruce Harris, regional director of Casa Alianza, has filed charges against attorneys and government officials alleged to be involved in “child trafficking.” These charges have all been dismissed. However, Mr. Harris has yet to stand trial in Guatemala on charges of slander brought against him in 1997 in response to his groundless accusations against attorney Susana Maria Luarca Saracho de Umaña.

Not all of Casa Alianza’s statements on intercountry adoption are necessarily reflective of the public positions taken by UNICEF. However, the following quotes from the Casa Alianza web site³¹ provide evidence of their anti-adoption rhetoric (with notations of where some of these positions are shared with UNICEF):

1. “Adoption is a process that can place many abandoned or orphaned children within caring and loving homes. It also allows childless couples to be parents. However many of the babies that are adopted internationally today are not abandoned. They are bought, stolen, or obtained by other unscrupulous means such as threats, violence, pressure and coercion.”
 - This statement implies that all relinquishment (e.g. not abandonment) adoptions are unscrupulous.
 - *UNICEF shares the view that adoption should preferentially result in the placement of abandoned or orphaned children who have been living in orphanages rather than those relinquished for adoption directly by their birthmothers.*
2. “The trafficking of children is a worldwide phenomenon and seriously violates the human rights of children involved. Trafficking may end in pornography, prostitution, slave labour and other types of exploitation of minors. The trafficking of children also involves international illegal adoption, which often uses legal means for criminal ends, namely the treatment of humans as commodities to be bought and sold, falsifying of documents, the kidnapping of children, the housing of babies awaiting private adoptions in illegal homes and nurseries.”
 - Equating intercountry adoption with trafficking of children for the purposes of pornography, prostitution, and slave labor is reprehensible. The position that intercountry adoption “uses legal means for criminal ends” implies that even the legally adopted children are victims of criminal intent. These statements are unjustified, unsupported, and untrue.
 - *This statement is supported by UNICEF and provided in the UN Special Rapporteur’s report and the ILPEC report.*
3. “Guatemala has traditionally relied on its coffee and beef exports to bring in foreign currency. Over the past few years, however, hundreds of lawyers, politicians and middlemen have turned their hands to the more lucrative adoption business: last year, adoptions were worth an estimated 18 million pounds sterling to the Country.”
 - Phrases such as these are what provides the perspective that children are commodities in intercountry adoption. As we have indicated, the sale of children is illegal, it is the adoption process (including legal fees, foster care, and medical care for several months) that results in the large fees associated with intercountry adoption (see Fees section of this packet).
 - *UNICEF supports this view, and similar statements are found in the ILPEC report and the UN Special Rapporteur’s report, as well as media interviews with UNICEF spokespeople.*

²⁹ *ibid*, accessed November 5, 2003

³⁰ <http://www.casa-alianza.org/EN/human-rights/illegal-ado/press/index02.shtml>, accessed October 31, 2003

³¹ <http://www.casa-alianza.org/EN/human-rights/illegal-adop/docs/indexdoc.stml>, accessed October 31, 2003

4. "However this measure [DNA testing] still does not prevent children being treated as commodities nor does it remove the pressure and violence that coerces mothers into giving up their children - for example the arrogant idea of the west that a baby is better off with a pair of Nike trainers than in his mother's arms."
 - Quotes such as this demonstrate that Casa Alianza does not understand the true nature of adoption. Love makes a family in adoption rather than biology, not materialism. A child at home with a permanent loving adoptive family does enjoy the comfort and security of his mother's arms.

5. "Arguably the process of Adoptions continues due to the absence of necessary controls, allowing the psychological damage of children and adults, caught up in the process, to continue."
 - This quote provides an excellent perspective of the Casa Alianza position on intercountry adoptions. In Casa Alianza's view, the only reason why adoptions are allowed in Guatemala is because the necessary controls do not exist to prohibit them. The support of the UNICEF-proposed adoption law, therefore, can be seen as a means to provide the "necessary controls" to end intercountry adoption.
 - There is no explanation of what type of psychological damage is occurring through intercountry adoptions, nor is any evidence of harm to adopted children or adults involved in intercountry adoption provided.

Bruce Harris, director of Casa Alianza, criticizes the current Notarial system as not being transparent but fails to recognize any of the checks and balances in place (see section on legal checks and balances in this packet). In addition, the Casa Alianza web site suggests that the adoption system would be more transparent if conducted through judges instead of Notaries - but then Harris criticizes the transparency of Guatemala's judicial system when criminal charges were filed against him for slander. In reference to intercountry adoptions he stated, "The adoption procedures are not very transparent. When done through lawyers, there is no check on the origins of a child and no follow-up or monitoring of the procedure. The adoption may well be legal in that it is in keeping with the law, but it may be accompanied by irregularities. The lawyers take advantage of 'voluntary jurisdiction' whereby it is not necessary for the judge to be involved in the adoption procedure."³² But in reference to his own trial he accuses the judicial system of operating without transparency. "Now they are trying to do the same through quasi legal moves in the Guatemalan judiciary which has not always been known for it's total Transparency."³³

Thus, Bruce Harris and Casa Alianza provide conflicting opinions about what they define as "transparency" in the Guatemalan legal system. This contradiction certainly does not lend credibility to their claim that the centralization of adoptions in Guatemala and assurance that all adoption cases are processed by a judge would increase the "transparency" of the process.

Casa Alianza and UNICEF use similar arguments to support their positions on intercountry adoptions from Guatemala, quoting the same reports to support their arguments, and often using the same rhetoric in their descriptions of Guatemalan adoptions. Casa Alianza and UNICEF reference one another in justifying the positions they take on Guatemalan adoptions.³⁴ Further, both UNICEF and Casa Alianza have used their influence (working with the PDH and the PGN) to encourage the government of Guatemala to pass restrictive adoption laws, and both of these organizations have successfully worked in tandem to increase the negative publicity about the legal process of adoptions in Guatemala. We have provided evidence throughout this packet showing how UNICEF is working to stop or greatly restrict intercountry adoptions from Guatemala. Casa Alianza's goal—similarly aligned with UNICEF and stated on their web page—is to ensure that proper "controls" are in place through the legal system of Guatemala to ensure that the process of adoptions through direct relinquishment does not continue.

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³² *ibid* accessed October 31, 2003

³³ Freedom of Speech Goes on Trial, July 23, 2002, available at: http://www.covenanthouse.org/about_pr_20020723-freedom_of_speech.html accessed November 1, 2003

³⁴ There is a link to UNICEF provided on the Casa Alianza web page describing "illegal adoptions" found at: <http://www.casa-alianza.org/EN/human-rights/illegal-adop/press/index02.shtml>. The UN Special Rapporteur lists Bruce Harris of Casa Alianza as a source for her information. And Héctor Dionisio, coordinator of Casa Alianza's legal support office, is quoted on emigration and visa information in the ILPEC report (page 18). And case #9 in the ILPEC report describing a child that was illegally declared abandoned and delivered for intercountry adoption (page 49) was found on the Casa Alianza web site. Casa Alianza is also listed in the "sources" pages of the ILPEC report.

CHAPTER 4

Position Statement on Guatemalan Intercountry Adoption Advocacy

As international adoptive families, adoption service providers, and supporters, we want to encourage the continued consideration of the best interests of children within the debate over intercountry adoption. Although we strongly applaud and support the goals of keeping biological families intact and ensuring that all of the world's children can remain and thrive within their birth family or birth country, we recognize that such goals cannot be attained in a short period of time, and in fact are an ongoing process in every country including our own. In reality, every day a significant number of children are born whose parents do not have the resources to raise them as they feel they should. We believe that each of these children deserves a permanent loving home, adequate nutrition, shelter, and education, and the opportunity to reach his or her full potential. We believe that legal and ethical intercountry adoption provides a legitimate, necessary and current solution for these children, and that it is in the best interests of the individual child to be placed with a permanent family with a minimum of delay. Based on our experience, and with the goal of child protection as our primary emphasis, we offer the following positions:

1. We support efforts where the ultimate goal is to build a social and economic infrastructure that will allow families to remain intact and will reduce international adoption as a method of caring for children. Such infrastructure development is a long-term process that requires significant capital investment and a change in societal attitudes. As we see it, these changes must include eliminating gender discrimination and bias against children born out of wedlock; providing prenatal and postpartum health care to all mothers and children; educating about family planning and alternatives to adoption; preventing family violence; emphasizing responsible paternity; educating women in marketable skills so that they might earn sufficient wages to support a larger family; establishing social programs to provide food, housing, medicine and clothing for children whose family cannot afford these items; and establishing a woman's right to legally relinquish a child. Abandonment should not be the only means of privately relinquishing a child.
2. However, until such time as it is possible to adequately, compassionately, and humanely care for abandoned or relinquished children in the country of their birth, it is critical that provisions are made for the children who need permanent homes now. Guatemala lacks available social welfare systems to support indigent birthmothers* to raise their children. Efforts to interest Guatemalan nationals in formally adopting relinquished or abandoned children have been largely unsuccessful. These factors, combined with a lack of other alternatives to adoption, mean that intercountry adoption is the best hope in the short-term to provide permanent, loving homes to individual Guatemalan children whose birthmothers do not feel capable of raising them due to social and economic circumstances.
3. We believe that every adult mother has the right to evaluate her family situation and determine whether family placement is a viable alternative to intercountry adoption. In the case of a minor birthmother, her parents or another responsible party should also be involved in her decision. A system in which every adult birth mother is required to notify her extended family of her decision to relinquish a child, and possibly have the child placed with a family member against her wishes, will undermine the mother's rights, will likely increase the number of child abandonments, and unnecessarily delay placement of many children into permanent homes.
4. We believe that a secure, monitored system of DNA testing conducted by licensed laboratories, such as is currently required for adoptions from Guatemala, provides irrefutable evidence of the child's maternity and eliminates the possibility that the child could be abducted from her biological mother and relinquished illegally for adoption. This safeguard has been established to prevent child abduction and "child trafficking" for profit.
5. Every effort should be made to avoid long-term institutionalization of children. We commend the system of private foster care and small private children's homes (hogares) in Guatemala and have experienced, firsthand, the benefits of such care on the physical, emotional, and social well-being of children.
6. We believe that each birthmother should have the opportunity to review her decision over a sufficient period of time, and to change her mind without fear of negative consequences. The current system in Guatemala requires that the birthmother, on four separate occasions over a period of several months, sign statements that confirm her intent to relinquish her parental rights

to the child. Her cooperation in this both demonstrates her commitment to the adoption and provides her several opportunities to change her mind without reprisal.

7. We believe that proper screening should be conducted on potential adoptive parents. The current process includes local, state, and federal police clearances, FBI checks, state child abuse clearances, as well as a comprehensive homestudy by a licensed professional social worker. We assert that this process provides sufficient evidence that adoptive parents are willing, capable, and eager to adopt and raise the child in a wholesome, loving environment.
8. We believe that adopted children deserve to have access to information about their biological heritage and parentage. The current system of direct relinquishments, which requires positive identification and interviews with the birthmother and the caregiver (foster mother or hogar director,) provides basic accessible information to adopted children.
9. We believe that the current system of private adoptions in Guatemala protects the welfare of the child and respects the rights of the birthmother, while providing relinquished children with permanent families within a reasonable period of time. This system currently works well and provides a small number of needy children with permanent homes while Guatemala effects changes in its sociopolitical infrastructure that will allow future children to remain with their families in Guatemala. In countries such as El Salvador, Romania, Paraguay, Peru, Honduras, Mexico, Bolivia and Ecuador, to name a few, that have tried to implement a “central authority” for adoptions without sufficient economic or infrastructure support, the effect on the welfare of waiting children has been devastating. We strongly believe that the current legal system of direct relinquishments and private adoption in Guatemala can best serve the current needs of the adoptable children of Guatemala, and that a centralized bureaucratic system that is not backed by the necessary social, political, and economic infrastructure currently cannot.

* Note: the term “birthmother” includes only those women who have made an adoption plan and relinquished their children. It does not include all women who are mothers.

a copy of this position statement, including over 6000 signatures, comments, and affiliations, can be found online at: <http://www.petitiononline.com/guatpos/petition.html>

Adoptive Families Giving Back to Guatemala

When families adopt a child from another country they are not just adding a precious child to their family but a culture, a language, and a country. Most of these families would not have actively supported humanitarian or other relief programs in their child’s birth country prior to their adoption experience but do so afterwards because they feel a strong tie to the country. Often, adoptive families want to give back to their child’s birth country through assisting the people to improve their living conditions as a way to show appreciation to the country as well as to try to do their part to correct the conditions and suffering that create the necessity for intercountry adoption.

There are many anecdotal stories of families collecting donations for distribution to charitable organizations throughout Guatemala at their adopted children’s birthday celebrations or during special events such as Family Day, a celebration of the day their child legally became a member of their family. Some examples of the various charities supported by families who have adopted children from Guatemala include: Hands of Hope, a medical clinic in the rural area of Guatemala (<http://www.hands-of-hope.com/>); Behrhorst Partners for Development (<http://www.behrhorst.org/>) which runs a maternal and child health program for indigenous Maya; and Transitions Foundation of Guatemala (www.transitions.echapters.com), an organization providing support to the disabled community in Guatemala. Many families also give back to Guatemala by donating medical supplies, baby formula, shoes, and clothing to private orphanages or hogares (e.g., Semillas de Amor in Antigua, <http://www.semillasdeamor.org/>), especially those in which their children were placed after birth. Still other families have taken the love of their child’s birth country and its people to great heights by starting and overseeing such charitable projects as the construction of new libraries, the creation of educational funds, and the collection and distribution of second-hand shoes.

On September 3, 2002, the Ann Arbor News published a story about a group of Michigan families, all with children adopted from Guatemala, who have worked together to earn money for a charitable organization in Guatemala (see article below). This group has chosen to support Common Hope, an organization dedicated to helping Guatemalan families that are living in extreme poverty. Another charitable organization in Guatemala, Orphan Resources International (www.orphanresources.org/), was started by Rod and Sarah Martin, parents of two children adopted from Guatemala. The Martins were inspired to create Orphan Resources after learning about the extreme need for social services in their children's birth country. The mission of Orphan Resources is to improve the living conditions and life experiences of Guatemala's large orphan population. They take food, clothes, toys, and work crews into orphanages to do construction and remodeling projects.

There are many other examples of families giving back to Guatemala. For instance, one adoptive father who works for a food manufacturer has now arranged for his company to donate 52,000 lbs. of dehydrated potatoes (1.2 million servings of mashed potatoes) to Orphan Resources and Hands of Hope and is hoping to repeat this every few months. Another family is working with the local government in the town of San Rafael to provide a safe drinking water distribution system to the community. The Guatemalan Adoptive Families Support Network raises funds to support the Guatemalan Stove Project to build masonry stoves in houses which use three stone fires, producing toxic smoke that reduces the lifespan of women working in the household (see <http://www.guatefam.org/stove.htm>). Some families have even founded their own orphanages to assist the needy children of Guatemala.

According to Hands of Hope, 40% of all of their in-kind donations come from members of the adoption community. They also claim that the adoption community provides an integral service in physically bringing them products that are donated. Many families routinely bring an extra suitcase or two with them when they visit Guatemala full of donations that otherwise might never have been delivered to Guatemala due to extremely high freight costs.

Most adoptive families believe that their child's birth country should be celebrated, visited, and supported since it is a very important part of how their family was created. The socio-cultural context in Guatemala—lack of social services, extreme poverty, 50% of the population suffering from malnutrition—renders the volunteer work and donations of adoptive families an essential support system for needy Guatemalan children and families. If intercountry adoptions from Guatemala cease, an essential system of humanitarian aid will be withdrawn effecting thousands of families who have few, if any, alternatives for supporting their medical, educational, and health needs.

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Parents give back to Guatemala: Adoptive families raise money for poor in their children's homeland

Wednesday, September 3, 2003

BY JO COLLINS MATHIS, News Staff Reporter

A recent garage sale did more than clear out the basements of a dozen Ann Arbor families, all of whom have children they adopted from Guatemala.

The sale raised more than \$1,000 to help needy families in the impoverished Central American country to which they feel permanently bonded.

"We have a happy duty to help edify not only Ann Arbor, as our community we live in, but Guatemala, the community that gave us the most precious thing in our lives," said Carrie Wilson, the mother of Nicolas and Isabel, both 4.

Lenore Webb, also the mother of two Guatemala-born children, Oscar, 4, and Gustavo, 3, started the playgroup three years ago with two neighbors who also had adopted children from Guatemala. Word got out and others joined.

When Webb visited Common Hope, an organization dedicated to helping desperately poor Guatemalans by empowering them to lift themselves out of poverty, she and her husband decided to support the cause.

"Then I thought, 'Wouldn't it be great if as part of this play group, we all did some fund-raising for Common Hope?'" she recalled. "And that way, we would have more energy, more ideas, more resources from all of us."

Since then, the families have continued to meet regularly for the preschoolers to play together and the parents to socialize. And they've raised several thousand dollars for Common Hope.

According to the 2000 U.S. Census Bureau, Guatemala is the sixth most common overseas country from which to adopt, making up 4 percent of international adoptions. Korea is first, with 24 percent, followed by China, 11 percent; Russia, 10 percent; Mexico, 9 percent; and India, 4 percent.

The play group does more than provide a social outlet for parents and children, said Marie Whisenant.

"Anthony will grow up knowing he is not alone in his situation," said Whisenant of her 3-year-old son. "He's not the only one of a different race in a Caucasian family. He's not the only one who has roots very far away, who unfortunately will never have very much information about his birth heritage. So he's going to grow up realizing there are others like him out there, and I think that can be very reassuring for a child, to not feel like there's no one out there who understands what it's like to be in that situation."

Whisenant said supporting Common Hope is a great opportunity to give back to Guatemala.

"Our families are built from Guatemala," she said. "We can't necessarily do the things we'd like to be able to do for the birth families. I wish there was a way I could get photos and news to Anthony's birth family to let them know how much he's loved and how well he's doing. Unfortunately, that's not a reality for me and it's not a reality for most families that adopt internationally."

Wilson first tried to adopt from Russia and went to the interior of Siberia in winter, a five-hour flight from Moscow. It turned out a nurse from the hospital was adopting that child.

Back home, she and her husband heard about the benefits of adopting from Guatemala, where children are placed in loving foster care situations before placement. Wilson went to Guatemala in 2001 to adopt her son, Nicolas, and ended up staying two months because of a possible change in the law. She waited not knowing how long the process would be stalled. She didn't have a car or speak the language. And she was also there when an earthquake struck 100 miles away, killing 1,000 people.

But the delay worked to Wilson's advantage, because she heard about a girl who was available for adoption. That's how Isabel joined Nicolas in the family.

Wilson said her children have greatly enriched her life. And she said it makes the parents in the play group feel good to help Common Hope help needy Guatemalan families improve their lives.

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Summary

Families Without Borders acknowledges that UNICEF offers assistance to children worldwide through vaccination, education, and nutrition programs, and we do not find fault with that well-intentioned mission. *However, we feel that the UNICEF position on intercountry adoption is misguided and threatens the welfare of the very children they aim to protect.* The position on intercountry adoption espoused by UNICEF ignores the current economic, social, and cultural realities of Guatemala, and other developing countries. We assert that UNICEF's continued funding and support of efforts to limit intercountry adoptions reflects extremely poor judgment regarding the allocation of limited financial resources.

In this information packet we have provided an overview of the UNICEF positions on intercountry adoption, and a detailed critique of the "evidence" they use to support their assertion that the current legal system of adoptions does not protect the rights of the children. Each of these positions and documents has been carefully analyzed and interpreted in the preceding pages. We also have explained in detail the current Guatemalan adoption process, which UNICEF frequently misrepresents.

In summary, the UNICEF position that intercountry adoptions from Guatemala are conducted in a manner inconsistent with the Convention on the Rights of the Child is misguided and dangerous. The studies UNICEF uses to support this position are seriously flawed and provide no evidence of the allegations raised by the organization (birthmother coercion, a network of professionals involved in "child trafficking", etc). The legal and human rights of adoptable children in Guatemala and their birthmothers are already protected through a system of private Notarial adoptions. This system currently provides safeguards of repetitive checks and balances and government oversight, while allowing children to join their permanent families in an expeditious manner.

There is no evidence that the new UNICEF-supported adoption legislation under consideration in Guatemala would better protect children who are relinquished for adoption. In fact, this legislation is detrimental because it ignores the socioeconomic and political realities of Guatemala; removes fundamental civil liberties of the birthmother; does not provide any safeguards that are not currently accounted for in existing adoption law; neglects the importance of children joining their forever families by delaying the age at which they can be adopted; and offers no support to adequately care for birthmothers and children in a country with no social welfare programs and extreme poverty. Implementation of such legislation in Guatemala at this time would likely result in an increase in child abandonment, infanticide, malnutrition, and child mortality.

We have also demonstrated that many adoptive families have not only attempted to maintain ties with the heritage of their children, but also provide significant humanitarian aid to the people of Guatemala. Since social services are not provided by the Guatemalan government, disruption of intercountry adoptions from Guatemala could eliminate a critical source of humanitarian support, resulting in even more hardship.

Although we are most knowledgeable about intercountry adoptions in Guatemala, the situation is not isolated to that country. The lobbying of UNICEF has successfully disrupted adoptions in India, Romania, El Salvador, Honduras, and many other countries. For instance, a recent UNICEF report has proposed a ban on relinquishments and a national moratorium on intercountry adoption in India. The impact of this report has caused unnecessary suspicions of all Indian intercountry adoptions and has had a negative humanitarian effect on the children.

If you agree that UNICEF's positions on intercountry adoption do not support the best interest of the children of Guatemala then we ask that you contact UNICEF and ask them to reconsider these positions and request that they re-allocate their resources to humanitarian programs.

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