



**International Adoption:
How to Prevent
Child Laundering**

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CHAPTER 1. INTRODUCTION

1.1. General Overview

«There can be no keener revelation of a society's soul than the way in which it treats its children.» – Nelson Mandela¹

International adoption, a phenomenon which is also referred to as “quiet migration”², began in the middle of the twentieth century, after the Second World War. When it started, it became very popular, as it was seen a mean to aid children displaced by war and other events, such as natural disasters (there was an increase of it in 2004, for instance, after the tsunami in South East Asia), or even give a better life to children from underdeveloped countries.

However, recently, this phenomenon has decreased, as result of scandals that occurred in sending nations, with allegations of irregular practices of child trafficking and child laundering, as a side black market of children selling also arose. According to some authors, trafficking and sale of children often occurs when independent adoption agents (which are the ones that mostly operate international adoptions) are involved, since this

¹ Nelson Mandela, Speech at the launch of the Nelson Mandela Children's Fund, 8 May 1995, available at http://db.nelsonmandela.org/speeches/pub_view.asp?pg=item&ItemID=NMS250&txtstr=Mahla», visited in 1st May 2017.

² Articles in the International Migration Review have viewed international adoption as a migratory process, see Peter Selman, *Intercountry Adoption in the new millennium; the quiet migration” revisited* (Population Research and Policy Review, June 2002, Volume 21), p. 205.

is the easiest way to obtain illegal benefits and improper gains during each stage of the international adoption procedure³. Concerning this matter, other authors refer to the distinction between grey and black market. The first of these definitions should be abolished, as it is the one that results in profits by selling children. As for the latter, it is the one that takes place in the majority of cases, in which private placement is arranged without profit, by well-meaning people. Yet it should still be subject to legislative reform⁴.

Notwithstanding the efforts made to control international adoptions, it is a fact that they are not enough, as the irregular practices, perpetrated by private adoption agencies, continue and it is significantly difficult to track all activities made by those agencies and prospective or birth parents and even harder to prove those activities to be child selling or trafficking⁵. In fact, all of those abuses have already led to the decision of moratorium⁶ making by some of the poorer countries that have been afflicted by some scandals relating to baby selling. Regarding this fact, it is paramount to have a complete notion of how this situation affects children's rights and how their best interests' can be improved by States, according to the existing international legislation as well as by enacting new one, if needed.

Even acknowledging that the 1993 Hague Convention has many pitfalls, moratoriums should not be the solution to eliminate the abuses committed through international adoption. This kind of adoption can, indeed, serve the best interests of children that come from the most severe backgrounds. Therefore, States should take all necessary

³ See Carstens C and Julia M, *Legal, Policy and Practice issues in Intercountry Adoption in the United States*, *Adoption & Fostering* 19:4, pp 26-33, 1995.

⁴ See Daniel G. Grove, *Independent Adoption: The Case for the Gray Market*, 13 *Vill. L. Rev.* 116 (1967), p. 118-120.

⁵ See David M. Smolin, *Intercountry Adoption as Child Trafficking*, 39 *Val. U.L. Rev.* 281 (2004), p. 309-311, available at <http://scholar.valpo.edu/vulr/vol39/iss2/1>, visited in 10th February 2017.

⁶ That is the case of Guatemala and Romania, now closed for international adoption, after allegations of abuses.

actions to preserve international adoption, which subsequently means attempting to regulate it to the best and tackling all its irregular activities.

Even though the 1993 Hague Convention has made a great attempt to address these issues, it only intended to subtly tackle illicit activities, not answering to a series of questions, regarding regulation on private adoption agencies and their accountability. As such, further action must be sought in order to fill in those loopholes.

1.2. Research Question

As stated in this thesis title, the central research question of this work will be on how to prevent child laundering. In order to answer this central question, this thesis will focus on how child laundering is practiced and how the 1993 Hague Convention does not properly solve this issue. Finally, this thesis will propose some actions that would prevent child laundering, particularly by clarifying how the 1993 Hague Convention unanswered gaps could be filled in, hence coming up with an answer to this problem.

Therefore, some sub-questions will also be answered, such as why does the 1993 Hague Convention has some loopholes, which need to be filled in, and why do independent adoption agencies promote the illicit practices.

1.3. Structure

The second chapter of this thesis will emphasize and describe the various types of illegal practices that can occur in the process of international adoption, dividing them into their different categories in order to understand how and why these abuses operate.

The third chapter of this thesis will highlight the reader on the existing international treaties on children's rights, most specifically regarding the protection of children from trafficking and the sale of children and giving special attention to the upper mentioned 1993 Hague Convention, the major international instrument on international adoption.

The fourth chapter will provide a general explanation of the international adoption process and, more specifically, will dwell upon the 1993 Hague Convention itself, beginning with the requirements for the existence of a legal international adoption. Subsequently, it will analyse the importance of Central Authorities as well as accredited bodies and private adoption agencies. The last part of this chapter is of paramount importance to this thesis, as it will explain how the existence of private adoption agencies, which can be divided in licensed adoption agencies and independent adoption agencies, can promote abuses of child laundering and child trafficking, problems that mostly appear with the existence of independent adoption agencies based on a liberal free-market approach.

Finally, the fifth chapter will propose some actions in order to tackle the illicit practices that will be addressed regarding international adoption. Those actions are an attempt to fill in the gaps that the 1993 Hague Convention presents. This chapter will begin with a

description of different authors' opinions regarding such matter and will, then, be divided in each one of the suggested actions, containing a subsequent explanation of each.

The conclusion of this thesis will formulate an answer to the central research question and will remind the reader the fact that, even though international adoption has often been a platform for the practising of crimes such as child laundering, it is also a mean to achieve children's best interests through the proposed actions.

1.4. Methodology

This thesis will use, mainly, a qualitative research method. This research will be based on the information available in literature and studies. Moreover, it will use analytical research to examine the international legislation on international adoption and on children protection from trafficking and selling. This analytical research will also include, firstly, an analysis of these crimes in international adoption and how they operate and, secondly, the effectiveness of this legislation. This will result in a set of recommendations for further implementation in order to improve the effectiveness of said legislation, at the end of this thesis.

CHAPTER 2. ILLEGAL PRACTICES IN INTERNATIONAL ADOPTION

2.1. Introduction

According to Professor David M. Smolin, intercountry adoption is deemed illicit child selling and child trafficking whether it consists of an intermediary inducing consent to adoption in violation of the standards and requirements of the Hague Convention and whether it consists on the transference of the child is transferred from the sending to the receiving State for remuneration or any consideration⁷. Bearing in mind the definition of “child laundering”, which, in accordance to the same scholar, “occurs when children are taken illegally from birth families through child buying or kidnapping, and then laundered through the adoption and legal systems as orphans and then adoptees”⁸, we must, first and foremost, identify which are the main reasons that allow these situations to happen, through an analytical research of the various illegal practices that can take place regarding international adoption. As a result, five different reasons will be presented, although more emphasis to social and financial reasons will be given, since these are the ones which have more influence. It is important to start on this thesis explaining why and how can international adoption become children trafficking or child laundering, which is the problem that this thesis addresses and tries to answer.

⁷ See David M. Smolin, *Intercountry Adoption as Child Trafficking*, 39 Val. U.L. Rev 281 (2004) p. 300, available at <http://scholar.valpo.edu/vulr/vol39/iss2/1>, visited in 1st May 2017.

⁸ See David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping and Stealing Children*, p. 112, available at <http://lawbepress.com/expreso/eps/749>, visited in 3rd May 2017.

2.2. Unqualified intermediaries operating in agencies

Private agencies or third parties and organizations that are not often constituted by trained and specialized child welfare staff mainly conduct international adoption. When accredited agencies are involved in the international adoption process, they also often operate outside the child welfare services⁹.

People working in this field include intermediaries from placement agencies (also known as “facilitators”), social workers, officials, orphanages, doctors, lawyers and official immigration staff and, often, their professional credentials are not required.¹⁰ In fact, intercountry adoption is even mentioned as a field without a profession¹¹, since it is open to a great variety of professions, but, unfortunately, most of times, includes people that are roughly qualified to deal with ethics and children.

Facilitators maintain their own orphanages or contract State or private agencies to place children with adoptive parents. The illegalities coming from international adoption in such cases derive from unofficial officers, “recruiters”, who are often paid by facilitators or orphanage directors to look up for young children in poor countries.

⁹ See John Triseliotis, *Intercountry Adoption Global Trade or Global Gift?*, Adoption & Fostering, Volume 24, Number 2, 2000, p. 47.

¹⁰ See David M. Smolin, *Intercountry Adoption as Child Trafficking*, 39 Val. U.L. Rev 281 (2004) p. 315, available at <http://scholar.valpo.edu/vulr/vol39/iss2/1>, visited in 1st May 2017.

¹¹ See David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping and Stealing Children*, p. 182, available at <http://lawbepress.com/expresso/eps/749>, visited in 3rd May 2017.

Afterwards, the facilitators bribe low-level government officials in exchange for forged paperwork that are suitable for the adoption process¹².

2.3. Inducement of consent

One of the most common forms of illegally obtaining children to transfer for receiving countries through the disguise of legal international adoption is through inducing the consent of birth families, in order to purchase these children from these vulnerable families.

One of the requirements for an international adoption, according to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, is the informed and free given consent in a legal expressed form, by the birth parents, not induced by any kind of payment or compensation¹³.

Often, the sending countries create systems to facilitate this process, where there is a literate person at the head of the conspiracy, with financial and social position to negotiate with Western adoption agencies and prospective adoptive parents. These individuals who interact with Western independent adoption agencies send out intermediaries, of a lower social position, who will serve as scouts, targeting people of an even lower social position¹⁴, the most vulnerable people, who can easily be deceived. These intermediaries offer amounts of money for the children and make false

¹² See Sarah Corbett, *Where Do Babies Come From?*, The New York Times Magazine, 16 June 2002, available at « <http://www.nytimes.com/2002/06/16/magazine/where-do-babies-come-from.html>», visited in 14th April 2017.

¹³ See Article 4 (c).

¹⁴ See David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping and Stealing Children*, p. 118, available at «<http://lawbepress.com/expresso/eps/749>», visited in 3rd May 2017.

statements. Usually, they tell the children's parents that they will remain in touch with their child, continue to receive support payments and letters from the adoptive parents, that their child is temporarily going away for a better life and even that later they will also migrate to the Western country where their child will be taken to and, thus, will be later able to reunite¹⁵. These statements are false, because these parents will never again know about their child; neither will they receive any financial benefit, conversely to what was promised to them.

Throughout this process, there are considerable amounts of money at stake. The person at the top of the conspiracy receives a certain bid for each child placed for international adoption. This bid is set, allegedly, according to a legitimate adoption fee, as well as a donation to the respective orphanage. However, this bid is used to pay the birth family, to bribe government officials, to pay the legitimate costs of child care and intercountry adoption, as well as for the intermediary to make a large profit¹⁶, which violates article 32 (1) of the Hague Convention, contemplating that no one shall derive improper financial or other gain from an activity related to intercountry adoption¹⁷. Despite this usual practice, this is a problem rooted in sending countries, since the placement adoption agencies in the receiving countries are, almost always, legitimate and licensed, not aiming to participate in these illicit activities¹⁸.

One of the most famous cases happened in Cambodia, a non-member State of the Hague Convention, and occurred between January 1997 and December 2001. Its fame comes

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Also, article 32 (2) claims that "only costs and expenses, including reasonable professional fees of persons involved in the adoption, may be charged or paid" and article 32 (3) states that "the directors, administrators and employees of bodies involved in an adoption shall not receive remuneration, which is unreasonably high in relation to services rendered".

¹⁸ See David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping and Stealing Children*, p. 119 available at <<http://lawbepress.com/expresso/eps/749>>, visited in 3rd May 2017.

from the fact that the person at the head of the conspiracy organization was an American citizen, Lauryn Galindo, who worked in Cambodia. “Recruiters” were used to go to the villages and persuade families to relinquish their children, using false statements and financial inducements with the intent to give those children false identities, identifying them as “orphans” before sending them to the USA as adoptees. These “recruiters” were then given a commission for each child¹⁹. Even though the USA’s moratorium to international adoption from Cambodia went in practice in December 2001, there is an ample probability that most of the Cambodian children who went to the USA between 1997 and 2003 were victims of laundering²⁰.

Another case of a country known for the practice of inducement of consent is Guatemala, another non-member State of the Hague Convention, which, before the USA moratorium in 2010, was using two systems of adoption, a “notarial system”, the private process, and a public process through a government recognized adoption agency. The “notarial system” meant that a lawyer, who also represented birth parents and the child, represented the adoptive parents. These lawyers usually bought children to birth parents, sometimes even when they were not yet born, and tricked the birth mothers to put their fingerprints in blank pieces of paper. These papers were, in fact, consents to adoption²¹.

¹⁹ See David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping and Stealing Children*, p. 135-139, available at «<http://lawbepress.com/expresso/eps/749>», visited in 3rd May 2017.

²⁰ Ibid, p. 144, and see Sarah Corbett, *Where Do Babies Come From?*, The New York Times Magazine, 16 June 2002, available at « <http://www.nytimes.com/2002/06/16/magazine/where-do-babies-come-from.html>», visited in 14th April 2017 .

²¹ Ibid, p. 166.

In a UN Report²², the Special Rapporteur claimed that there was evidence of trafficking of babies and young children for intercountry adoption in Guatemala, which led to innumerable moratoriums against adoptions from Guatemala in a series of countries.

In order to prevent such illegal situation, the USA decided to implement a DNA testing system, which had already been used by Canada. This system required birth mothers relinquishing children to submit DNA testing of themselves and the child, which reduced the numbers of cases of laundered children²³ in the USA. The success of this system, however, was not complete, since birth mothers could also be paid to submit to this test, as well as the child himself/herself could be switched after the test²⁴.

Article 4 (c) (4) of the Hague Convention also claims that the consent of the birth mother must be given only after the birth of the child. However, sometimes, as mentioned, this inducement of consent is made before the child labour. Often, vulnerable and impoverished women in developing countries are offered financial assistance if they relinquish their children for adoption²⁵. Nonetheless, there are also reports about women being forced to renounce their babies for being unable to liquidate a debt²⁶.

According to Professor David M. Smolin, the financial issues connected to relinquishment of children only appear when birth families receive any amount of money or assistance. Even though any remuneration that “induces” consent to adoption

²² See UN Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, UN Doc. E/CN.4/2000/73/Add.2, 27 January 2000, p. 8-9.

²³ See David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping and Stealing Children*, p. 167, available at <http://lawbepress.com/expresso/eps/749>», visited in 3rd May 2017.

²⁴ Ibid.

²⁵ See David M. Smolin, *Child Laundering As Exploitation: Applying Anti-Trafficking Norms to Intercountry Adoption Under the Coming Hague Regime*, March 2007, p. 18, available at http://works.bepress.com/david_smolin/4/», visited in 16th April 2017.

²⁶ See David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping and Stealing Children*, p. 124, available at <http://lawbepress.com/expresso/eps/749>», visited in 3rd May 2017.

would be enough to be designated as child selling²⁷, these remunerations mostly consist of small amounts of money, which hampers proof of it. Also, the distinction between inducement and assistance is problematic²⁸, since an inducement can certainly be disguised as assistance.

2.4. Bureaucratic reasons

Prospective adoptive parents often value whether an international adoption was “satisfactory” or not depending on its speed and the condition of the child²⁹, which means the sending nations will comprehend that they can make a lot of money out of speedily delivering orphans with the requested characteristics³⁰.

The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption facilitates the adoption of children across national borders, eliminating bureaucracies and prioritizing domestic adoption, according to article 4 (b)³¹, even though the Convention may take years to be ratified domestically³². Despite this desire of reducing delays, complications and costs of adoption can also impose new burdens and raise costs, thus prospective parents perceive that the Hague Convention adoption process is more bureaucratic, time-consuming and difficult, than the non-

²⁷ See David M. Smolin, *Intercountry Adoption as Child Trafficking*, 39 Val. U.L. Rev 281 (2004) p. 311, available at <http://scholar.valpo.edu/vulr/vol39/iss2/1>, visited in 1st May 2017.

²⁸ Ibid.

²⁹ See David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping and Stealing Children*, p. 169, available at <http://lawbepress.com/expresso/eps/749>, visited in 3rd May 2017.

³⁰ Ibid, p 134.

³¹ Article 4: “An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin (b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child’s best interests.”

³² See S. I. Strong, *Children’s Rights in Intercountry Adoption: Towards a New Goal*, 13 B. U. Int’l L. J. 162 (1995), p. 176.

Hague process, which means that prospective parents may opt for a non-Hague Convention member in order to reduce transaction costs³³.

2.5. Financial reasons

Sending nations are usually poor and developing countries. The concept of “poverty” is very complex, but, undoubtedly, its main characteristic is vulnerability, which makes a hardship to implement laws that would protect those people subjected to it³⁴. One of the main results of this characteristic is also the fact that people struggling to access resources and a subsistent livelihood, in other words, basic needs, are less concerned with other problems³⁵. This also happens when it comes to combating child laundering, since societies with millions of poor families and limited resources may not choose to use their limited governmental capacity on a proper international adoption system³⁶. This troublesome fact even leads to the ineffectiveness of the legitimate adoptions regulations, as the government lacks the capacity to enforce those regulations. In addition, these countries also suffer from high incidence of child trafficking for sex and labour purposes, which are considered greater and more urgent harms to be tackled³⁷.

³³ See Asif Efrat, David Leblang, Steven Liao and Sonal S. Pandya, *Babies Across Borders: The Political Economy of International Child Adoption*, International Studies Quarterly (2015), 59, 615-628, p. 619.

³⁴ Sheela Patel and Diana Mitlin, *Reinterpreting the Rights-Based Approach: A Grassroots Perspective on Rights and Development*, in Hickey and Mitlin (eds.), *Rights-Based Approaches to Development. Exploring the Potentials and Pitfalls* (Kumarian Press, 2009), 107-121, p. 16.

³⁵ *Ibid.*, p.11.

³⁶ See David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping and Stealing Children*, p. 130, available at «<http://lawbepress.com/expreso/eps/749>», visited in 3rd May 2017.

³⁷ *Ibid.*

Corruption also tends to spread in countries with a low income per capita and a large proportion of persons living in extreme poverty³⁸, because of the decay, absence of institutions and disempowerment of people victims of corruption³⁹. Corruption impedes the economic development of these countries, as well as results in routine bribery to public officials in order to obtain legitimate approvals and services as well as a means of acquiring illegitimate approvals and services⁴⁰.

Even though international adoption is generally seen as an humanitarian act that serves the best interests of children and reminds of adults' responsibilities towards the global community⁴¹, international adoption can also be considered as an act of exploitation towards impoverished people, since these people are so vulnerable and poor that, in their despair, they even accept to relinquish their children and can even be grateful for it⁴². Smolin even claims that the exploitation can be not only towards the birth parents, but also towards the child, who also loses his/her family⁴³. Furthermore, if the removal of the child is illicit and benefits others financially, it becomes a form of exploitation⁴⁴.

The system of checks used within the 1993 Hague Convention, where the Central Authority of the State of origin of the child establishes the child's adoptability and matching between him/her and the prospective adoptive parents, defending a joint

³⁸ Ibid, p. 129.

³⁹ Balakrishnan Rajagopal, *Corruption, Legitimacy and Human Rights: The Dialectic of the Relationship*, 14 Conn. J. Int'l L. 495 (1999).

⁴⁰ See David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping and Stealing Children*, p. 129, available at <http://lawbepress.com/expresso/eps/749>», visited in 3rd May 2017.

⁴¹ See Elizabeth Bartholet, *International Adoption: The Human Rights Position*, Harvard Law School Faculty Scholarship Series, Paper 28, p. 8-9, available at http://lsr.nellco.org/harvard_faculty/28», visited in 12th February 2017 and see Sara Dillon, *Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption*, 21 B. U. Int'l L. L. J. 179 (2003).

⁴² See David M. Smolin, *Intercountry Adoption and Poverty: A Human Rights Analysis*, 36 Cap. U. L. Rev. 413, 2007, p. 436-440.

⁴³ See David M. Smolin, *Child Laundering As Exploitation: Applying Anti-Trafficking Norms to Intercountry Adoption Under the Coming Hague Regime*, March 2007, p. 35, available at http://works.bepress.com/david_smolin/4/», visited in 16th April 2017.

⁴⁴ Ibid, p. 36.

responsibility between the Central Authority of the sending State and the one from the receiving State in an attempt to create a more reliable system, may not, accordingly, happen. Even when a report about the prospective adoptive parents is made by an accredited agency as a proof of suitability, it does not guarantee that an illegality will not take place, because those who find and do the matching between children and adoptive parents are not necessarily the same and it is not always clear who is it that makes the matching⁴⁵.

The United Nations Guidelines for Alternative Care of Children demand that financial and material poverty should never be the only justification for the removal of a child from parental care, for receiving a child into parental care, or for preventing his/her reintegration, thus being the reflection of the need to support family⁴⁶. However, the lack of government capacities as a consequence of their limited resources, results in adoption abuses and also in the terrible orphanage conditions children are subjected to in these underdeveloped countries⁴⁷. Moreover, what happens is that children go to orphanages not only because they have no parents, but also because their parents cannot afford to feed and educate them⁴⁸. Even though domestic adoption is prioritized⁴⁹, it does not happen in practice, due to the inducement that is made to place children for

⁴⁵ See John Triseliotis, *Intercountry Adoption Global Trade or Global Gift*, Adoption & Fostering, Volume 24, Number 2, 2000, p. 51.

⁴⁶ UNGA (2010) "Resolution 64/142", UN Doc. A/RES/64/142, 24 February 2010, paragraph 15.

⁴⁷ See Elizabeth Bartholet, *International Adoption: The Human Rights Position*, Harvard Law School Faculty Scholarship Series, Paper 28, p. 12, available at http://lsr.nellco.org/harvard_faculty/28, visited in 12th February 2017 and see Marianne Blair, *Safeguarding the Interests of Children in Intercountry Adoption: Assessing the Gatekeepers*, 34 Cap. U. L. Rev. 349 (2005), p. 358.

⁴⁸ The Save the Children Fund, *Keep Children Out of Harmful Institutions: Why we should be investigating family-based care*, 2009, p. 5, available at https://www.savethechildren.org.uk/sites/default/files/docs/Keeping_Children_Out_of_Harmful_Institutions_Final_20.11.09_1.pdf, visited in 10th June 2017.

⁴⁹ See The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993) Preamble "Recalling that each State should take, as a matter of priority, appropriate measures to enable the child to remain in care of his or her family of origin" and Article 4 (b): An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests".

international adoption that comes from “adoption fees” and “donations” given to sending countries⁵⁰.

Regarding orphanage conditions, in most of sending countries standard care is very low due to extreme poverty, meaning that many children are abused and neglected⁵¹. There are reports about the shocking and horrifying conditions in which children are accommodated. They describe that babies are housed naked and filthy, with a complete lack of hygiene or attention, since there are not enough nannies for so many children⁵². There is a greater alarm when there is the realization that it would cost little to improve children’s conditions in these institutions as large amounts of money are acquired in adoption abuses⁵³. In fact, the adoption fees and payments by receiving Western countries should not be forgotten. These fees and payments contribute to, and facilitate the use of, bribery in the adoption system⁵⁴. Prospective adoptive parents believe to be paying for a service and the destiny of that money, designated as “agency fees”, is not always clear⁵⁵. Despite of article 32 of the Hague Convention, referring to the prohibition of the “improper financial gain” through intercountry adoption, it is indeed troublesome to ensure the destination of that money, since foreign agencies from the sending countries claim that those sums are for orphanage funding, including children care⁵⁶. All this illustrates an alarming lack of financial transparency at the agency level.

⁵⁰ See David M. Smolin, *Intercountry Adoption and Poverty: A Human Rights Analysis*, 36 Cap. U. L. Rev. 413, 2007, p. 436-440.

⁵¹The Save the Children Fund, *Keep Children Out of Harmful Institutions: Why we should be investigating family-based care*, 2009, p. 8, available at «https://www.savethechildren.org.uk/sites/default/files/docs/Keeping_Children_Out_of_Harmful_Institutions_Final_20.11.09_1.pdf», visited in 10th June 2017.

⁵² See David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping and Stealing Children*, p. 140, available at «<http://lawbepress.com/expresso/eps/749>», visited in 3rd May 2017.

⁵³ *Ibid*, p. 140.

⁵⁴ *Ibid*, p. 130.

⁵⁵ See David M. Smolin, *Intercountry Adoption as Child Trafficking*, 39 Val. U.L. Rev 281 (2004) p. 316, available at «<http://scholar.valpo.edu/vulr/vol39/iss2/1>», visited in 1st May 2017.

⁵⁶ *Ibid*.

Another event that may be linked to financial reasons is the intra-familial kidnapping of children, in which extended or immediate relatives of the child remove him/her by force or by deceitful means from the parents, without having any legal authorization for it. In some situations, the parents of the child may also wilfully decide to forsake their parental rights, without pretending to transfer these rights to any specific person⁵⁷. In such cases, the child is then abandoned or taken to an orphanage. There is frequently a financial motivation of avoiding the burden of raising the child⁵⁸. For instance, in India, a child can be easily obtained through illicit means, since the Indian society is based on very ancient rules, entrenched in a series of dogmas, which is understandable through the caste system that separates people coming from different backgrounds. Respecting female girls, the predominant Indian dowry system for each female infant in a poor family becomes a problem, because the family needs to pay a considerable sum of money to the groom, in order to arrange a marriage to the girl⁵⁹.

Financial causes can also lead to the shift of agencies that have been declined the Hague Accreditation, under the article 22 (2) of the Hague Convention. In other words, an agency that was denied accreditation may turn itself to non-member States of the Hague Convention, such as most of the African nations. An example of this was the shifting of agencies to Ethiopia after the shutdown of adoptions from Guatemala in the USA, in 2010⁶⁰.

⁵⁷ See David M. Smolin, *The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals*, p. 20, available at «<http://law.shu.edu/students/academics/journals/law-review/issues/archives/upload/smolin.pdf>», visited in 12th June 2017.

⁵⁸ See David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping and Stealing Children*, p. 123, available at «<http://lawbepress.com/expresso/eps/749>», visited in 3rd May 2017.

⁵⁹ See David M. Smolin, *The Two Faces of Intercountry Adoption: The Significance of the Adoption Scandals in India*, p. 54, available at «<http://law.shu.edu/students/academics/journals/law-review/issues/archives/upload/smolin.pdf>», visited in 10th June 2017.

⁶⁰ See Karen Smith Rotabi and Judith L. Gibbons, *Does the Hague Convention on Intercountry Adoption Adequately Protect Orphaned and Vulnerable Children and Their Families?*, Springer Science + Business Media, LLC, 2011.

2.6. Social reasons

International adoption is, somehow, seen as a remnant of colonialism of Western countries to Eastern and developing countries or as a new form of colonialism, triggered by an humanitarian impulse and the globalization. In fact, adoptive parents from former colonial powers may seek children from former colonies, due to cultural, economic and administrative ties, facilitating, therefore, the process of international adoption⁶¹.

It has occasionally happened that some orphanages and organizations where cases of child laundering occurred were religious organizations⁶². On the one hand, this can be regarded as a financial reason, taking into account that the fees and donations created the temptation for these practices. On the other hand, this is also a social reason, due to the significant importance and role that religion holds in some societies. In such cases, religious organizations may see little harm in their actions, considering they are practicing a good action towards those children, therefore, they see it as an humanitarian act⁶³.

Finally, poor and vulnerable people from underdeveloped countries who are subject to these illicit practices cannot access the means to vindicate their rights, since the lack of

⁶¹ See Asif Efrat, David Leblang, Steven Liao and Sonal S. Pandya, *Babies Across Borders: The Political Economy of International Child Adoption*, *International Studies Quarterly* (2015), 59, 615-628, p. 621.

⁶² For instance, it happened in India.

⁶³ See David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping and Stealing Children*, p. 161, available at <<http://lawbepress.com/expresso/eps/749>>, visited in 3rd May 2017.

administrative and judicial resources of these governments makes them incapable of obtaining redress⁶⁴.

2.7. Conclusion

In this chapter there was the division of the different illegal practices in international adoption in different reasons, since all practice has a main reason and its own background. One of the most common forms to launder children is through the inducement of consent, although, as we have seen, there can be others. Above all, there are financial reasons behind these activities, where corruption plays the most important role.

Making clear what is the problem at stake is, becomes paramount to point out the ways in which the existing international legislation already addresses this matter, which will take place in the next chapter of this thesis.

⁶⁴ Ibid, p. 129.

CHAPTER 3. INTERNATIONAL INSTRUMENTS

3.1. Introduction

This chapter is crucial in analysing the existing general international legislation that protects children in vulnerable circumstances such as the ones that were described above. As such, in this chapter, an analytical description and examination of the current international legislation regarding the matter will take place, before focusing on the main international instrument on international adoption, the 1993 Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption.

3.2. International Instruments

The existence of binding international legislation protecting children, such as the United Nations Convention on the Rights of the Child (1989)⁶⁵, was not enough to prevent these wrongful activities, despite of its article 21 (d) that addresses the matter, condemning “improper financial gain”. Moreover, its article 35 imposes States to take actions to prevent the abduction, sale or traffic of children. Likewise, the Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with

⁶⁵ UNGA (1989) “Resolution 44/25”, UN Doc. A/RES/44/25, 20 November 1989.

Special Reference to Foster Placement and Adoption Nationally and Internationally⁶⁶ (1986), although it was not binding, on its article 20 did not define “improper financial term” and, consequently, did not provide means to prevent it. Furthermore, the United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956) only covered sexual and labour exploitation of children.

Due to these flaws on the legislation, in 1988, the Hague Conference on Private International Law began to work in order to fray them. Even though the Hague Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions already existed, there was common agreement that the reality of international adoption was demanding a new approach, with the discussion of new problems, as the child trafficking. The Permanent Bureau of the Hague Conference submitted the subject of international co-operation in respect to intercountry adoption to the Special Commission. In 1989, the Permanent Bureau clarified the main focus of a new instrument in a Memorandum, where the need for legally binding standards in intercountry adoption was mentioned, as well as the necessity for a supervision system of those standards and the need to promote co-operation between countries of origin and countries of destination.⁶⁷ Finally, the Seventh Session of the Hague Conference on Private International Law adopted the Final Act of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (29 May 1993).

Another instrument that later on contemplated the matter of trafficking of human beings was the United Nations Convention Against Transnational Organized Crime (2000)⁶⁸.

⁶⁶ UNGA (1986) “Resolution 41/85”, UN Doc. A/RES/41/85, 3 December 1986.

⁶⁷ "Memorandum concerning the preparation of a new Convention on international co-operation and protection of children in respect of intercountry adoption", November 1989, pp. 1-2.

⁶⁸ UNGA (2000) “Resolution 55/25”, UN Doc. A/RES/55/25, 15 November 2000.

Its supplementing Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children provides a definition of “trafficking in persons” in its article 3 (a), which highlights three main elements of it: transfer or transportation; by wrongful means, such as threat or use of force/coercion and the purpose of exploitation. In addition, article 3 (c) includes the existence of child trafficking when there is transfer or transportation of the child with the intent of exploitation, even if not through wrongful means. However, its article 3 (a) defines what is considered to be “exploitation” and none of those situations are applicable to the situation of selling a child to the purpose of adoption⁶⁹.

Apart from this instrument, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000)⁷⁰ was the first international instrument to include a definition of “sale of children”⁷¹ and also to connect it to the context of international adoption, when there is the situation of “improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption” (article 3 (1) (a) (ii)). Regarding this article, even though it mentions “as an intermediary”, the United Nations Committee on the Rights of the Child has recommended that States would penalize all the people involved in the sale of children with the objective of adoption, due to article 3 (5)⁷², where it states “all persons involved in the adoption of a child”. The term “applicable international legal instruments on adoption” present in article 3 (1) (a) (ii) concerns the 1993 Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption, as it has been interpreted by many

⁶⁹ See David M. Smolin, *Intercountry Adoption as Child Trafficking*, 39 Val. U.L. Rev 281 (2004), p. 295, available at <http://scholar.valpo.edu/vulr/vol39/iss2/1>, visited in 15th February 2017.

⁷⁰ UNGA (2000) “Resolution 54/263” UN Doc. A/RES/54/263, 25 May 2000.

⁷¹ Article 2 (a).

⁷² “State Parties shall take all appropriate legal and administrative measures to ensure that all persons involved in the adoption of a child act in conformity with applicable international legal instruments.”

countries as well as recommended by the United Nations Committee on the Rights of the Child⁷³.

3.3. Regional Instruments

As far as the Council of Europe is concerned, there is an European Convention on the Adoption of Children⁷⁴, in which is important to refer, because even though it is applicable to national adoption, it intends to be an “effective complement” to the 1993 Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoption, according to the 9th paragraph of its preamble. Its article 17 also condemns the improper financial gain from an activity relating to the adoption of a child. Thus, the Explanatory Report to the European Convention on the Adoption of Children (Revised)⁷⁵ points out what should not be considered “improper financial gain”: “the reimbursement of direct and indirect costs and expenses of an adoption and the payment of reasonable remuneration in relation to services rendered are allowed”.

In addition, there are also some Recommendations from the Council of Europe. The first one that deserves note is Recommendation 1443 (2000) on international adoption and respecting children’s rights. Paragraph 2 clearly condemns the establishment of a flow market of children from underdeveloped countries to developed countries, as well as all the activities perpetrated in order to facilitate adoption and to commercialize its practice. Furthermore, paragraphs 4 and 5 refer the 1993 Hague Convention on the

⁷³ UNCRC, Forty-third session “Consideration of Reports Submitted by States Parties Under Article 12 (1) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, Concluding Observations: Vietnam”, UN Doc. CRC/C/OPSC/VNM/CO/1, 17 October 2006.

⁷⁴ CETS 202 Adoption of Children (Revised Convention), 27.XI.2008.

⁷⁵ Explanatory Report – CETS 202 – Adoption of Children (Revised Convention), 27.XI.2008.

Protection of Children and Co-operation in Respect of Intercountry Adoption, pointing the need for the Council of Europe member States to ratify it and conduct policies and actions to abide the Convention standards and rules.

Moreover, other relevant recommendation is Recommendation 1828 (2008) on the disappearance of newborn babies for illegal adoption in Europe, which sharply condemns the increasing trade of children from underdeveloped countries and all forms of children trafficking. As a result, this Recommendation advises all the member States to sign and ratify all international instruments protecting children and preventing trafficking in human beings, together with the 1993 Hague Convention, and to implement all necessary actions to eradicate the abuses committed in international adoption.

A reference should be made to other main regional instrument, the Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors (1984)⁷⁶, that together with the European Convention on the Adoption of Children, already referred, influenced the later Hague Convention on the Protection of Children and Co-Operation in Respect of Intercountry Adoption⁷⁷.

Lastly, a final note to another regional instrument, the African Charter on the Rights and Welfare of the Child (1990)⁷⁸, that in its article 24⁷⁹ allows intercountry adoption, but

⁷⁶ See <<http://www.oas.org/juridico/english/treaties/b-48.html>>, visited in 13th June 2017.

⁷⁷ See United Nations Department of Economic and Social Affairs, Child Adoption: Trends and Policies, United Nations, New York, 2009, p. 19, available at <http://www.un.org/esa/population/publications/adoption2010/child_adoption.pdf>, visited in 10th March 2017.

⁷⁸ See <http://www.achpr.org/files/instruments/child/achpr_instr_charterchild_eng.pdf>, visited in 23rd June 2017.

⁷⁹ Article 24 (b): “State Parties which recognize the system of adoption shall ensure that the best interest of the child shall be the paramount consideration and they shall recognize that inter-country adoption in those States that have ratified or adhered to the International Convention on the Rights of the Child or this Charter, may, as the last resort, be considered as an alternative means of a 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”.

only as a last resort, for children that cannot be placed in foster or institutional care in their origin countries⁸⁰ and in its article 29⁸¹ includes a protection from sale, trafficking and abduction of children for any purposes, by any form and by any person, including the parents.

3.4. Conclusion

Through the analysis of this chapter, we realize how it has been of great importance at an international level to promote the protection of children, essentially when they are defenseless and subjected to abuses committed in situations of adoption, which already is a vulnerable situation itself.

This chapter was an introduction to the next one, which focus on the main international instrument on intercountry adoption, the already mentioned Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption. It is important to have a general idea of the existing legislation, before narrowing our study into the most important treaty in our analytical research.

⁸⁰ See Rachel J. Wechsler, *Giving Every Child a Chance: The Need For Reform and Infrastructure in Intercountry Adoption Policy*, 22 Pace Int'l L. Rev. 1 (2010), p.24, available at <<http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1024&context=pilr>>, visited in 23rd June 2017.

⁸¹ Article 29 (a): “State Parties to the present Charter shall take appropriate measures to prevent the abduction, sale of, or traffic in children for any purpose or in any form, by any person including parents or legal guardians of the child”.

CHAPTER 4. THE HAGUE CONVENTION ON THE PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION

4.1. Introduction

After the above description of the international legislation on trafficking in children and children protection, this thesis will further focus on the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, as it is the main leading international instrument that contemplates international adoption. This analysis is necessary to understand the means by which private adoption agencies shown up and how they work and operate nowadays, particularly the legislation that is applicable to them. This chapter will, then, narrow its focus to independent adoption agencies, also permitted under the Convention, but more susceptible to the occurrence of abuses.

4.2. Requirements for a possible intercountry adoption

The Convention was established under the main principle of ensuring children's best interests and respecting children's fundamental rights. Those should be central ideas of international adoption. Thus, that is stressed in article 1 (a) of the Hague Convention.

The other main objectives of the Convention are also expressed in article 1: establishing a system of co-operation between the Contracting States to ensure that the child's best interests are safeguarded, as well as to prevent abduction, sale or traffic of children (b) and securing the recognition between Contracting States of adoptions made within the parameters of the Convention (c).

Being of difficult precise determination, the concept of "children's best interests" comes from article 3 (1) of the Convention on the Rights of the Child. There is no international criterion on how those interests should be settled, despite of the attempts to fill this gap on the Convention⁸². This fact has a major impact when it comes to international adoption, as decisions are made between actors from different cultures and social backgrounds⁸³.

Another main aspect in the Hague Convention is the principle of subsidiarity, on article 4. With this view, international adoption should only take place if there is no other way for the child to remain in his/her original State, with his/her family or other adoptive family of the same State, which means that institutional care should only be considered as a last resort. The principle of subsidiarity (article 4) establishes all the requirements that must be observed in order to make an international adoption viable: the child needs to be considered adoptable (a); there must have been an attempt from the State to place the child within other relatives if his/her parents are unavailable and, if he/she does not have any relatives available, the State must try to place the child in an adoptive family

⁸² UNCRC (2013) "General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration", UN Doc. CRC/C/CG/14, 29 May 2013, on which it is stated that the best interests of the child should regard the "full and effective enjoyment of all rights recognized" in the Convention on the Rights of the Child, as well as those aimed at the "holistic development of the child". Moreover, it also refers that it must be determined in a case-by-case basis. See also Nigel Cantwell, *The Best Interests of the Child in Intercountry Adoption*, UNICEF Office of Research, 2014, p. 5.

⁸³ See United Nations Department of Economic and Social Affairs, Child Adoption: Trends and Policies, United Nations, New York, 2009, available at «http://www.un.org/esa/population/publications/adoption2010/child_adoption.pdf», visited in 10th March 2017.

within the same State, so that there is a possibility for the child to remain in his/her country and, only after exploring those possibilities, can the State establish that intercountry adoption may be in his/her best interests, once the State has studied his/her own particular case (b)⁸⁴. Moreover, other requisites presented in article 4 are: the necessary consents needed, which must have occurred in an informed way (c) (1), must have been given freely, in a required legal form (c) (2), cannot have been induced by payment or compensation (c) (3) and the mother's must have been given only after the birth of the child (c) (4). In addition, considering the age and maturity of the child, he/she can also give his/her own consent for the adoption, after taking into account his/her own opinions and having been informed and assured that the consent was given freely, in a required legal form, and was not induced in any kind (d).

In addition, article 5 establishes the scope of an adoption under the Convention within the receiving State, since this State must also have competent authorities, who must determine whether the prospective adoptive parents are eligible and suited to adopt or not (a); ensure that the prospective adoptive parents have been counselled as may be necessary (b) and determine that the child is or will be authorised to enter and reside permanently in that State. These conditions have to be cumulatively filled, but the receiving country has the freedom to establish additional conditions⁸⁵.

⁸⁴ Likewise, article 21 (b) of the Convention on the Right of the Child also states that intercountry adoption may only be considered if the child cannot be placed in his/her country of origin.

⁸⁵ See G. Parra-Aranguren, *Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, 31 December 1993, available at «<https://assets.hcch.net/upload/exp133e.pdf>», visited in 15th March 2017.

4.3. Central Authorities and Accredited Bodies

Chapter III of the Hague Convention sets the Central Authorities and Accredited Bodies, which are the competent authorities to perform international adoption. In consonance with the Hague Conference on Private and International Law Guide to Good Practice No.2, *Accreditation and Adoption Accredited Bodies* (2012), the existence of these bodies was a requirement when the Hague Convention was proposed as a treaty, aiming to improve international adoption standards and discourage or prohibit private and independent adoptions. These authorities may be Central Authorities, public judicial or administrative authorities and accredited bodies and are established by legislation, administrative decree or executive order, depending on the legal aspects of each contracting State⁸⁶. Regarding this, article 6 states that the Convention's contracting States shall have a Central Authority and article 7 designates the attributions given to Central Authorities, reminding that they must co-operate with each other and promote co-operation amongst competent authorities in their States to protect children and to achieve the other objects of the Convention (a), which means that they have both an international and an internal aspect in their functions: internationally, they must cooperate with the other Contracting States; internally, they must promote cooperation with competent authorities⁸⁷. Therefore, the Central Authorities should act as gatekeepers, since all the international adoptions are subject to

⁸⁶ See Hague Conference on Private International Law Guide to Good Practice No1, *The Implementation and Operation of the 1993 Hague Inter-country Adoption Convention* (2008), p. 46.

⁸⁷ See Hans Van Loon, *Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Inter-country Adoption*, *The International Journal of Children's Rights* 3: 463-468, 1995.

its system of checks⁸⁸. Moreover, the Central Authorities are considered to be of extreme importance regarding the best interests of the child and children and child welfare, particularly due to the fact that, in the States of origin, these are the entities that are responsible for establishing the child's adoptability and making the match between adoptable child and prospective adoptive parents, which promotes the defence of a joint responsibility between the Central Authorities of origin and receiving States, in order to create a more reliable system⁸⁹. In addition, article 8 concerns the illegal side effects of international adoption, stating that Central Authorities shall take all appropriate actions to prevent improper financial gain and any other practices contrary to the Convention.

According to articles 10 and 11, the Central Authorities can license various agencies and agents in their own countries to implement the functions defined in article 9⁹⁰. Article 10 acknowledges that accreditation shall only be granted to and maintained by bodies demonstrating their competence to perform their entrusted tasks and article 11 declares that such bodies shall only pursue non-profit objectives (a); shall be directed and staffed by qualified people (b) and shall be subjected to supervision by competent authorities of the States (c). Hans Van Loon, former Secretary General of the Hague Conference on Private International Law, even refers that the advent of "accredited bodies" in the Hague Convention is a novelty, stating that it illustrates the fact that private organizations play an important role as intermediaries in the adoption process⁹¹.

⁸⁸ See Peter Hayes, *The Legality and Ethics of Independent Inter-country Adoption Under the Hague Convention*, International Journal of Law, Policy and Family 25 (3), (2011), 288-317.

⁸⁹ International Reference Centre for the Rights of the Children Deprived of their Family (ISS/IRC), *Inter-country Adoption The Primary Importance of Cooperation Between Central Authorities*, Fact Sheet N°37, May/June 2007.

⁹⁰ See Holly C. Kennard, *Curtailing the Sale and Trafficking of Children: A Discussion of the Hague Conference Convention in Respect to Inter-country Adoptions*, 14. J. Int'l L. 623, p. 634.

⁹¹ See Hans Van Loon, *Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Inter-country Adoption*, The International Journal of Children's Rights 3: 463-468, 1995.

An accredited body can be a private or public⁹² adoption agency that goes through the accreditation process referred in articles 10 and 11. Public accredited bodies are, however, pledged to the same obligations as private ones. It is also important to mention that the accredited bodies are not compulsory under the Hague Convention, but many contracting countries require their existence to mediate international adoptions⁹³. These accredited bodies are deemed helpful, since they support prospective adoptive parents during the whole adoption procedure and they fight all the deficiencies in international adoptions, such as the trafficking of children and improper financial gain⁹⁴.

Nonetheless, the establishment of private adoption agencies as accredited bodies was utterly controversial, as the current abuses that happen in intercountry adoption are the result of the involvement of those private agencies as intermediaries in the adoption proceedings, which made some participants in the Special Commission refusing to accept these accredited bodies with delegated Central Authorities' functions. The result was the agreement made through article 11, which makes these private adoption agencies possible, granted that they respect the requirements presented in article 11⁹⁵. In addition, article 22 (2) includes the possibility of non-accredited bodies performing certain duties, as long as they fulfil the condition required by the Central Authority of the State under articles 15 to 21 and the State makes a special declaration. This declaration is a statement through which the State accepts or refuses the participation of these non-accredited bodies. The State may whether choose to expressly object or remain silent, this second being deemed an agreement. In other words, article 22

⁹² For instance, France has the *Agence Française de l'Adoption* and Italy has the *Agenzia Regionale per le Adozioni Internazionali (Regione Piemonte)*.

⁹³ That is the case of countries like Canada, Italy, Norway and Sweden, as an example.

⁹⁴ See Hague Conference on Private and International Law Guide to Good Practice No.2, *Accreditation and Adoption Accredited Bodies* (2012), p. 31.

⁹⁵ See G. Parra-Aranguren, *Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, 31December 1993, available at <<https://assets.hcch.net/upload/exp133e.pdf>>, visited in 15th March 2017.

represents a reasonable compromise between antagonist positions, as stated by Gonzalo Parra-Aranguren, judge at the International Court of Justice.

Therefore, there are two different types of private adoption agencies: **licensed adoption agencies** and **independent adoption agencies**. On the one hand, licensed adoption agencies are private accredited bodies, which were given accreditation under articles 9, 10 and 11 by a judicial or administrative government body, through recognition, certification or authorization. Some institutions, which are not regarded as adoption agencies, such as children's orphanages and child welfare services, are also granted this recognition. On the other hand, independent adoption agencies, also known as intermediaries, are not granted accreditation or authorization to make part in the international adoption process, but still intervene in some of the adoption stage, or even in the whole adoption process, under article 22 (2)⁹⁶. Also, article 32, states that no one shall derive improper financial or other gain from an activity related to an intercountry adoption, which makes the referred accountability⁹⁷ in article 22 (2) (a) applicable to all people involved in the adoption procedure, though the competent authorities to which the independent adoption agencies are accountable are never defined throughout the Convention⁹⁸.

⁹⁶ See Holly C. Kennard, *Curtailling the Sale and Trafficking of Children: A Discussion of the Hague Conference Convention in Respect to Intercountry Adoptions*, 14. J. Int'l L. 623, p. 627.

⁹⁷ "Any Contracting State may declare to the depositary of the Convention that the functions of the Central Authority under Articles 15 to 21 may be performed in that State, to the extent permitted by the law and subject to the supervision of the competent authorities of that State, also by bodies or persons who (a) meet the requirements of integrity, professional competence, experience and accountability of that State".

⁹⁸ See Holly C. Kennard, *Curtailling the Sale and Trafficking of Children: A Discussion of the Hague Conference Convention in Respect to Intercountry Adoptions*, 14. J. Int'l L. 623, p. 637.

4.4. Independent Adoption Agencies

The Permanent Bureau at the Hague Conference on Private International Law, which carries out the preparation and organization of the Plenary Sessions and the Special Commissions of the Hague Conference⁹⁹ has defended a social democratic approach of independent adoption agencies, which tries to exclude them as far as possible, since they are a more liberal approach to intercountry adoption¹⁰⁰. The liberal approach defends that individuals can purchase their own needs from free-market economy, which means that the State has a minimum role and, as far as international adoption is concerned, the major role is given to independent adoption agencies, either for profit or non-profit basis, and also to private non-agency adoptions, directly arranged between prospective parents and birth parents and perhaps the aid of an intermediary, which means both prospective and birth parents are able to choose which type of agency they prefer to use¹⁰¹. On the contrary, the social democratic approach holds that the State is the primary provider of welfare services and intervenes directly in social and economic life, its goal is to reunite families if they are separated¹⁰².

Through the Hague Conference on Private and International Law Guide to Good Practice No.1, *The Implementation and Operation of the 1993 Hague Intercountry Adoption Conference* (2008), the Permanent Bureau at the Hague Conference on Private International Law asserts a State intervention and family support perspective, standing

⁹⁹ See <<https://www.hcch.net/en/faq>>, visited in 16th April 2017.

¹⁰⁰ See Peter Hayes, *The Legality and Ethics of Independent Intercountry Adoption Under the Hague Convention*, *International Journal of Law, Policy and Family* 25 (3), (2011), 288-317.

¹⁰¹ See Jonathan Dickens, *Social Policy Approaches to Intercountry Adoption*, *International Social Work*, 52(5), 2009, 595-607, p. 596.

¹⁰² *Ibid*, p. 598.

up to the elimination of a form of intercountry adoption in which individuals or mediating bodies outside the formal structure of the Central Authority propose a match (independent adoption)¹⁰³: the Permanent Bureau claims that the role of Central Authorities is not just of checking matches, but also of making matches¹⁰⁴, which means that the adoptions subject to objection by the Permanent Bureau are the ones without official matching. According to scholar Peter Hayes, there are three areas, which need further elucidation. Firstly, the Hague Conference on Private and International Law Guide to Good Practice No.1 is very rigid in the sequence of acts it shows to the definition of independent adoption, as other sequences are also possible, such as travelling to the country of origin of a child first, finding a child later and, lastly, making the assessment of suitability. Furthermore, other types of adoption would also be excluded: the holiday's adoptions, in which prospective parents go on a trip without the intention to adopt, but meet during the trip a certain child they wish to adopt, for instance. Secondly, the Central Authority's assistance to intermediaries is vague, as it is stated that an independent adoption is made without the assistance of a Central Authority or accredited body or approved non-accredited person, but in the article 22 (2) of the Hague Convention, the non-accredited bodies that meet the required conditions, can intervene in intercountry adoptions. Thirdly, the Hague Conference on Private and International Law Guide to Good Practice No.1 provides a separate definition of private adoptions, not clarifying the relationship between private adoptions

¹⁰³ See The Hague Conference on Private and International Law Guide to Good Practice No.1, *The Implementation and Operation of the 1993 Hague Intercountry Adoption Conference* (2008) has adopted a view of independent adoption in which the prospective parents have complied with some official procedures before having been matched with a child: they have been approved as eligible and suited to adoption by the Central Authority or accredited body and afterwards, they travel on their own to the country of origin to find a child to adopt, this time without having the assistance of the Central Authority or accredited body anymore. See Peter Hayes, *The Legality and Ethics of Independent Intercountry Adoption Under the Hague Convention*, *International Journal of Law, Policy and Family* 25 (3), (2011), 288-317.

¹⁰⁴ See Peter Hayes, *The Legality and Ethics of Independent Intercountry Adoption Under the Hague Convention*, *International Journal of Law, Policy and Family* 25 (3), (2011), 288-317.

(when there is an arrangement between prospective and birth parents, with or without the aid of an intermediary) and independent adoptions, which possibly implies that preliminary matching in independent adoptions always involves mediators as well as a lack of authorisation by the receiving State of the child and maybe the State of origin of the child. Regarding this issue, if a preliminary match made through an arrangement between both prospective and birth parents is made and later an official authorisation is given, both by the State of origin and the receiving State (which happens in private adoptions), this is considered to be a case of independent adoption, therefore, including the above referred holiday adoption.

There is the suggestion¹⁰⁵ that some of those unclarified points may have been made on purpose, in order to allow a more flexible definition so that a greater number of States agree to ban independent adoption, while narrowing the concession of independent adoption under the Hague Convention, since it is permitted according to it.

Briefly, international adoption occurs through three stages: firstly, there is an analysis of the suitability of the prospective parents in the receiving country; secondly, it is made a preliminary matching between prospective parents and a child; thirdly, the State authorities of the country of origin decide whether they approve or not the respective match. Both stages one and two must be carried out by the Central Authority or an accredited agency or approved non-accredited bodies, according to the Permanent Bureau. However, independent adoption does not respect these stages, when the preliminary match on stage two is made without the Central Authority or an accredited body. Despite the fact that the Hague Conference on Private and International Law Guide to Good Practice No.1 seeks the reliance on the Central Authorities and

¹⁰⁵ Ibid.

accredited bodies, the Hague Convention allows the active role of prospective parents in the preliminary matching, according to articles 14, 15 and 16, since they indicate that the international adoption process only starts once the prospective parents identify a child and manifest their wish to adopt him/her¹⁰⁶.

In order to highlight the process described in those articles from the Hague Convention, it is important to clarify that article 14¹⁰⁷ could be interpreted both as referring to a specific child or any child from another State. The Permanent Bureau's wish, once again, is to narrow the interpretation and only consider parents wishing to adopt any child, generally. Besides, in an independent adoption, without a professional matching, article 15 (1)¹⁰⁸ is a result of article 14: article 15 is instigated and a report is prepared, if the receiving State is satisfied with the eligibility of the parents to adopt, when the prospective adoptive parents show their wish to adopt a specific child. Additionally, the Hague Convention text never states that only a professional matching is allowed, which has made article 16 somehow troublesome to the Permanent Bureau, due to its clauses c and d¹⁰⁹. Article 16, in an independent adoption, is also a consequence of articles 14 and 15, since it is a report made if the State of origin is pleased with the adoptability of the child, also taking into account the words of scholar Peter Hayes in this matter. Also, in his article¹¹⁰, it is also stated that the Hague Convention's aim was to safeguard the permissibility of independent adoptions, as long as the Contracting States allowed them

¹⁰⁶ Ibid.

¹⁰⁷ "Persons habitually resident in a Contracting State, who wish to adopt a child habitually resident in another Contracting State, shall apply to the Central Authority in the State of their habitual residence".

¹⁰⁸ "If the Central Authority of the receiving State is satisfied that the applicants are eligible and suited to adopt, it shall prepare a report including information about their identity, eligibility and suitability to adopt, background, family and medical history, social environment, reasons for adoption, ability to undertake an intercountry adoption, as well as the characteristics of the children for whom they would be qualified to care".

¹⁰⁹ "If the Central Authority of the State of origin is satisfied that the child is adoptable, it shall (c) ensure that consents have been obtained in accordance with article 4; (d) determine, on the basis in particular of the reports relating to the child and the prospective adoptive parents, whether the envisaged placement is in the best interests of the child".

¹¹⁰ See Peter Hayes, *The Legality and Ethics of Independent Intercountry Adoption Under the Hague Convention*, *International Journal of Law, Policy and Family* 25 (3), (2011), 288-317.

and it is utterly pointed out that the Hague Convention's main objective is to check the probity of international adoptions, without specifying any particular mechanism for the initiation of a match. This can be explained due to the fact that international treaties need to be ambiguous so that they can be adopted by as many States as possible¹¹¹, such is the case of the Hague Convention.

4.5. Conclusion

The meticulous examination of the 1993 Hague Convention provisions on the international adoption requirements, process, competent authorities and permissible private entities has made perceptible that abuses, such as child trafficking and child laundering, become easier to happen, since the lack of regulation on the accountability of these entities and the matching process itself proves that there are gaps in the Convention that need to be corrected.

In consequence, after answering the question on where the Hague Convention has its loopholes that need to be filled in and why independent agencies promote the abuses, this thesis will subsequently suggest some actions to fill in those gaps that such convention was, unfortunately, unable to do.

¹¹¹ See Jonathan Dickens, *Social Policy Approaches to Intercountry Adoption*, *International Social Work*, 52(5), 2009, 595-607, p. 602.

CHAPTER 5. ACTIONS TO BE CONSIDERED

5.1. Introduction

Some intercountry adoption advocates, such as Professor Elizabeth Bartholet, blame human rights organizations, including UNICEF, for having created pressure against international adoption, leading to its shutdowns¹¹². These international organizations usually argued that international adoption should only be considered after domestic adoption and “permanent” family or foster care are found unavailable, as well as call for moratoriums for sending countries, based on the alleged adoption abuses¹¹³. Other scholars, such as Smolin, contrarily, believe that this position leads to the minimization of scandals, undermining the efforts in the international adoption much needed reform for some practice standards¹¹⁴. Moreover, Smolin also suggests that the ideological discussion around international adoption, which consists of the fact that it causes power imbalances between sending and receiving countries, the loss of the child’s original culture and identity, as well as the fact that international adoption is a remnant of colonialism of poorer countries¹¹⁵, has also led to the crucial point of the discussion,

¹¹² See David M. Smolin, *Child Laundering and the Hague Convention on Intercountry Adoption: The Future and Past of Intercountry Adoption*, 48 U. Louisville L. Rev. 441, 2009-2010, p. 442, and see Elizabeth Bartholet, *International Adoption: The Human Rights Position*, Harvard Law School Faculty Scholarship Series, Paper 28, p. 8-9, available at http://lsr.nellco.org/harvard_faculty/28, visited in 12th February 2017.

¹¹³ See Elizabeth Bartholet, *International Adoption: The Human Rights Position*, Harvard Law School Faculty Scholarship Series, Paper 28, p. 7-9, available at http://lsr.nellco.org/harvard_faculty/28, visited in 12th February 2017.

¹¹⁴ See David M. Smolin, *Child Laundering and the Hague Convention on Intercountry Adoption: The Future and Past of Intercountry Adoption*, 48 U. Louisville L. Rev. 441, 2009-2010, p. 442.

¹¹⁵ *Ibid*, p. 445.

which is the regulatory failure that leads to the child laundering scandals¹¹⁶. Another position is the one taken by Richard Posner, judge of the United States Court of Appeals for the Seventh Circuit, who claims that pregnant women should be able to sell their parental rights to qualified adoptive parents, which would mean that they would be selling their custodial rights, rather than the child, hence favouring adoption and not constituting any kind of baby-selling, but this position has not been very persuasive to other scholars¹¹⁷. Finally, another interesting position is defended by S. I. Strong, who claims that children should be allowed to terminate parental rights when they thought necessary, thus allowing them to be adopted by parents either from their country or from other countries, also stating that if children's needs are to be served adequately, international organizations need to empower children to make their own decisions¹¹⁸.

Currently, if a Contracting State of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption is implementing it insufficiently or inadequately, other Contracting States may object and cease intercountry adoption interactions with that respective Contracting State, as it happened, in 2010, when the USA announced they would not be receiving any more children from Guatemala, a non-member of the Hague Convention¹¹⁹. However, as we have seen throughout this thesis, this has not been sufficient to fight the Hague Convention's drawbacks.

¹¹⁶ Ibid, p. 445.

¹¹⁷ See David M. Smolin, *Child Laundering As Exploitation: Applying Anti-Trafficking Norms to Intercountry Adoption Under the Coming Hague Regime*, March 2007, p. 16, available at http://works.bepress.com/david_smolin/4/, visited in 16th April 2017.

¹¹⁸ See S. I. Strong, *Children's Rights in Intercountry Adoption: Towards a New Goal*, 13 B. U. Int'l L. J. 162 (1995), p. 165.

¹¹⁹ See Karen Smith Rotabi and Judith L. Gibbons, *Does the Hague Convention on Intercountry Adoption Adequately Protect Orphaned and Vulnerable Children and Their Families?*, Springer Science + Business Media, LLC, 2011.

In fact, some argue¹²⁰ that the Hague Convention was designed to prevent abuses that have been discussed throughout this thesis only indirectly¹²¹, since the international instrument assumes that other means, supplemental to it, will address criminal law responses¹²². However, this has proved not to be enough. The Hague Convention is incomplete in its aim to establish a system with standards for international adoption procedures, only partially answering to the abuses¹²³. More needs to be done.

This thesis will, finally, propose some actions to be implemented worldwide to tackle the abovementioned abuses.

5.2. Financial help to birth parents

This action is based on a priority idea which is the principle of keeping families together¹²⁴, thus ensuring the child's best interest¹²⁵, a principle also contemplated in the 1993 Hague Convention¹²⁶ as being one of its purposes¹²⁷.

¹²⁰ See David M. Smolin, *Child Laundering and the Hague Convention on Intercountry Adoption: The Future and Past of Intercountry Adoption*, 48 U. Louisville L. Rev. 441, 2009-2010, p. 449.

¹²¹ See G. Parra-Aranguren, *Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, 31 December 1993, available at [«https://assets.hcch.net/upload/exp133e.pdf»](https://assets.hcch.net/upload/exp133e.pdf), visited in 15th March 2017.

¹²² The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography was created in 2000 and addresses the issue in its article 3 (1) "Each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether these offenses are committed domestically or transnationally or on an individual or organized basis"; (a) "in the context of sale of children as defined in article 2"; (1) (ii) "Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption" and in its article 3 (5) "State Parties shall take all appropriate legal and administrative measures to ensure that all persons involved in the adoption of a child act in conformity with applicable international legal instruments".

¹²³ See David M. Smolin, *Child Laundering and the Hague Convention on Intercountry Adoption: The Future and Past of Intercountry Adoption*, 48 U. Louisville L. Rev. 441, 2009-2010, p. 451.

¹²⁴ UNGA (1989) "Resolution 44/25", UN Doc. A/RES/44/25, 20 November 1989, United Nations Convention on the Rights of the Child, Article 7 (1) "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents".

It consists of giving financial aid to impoverished birth families in order to keep the child with the birth family¹²⁸. There is an understandable similarity between aid and inducement of consent, since their distinction is so dubious and article 4 (c) (3) of the 1993 Hague Convention prohibits situations of international adoption due to financial inducement of consent in the child's relinquishment¹²⁹. As we have discussed above, those cases can easily exist in situations of extreme poverty and despair, where people feel compelled to relinquish their child. Therefore, giving aid to birth families in such vulnerable situations to keep their children would be a safeguard to promote the children's rights and best interests¹³⁰. This aid should, in addition, be unconditional and prior to placing a child for adoption, in other words, regardless of the relinquishment or consent of the birth parents¹³¹ hence this would reduce these families' exposure to exploitation, thus would make of it an altruistic act, empowering these families at risk¹³².

¹²⁵ UNGA (1989) "Resolution 44/25", UN Doc. A/RES/44/25, 20 November 1989, United Nations Convention on the Rights of the Child, Article 3 (1) "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

¹²⁶ See The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993) Preamble "Convinced of the necessity to take measures to ensure that intercountry adoption are made in the best interests of the child and with respect for his or her fundamental rights (...)", Article 1 (a) "The objects of the present Convention are to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law", Article 4 (b) "An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests".

¹²⁷ See Hague Conference on Private and International Law Guide to Good Practice No.1, *The Implementation and Operation of the 1993 Hague Intercountry Adoption Conference* (2008), p. 29.

¹²⁸ See David M. Smolin, *Intercountry Adoption and Poverty: A Human Rights Analysis*, 36 Cap. U. L. Rev. 413, 2007, p. 434 and see See David M. Smolin, *Intercountry Adoption as Child Trafficking*, 39 Val. U.L. Rev 281 (2004) p. 313, available at «<http://scholar.valpo.edu/vulr/vol39/iss2/1>», visited in 1st May 2017.

¹²⁹ "An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin have ensured that the consents have not been induced by payment or compensation of any kind and have not been withdrawn."

¹³⁰ See David M. Smolin, *Child Laundering and the Hague Convention on Intercountry Adoption: The Future and Past of Intercountry Adoption*, 48 U. Louisville L. Rev. 441, 2009-2010, p. 432.

¹³¹ See David M. Smolin, *Intercountry Adoption and Poverty: A Human Rights Analysis*, 36 Cap. U. L. Rev. 413, 2007, p. 434.

¹³² *Ibid*, p. 443.

In this view, a distinction should be made between sending countries, differentiating each sending nation according to their particularities¹³³. This distinction is a consequence of some sending countries being wealthier and more prosperous than others are. In some sending countries, poverty is only relative, whether, in others, it is extreme¹³⁴, which subsequently means that larger amounts of money would be required for relatively poor countries than for extremely poor countries in order to enable an international adoption¹³⁵.

An outcome of this action would also be a decrease in the number of children in orphanages, meaning that governments would have to invest less in children welfare care system¹³⁶.

5.3. Regulation on agency fees and donations

Article 32 (1) of the 1993 Hague Convention claims that no one shall derive improper financial or other gain from an activity related to an intercountry adoption¹³⁷, thus all “proper” gains are permitted, including the reimbursement of direct and indirect costs and expenses¹³⁸ and the payment of reasonable professional fees of people involved in

¹³³ Ibid, p. 452.

¹³⁴ Ibid, p. 448.

¹³⁵ Ibid.

¹³⁶ Ibid, 446.

¹³⁷ Also UNGA (1989) “Resolution 44/25”, UN Doc. A/RES/44/25, 20 November 1989, United Nations Convention on the Rights of the Child, Article 21 (d) “State 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 take all appropriate measures to ensure that, in intercountry adoption, the placement does not result in improper financial gain for those involved in it”.

¹³⁸ See G. Parra-Aranguren, *Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, 31 December, 1993 available at <<https://assets.hcch.net/upload/exp133e.pdf>>, visited in 15th March 2017.

the adoption¹³⁹. In paragraph (2) of article 32, “persons involved in the adoption” is interpreted broadly, including any persons rendering services in the adoption process¹⁴⁰ and member States shall establish¹⁴¹ the reasonability of the remunerations, referred on paragraph (3)¹⁴².

There is a concern with the transparency in costs and fees in the Convention through accreditation, regulation and supervision of bodies¹⁴³, but it is insufficient, since it leaves this issue to the State discretion¹⁴⁴, resulting in a lack of transparency, as already explained, as to how funds are spent¹⁴⁵ and guidelines at agency level¹⁴⁶.

The transparency aimed could be achieved through the disclosure of fees and costs at agency level in a standardized format, which contained distinction between necessary expenses and fees paid for services¹⁴⁷. There could be also established limits to adoption fees that would be permitted, which would vary in consonance to the sending nation,

¹³⁹ See The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993) Article 32 (2) “Only costs and expenses, including reasonable professional fees of persons involved in the adoption, may be charged or paid.”

¹⁴⁰ See G. Parra-Aranguren, *Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, 31December 1993, available at «<https://assets.hcch.net/upload/expl33e.pdf>», visited in 15th March 2017.

¹⁴¹ See The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993) Article 32 (3) “The directors, administrators and employees of bodies involved in an adoption shall not receive remuneration which is unreasonably high in relation to services rendered.”

¹⁴² See G. Parra-Aranguren, *Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, 31December 1993, available at «<https://assets.hcch.net/upload/expl33e.pdf>», visited in 15th March 2017.

¹⁴³ See Hague Conference on Private and International Law Guide to Good Practice No.1, *The Implementation and Operation of the 1993 Hague Intercountry Adoption Conference* (2008), p. 60.

¹⁴⁴ Ibid, “States should consider the types of abuses that could occur and how best to structure and finance a system in order to minimize those abuses.”

¹⁴⁵ See David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping and Stealing Children*, p. 175, available at «<http://lawbepress.com/expreso/eps/749>», visited in 3rd May 2017.

¹⁴⁶ See Karen Smith Rotabi and Judith L. Gibbons, *Does the Hague Convention on Intercountry Adoption Adequately Protect Orphaned and Vulnerable Children and Their Families?*, Springer Science + Business Media, LLC, 2011

¹⁴⁷ See David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping and Stealing Children*, p. 178, available at «<http://lawbepress.com/expreso/eps/749>», visited in 3rd May 2017.

and to donations, which should be voluntary¹⁴⁸. These limits then should be enforced, demanding that agencies disclosed all their transactions¹⁴⁹.

Regarding independent adoption-agencies contract clauses with prospective adoptive parents, these agencies generally impose clauses prohibiting the disclosure of international adoption data¹⁵⁰, which should be considered illegal, as a mean to reach transparency.

The United Nations Convention on the Rights of the Child proclaims in its article 11 (2) that, envisioning to take actions to combat the illicit transfer and non-return of children abroad, State Parties shall promote the conclusion of bilateral and multilateral agreements or access to existing agreements, which is a rule to ensure that intercountry adoption abides to certain rules and to certain conditions¹⁵¹. Usually, these agreements are negotiated to facilitate intercountry adoptions between certain countries¹⁵², but some countries also negotiate agreements that seek to prevent and criminalize the abduction and sale or trafficking in children in intercountry adoption¹⁵³.

Furthermore, there are associations in Europe, such as Euradopt¹⁵⁴ and the Nordic Adoption Council¹⁵⁵, aiming to achieve co-operation between governments and private and authorized adoption organizations within their member States as well as promoting

¹⁴⁸ Ibid, p. 179.

¹⁴⁹ Ibid.

¹⁵⁰ For instance, Holt International, a private licensed adoption agency from the USA, obliges prospective adoptive parents to the “Non-Disclosure of Holt Intercountry Procedures and Trade Secret”, p. 9, see <<https://www.holtinternational.org/adoption/IASA.pdf>>, visited in 22nd June 2017.

¹⁵¹ See United Nations Department of Economic and Social Affairs, Child Adoption: Trends and Policies, United Nations, New York, 2009, p. 59, available at <http://www.un.org/esa/population/publications/adoption2010/child_adoption.pdf>, visited in 10th March 2017.

¹⁵² Ibid.

¹⁵³ Ibid, p. 60.

¹⁵⁴ See <http://portal.euradopt.org/index.php?option=com_content&view=article&id=1&Itemid=102>, visited in 22nd June 2017.

¹⁵⁵ See <<http://www.nordicadoption.org/1/nac/>>, visited in 22nd June 2017.

Ethical Rules¹⁵⁶ applicable in intercountry adoptions and improve legislation for children's protection.

5.4. Regulation of sanctions/accountability

Article 32 of the 1993 Hague Convention does not establish the consequences for its non-abidance¹⁵⁷, because it does not prevent directly, but only indirectly “the abduction, the sale of and the traffic in children”¹⁵⁸. There is only an expectation that the abidance of the Convention's rules will originate the avoidance of such abuses¹⁵⁹. Such offenses are criminal acts and member States should ensure that they have criminal laws to penalize them¹⁶⁰, which means the system itself does not have accountability measures¹⁶¹ and addresses only civil aspects¹⁶².

Independent adoption agencies strive to avoid accountability for their role in international adoption, even considering that they have no legal responsibility for the

¹⁵⁶

See http://portal.euradopt.org/index.php?option=com_content&view=article&id=8:ethical%C2%ADrules&catid=2&Itemid=114&tmpl=component&print=1&layout=default&%E2%80%A6, visited in 22nd June 2017. As far as fees and regulations are concerned, article 21 “Fees charged to the organization by professionals should be commensurate with the work carried out”, article 22 “Representatives and co-workers responsible for the adoption procedures should have professional or other appropriate training”, article 23 “Organisations must provide information to the competent authorities of both the sending and receiving countries concerning child trafficking, improper financial gain and any other abuses. They must promote adoption through licensed or authorised organisations” and article 25 “The adoption work should be carried out in such a way that competition for children or contacts should be avoided”.

¹⁵⁷ See G. Parra-Aranguren, *Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, 31 December 1993, available at <https://assets.hcch.net/upload/exp133e.pdf>, visited in 15th March 2017.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ See Hague Conference on Private and International Law Guide to Good Practice No.1, *The Implementation and Operation of the 1993 Hague Intercountry Adoption Conference* (2008), p. 33.

¹⁶¹ See David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping and Stealing Children*, p. 193, available at <http://lawbepress.com/expresso/eps/749>, visited in 3rd May 2017.

¹⁶² See Holly C. Kennard, *Curtailing the Sale and Trafficking of Children: A Discussion of the Hague Conference Convention in Respect to Intercountry Adoptions*, 14. J. Int'l L. 623, p. 647.

acts of others¹⁶³, including broad renunciations in their contracts with prospective adoptive parents to avoid accountability for failures¹⁶⁴. Moreover, receiving countries only seriously investigate cases of suspicion of abuses when their citizens are involved¹⁶⁵, always trying to shift their responsibility to sending nations, which is useless, due to the lack of governmental capacity and corruption¹⁶⁶ and, besides, does not respect the Convention's safeguards¹⁶⁷, even though the sad reality of the hardship of being able to reunite sufficient evidence from those illicit activities¹⁶⁸.

5.5. Universal applicability of the Hague Convention

The 1993 Hague Convention is only applicable between two Convention countries, fact which is considered a major gap¹⁶⁹, because, currently, the major sending nations have not ratified the Convention, as we have previously seen in this thesis, increasing the probability and incidence of abuses, especially in countries like Guatemala. The

¹⁶³ Once more, for instance, see For instance, Holt International, a private licensed adoption agency from the USA, obliges prospective adoptive parents to the “Non-Disclosure of Holt Intercountry Procedures and Trade Secret”, p. 2, see <<https://www.holtinternational.org/adoption/IASA.pdf>>, visited in 22nd June 2017, stating that all cooperative agencies are entities separate and distinct from Holt and that Holt has no control over the means or manner of the performance of the services provided by any cooperative agency.

¹⁶⁴ See David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping and Stealing Children*, p. 194, available at <<http://lawbepress.com/expresso/eps/749>>, visited in 3rd May 2017.

¹⁶⁵ See David M. Smolin, *Child Laundering and the Hague Convention on Intercountry Adoption: The Future and Past of Intercountry Adoption*, 48 U. Louisville L. Rev. 441, 2009-2010, p. 496.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid, p. 497.

¹⁶⁸ See Holly C. Kennard, *Curtailing the Sale and Trafficking of Children: A Discussion of the Hague Conference Convention in Respect to Intercountry Adoptions*, 14. J. Int'l L. 623, p. 647.

¹⁶⁹ See Karen Smith Rotabi and Judith L. Gibbons, *Does the Hague Convention on Intercountry Adoption Adequately Protect Orphaned and Vulnerable Children and Their Families?*, Springer Science + Business Media, LLC, 2011.

universal applicability would also mean the realization of the paramount principle of ensuring the best interests of children¹⁷⁰.

Enforcement in applying the Hague Convention regulations should be sought and further regulations at a global level enacted by all members and non-members of the Convention¹⁷¹. This strategy could be further implemented through the next action.

5.6. Creation of an international adoption agency and an international family court

An alternative to agencies would be the creation of an international adoption agency to coordinate international adoptions, store data on orphans and develop global regulations¹⁷². This agency would have a body composed by representative from every country that entrusts international adoption to this international agency¹⁷³. This would overcome the current lack of efficiency, since there would be no need to resort private agencies and be subjected to the legislation of each country's government¹⁷⁴. The outcome of this would be a decrease in international adoption costs, hence, a subsequent decrease in child laundering. This international agency would be responsible to make the matching between the adoptive parents and the child¹⁷⁵.

¹⁷⁰ UNGA (1989) "Resolution 44/25", UN Doc. A/RES/44/25, 20 November 1989, United Nations Convention on the Rights of the Child, Article 3.

¹⁷¹ See David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping and Stealing Children*, p. 177, available at «<http://lawbepress.com/expresso/eps/749>», visited in 3rd May 2017.

¹⁷² See Rachel J. Wechsler, *Giving Every Child a Chance: The Need For Reform and Infrastructure in Intercountry Adoption Policy*, 22 Pace Int'l L. Rev. 1 (2010), p. 37, available at «<http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1024&context=pilr>», visited in 23rd June 2017.

¹⁷³ Ibid, p. 38.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid, p. 39.

In addition, the creation of an international family court would enforce international legislation on family and international adoption, since the International Court of Justice only litigates cases between States¹⁷⁶. The funding would probably come from the United Nations¹⁷⁷.

Another author, Jennifer A. Rattclif, also suggests the creation of a United Nations body, reassuring the promotion of the best interests of children and looking at individual framework problems in each country¹⁷⁸. This could be a United Nations Central Authority in charge of interpreting and developing the 1993 Hague Convention, reaching an impartial and more effective implementation of the instrument¹⁷⁹.

5.7. Open adoption

Finally, another action to consider would be the encouragement of open adoption, a form of adoption that allows birth parents to have contact with the adoptive parents and the child. The adoptive parents have the parental legal rights for the child, but birth family can also communicate with the child¹⁸⁰. Also there are different levels of openness: the fully open adoption (birth parents can contact directly with the child,

¹⁷⁶ Ibid, p. 40.

¹⁷⁷ Ibid, p. 41.

¹⁷⁸ See Jennifer A. Ratcliff, *International Adoption: Improving on the 1993 Hague Convention*, 25 Md. J. Int'l L. 336 (2010), p. 354, available at «<http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1528&context=mjil>», visited in 22nd June 2017.

¹⁷⁹ Ibid.

¹⁸⁰ See «<https://www.childwelfare.gov/pubPDFs/openadoption.pdf>», visited in 22nd June 2017.

which develops their relationship) and semi-open adoption (birth parents can only contact with adoptive parents, whom preserve their privacy)¹⁸¹.

The empowerment that open adoption brings to birth parents is enormous, since it enables them to freely make the choice of relinquish the child or not and, most of all, safeguards their connection to the child.

From the child's perspective, this solution is also recommendable. Article 8 (1) of the United Nations Convention on the Rights of the Child proclaims that "State Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference"¹⁸². Also, Euradopt and Nordic Adoption Council also remind the importance of the child's background and the child's right to his/her ethnical and cultural identity¹⁸³.

Therefore, this action could silence the nationalist argument against intercountry adoption, defending that children should grow up with people from their culture, ethnicity, language and religious background¹⁸⁴.

¹⁸¹ Ibid, p.3.

¹⁸² UNGA (1989) "Resolution 44/25", UN Doc. A/RES/44/25, 20 November 1989.

¹⁸³ See http://portal.euradopt.org/index.php?option=com_content&view=article&id=8:ethical%C2%ADrules&catid=2&Itemid=114&tmpl=component&print=1&layout=default&%E2%80%A6, visited in 22nd June 2017, Article 10 "The child has a right to his or her ethnical and cultural identity. The organization is responsible for making available to the parents information about the particular ethnical and cultural identity of the child." and Article 11 "It is the right of every adopted child to have access to information concerning his or her background. The organization is responsible for procuring available information about the child's background and for providing the child's adoptive parents with access to the information. This information should be presented to the child according to his or her age and level of understanding except when this is contrary to the child's best interest."

¹⁸⁴ See Asif Efrat, David Leblang, Steven Liao and Sonal S. Pandya, *Babies Across Borders: The Political Economy of International Child Adoption*, International Studies Quarterly (2015), 59, 615-628, p. 618.

5.8. Conclusion

The international regard of the abovementioned actions would be, undoubtedly, quite helpful and efficient as an aid to the problem of the abuses perpetrated by private agencies, which take advantage of people's vulnerability and existing corruption in many countries. Above all, they would help to fill in the already mentioned loopholes in the 1993 Hague Convention.

Even though there needs to be further regulation in each country, the improbability and difficulty of this in many countries can be overcome by the creation of further international legislation as well as through the creation of an international adoption agency and an international family court, as suggested.

As it was stated this international instrument assumes that other means, supplemental to it, will address criminal law responses, but it seems that, the meanwhile created Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, in 2000, was not enough to provide those responses, in its article 3 (1) and 3 (5), hence it could be legislated a new Optional Protocol, focusing on regulations to private adoption agencies and their accountability. In addition, the universal applicability of the Hague Convention would prevent many abuses, as well.

CHAPTER 6. CONCLUSION

This thesis intends to propose some actions to tackle the illicit practices of international adoption, such as child laundering and trafficking in children, a reality perpetrated by accepting the existence of private adoption agencies and, most of all, a reality resultant of gaps in the most important international instrument on international adoption, the Hague Convention.

I began this thesis by explaining how the practices of child laundering and child trafficking occur and the main characteristic reasons behind them. Afterwards, I analysed the most relevant international legislation on child protection and intercountry adoption, which, of course, led me to the thorough detailed examination of the Hague Convention, especially the requirements for its application, the competent authorities for such and the process of approval of independent adoption agencies, the entities that commit most of the crimes. The process of approval of those entities, as well as the international adoption procedures through independent adoption agencies helped me to understand why those entities promote the illicit practices.

Finally, the thesis culminated with the proposed forms to eliminate those illicit practices, thus I proposed on ways of filling in the gaps of the Hague Convention, which could be done through the implementation of further international legislation, an Optional Protocol, and even the creation of an international agency, to guarantee the possibility to regulate all participating countries. The universal applicability of the Hague Convention would also tackle a series of illicit practices.

I defend that international adoption can, indeed, be an altruistic act and an act of love, just as domestic adoption, since there are so many children needing parents, a family and a home. However, an act of altruism should not have its foundation on deceit and vulnerability of other people.

International adoption is, therefore, also a way to promote children's best interest, providing children with a loving environment, thus the alternative to domestic adoption. Institutional care should be the last resort due to the many disadvantages it has and its negative impact on children.

Filling in the gaps of the Hague Convention is paramount, as we should not forget that "children are the most precious treasure a community can possess, for in them are the promise and guarantee of the future."¹⁸⁵

«...in serving the best interests of children, we serve the best interests of all humanity.»

- Carol Bellamy, former head of UNICEF¹⁸⁶

¹⁸⁵See http://www.bahai.org/library/authoritative-texts/the-universal-house-of-justice/messages/20000421_001/20000421_001.pdf, visited in 23rd June 2017.

¹⁸⁶ See http://www.niccy.org/media/1038/niccy_annual_event_2013_-_commissioners_speech.pdf, visited in 23rd June 2017.

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