

Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption: a legal framework for stealing, kidnapping and trafficking children

1. Introduction

International adoption today highlights the imbalance between the industrialised countries which due to lower birth rates and a change of mentality are representing the “demand” for children of all cultures, religions, races, on the one hand and countries with social and economic difficulties, with political instability, but with a galloping demography, which represent the “supply” of such children, on the other hand. Such situations were compared to a “international children market”, with the international adoption being very often the middle of “traffic”.

The issue of adoption has exceeded the State’s competence in the matter. In addition to the steps taken by each state individually, there were concluded bilateral, regional and international organisations, all their actions being subject to a principle, that of protecting the interests of children.

2. Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption: Objectives and Scope

The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, adopted on May 29, 1993 was developed as regard to the concerns for the international adoption system and the lack of the protection of parties in the law¹. Intercountry adoption is a well balanced care option. For children who can not get a a proper care in a family living in their country of origin, intercountry adoption may be the best permanent solution. “This Convention is an important development for children, birth families and prospective foreign adopters.”²

Once with the Seventeenth Session of the Hague Convention the principles of the United Nations’s Convention on the Rights of the Children were extended. While the United Nation’s CRC states its “preference for domestic solutions (even if that means placing the child in foster care or in

¹ Sarah Sargent, ‘Suspended Animation: The Implementation of the Hague Convention on Inter-country Adoption in the United States and Romania’ [2004] 10 Tex. Wes. L. Rev. 351, 358-359.

² http://www.unicef.org/esaro/5440_inter_country_adoption.html

institutional care)³, the Hague Convention states that the paramount objective is the “best interest of the child” and that can be achieved in a family environment; thus a foreign family is to be preferred to a domestic orphanage. The importance of situating the child’s interest on the first place is enhanced in a adoption case⁴ because adoption means finding a family for a child, not a child for a family⁵. This is also stated in UNICEF’s position on Intercountry Adoption, released in 2010, which suggests that for children who can not be raised in their birth families a family environment should be sought in detriment of institutional care⁶. In any case whether domestic institutional care or an international adoption is more suitable for a child depends on the child’s personal circumstances. For there are situations when children live happily in a institutional care, are attached to the carers and moving them would not be the best solution⁷. This was recognised by the European Court Of Human Rights in a recent decision, *Pini v Romania*, in which the court decided that the adoptive parents wish could not override the two ten years old girls who did not want to leave the institutional care in which they were raised⁸.

The Hague Convention is the most outstanding international agreement regarding the regulation of intercountry adoptions⁹. Today, the Hague Convention is in force in 93 States¹⁰. Once a country has ratified the Convention it is bounded by its provisions and it has to apply it in its domestic and international law¹¹. Anyway, when a State is only signing the Convention it is not constrained to ratify it, it only expresses the State’s will to become a party.¹²

³Erica Briscoe, ‘The Hague Convention on Protection of Children and Co-operation in Respect of Inter Country Adoption: Are its Benefits Overshadowed by its Shortcomings’ [2009] 22 Journal of the American Academy of Matrimonial Lawyers 437, 439.

⁴ E.C.H.R., Pini and Bertani and Manera and Atripaldi v Romania, 22 June 2004, 1245 ‘The Official Gazette of Romania’ [2004]

⁵ E.C.H.R., Frette v France, 26 Feb 2002, www.echr.coe.int, visited on 21 April 2014.

⁶ http://www.unicef.org/media/media_41918.html

⁷ Marianne D Blair, ‘Safeguarding the Interest of Children in Inter country Adoption: Assessing the Gatekeepers’ [2005] 34 Cap.U.L.Rev. 349,397.

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[http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"sort":\["kupdate%20Descending"\],"appno":\["78028/01"\],"documentcollectionid":\["DECISIONS"\]}](http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{).

⁹ Briscoe (n 3), 439.

¹⁰ http://www.hcch.net/index_en.php?act=conventions.status&cid=69, visited on 10 April 2014.

¹¹ Laura McKinney, ‘International Adoption and the Hague Convention: Does Implementation of the Convention protect the best Interests of Children?’ [2007] 6 Whittier Journal of Child and Family Advocacy 361, 385.

¹² Briscoe (n 3), 439.

In the preamble to the Hague Convention there are listed some of the principles of the Convention. It is stated that a child is supposed to “grow up in a family environment” but that does not mean that it obliges the Contracting States to send the children out of the country for an adoptive placement in any particular circumstance¹³; it does not give the right to an institutionalised child to automatic intercountry adoption in case of an absence of domestic adoption. Moreover the Guide to Good Practice from 2008 also states that the Convention does not oblige States to engage in intercountry adoption¹⁴. The preamble sets out that the States should make all that is possible for the child to remain in the State of origin with his or her family, but the Convention’s provisions does not explicitly ask for that as a condition to be fulfilled before to proceed to intercountry adoption¹⁵. The Convention’s objectives are to facilitate intercountry adoptions by providing a system of co-operation among the Contracting States and so safeguarding them from abusive practices and also by securing the recognition of the adoption in Contracting States. A better co-operation between States can be achieved through Central Authorities, so each Contracting State is required to establish a Central Authority, which has to take all the appropriate measures to prevent improper financial gain or other kind of gain in connection with adoption; the Convention gave a legal effect to the adoptions that were made under the free written consent of birth parents, as long as the consent was not determinate by financial gain.¹⁶

The Convention does not contain direct provisions to prevent the practices of abduction, sale of, or traffic in children, it is preventing those practices indirect because “it is expected that the observance of the Convention’s rules will bring about the avoidance of such abuses”¹⁷.

3. International child abduction, sale of and trafficking under the Hague Convention regime

¹³David Smolin, 'Child Laundering and the Hague Convention on Inter country Adoption: the Future and Past of Inter country Adoption, [2010] 48 University of Louisville Law Review 441, 448..

¹⁴ Hague Conference on Private International Law, The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: Guide to Good Practice, Guide No.1 100 [2008] 102.

¹⁵ David M Smolin, ‘Hague Conference on Private International Law, Abduction, Sale and Traffic in Children in the Context of Inter country Adoption’, Document No. 1, 2010, p. 5.

¹⁶ Gabriela Marquez, ‘Transnational Adoption: The Creation and Ill Effects of an International Black Market Baby Trade’ [2000] 21 Journal of Juvenile Law 25, 37.

¹⁷ Explanatory Report by G. Parra-Aranguren, Proceedings of the Seventeenth Session, 10 to 29 May 1993, Tome II Adoption – co-operation, Hague Conference on Private International Law, 555.

International adoption is not a new practice¹⁸. International agreements and treaties like the Convention on the Rights of Children and the Hague Convention on Protection of Children and Respect of Intercountry Adoption have not provided a solution to the problem¹⁹.

The Hague Convention was aimed to improve the international adoption system that existed before, a system that was considered as “chaotic”, “incoherent”, and under which many children were subject to abuses²⁰. The improvement was supposed to be brought by the formation of Central Authorities who would supervise the persons and the organisations that are involved in intercountry adoptions. Even so with all these improvements and moreover despite the increase of domestic regulations the traffic of children was being amplified once with the international adoptions²¹ and it still is a serious problem in the today’s intercountry adoption system²².

The reasons that the prospective adoptive parents choose international adoption in detriment of domestic adoption are different from couple to couple. One of the reasons might be the lower costs of the adoption. For others a good reason for choosing this kind of adoption is that it is more certain that the mother will not reclaim the child. Another motivation is that despite domestic adoption, by choosing international adoption the prospective parents won’t have to wait too long for adopting a child; for a domestic adoption prospective parents have to wait up to ten years, while for an international adoption the waiting time is between 6 months and 2 years.

The Convention itself is not guilty of the abusive practices, but rather the problems are the result of a poor implementation of the Convention. This is proved by the fact that the majority of “the sending countries have not ratified the Convention during the relevant periods”²³.

Sending countries that were greatly influenced by child traffic in the last 20 years, states like Cambodia, China, Guatemala, Ethiopia, Haiti, India, Liberia, Nepal, Samoa, and Vietnam²⁴ are

¹⁸ Holly C. Kennard, ‘Curtailling the Sale and Trafficking of Children: A Discussion of the Hague Conference Convention in Respect of Intercountry Adoptions’ [1994] 14 U. PA. J. INT’L Bus. L. 623, 623.

¹⁹ Mahsa Farid, ‘International Adoption: The Economics of the Baby Industry’ [2013] 12 Whittier J. Child. & Fam. Advoc. 81, 82.

²⁰ J.H.A. van Loon, Report on Intercountry Adoption, Preliminary Document No. 1 of April 1990, Preliminary Work, Proceedings of the Seventh Session, 10 to 29 May 1993, p.129 cited in David M Smolin, ‘Hague Conference on Private International Law, Abduction, Sale and Traffic in Children in the Context of Intercountry Adoption’, Document No. 1, 2010, p. 13.

²¹ Smolin, ‘Hague Conference on Private International Law, p. 14.

²² *ibid*, p.14

²³ Smolin, Hague Conference on Private International Law (n 13), p.14.

²⁴ *ibid*, p.14.

countries that have ratified the Convention just a few years ago²⁵. A good example is Cambodia, which acceded to the Convention in 2007²⁶ and before that, in 2001 the processing of adoption petitions for Cambodia was suspended because of numerous concerns related to fraud, as well as the lack of sufficient local legal frameworks and other safeguards to protect the children's best interests²⁷. Along with the inadequate implementation by the sending countries, receiving countries did not implement the minimum requirements established by the Convention for safeguarding the intercountry adoptions; because of that many States are associating the intercountry adoption with the sale of and trafficking children so that these States do not participate to intercountry adoptions or are participating only in a limited extent²⁸.

The scandals concerning child trafficking were “perhaps disguised by the large-scale increase in intercountry adoption”²⁹ that took place between 1993, when the Hague Convention was finalised, and 2004. In this period in some countries the intercountry adoptions have doubled or even tripled their number. For example in the United States the adoptions increased their number from 7377 in 1993 to 22.991 in 2004 and Italy has doubled its the number of adoptees from 1606 in 1993 to 3402 in 2004³⁰.

It was concerned an increase in global child trafficking³¹. There are several reasons for the continuing child trafficking under the Hague Convention regime. One of the reason is that the States through their Central Authorities and accredited bodies usually act like the child trafficking does not exist, leaving the “investigation and follow-up of such cases to triad members, the press, and non-governmental organisations”³². Another reason is that the States did not take into consideration the subsidiarity principle that is acknowledged by the Hague Convention. Intercountry adoptions procedures are taking place without effort from the Central Authorities or other accredited bodies, private or public, to keep the child in the family of origin. Selling and trafficking appear when families in poor countries having financial problems are propositioned to sell there children in order to

²⁵ http://www.hcch.net/index_en.php?act=conventions.status&cid=69, visited on 20 April 2014.

²⁶ *ibid* (n 23)

²⁷ http://adoption.state.gov/country_information/country_specific_info.php?country-select=cambodia, visited on 20 April 2014

²⁸ Smolin, Hague Conference on Private International Law(n 13), p. 15.

²⁹ *ibid*, p. 15.

³⁰ <http://www.johnstonsarchive.net/policy/adoptionstatsintl.html>, visited on 11 April 2014.

³¹ <https://www.unodc.org/unodc/en/frontpage/2012/December/increase-in-global-child-trafficking-gives-cause-for-concern-says-new-unodc-report.html?ref=fs1>, visited on 11 April 2014.

³² Smolin, Hague Conference on Private International Law(n 13), p. 16.

survive³³. In these circumstances it became accepted that the child to be sent abroad and not to try to assist the family even when the sum of money needed for the child to remain with his or her family is smaller comparing to the sum needed to send the child to another country. This practice led to obtaining children from poor families through financial inducement, fraud or even force³⁴.

Also a reason is the inadequate implementation of the Convention; despite the fact that the Convention contains measures to prohibit child trafficking for adoption, its implementation and safeguards have proven weak, and child trafficking is currently dominating the international adoption industry³⁵. This poor implementation is a result of leaving the countries to enforce its provisions as they wish; that means that the countries that participate to a adoption must find the political will to effectively implement and enforce the Convention.

The Hague Convention's provision concerning the relinquishment of the child by his or her parents are also pretty weak and are not able to prevent child trafficking³⁶. Firstly, the provision regarding the parents consent only says that the consent should be given in written form, the parents should be counselled before giving their consent and that the consent should not be induced; by not explaining what "induce" means and by not requiring the States in a direct way to prohibit the sale of and trafficking children, the Convention fails to interdict the selling and trafficking³⁷.

Secondly, the Convention does not provide a procedure for uncovering child selling schemes under the facade of legitimate adoption. Under these circumstances it is difficult to distinguish between a payment made for professional services and an illicit payment made to orphanages for procuring the child³⁸.

4. Case Study: Romania

At the beginning of 1999, after the fall of Nicolae Ceausescu's political regime in late 1989, intercountry adoption began to develop in a quick way so that thousands of children were taken out

³³ Kelly M. Wittner, 'Curbing Child-Trafficking in Intercountry Adoptions: Will International Treaties and Adoption Moratoriums Accomplish the Job in Cambodia?'[2003] 12 PAC. RIM L. & POL'Y J. 595, 599.

³⁴ Smolin, Hague Conference on Private International Law(n 13), p. 17.

³⁵ Patricia J. Meier & Xiaole Zhang, 'Sold Into Adoption: The Hunan Baby Trafficking Scandal Exposes Vulnerabilities in Chinese Adoptions to the United States [2009]39 CUMB. L. Rev. 87, 91.

³⁶ Jonathan G Stein, ' A Call to End Baby Selling: why the Hague Convention on Intercountry Adoption should be modified to include the Consent Provisions of the Uniform Adoption Act [2002] 24 Thomas Jefferson Law Review 40, p.77.

³⁷ Stein (n 34), p 76.

³⁸ *ibid*, p.77.

of the country to be adopted in Western Europe and North America³⁹; between January 1990 and July 1991 UNICEF estimates that 10,000 Romanian children were sent abroad⁴⁰. In the most of cases the adoption were successful and on a long term (e.g. Groze & Ileana- 1996⁴¹, Fisher, Ames, Chisholm & Savoie, 1997⁴²). Because of the great demand for Caucasian children in Western countries with wealthy people, in Romania was being developed a “black market trade in young children”⁴³. In many cases intercountry adoption led to abusive practices such as sale of, traffic in children and even paying the parents who were in need to give up their children for adoption⁴⁴. Because of the rumours of child abduction and baby selling in 1991 Romania has issued a temporary moratorium on intercountry adoptions.

The “baby market” from Romania has determined the international community to accelerate the efforts for setting up a international instrument for regulation of international adoption⁴⁵. Romania was one of the first countries that ratified the Convention, but its implementation faced many problems regarding financial arrangements and accusations of child trafficking. Romania signed the Hague Convention in 1993 and ratified it in 1994 by Law 84/1994. According to IGIAA Report in that year there were approximately 2000 international adoptions from Romania. There was a decline in the next 3 years, followed by an acute increase to 2,000 in 1998, 2,600 in 1999 and reaching approximately 3000 in 2000 before the moratorium was imposed; however in any case the number of international adoptions has exceeded the number of domestic adoptions⁴⁶. A cause of this is that although the Convention states in its Preamble the principle of subsidiarity it does not give any concrete measures that have to be taken. Therefore in a country such as Romania, which has repeatedly violated the principle of subsidiarity and has chosen the international adoption as a ‘automatic’ measure for orphans, the Hague Convention provides a minimal protection for children

³⁹ Jonathan Dickens, ‘ The Paradox of Inter-country Adoption: analysing Romania’s experience as a sending country’ [2002] 11 Int J Soc Welfare 76, 76.

⁴⁰ http://www.unicef.org/ceecis/GDD_2005_Romania_Child_system.pdf, visited on 10 April 2014.

⁴¹ Jeffrey J Haugaard, Julie C. Wojslawowicz Megan Palmer, ‘International Adoption: Children from Romania’ [2000] 3 Adoption Quarterly 73, 80.

⁴² *ibid*, p. 83.

⁴³ Lisa M Yemm, ‘International Adoption and the “Best Interests” of the Child: Reality and Reactionism in Romania and Guatemala’ [2010] 9 Wash. U. Global Stud. L. Rev. 555, 565.

⁴⁴ Dickens (n 37),p. 76.

⁴⁵ Oliver Bačanović, Angelina Bačanović, Nataša Jovanova, *Illegal Trafficking- Form of Trafficking in Children, International Scientific Conference, Security and Euroatlantic Perspectives of the Balkans* (University “St. Kliment Ohridski”- Bitola Faculty of Security- Skopje, Vol II, Skopje, 2012), p. 283.

⁴⁶ Re-Organising the International Adoption and Child Protection System (IGIAA Report), p.29

and their families⁴⁷. Still the Convention “has improved the safeguards for children in some cases in which international adoption occurs, perhaps unavoidably also confers on the practice of international adoption a certain legitimacy which it might not otherwise have”⁴⁸.

In 2001 following a Report on Intercountry Adoption the Rapporteur Emma Nicholson concludes that an adoption moratorium is necessary for Romania to reform its adoption system. The review identified a number of financial related problems⁴⁹. The most worrying concern was that the prospective adoptive parents pay much more than the actual costs of the adoption⁵⁰. Another concern was that domestic adoptions were being inhibited and that led to situations when relatives willing to adopt the child did not have this possibility because the child was diverted to persons from abroad⁵¹.

The Romanian government has struggled to reform its intercountry adoption system of laws by developing an “Operational Plan for Implementation of the Government Strategy Governing the Protection of the Child in Difficulty”⁵² and by consulting the Permanent Bureau of the Hague Convention on Private International Law and the European Commission regarding the evaluation of its legislation⁵³. However, despite the efforts of Romania, the Rapporteur concluded that the reforms have not focused on the problems that Romania has with institutionalised children and most important that, in several cases, the children that were offered for intercountry adoption were not actually orphans⁵⁴. In reality the children are abandoned or were given in states care, in most of the cases under financial pressures. Under this circumstances is easier to use the children in a system of child trafficking⁵⁵. The moratorium introduced by Romania has suspended the administrative and legal procedures on international adoption⁵⁶. However, the govern decided that in exceptional

⁴⁷ Andrew Bainham, ‘ International adoption from Romania- why the moratorium should not be ended’ [2003] 15 Child & Fam. L.Q. 223, 230.

⁴⁸ *ibid*, p. 230.

⁴⁹ Michael W Ambrose, Anna Mary Coburn, ‘Report on Intercountry Adoption in Romania’, p.2 http://pdf.usaid.gov/pdf_docs/pnacw989.pdf, visited 11 April 2014.

⁵⁰ *ibid*, p.5.

⁵¹ *ibid*, p.7.

⁵² Government Strategy Concerning the Protection of the Child in Difficulty (2001-2004), <http://www.romaniaunog.org/strategies/strategychild.htm> , visited on 11 April 2014.

⁵³ <http://www.highbeam.com/doc/1G1-76753314.html>, visited on 11 April 2014.

⁵⁴ Report an Inter-country Adoption, p. 11, 13.

⁵⁵ Report on Inter-country Adoption, p. 13.

⁵⁶ O.U.G. nr.7/2003 – Suspendarea temporară a tuturor procedurilor referitoare la adopția internațională (Art. 1(1)) (The temporary suspension of all the procedures regarding Inter-country Adoption).

situations when the adoption is in the best interest of the children the govern may approve the submission of those intercountry adoption requests.

At the Hague Conference on Private International Law that took place in 2005, an expert from Romania pointed out that between 2001 and 2004 the moratorium was in force and that the applications submitted before this period were taken into consideration and some of them were approved⁵⁷. Moreover she stated that the 2001 moratorium was followed in 2005 by a new legislation and the moratorium was not applied anymore. The change brought by the new law was a restriction so that the only persons who could adopt a child from Romania were the child's biological grandparents⁵⁸ because in this way the traffic and sale of children could have been controlled more easy. As a result in the following years until 2012 international adoption did not take place anymore⁵⁹ despite the pressures coming from United Staes of America. After the accession to the European Union in 2007 the resumption of intercountry adoptions was discussed by the European Union and together with the USA were making pressures, but regardless of all that the Romanian Government did not want to reopen the gates of intercountry adoption⁶⁰. In a session of European Parliament that took place in 2011, a Romanian member of the European Parliament says that the resumption of intercountry adoptions is a issue that concerns the national competence and that in Romania there are more families willing to adopt than children available for adoption, and the Romanian legislation, contributed by international experts, is perfectly consistent with the European legislation⁶¹.

Following the acute pressures that were made, Romania, after more than a decade of banned international adoptions on April 7 2012 came into force the new law on adoptions, Law 233/2011

⁵⁷ REPORT AND CONCLUSIONS OF THE SECOND SPECIAL COMMISSION ON THE PRACTICAL OPERATION OF THE HAGUE CONVENTION OF 29 MAY 1993 ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION, http://www.hcch.net/index_en.php?act=text.display&tid=45, visited on 26 April 2014.

⁵⁸ Legea 273/2004 privind regimul juridic al adoptiilor (Law 273/2004 regarding The Juridical Status of the Adoption), http://www.adoptiromania.ro/files/legislatie/60_leg_Legea%20233-2011%20pt%20%20completarea%20si%20modificarea%20L273-2004.pdf. ; http://www.hcch.net/index_en.php?act=text.display&tid=45, visited on 26 April 2014.

⁵⁹ http://www.adoptiromania.ro/files/statistici/8_dez_statistici%20adoptii%201997-2012.pdf ; http://www.hcch.net/upload/wop/adop2010pd05_ro.pdf, visited on 11 April 2014.

⁶⁰ <http://www.romanialibera.ro>.

⁶¹ <http://www.romanialibera.ro/actualitate/politica/elena-basescu--ficare-stat--nu-altcineva-trebuie-sa-aleaga-solutiile-privind-adoptia-internationala-213679>, visited on 12 April 2014.

with modifications that allow foreigners to adopt Romanian children but imposing strict conditions on the adoption process. The most significant modification brought by the new law is broadening the category of persons who can adopt a child from Romania; the eligible persons are relatives up to the fourth grade with the child or even married couples where at least one of them has a Romanian citizenship⁶². In the following year of the new regime of intercountry adoptions the eligible children for intercountry adoption was around 200⁶³.

Conclusion

The Hague Convention has brought significant improvements to intercountry adoption system through its establishment of safe practices and procedures, but it has its lacks and needs some amendments or modifications addressing many fundamental issues that are important for the international adoptions to take place in a safe way and so to avoid child trafficking. In order to become a more effective instrument the Convention must clarify its definitions to provide a more comprehensive protection for the persons that are part to a intercountry adoption process and it must be amended to include language that provides greater protection and uniformity to the international child adoption process.

⁶² http://www.adoptiromania.ro/files/legislatie/60_leg_Legea%20233-2011%20pt%20%20completarea%20si%20modificarea%20L273-2004.pdf, visited on 11 April 2014.

⁶³ http://www.adoptiromania.ro/files/adoptie/131_dez_Eligible%20children%20at%202012.11.2013.pdf, visited on 11 April 2014.

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