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**THE HAGUE CONVENTION ON PROTECTION OF CHILDREN AND
CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTIONS - NON-HAGUE
ADOPTIONS AND FUNDAMENTAL RIGHTS OF THE CHILDREN**

Bachelor's thesis

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ABSTRACT

The 1993 Hague Adoption Convention has proven itself the most effective and promising international legal framework on intercountry adoption, by implementing the human rights principle of best interests of the child as the paramount consideration in matters involving children into practice. However, the fact it allows its members to engage in intercountry adoptions with all the numerous non-member countries paying no respect to its provisions poses a serious risk to a large number of children being adopted in circumstances associated with illegal practices violating the best interests of the child.

The aim of this research is to find the answer to the question whether prohibiting the member countries of the Convention from engaging in adoption processes with non-member countries improves the actual realization of the best interest of the child. It also aims to provide a comprehensive suggestion on the most significant methods to incentivize the accession to the Convention and to enhance the compliance with its provisions. The methodology used is qualitative research, in particular studying and examining the literature on intercountry adoption as well as on the relevant legislations.

The main results present that a complete ban of adoptions between member and non-member countries does not serve the best interests of the child since it will result in a full stoppage of adoptions from the non-member state and a large scale institutionalization of children. In respect of incentivizing the accession to the Convention and enhancing the compliance with it, emphasis shall be based on an improved co-operation between member and non-member countries, as well as on a creation of an agency assisting in the implementation of the Convention.

Keywords: The 1993 Hague Adoption Convention, the best interests of a child, non-Hague adoptions, a ban, incentivizing compliance

INTRODUCTION

Intercountry adoption has proven a significantly important and sometimes ultimately the best solution for countless children in a need for permanent family. Whether it is about orphans who have lost their birth parents or children whose primal family has not been capable of taking care of them amidst a prolonged humanitarian crisis in the home country, in many cases an intercountry adoption may be the best option for the child by providing a permanent family in a stable environment. However, the scale of the global adoption market has given a rise to several and severe illegal and abusive practices, closely linked to the adoption process such as child trafficking, child abduction, and coercion of birth parents, conducted often with the object of gaining financial profit¹, rendering numbers of intercountry adoptions seriously against the fundamental rights of the child.²

Article 21 of the United Nations Convention on the Rights of the Child (CRC) states that “...the system of adoption shall ensure that the best interests of the child shall be the paramount consideration...” and adds several complementary provisions in the sub-paragraphs such as declaring intercountry adoption as so-called last resort, only an alternative solution for a care of the child in a need for alternative care.³ Those fundamental rights of the child, by having essentially the whole world parties to the CRC, enjoy the status of universally recognized human rights legal principles. However, their inevitable deficiencies in terms of a capability to more precisely regulate and prevent many of the abusive practices associated with intercountry adoption gave a rise to the Hague Convention on Protection of Children and Co-operation in

¹ Hayes, P. (2011). The Legality and Ethics of Independent Intercountry Adoption Under the Hague Convention. *International Journal of Law, Policy and the Family*, 25(3). p 288-292.

² Briscoe, E. (2009). THE HAGUE CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION: ARE ITS BENEFITS OVERSHADOWED BY ITS SHORTCOMINGS? *Journal of the American Academy of Matrimonial Lawyers*, 22, 439

³ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, Art. 21

Respect of Intercountry Adoption in 1993. Since coming into force, the Hague Convention has been the leading set of legal rules regarding the intercountry adoption, with several minimum safeguards⁴ on controlling and regulating the process in the light of the fundamental rights of the children.

The legal issue at hand is the actual global realization of the fundamental rights of the child, namely the best interest of the child. Despite the weaknesses every regulative collection has, the Hague Convention has proven itself the most effective and promising international legal framework implementing the human rights principle of best interests of the child into practice in the realm of intercountry adoption⁵. The Hague Convention has been regarded as much needed, since mere CRC as a framework for intercountry adoption has proven an insufficient instrument giving room in practice to illegal practices harshly violating its own objectives. However, as a contrast to the CRC, in all its importance the Hague Convention has been ratified by only 96 countries, including nearly all of the so-called receiving states from the wealthier western world, yet lacking a significant number of major states of origin, much of them considered as developing states with varying political and economical disturbances, where the highest safeguards are needed the most. Furthermore, the Hague Convention does not explicitly prohibit its parties from engaging in, seemingly poorly protected, intercountry adoptions conducted outside the provisions of the Hague Convention with non-parties to the Convention.

Therefore, the first question which shall be evaluated with precision is whether, to protect and improve the actual realization of the best interests of a child, the Hague Convention should prevent its parties from being involved in intercountry adoptions that have not been conducted in accordance with the provisions of the Convention. And secondly, what are the most relevant measures to be taken to incentivize the accession to the Convention and enhance the compliance with its provisions.

⁴ Pfund, P. H. (1993). Briefing Paper: Hague Convention on Intercountry Adoption. *Women Lawyers Journal*, 79(3). p 6

⁵ Hansen, M. E., & Pollack, D. (2006). The regulation of intercountry adoption. *University of Louisville Law Review*, 45(1), p 105-128.

In this paper, the connection between intercountry adoption and fundamental rights of the child will be shown at first, followed by evidencing the role of the Hague Convention as a greatly successful and leading international instrument regarding the protection of the children involved in the process of intercountry adoption. After that, the question on prohibition of non-Hague adoptions will be profoundly considered and discussed. It is followed by the chapter dealing with the reasons hindering the will to access the Convention and comply with its provisions, and what are the actions to be taken to incentivize the higher level of adherence to it. Finally, the paper will be completed with the concluding remarks.

This research is based on qualitative research and it makes use of a wide range of field-specific literature in a form of journal articles and books, as well as other relevant written sources with valuable and reliable information on the numerous issues of intercountry adoption, on the methods to improve and incentivize the compliance with multilateral treaties in different situations, and on a number of other issues appearing in this paper.

1. INTERCOUNTRY ADOPTION AND FUNDAMENTAL RIGHTS OF THE CHILD

Despite the benign and respected nature of intercountry adoption as a mechanism to provide an alternative and permanent home for children in need, often living in institutional care such as in orphanages, or living in an extreme poverty with birth parents incapable of even feeding and clothing them, the system includes major human rights issues in respect of the fundamental rights of the children. Since intercountry adoption is, in essence, about children taken off from their original family environment and placed to a foreign country, as well as it is a system driven much by the demand of receiving countries⁶ with countless prospective adoptive parents ready to pay significant sums of money in order to carry out an adoption process, an intercountry adoption process includes several steps where the child's interests may be dismissed. Therefore, there has been established safeguards with high authority to protect the children against those violations.

The global regulatory framework on protecting children in intercountry adoption is based on two conventions. The global cornerstone setting up a framework protecting child's interests in adoption is included in the United Nations' Convention on the Rights of the Child, establishing the best interest of the child as a fundamental right. Notwithstanding its indisputable significance, numerous reports on abuses detected in the process of intercountry adoptions led to a drafting of the leading global multilateral agreement regarding specifically the protection of children in intercountry adoption: 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.

⁶ Smolin, D. M. (2007). Intercountry Adoption and Poverty: A Human Rights Analysis. *Capital University Law Review*, 36(2), p 453.

1.1 The United Nations Convention on the Rights of the Child

Underlying general legal principles giving child's welfare the paramount importance in the process of intercountry adoption have been founded in the United Nations Convention on the Rights of the Child (CRC). The convention, whose principles enjoy the status of universal human rights, was adopted by the United Nation General Assembly in 1989 and so far it has been signed by 196 countries, making it one of the most widespread global agreements existing.⁷ Taking into account the enormous global acceptance of its principles, as well as the substantive content of the convention providing children with rights regarded as absolutely fundamental, one cannot contest its ultimate authority in the matters of intercountry adoption.⁸

In respect of intercountry adoption, the crucial cornerstone, among three other key elements governing other issues, of CRC is the creation of the concept of the best interests of the child.⁹ According to that general rule, applying essentially to all matters involving children, the child's best interest shall be the paramount consideration in all situations where decisions about children are made.¹⁰ The simple statement has an extremely general character, hence the further articles of CRC include more specified forms of the principle. Adoption particularly has been dealt with in Article 21 where it has been stated that all the state parties having a role in adoption process shall ensure the best interests of the child, as well as the parties shall act according to five additional provisions. Those provisions include requirements such as inter-country adoption shall never be the first mean for a child's care, those involved in intercountry adoption shall never acquire any improper financial gain, and the adoption shall be permissible in view of the child's status concerning parents, relatives and legal guardians.¹¹

⁷ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577.

⁸ Commission Concerning Bilateral Agreements on Intercountry Adoption - Report to the Government [Review]. (2015, March 2). *The Swedish Intercountry Adoptions Authority*, 10

⁹ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, Art. 3

¹⁰ UN Convention on the Rights of the Child. (n.d.). Retrieved from <http://www.lapsiasia.fi/en/lapsen-oikeudet/> Office of the Ombudsman for Children of Finland

¹¹ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, Art. 21

As summarized, in the light of intercountry adoption the content and the spirit of the CRC assigns a strict requirement to all actors in the adoption process that the interests of any other party, such as prospective adoptive parents, adoption agencies, or countries involved in the adoption process, shall in no situation have the precedent over the child's best interest.¹² One shall definitely note that it unquestionably functions as the core global legal framework establishing fundamental rights protecting children in the process of intercountry adoption. However, it has received much-deserved critique of its unambiguous gaps and deficiencies, in particular regarding the pivotal but vague notion of the best interests of the child. It appears that the imprecision and generality of the CRC renders it impossible to rely solely on the provisions of CRC, if the illicit practices violating children in intercountry adoption are to be tackled and the best interest of the child ensured.¹³

1.2 The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption

On 29th of May 1993 was adopted the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (the Hague Convention). While the CRC was drafted to establish a legal framework on general protection for children, the Hague Convention, as an implementation of CRC¹⁴, addressed the urgent need for an international agreement specifically on intercountry adoption that would establish more specifying and practical legislation on protection for children against illegal practices overshadowing intercountry adoption such as child trafficking, baby buying, and other abusive practices not in the best interests of the child and hence against fundamental rights of the child.¹⁵In essence, The Hague Convention follows the CRC by acknowledging the best interests of the child as the primary legal right that shall be

¹² Commission Concerning Bilateral Agreements on Intercountry Adoption - Report to the Government [Review]. (2015, March 2). *The Swedish Intercountry Adoptions Authority*, p 10-11.

¹³ Lowe, N., & Douglas, G. (2015). *Bromley's Family Law* (11th ed.). Oxford University Press, p 1010

¹⁴ ADOPTION AND CHILDREN: A HUMAN RIGHTS PERSPECTIVE (Publication). (2011). Council of Europe, Commissioner for Human Rights, p 11

¹⁵ Ratcliff, J. A. (2010). International Adoption: Improving on the 1993 Hague Convention. *Maryland Journal of International Law*, 25(1), p 336

protected in the process of intercountry adoption, yet it gives a more concrete form instead of the short and vague expression provided in CRC.

The core of the Convention lies in the twofold system of establishing certain protective safeguards in respect of protection of children, and establishing a system of co-operation between parties to the convention to supervise and ensure the provisions of Convention are complied with. For instance, in respect of safeguards, the Convention upholds and more specifically defines the “subsidiarity principle”¹⁶ of CRC, according to which the intercountry adoption shall not be the first option for a child in a need for permanent care and it is subordinate to a domestic adoption.¹⁷ The Hague Convention concretises the principle by setting up a condition that intercountry adoption shall be considered as a suitable option only after “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”¹⁸. Furthermore, the Convention puts on place a comprehensive list of further provisions fighting against child trafficking, baby buying and other illicit practices often emerging in the early stages of adoption process by, for instance, requiring the authorities of the state of origin to ensure “the persons, institutions and authorities whose consent is necessary for adoption, have been counselled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin”, or to ensure that “the consents have not been induced by payment or compensation”¹⁹.

To ensure the compliance with the safeguards, the Hague Convention requires every contracting state to “designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities”²⁰. Those duties include, for instance, an obligation to take all the measures needed to prevent any party from gaining improper financial benefit from the

¹⁶ ADOPTION AND CHILDREN: A HUMAN RIGHTS PERSPECTIVE (Publication). (2011). Council of Europe, Commissioner for Human Rights, p 11

¹⁷ Pfund, P. H. (1994). Intercountry Adoption: The 1993 Hague Convention: Its Purpose, Implementation, and Promise. *Family Law Quarterly*, 28(1), p 56.

¹⁸ Hague Conference on Private International Law, *Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption*, 29 May 1993, 33 Art. 4b

¹⁹ *Ibid.*, art. 4c(1)-(3).

²⁰ *Ibid.*, art. 6(1)

adoption process, as well as an obligation take all the measures needed to prevent and detect practices that are against the provisions and objects of the Convention.²¹ Furthermore, Central Authorities “shall take ... all appropriate measures to collect, preserve and exchange information about the situation of the child and prospective adoptive parents, so far as is necessary to complete the adoption”²²

The Hague Convention gained popularity quickly²³ and it has been considered as “the most significant international agreement regarding the regulation of intercountry adoptions”²⁴. Indeed, the safeguards and the system of co-operation established by the Convention makes it ultimately the best and the most promising international agreement fighting against illegal adoption practices violating the best interests of the child. However, it has only 96 state parties which is relatively few taking into account its well-founded and extremely important aim to be a worldwide instrument ensuring the actual realization of children’s human rights in adoption process by implementing the CRC’s invaluable but vague principles into practice. Furthermore, due to the fact that the Convention has no mention about relations to non-member countries²⁵, i.e. the Convention does not prohibit those 96 member states from conducting intercountry adoptions with non-member states, a major number of intercountry adoptions are still conducted outside of the provisions of the Convention, between member and non-member states.²⁶

²¹ *Ibid.*

²² *Ibid.*, art. 9a

²³ Hansen, Pollack (2006), *supra* note 5, p 105-106.

²⁴ Briscoe (2009), *supra* note 2, p.439

²⁵ Briscoe (2009), *supra* note 2, p.440

²⁶ Brown, T. W. (2016). Exploitation of Intercountry Adoption: Toward Common Understanding and Action. *Adoption Quarterly*, 19(2), p 63-80.

2. THE POSITION OF THE HAGUE CONVENTION

Indeed, the Hague Convention has 96 state parties to it, which is only around half of the countries in the world. The result is that, despite the increase in ratifications of the Convention, most of the intercountry adoptions are still performed according to bilateral agreements or other individual agreements paying respect, in terms of international law, only to principles of CRC. It is noted that the reason behind a great portion of non-hague intercountry adoptions has, at least partly, much to do with the fact that ratification of the Hague Convention in the state of origin essentially decreases the amount of performed Hague adoptions, and thus changes the ratio. On the contrary, it is equally argued that since the ratification of the Hague Convention indeed decreases intercountry adoptions from the state of origin, the significant demand of adoptions by receiving countries drives them to focus more on non-Hague countries with looser and often cheaper adoption process, and thus increasing the number and portion of non-Hague adoptions.²⁷ Nevertheless, the fact is that the absolute number of intercountry adoptions, whether through the Hague system or not, have been in decrease since 2004, mostly due to improved conditions in the sending countries, i.e. less need for an intercountry adoption in the light of the best interests of the child.²⁸ However, despite the global decrease²⁹ in absolute adoption numbers, one shall reasonably say that intercountry adoption is still a large-scale and significant phenomenon, not the least due to increased demand of adoptable children in the traditional receiving states³⁰, and that the number of adoptions conducted without regard to essential safeguard provisions of the Hague Convention protecting the fundamental rights of the child is still woefully high.

²⁷ ADOPTION AND CHILDREN: A HUMAN RIGHTS PERSPECTIVE (Publication). (2011). Council of Europe, Commissioner for Human Rights, p 19

²⁸ *Ibid.*, p 8

²⁹ Finnish Adoption Board Annual Report 2016 (Rep. No. 369/02.02.03.00/2017). (2017). Finnish Adoption Board. p 16.

³⁰ Ryan, E. J. (2006). For the Best Interests of the Children: Why the Hague Convention of Intercountry Adoption Needs to Go Farther, as Evidenced by Implementation in Romania and the United States. *Boston College International and Comparative Law Review*, 29(2).

Interestingly, the great opportunity the Hague Convention provides is the composition of the state parties. At its current form the Convention applies when both the sending country, i.e. the child's state of origin, and the receiving country, i.e. the country of prospective adoptive parents, are state parties to the Convention. While the so-called traditional states of origin, often developing countries with serious political and economical disturbances as well as significantly high birth rates, include a great number of states not parties to the Convention, the group of mostly receiving countries who are accountable to enormous majority of the intercountry adoptions globally consists mostly of developed and stable western countries which have completely signed, ratified, and implemented the Convention.³¹ For instance, it has been ratified by all countries of the European Union.³² Therefore, given that the global intercountry adoption essentially functions through those developed receiving state parties, the chance lies on the increased legal obligations on their actions. The great opportunity and the underlying question the of this text is based specifically on this issue, whether the best interests of the child would be achieved, by an idea proposed by some³³, by banning those receiving state parties from being involved in any adoption processes conducted outside the Hague provisions, as well as how the the accession to the Convention and compliance with its provisions could be incentivized and enhanced the best.

However, before stepping ourselves in the ban, its effects, and the discussion of methods incentivizing accession and compliance with the Convention, it is important to establish the superiority of the Hague Convention by understanding and pointing the concrete differences adoptions conducted according to the Hague Convention and the adoptions conducted outside its provisions have in the light of the best interest of the child and the emergence of illegal practices linked to intercountry adoptions.

³¹ Briscoe (2009), *supra* note 2, p.440-454.

³² Adoption of children in the European Union (Publication). (2016). European Parliament. 2; Adoption: Cross-border Legal Issues and Gaps in the European Union (Publication). (2015). European Parliament, Legal Affairs. p 2-5

³³ Schmit, A. (2008). The Hague Convention: The Problems with Accession and Implementation. *Indiana Journal of Global Legal Studies*, 15(1), p 375-380.

2.1 Comparison of Hague and non-Hague intercountry adoptions

It could be seen as already reasonable to advocate the spreading of the Hague Convention all over the world, only by taking into account its function and aim of creating a global legal framework protecting the best interests of the child in the process of intercountry adoption by implementing CRC into practice via setting up safeguards and establishing international co-operation that previously did not exist. Even more, some parties to the Convention have realised that it is not only about their written-down legal responsibilities but about their moral obligation to protect the fundamental rights of the children. For instance, United States have made several attempts to encourage certain non-Hague countries such as Vietnam to comply at least with the most essential provisions of the Convention to protect children's human rights. However, without underestimating its undeniably ambitious and advanced form the actual practical effects of the Convention, compared to the intercountry adoptions outside its provisions, shall be pointed out and shown.

Perhaps the most significant difference the Hague Convention has made is the major decrease, and the reasons behind it, in the absolute numbers of intercountry adoption, despite the international demand of intercountry adoptions posed by prospective parents in receiving countries is an accelerating trend. In particular, it is widely accepted that one of the main reasons is the proper and systematic application of principle of subsidiarity the Hague Convention provides. Since the principle, established in Article 4b and the preamble of the Convention, imposes strict requirements for the contracting state of origin to carry out a proper investigation, due to the best interest of the child, about the possibilities to keep the child with his/her family of origin, and if it is not possible, only then to place the child to another and permanent family through domestic or intercountry adoption³⁴, the flow of children from the state of origin to another contracting state has slowed down. For example China shall be considered as an extremely good and illustrative example of the effects of the Article 4 and the principle. The number of children adopted through a process of intercountry adoption was more than 14'000 in

³⁴ Turner, C. (2016). The History of the Subsidiarity Principle in the Hague Convention on Intercountry Adoption. *Chi.-Kent J. Int'l & Comp. Law*, 16, p 119-121

2005, yet much due to the ratification of the Convention in late 2005 and coming into force in early 2006 the number of annual intercountry adoptions had dropped to some 6000.³⁵ Therefore, since the effect of a properly applied principle of subsidiarity is eminent, it shall be concluded that a great number of non-Hague adoptions, paying no respect to the Convention by not having an authority strictly following the principle of subsidiarity, have been made and are still made in circumstances where the subsidiarity principle has not been applied and the intercountry adoption has not been in the best interests of the child.

While the Convention has, indeed, done a lot to stop the overflow of children to adoptive parents in other side of the world and focused on finding other and better domestic solutions for children, some of the merits that Hague-adoptions have when comparing to non-Hague adoptions can be seen, in turn, only by focusing on the proven abusive practices in the process of non-Hague adoption. There can be found harsh examples of adoption processes in certain countries, where the illegal practices the Convention particularly fights against such as kidnapping and baby buying have been prevalent. An example *par excellence* is the analysis conducted about the pre-Hague situation of Guatemala where the human rights violations have been self-evident. The system before ratification of the Hague Convention was based nearly completely on actions of unregulated notaries and lawyers who represented all sides involved in the intercountry adoption, and hence had all the power in their hands, as well as an presumably high financial interest in the materialized adoptions. The system has been full of illegal practices such as birth mothers being paid, in average around 1000 dollars, an extremely great amount of money for them, officially as an assist to “medical expenses”, but in fact functioning as a premium in exchange for a baby and all rights to him/her. In practice, the chain of events often happened in a way that so called baby broker gave the child to a notary, after obtaining the child from the birth mother, who consequently paid the birth mother in exchange for the custody of the child. The notary placed the child to a foster home until the administrative adoption process had been concluded and the child was taken to a new permanent home.³⁶ Here the most important finding is that the terrible and prevalent practice, indeed not in the best interest of the child and,

³⁵ADOPTION AND CHILDREN: A HUMAN RIGHTS PERSPECTIVE (Publication). (2011). Council of Europe, Commissioner for Human Rights, p 19.

³⁶ Long, M. (2009). Guatemala Passes Domestic Legislation to Implement Hague Adoption Convention; but Does It Help the Children. *Law and Business Review of the Americas*, 15(3), p 642-643.

hence, harshly violating the fundamental rights of the child, was enabled to remain prevalent for a long time due to a lack of any governmental control or supervising. When the Hague Convention as one of its main functions requires to establish a governmental central authority with obligations to prevent and trace such abuses, there was no authority monitoring any of the steps included in the adoption processes in Guatemala. The system was nominally according to the legal provisions of, alone seemingly poorly functioning, CRC, but the actual protection of the rights of the child and of any other vulnerable party in the adoption was nearly nonexistent.

The Hague Convention has received its critique as well. Among the critical speeches, it has been stated that, despite the ultimate object of the Convention to ensure the best interests of the child by preventing the practice of child trafficking in its different forms, the Convention has not had an effect of completely shutting down those serious incidents. The reports on abusive practices in many sending countries parties to the Convention still do emerge, and in particular it has been noted that a system of governmental central authority cannot in any situation be considered as a waterproof system in respect of child trafficking.³⁷ However, since the Hague Convention was drafted to enhance the control over the infamous contemporary global adoption market, described as “chaotic” or “incoherent”³⁸ with enormous and often realized risks towards the fundamental rights of the children, the failure to entirely eliminate targeted practices does not have much deeper relevance since the apparent accomplishments of the Convention are clear. Furthermore, much of the critique derives from the occasions where the problems can be traced to insufficient success on implementation. For instance, even the critics have admitted that lack of a political will and stableness has played a significant role in the implementation problems, as well as certain child trafficking incidents have been found to have been preventable if only the receiving states with significant resources had carried out their own responsibilities on ensuring the child is adoptable.³⁹ Therefore, the mere presence of those objected practices cannot be a factor overriding the Convention’s status as the most prominent piece of international law on intercountry adoption.

³⁷ Smolin, D. M. (2010). Child Laundering and the Hague Convention on Intercountry Adoption: The Future and Past of Intercountry Adoption. *University of Louisville Law Review*, 48(3), p 493

³⁸ *Ibid.*, p 461

³⁹ *Ibid.*, p 494-496.

To be concluded, the Hague Convention has its indisputable accomplishments in both regulatory level with modern safeguards and objects, as well as in practice, despite the deserved critique it has always received. After all, one shall agree with the largely prevailing perception following the statement made by the professor Sara Dillon from Suffolk University that in spite of certain deeper and more complex legal, financial, and political problems attached on the intercountry adoption, from a pure human rights perspective the Hague Convention is hugely significant alleviation for countless children under a risk.⁴⁰

⁴⁰ McKinney, L. (2006). International Adoption and the Hague Convention: Does Implementation of the Convention Protect the Best Interests of Children. *Whittier Journal of Child and Family Advocacy*, p 412

3. PROHIBITION OF NON-HAGUE ADOPTIONS

It is to be concluded that while the Hague Convention has proven itself the most prominent instrument implementing global human rights provisions in terms of adoptive children at the current time, as well as in the near future, the number of non-parties dismissing its provisions and continuing intercountry adoptions with major and serious gaps in terms of protection on the rights of the child is dangerously high. Since one shall acknowledge that the increasing demand of adoptable children and the great number of available non-Hague adoptions have constructed a sphere of intercountry adoptions struggling with illegal practices, solutions to the problem recognized already over 20 years ago do not very likely anymore include diplomatic acts of persuasion, ostensibly closer cooperation, or notifications about the existence of conventions regarding fundamental rights. Therefore, the important yet forcible suggestion to be examined is whether the Hague Convention should place a legal prohibition of engaging in intercountry adoptions conducted with any state which has not ratified and implemented the Convention, in order to prevent the problematic non-Hague adoptions and to enhance the global compliance with the Convention's provisions.

In essence, the proposal of a complete ban is based on the idea that by preventing the process of non-Hague adoption from the receiving contracting states who occupy the Convention and thus have ultimately the position to freeze the market of intercountry adoption, poorly regulated and separate non-Hague adoption procedures continually associated with illegal practices violating children would face a sudden and permanent stop. It shall be said that the prohibition would definitely have a significantly efficient effect in tackling such practices, yet the overall assessment of its impact on the best interests of the child proves to be problematic.

3.1 Effects of the ban on the best interests of the child

Indeed, the proposal brought up at times, aiming to protect the best interest of the child in the intercountry adoption, but which has not been under a proper investigation is a full prohibition placed by the Hague Convention for its parties to conduct intercountry adoptions with non-Hague countries. There surely exists only marginally arguments disputing the prohibition's impact solely on the emergence of the illegal practices. A simple conclusion deriving from the fact that non-Hague adoptions would not happen nearly at all anymore is obviously that those practices violating children's rights will face a drastic decrease, since there would be no room for adoptions conducted outside the well-tried principles of the Convention due to "receiving side" of intercountry adoptions being under the strict legal restriction and thus incapable of participating in non-Hague adoptions. This presumptive and well-reasoned scenario of full stop for wide scale habitual child trafficking, baby buying, and for other prevalent adoption practices against the best interests of the child surely poses the ultimate benefit and accomplishment of the proposed adoption ban. Indeed, after decades of poorly regulated and supervised processes of intercountry adoptions with continuing reports on abusive practices harshly violating the fundamental rights of the children, a prohibition would in absolute terms provide the most efficient solution for the problem of illegal practices itself.

However, despite the issue of ruthless abuses occurring in poorly regulated and even less supervised non-Hague adoptions, in a bigger picture the truth is that the ultimately right solution to ensure the actual realization of the best interest of the child is often to provide a child living without permanent and domestic care in a family environment an adoptive family through a process of intercountry adoption. For instance, in the aforementioned situation of Guatemala there are not enough alternative solutions, given that over 200 000 children are born every year to families fighting against severe financial challenges, and often living in extreme poverty. A similar serious economical and political chaos is reality in many traditional states of origin which creates a real and extremely urgent need for legitimate intercountry adoptions.⁴¹ Ideally, the complete prohibition would function as the strongest possible incentive for the non-member

⁴¹ Long (2009), *supra* note 36, p 643

states to sign and ratify the Hague Convention and to comply with its provisions as soon as possible in order to ensure that intercountry adoption will be available for thousands of children whose best interests are in a genuine need for it. However, the findings from the previous aspirations to push the erratic non-member states of origin with serious reported abuses in their systems of intercountry adoption into parties to the Convention demonstrate great practical difficulties.

The process of fulfilling all the requirements laid down in the Hague Convention has proven extremely demanding for many countries aiming to ratify and implement it. It has been stated that such a thorough reform to a country's legal system of intercountry adoption shall be understood to be largely unrealistic for poor and unstable developing countries.⁴² The statement receives solid support deriving from the fact that a proper implementation of the Convention has never been a mere political issue and decision but it is a wide and demanding practical process putting tough pressure on the financial resources and functioning of the administration.⁴³ As an example, the infamous events of Romania illustrate painfully well the difficulty of implementing the Convention and the possible consequences of it. In the case, Romania eagerly attempted to ratify and implement the Convention among the first countries, only a few years after the adoption of its final draft. Initially, it committed to take all the steps a proper implementation to national legislation needs such designating the central authority with sufficient resources to control and monitor the adoption processes. While the will to comply with its provisions and to ensure a legitimate intercountry adoption process for a high number of Romanian children in need was rather genuine, the financial and political problems led to a disaster in terms of fundamental rights of the children. The aim to a proper implementation was there, yet the aforementioned problems resulted in insufficient and inconsistent compliance with the Convention, at first leading to thousands of children being stuck in institutional care, and finally leading to a complete ban of intercountry adoptions from Romania imposed by the government itself with a result of 26 000 institutionalized children, .⁴⁴ As a conclusion, the lesson Romania has taught is that it points out the inadequacy of a mere will or commitment to comply with the

⁴² Sohr, K. (2006). Difficulties Implementing the Hague Convention on the Protection of Children and Co-Operation in Respect of Intercountry Adoption: A Criticism of the Proposed Ortega's Law and an Advocacy for Moderate Adoption Reform in Guatemala. *Pace International Law Review*, 18(2), p 582.

⁴³ Briscoe (2009), *supra* note 2, p 452

⁴⁴ Sohr (2006), *supra* note 42, p 584.

provisions of the Convention. With no regard to the question whether the prohibition would immediately result in systematic attempts among the non-Hague countries to sign, ratify, and implement the Convention, it shall be emphasized that for several countries outside the Convention a full and prompt implementation of it as the only mean to open again the important flow of intercountry adoptions may very likely prove impossible.

The considered and likely scenario of many non-Hague countries struggling with a proper and efficient implementation of the Convention, together with accepting the realistic approach that not each and every one of the non-Hague would be willing to take an immediate action to get back in the so-called global adoption market, poses without a fail a serious risk to fundamental rights of the children since the ban would most likely cause at least a temporary stop to intercountry adoptions from several countries and a gigantic increase in number of institutionalized children. In particular, at the core of the issue, it is stated that a long-term institutionalization cannot in any situation provide children the parental care their psychological and bodily development requires since it is “an act of abuse” itself⁴⁵. It appears obvious that since even the best institutions cannot succeed in it when the care is long-term⁴⁶, residing in the below-average institutions, in terms of quality of the care, has historically resulted systematically in severe developmental disorders⁴⁷. It is, therefore, argued that despite the opposition to intercountry adoptions has its arguments when advocating the prohibition, in particular of adoptions conducted outside the provisions of the Hague Convention, the basic human rights and the best interests of the child are significantly often ensured the best by allowing the intercountry adoption even in a current situation where the existence of illegal adoption practices cannot be completely excluded⁴⁸.

⁴⁵ Yemm, L. M. (2010). International Adoption and the “Best Interests” of the Child: Reality and Reactionism in Romania and Guatemala. *Washington University Global Studies Law Review*, 9(3). p 567

⁴⁶ Bartholet, E. (2010). International Adoption: The Human Rights Position. *Global Policy*, (1), p 15.

⁴⁷ Smolin (2010), *supra* note 37, p 465-467.

⁴⁸ Bartholet (2010), *supra* note 46, p 15-16.

3.2 Conclusion

While the Hague Convention aims to establish a global and trusted system of intercountry adoption comprising a high level of safeguards and provisional standards tackling child trafficking and other illicit practices, one shall not forget that it still functioning under the higher authority, namely the CRC, with the object of ultimately giving the best interests of the child the paramount consideration. Fighting illegal adoption practices comprising, for example, fraudulent documentations and harsh acts of baby trafficking with the objective of financial gain⁴⁹ shall be in the protectors' target since it has an extremely significant relevance to realization of the best interests of the child, yet we shall not give the war against those criminal actions to have an authority to override the overall assessment of the the best interests of the child. Despite the actual realization of the best interest of the child shall be enhanced by increasing the global compliance with the provisions of the Hague Convention, it appears evident that a prohibition placed on state parties to the Convention to engage in non-Hague adoption would result in extensive blockage to a significant portion of intercountry adoptions which ultimately violates the fundamental rights of the children more than protects them.

⁴⁹ Sargent, S. (2004). Suspended Animation: The Implementation of the Hague Convention on Intercountry Adoption in the United States and Romania. *Texas Wesleyan Law Review*, 10(2), p 354-355.

4. INCENTIVIZING ACCESSION TO THE HAGUE CONVENTION AND ENHANCING THE COMPLIANCE WITH ITS PROVISIONS

As the underlying idea of the paper goes, a high compliance with the provisions of the Hague Convention provides the children involved in the process of intercountry adoption the greatest protection and respect to their fundamental rights. It has been pointed out that the area of non-Hague intercountry adoptions is severely under-regulated in terms of adherence to provisions guaranteeing fundamental rights of the children, namely the best interest of the child, and the systematic continuation of those poorly regulated and supervised adoption processes associated with different illegal practices such as baby buying and baby laundering cannot be accepted in their current form. However, as the previous part suggests, one shall state that the best interest of the child cannot be achieved by setting up a complete ban on adoptions conducted between member and non-member states to the Hague Convention, in a hope of extinction of illegal practices and increased pace of accessions and proper implementations by the current non-Hague countries.

It appears that the most realistic and prominent means to increase the global compliance with the provisions of the Hague Convention, without creating an injurious stoppage of intercountry adoptions, are systems creating incentives and premises for non-Hague countries to strive for a greatest possible compliance with the Convention, as well as for an accession to it, without a fear of being subjected to an adoption ban or to another kind of explicit penalty resulting from inherent difficulties on compliance with the provision of the Convention.

4.1 Position of the non-Hague countries

From the perspective of the non-Hague countries, the status quo provides only little incentive or realistic opportunities to access to the Hague Convention and to comply with all of its provisions, or to voluntarily uptake the provisions without formally accessing the Convention. One could say that providing a safe system of intercountry adoptions for countless children in need, often placed to a significant risk regarding their fundamental rights, would certainly function as the greatest incentive to make all the effort to successfully implement the provisions of the Hague Convention and, thus, facilitate a remarkable increase in the protection of children's rights. However, as we have seen, the flow of non-Hague adoptions is on and alive⁵⁰. It appears that the unrestrained continuation of non-Hague adoptions, still in the era of Hague Convention, and the examples of real and often inherent difficulties in developing countries' pursuits to properly implement the Convention have created an atmosphere of disincentives hindering non-Hague countries' interest to the attempts towards a considerable compliance with the Convention.

Indeed, a crucial problem is that for a great number of non-Hague countries a full and prompt implementation of the Hague Convention is extremely difficult, or nearly completely impossible. As already mentioned in the paper, the group of non-Hague countries consists much of countries with serious political, economic, and administrative issues and disturbances, as well as many of the countries are lacking an efficiently functioning and organized legal system that would be capable of executing the demanding implementation process at a full scale⁵¹. Therefore, a lack of support is evident. However, in respect of the accession and implementation, the fundamental disincentive appears to emerge by the combination of the difficulties in implementation and the opportunity the Convention provides for the Member States observing defects and delays in the implementation processes of new arrivals. In particular, the Convention allows the member states to object to adoptions with another country accessing the Convention, i.e. refusing to conduct intercountry adoptions with the state, as has been done by several countries towards

⁵⁰ *NCFCA on Topic: Hague vs. Non-Hague Country Adoptions* (Publication). (n.d.). Retrieved May 9, 2019, from National Council for Adoption website: <https://www.adoptioncouncil.org/files/large/7a933009abbcca1>

⁵¹ Schmit (2008), *supra* note 33, p 390

Guatemala during its problematic implementation process.⁵² It works as a great illustration how a country's aim and willingness to implement the Convention appears to be not enough, and the emphasis has been placed by many older member countries to the pure efficiency and thoroughness of the implementation of provisions. For instance, it has been observed that Guatemala has taken many more steps towards a proper compliance with the Hague Convention compared to steps taken by non-Member countries, yet the adoption relations with Guatemala have been frozen due to problems in its implementation process by many countries who still continue intercountry adoptions with non-member countries.⁵³ It shall, however, be noted that for instance United States has made attempts to help Guatemala to comply with the provisions of the Convention, yet it has also taken a stance that it will also consider the banning of adoptions if the progress is not satisfactory.⁵⁴ Indeed, the current way how the accession and implementation process is handled by the member countries, together with a strong lack of support in the implementation process, creates a major disincentive to non-Hague countries, living in a fear of being subjected to an adoption ban if aiming to access to the Convention but failing to fully comply with the Convention which is reality for many countries while for some of them full implementation even being purely unrealistic.⁵⁵ Furthermore, the smooth continuation of non-Hague adoptions shall be seen as encouraging the countries to stay out of the demanding process of enhancing their compliance with the provisions of the Convention.

The task of creating incentives and premises for non-Hague countries is greatly challenging. Since accessing and implementing the Convention can be extremely demanding, as well as it is voluntary, and the resources and facilities of those countries outside of it at the moment set real challenges and limits to what extent a compliance with the Convention is even a realistic scenario, one cannot see it as a surprise that staying in bilateral agreements with the receiving countries and abiding only by certain rules set by the receiving states⁵⁶ appears still as a tempting option.

⁵² *Ibid.*, p 385

⁵³ *Ibid.*, p.388-389

⁵⁴ *Ibid.*, p.392

⁵⁵ *Ibid.*, p.389

⁵⁶ *Ibid.*, p.389

However, as the first suggestion, the situation has its opportunities as the receiving states possess significant power over the system of non-Hague adoptions by having the opportunity to completely freeze them. As it has been seen, receiving states have shown initiative to direct non-Hague countries towards compliance with certain guidelines having similar content with the Hague Convention, yet the guidelines have no binding status.⁵⁷ It brings significant optimism on the opportunity to enhance the co-operation in non-Hague adoptions and reform their rules, as a first and easier step towards better compliance with the Convention, as long as the implementation process of the Convention remains unrealistic for many.

Secondly, and perhaps even more importantly, the economic and technical side of the difficult issue shall be given great attention. As it has been said rather bluntly, yet seemingly justly, “the Hague Convention will never be broadly ratified and properly implemented unless there is a global fund to assist in the creation of national adoption departments or official agencies”⁵⁸. Therefore, the second idea, brought up by some but devoid of more precise consideration, which shall be evaluated is an international agency functioning as an actor facilitating the compliance with the Hague provisions by providing significant assistance in the implementation process, thus creating an incentive for non-Hague countries to access to the Convention and commence the implementation process. It appears that such capacity building actions are essential if the objective of increased accessions to the Convention shall be reached.

In essence, these suggestions fundamentally aim to address the crucial issues of economic and administrative weaknesses of the sending countries, as well as they aim to incentivize compliance with the Hague provisions by enhancing the co-operation between states in the non-Hague adoptions.

⁵⁷ *Ibid.*, p. 389

⁵⁸ Dillon, S. (2003). 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. *Boston University International Law Journal*, 21(2), 255

4.2 Enhanced co-operation in non-Hague adoptions

The Hague Convention has, indeed, proven for many non-Hague countries to be extremely challenging to be implemented properly. As mentioned, the current situation shall not be seen as an optimal for non-Hague countries in terms of their much hoped compliance with the provisions of the Convention. From the possible means to incentivize the increase in compliance with the provisions of the Convention, the enhanced system of co-operation in non-Hague adoptions has a number of benefits likely improving the current situation.

In general, promoting co-operation between parties has been seen as an effective tool to reach a greater level of mutual understanding and commitment to certain goals, in terms of both will and capability to fully participate in certain process. As an example of an adverse effect, regarding a ratification of international trade treaties, it has been stated that a low participation in drafting and shaping of the rules has a clear connection with a low compliance with those rules, especially in cases of developing countries.⁵⁹ It shall be brought up as a fairly interesting anecdote, providing perhaps additional understanding on the roots of the issue, that during the time the Hague Conference on Private International Law was drafting the Hague Adoption Convention in 1993 the Conference had only 38 parties to it, consisting mostly of countries of only the European Community and EFTA.⁶⁰ It has been seen in several conflicts and issues relating to voluntary adhesion to certain rules, that an opportunity to affect what rules and provisions are binding yourself have a substantial effect on the willingness and commitment to comply with them and improve them further.⁶¹

There already exists a certain level of co-operation between receiving Hague countries and sending non-Hague countries in a form of bilateral agreements that have been negotiated and concluded between the states, yet those agreements notoriously are not obligated by international

⁵⁹ Vittori, M. (2006). Enhancing the Participation of Developing Economies in the Multilateral Trade Treaties' Rule-Making and Accession Process: The UNCTAD/WTO ITC Approach. *Uniform Law Review*, 11(1), p 157.

⁶⁰ Pfund, P. H. (1993), *supra* note 4, p 6-7.

⁶¹ Heffes, E., & Kotlik, M. D. (2014). Special agreements as a means of enhancing compliance with IHL in non-international armed conflicts: An inquiry into the governing legal regime. *International Review of the Red Cross*, 96(895/896), p 1199-1201.

law to pay any respect to the provisions of the Hague Convention, and in their current form pose a serious risk to the best interest of the child. However, by forming and amending bilateral agreements to include procedural rules functioning in accordance with the provisions of the Convention, a state may take a significant step towards compliance with the Convention and, hence, the future accession⁶².

As the only rules the non-Hague sending countries have to comply with are the standards the receiving country has placed⁶³, the enhanced co-operation shall be based on the state parties' more responsible approach to non-Hague adoptions, by recognizing their position as a pressing power aiming to steer the content of the bilateral agreements towards the content of the Convention. Perhaps the most illustrative example is the poor results of the Guide to Good Practice by The Hague Conference that has stated that "it is generally accepted that State Parties to the Convention should extend the application of its principles to non-Convention adoptions", yet in reality the practical effect of the recommendation has been weak since bilateral agreements are largely devoid of increased compliance with the Convention principles⁶⁴. Despite the full application of all principles of the Convention in bilateral agreements would be largely an unrealistic attempt, due to reasons regarded earlier, one shall state that as long as receiving countries place guidelines and other principles following the Convention only as non-binding recommendations instead of integrating them even in a promising extent to bilateral agreements, the current situation of under-regulated intercountry adoptions does not change.

Indeed, the enhanced co-operation incentivizing compliance with the provisions of the Convention shall be based on a new and more powerful approach by the receiving states and on a greater involvement of the sending non-Hague countries in the process of negotiating their obligations and standards to be followed. The disturbances and challenges in the developing countries create a huge obstacle on a proper implementation of the Convention, rendering

⁶² *Commission Concerning Bilateral Agreements on Intercountry Adoption - Report to the Government*(p. 31, Rep. No. 1.1.1:485/14). (2015). Stockholm: Myndigheten för internationella adoptionsfrågor.

<http://www.mfof.se/Documents/remissvar-och-rapporter/report-concerning-bilateral-agreements-adoption.pdf>

⁶³ Schmit (2008), *supra* note 33, p 389

⁶⁴ Smolin, D. M. (2013). The Corrupting Influence of the United States on a Vulnerable Intercountry Adoption System: A Guide for Stakeholders, Hague and Non-Hague Nations, NGOs, and Concerned Parties. *Utah Law Review*, 81(4), p 124.

accession process of it largely unattractive. However, the great number of developing countries aiming to access and implement the Convention can be seen as an indicator that there exists a real willingness to adhere with an advanced adoption regulation. Therefore, increased level of involvement of the sending countries on shaping and negotiating the content of the bilateral agreements can be seen as a step towards greater compliance with the provisions of the Convention. As it is a largely accepted view, a major factor hindering the will of the non-Hague countries to access the Convention is a fear of being subjected to a ban when facing inherent troubles in the implementation process⁶⁵. Since a straightforward accession of the Convention may be a too challenging process for many, creating a system where the receiving state may provide assistance, for instance by sharing knowledge and technical experience when it comes to the implementation process, for the sending country to comply with the provisions of the Convention may turn out as an effective way to incentivize the commitment to adhere with the principles of the Convention. Ideally, the receiving country could in exchange adhere to certain provisions of the Convention by accepting them as a part of the bilateral adoption agreement. Hence, the incentive to reach for a greater compliance would be significantly greater, since the adherence to new provisions and principles could be conducted in a pace, and starting from the provisions, suitable for the developing sending state, without an immediate fear of being subjected to a ban. It has to be noted, however, that the role of the receiving country is extremely crucial in order to create an efficient system of co-operation that serves the purposes of increased compliance with the Convention provisions. Despite the opportunity provided to the sending country to have more space to negotiate about its obligations and steps towards the principles of the Convention, the receiving Hague country has to find a fair level of pressure to be put on the sending country, in terms of ensuring a sufficient ambitiousness towards a full compliance eventually, since it has as a receiving state a better position to control the situation.⁶⁶

4.3 Global agency providing assistance in the implementation of the Hague Convention

⁶⁵ Schmit (2008), *supra* note 33, p 388, 394-395

⁶⁶ *Ibid*, p.385

In cases of developing countries, the implementation of international treaties has proven greatly challenging regardless the subject of the treaty since the accession often places countries under certain legal obligations which are extremely demanding for such countries battling with the much talked about economic and administrative challenges or even crises.⁶⁷ For instance, requirements of making significant changes in domestic law or creating new authorities such as the obligation under the Hague Convention to establish a new central authority⁶⁸ are conditions that pose serious challenges for several countries. Since a great number of non-Hague countries are amidst such challenges and disturbances, one shall state that the most essential method to actually incentivize the accession of the Convention for such countries and, thus, enhance the compliance with the provisions of the Convention is significant capacity building support in a form of an actor or system providing the countries with real and effective assistance in respect of the obstacles in the implementation process, whether they are financial, administrative, or other issues.

In terms of concrete opportunities to improve the current undesirable situation, it has been argued that a global agency with a high level of expertise shall be established to assist the countries accessing to the Convention by building capacity. As an anecdote, to ensure a functionality and realism in the prominent idea as such, one shall state that the Hague Conference shall take the leading role and establish the agency under its authority. While the function of the agency would be also to supervise the compliance with the Convention, it shall especially provide assistance in the challenging implementation process. The assistance can be of a nature of supporting in the structural issues in the implementation process such sharing crucial knowledge and creating, for instance, road maps or other blueprints how the process could be concluded in each particular state, yet perhaps the key relevance lies on the financial side of the issue since it has been stated “the Hague Convention will never be broadly ratified and properly implemented unless there is a global fund to assist in the creation of national adoption departments or official agencies”⁶⁹. Indeed, the idea of a whole new agency with the mission of enhancing compliance with provisions by facilitating countries’ implementation⁷⁰

⁶⁷ Vittori (2006), *supra* note 59, p 157.

⁶⁸ Ratcliff (2010), *supra* note 15, p 354-355

⁶⁹ Dillon (2003), *supra* note 58, p 254

⁷⁰ *Ibid.*, p 254-255

through financing and high expertise consultation appears to be an extremely potential opportunity, yet it shall be analyzed further here.

At first, one shall agree that a demand for an actor such as specialized agency is real since the Convention has not been able to provide a sufficient level of assistance to countries implementing it. It appears clear that nearly all of the traditional receiving countries as well as a number of sending countries have been able to swimmingly implement the Convention and adapt their national legislation to the provision of the Convention, but a great number of developing countries aiming to access and implement the Convention have faced serious and sometimes decisive problems preventing them to fully comply with its provisions, much due to the fact that the Convention provides insufficient help and guidance to the countries whose infrastructure and financial state have not been capable of conducting a proper implementation such as creating the required and properly functioning central authority.⁷¹ One cannot take any stance contrary to the statement that in order to incentivize the accession to the Convention the approach from the Hague Convention and Conference cannot be anymore to let the developing states as new arrivals to fight the difficulties alone and under the threat of an adoption ban if failing to comply with the Convention, but to create an efficient system of support. In respect of creating that solid system of support and assistance, an international agency has its evident potential.

4.3.1 Financial assistance

As to the content of its activities and responsibilities, incorporating a scheme for financial assistance shall be seen as one of the most promising and needed tools of the proposed specialized agency to facilitate the implementation of the Conventions. As it has been argued also in the debate regarding the adherence of developing countries to multilateral trade treaties, in order to enhance the compliance with a treaty that requires significant steps in e.g. changing national law, creating new authorities or training public officials, donors have been strongly encouraged to get involved and assist in those processes by providing financial assistance.⁷² It is not the purpose to argue in favour of a system of financial assistance based on the donations of the private donors but to illustrate how the financial challenges and obstacles of developing

⁷¹ Pfund (1994), *supra* note 17, 74-75

⁷² Vittori (2006), *supra* note 59, p 156-157

countries in their attempts to implement multilateral treaties and conventions are widely acknowledged and prevailing problems in all cases where developing countries aim to a considerable compliance with a demanding set of rules. Therefore, it is reasonable to argue that an agency with an administrative authority on financial aid is much needed and it would provide a significant leap towards more successful implementation of the Convention since crucial financial challenges are reality for many non-Hague countries.

In respect of the practical execution of the assisting financial measures, the mechanism created in Montreal Protocol, a greatly successful global environmental agreement and a protocol aiming to fight the climate change by creating a policy which reduces emissions of hydrofluorocarbon⁷³, has features extremely relevant regarding the suggested financing mechanism on facilitating the Hague implementation. In particular, the protocol has established a system of multilateral fund which assists developing countries struggling with their obligations on reaching the objectives of the protocol, namely reducing the emissions in question. The fund is controlled and operated by the Executive Committee of the Fund who makes the decisions concerning the administration and disbursements of the fund.⁷⁴ Despite the areas of application are completely different, the challenges a widespread implementation of the Convention and the Protocol are facing are similar, as well as the protocol has already from its start realized better that despite a need for certain control of non-compliance, the system shall be based on strongly promoting and enhancing the compliance rather than strictly penalizing the non-compliance⁷⁵ of poor countries genuinely willing to reach the objects⁷⁶. Therefore, to facilitate a proper implementation of the Hague Convention a financing mechanism strongly influenced by the multilateral fund incorporated in the extremely successful Montreal Protocol has great potential to be the cornerstone of the scheme in a need for financial mechanism. In respect of financing the fund, despite forming a proposal for a complete practical solution would be a question and research of its own, the most realistic system that has been brought up as a suggestion and one shall reasonably agree on has surely been the idea that a certain slice from the fees generated from the

⁷³ Kennedy, V. (2012). The Montreal Protocol: Fit for Hydrofluorcarbos. *Sustainable Development Law & Policy*, 12(2), p 25.

⁷⁴ Montreal Protocol: Financing the Implementation. (1992). *Environmental Policy and Law*, 22(5), p 315-316.

⁷⁵ Koester, V., & Young, T. (2007). Compliance with Environmental Conventions. *Environmental Policy and Law*, 37(5), p 399-340.

⁷⁶ Usuki, T. (2000). Measures to Ensure Compliance with the Montreal Ozone Protocol - New Institutionalized Reaction to Non-Compliance. *Japanese Annual of International Law*, 43, p 22.

Hague adoptions would be directed to countries in a need for assistance in the implementation process,⁷⁷ yet one shall agree that there certainly also remains a desire for strong financing measures, as an alternative source of funding, by the wealthiest receiving countries.

4.3.2 Technical assistance

One shall acknowledge that a lack of finance is one of the more crucial obstacles of a proper implementation of the Convention by developing countries. However, the idea of an agency with a mission to have a radical impact on facilitating the implementation process and, hence, to greatly incentivize the accession to the Convention requires also to address technical issues on the administrative and organizing level of the countries.

As greatly illustrative examples, the infamous cases of Romania and Cambodia point it greatly how, besides the economic challenges, a total failure in implementing the Convention may derive from serious issues in the technical implementation of it⁷⁸. In particular, what happened in Cambodia has the ultimate relevance when it comes to advocating a significant procedural assistance in the implementation. During the late 1990s the government of Cambodia had problems to a large extent in properly creating and enforcing new regulations and amending the existing ones, whether regarding the Hague Convention or completely other subjects. It resulted in an extremely serious situation where the inability of the government to establish, through a new national regulation, a system for handling visa applications involved in the adoption processes gave eventually room for a child-laundering of a historic scale.⁷⁹ Speaking retrospectively, one shall reasonably argue that a proper assistance in reforming the old adoptive system which includes, for instance, the creation of the required central authority and training the needed officials to control, supervise, develop the system of intercountry adoption would have significantly improved the situation, especially during the existence of an agency with real power and expertise to provide effective assistance and implementation plans to be followed.

⁷⁷ Dillon (2003), *supra* note 58, p 211

⁷⁸ Ratcliff (2010), *supra* note 15, p 345

⁷⁹ *Ibid.*, p 346-347

Characterising the most important activities, as in the case of scheme for financial assistance, one can find great similarities between how international environmental treaties have successfully created systems of technical assistance in respect of implementation and how the suggested agency advocating the Hague Convention should participate in the implementation processes. It has, for instance, been included in Rotterdam Convention on Prior Informed Consent that “parties with a more advanced program for regulating chemicals should provide technical assistance, including training, to other Parties in developing their infrastructure and capacity to manage chemicals”⁸⁰. Furthermore, those international treaties on other subjects than intercountry adoption have incorporated several other provisions with a great potential in terms of acting as role models for the activities of the suggested agency. Given the situation in many countries struggling with the provisions of the Convention, activities such monitoring the compliance and providing concrete and precise recommendations assisting the implementation process⁸¹ are of a nature one shall take as necessary functions of the proposed agency.

To be concluded, the need for mentioned procedures, provided by an agency which would be possessing the high level of expertise when it comes to such technical assistance in improving and developing the infrastructure of and creating strategies for the struggling states, seems rather explicit. Much of the non-Hague countries are facing enormous technical challenges, for example when making changes in national legislation or making other plans of actions for the implementation procedure, in implementation process of the Convention. Taking into account the challenging situation of many countries in terms of taking consistent and stable steps towards compliance with the Convention, one shall agree that an actively and effectively functioning assisting agency shall have the capability to have a significant practical impact in the implementation processes of the countries, through certain specified capacity building actions.

⁸⁰ Perrault, A., & Levitt, J. (2005). *USING INTERNATIONAL LAW AND INSTITUTIONS TO PROTECT CHILDREN'S ENVIRONMENTAL HEALTH* (pp. 71-72, Publication). Washington D.C.: Center for International Environmental Law.

⁸¹ *Ibid.*, p 62

CONCLUSION

The first aim of this paper was to research and evaluate whether the ultimate goal of best interests of the child would be achieved the best by prohibiting the member states of the Hague Convention from engaging in intercountry adoptions with countries not parties to the Convention. The underlying idea has been that since an enormous majority of so-called receiving states have already signed and ratified the Convention, while the group of traditional sending states, consisting mostly of poor and developing countries, include a fair number of non-Hague countries still conducting intercountry adoptions with the member states, a prohibition of intercountry adoptions between member and non-member states would intercept the flow of those under-regulated non-Hague adoptions which are potentially and often actually violating the fundamental rights of the child.

The conclusion this paper supports is that a prohibition of non-Hague adoptions ultimately does not serve the best interests of the child. To be concluded, it appears that a prohibition of non-Hague adoptions would, indeed, reach an outcome close to a full stop of non-Hague adoptions, and thus to effect a dramatic decrease in violations towards children involved in the adoption processes. However, although one shall state the ban would ideally also function as the greatest possible incentive to access the convention and comply with its provisions in order to join the flow of intercountry adoptions again, in reality the serious economic, political, and administrative challenges of the non-Hague countries will likely create a large scale obstacle on implementation of the Convention and result in a wide scale stoppage of intercountry adoptions from non-Hague countries. The outcome would surely render a sharp decrease in abusive adoption practices, yet the overall assessment of the best interests of the child suggests only the view that such stoppage will result in a large scale and harmfully long term institutionalization of children in an absolute need for permanent family, hence violating their fundamental rights and best interests more than the current situation associated with the high danger of adoption violations.

Secondly, the paper aimed to answer the question of what methods would be the most relevant on incentivizing the accession to the Hague Convention and enhancing the compliance with its provisions. A key finding was that the crucial reasons hindering the will to aim for an accession to the Convention or for a better compliance with its provisions were the lack of an economic and administrative capacity to properly implement the Convention, a fear of being boycotted by member states when facing inherent difficulties in the implementation process, as well as the unlimited opportunity to smoothly continue non-Hague adoptions with member countries. As it comes to the unrestricted continuation of non-Hague adoptions, this paper suggests that Hague countries shall step up and work towards an enhanced co-operation with non-member states. In particular, it shall be stated that since the Hague countries are having the authority to set up requirements concerning the procedures of non-Hague adoptions that non-Hague countries must comply with, those member states shall through re-negotiation of existing bilateral adoption agreements put a fair level of pressure on non-Hague countries to take considerable step towards greater compliance with the Convention, yet without formally accessing to it. As the improvement on compliance shall be made based on enhanced co-operation, the proposal essentially includes certain reciprocity where the member country gradually sets up stricter standards for the sending country, which in turn has the opportunity to influence upon what provisions it shall be bound by.

In respect of incentivizing the accession to the Convention, the paper presents that providing the countries commencing the implementation process with significant capacity building assistance has the greatest potential on incentivizing the accession to the Convention since it targets the measures straight to the crucial obstacles disincentivizing the accession. In particular, the finding is that economic, political, and administrative disturbances are the obstacles hindering the will to access the most, since issues with those challenges are inherent during the implementation process and may result in an adoption boycott set up by member states. Therefore, it shall be concluded and suggested that the most prominent and effective tool to incentivize accession is to establish a global agency with high level of expertise providing financial and technical assistance on implementation. More particularly, the financial assistance shall be established by creating a multilateral fund under the agency which will allocate the financial aid for countries whose

implementation is strongly dependent on such assistance. In respect of the technical side, it shall be suggested that the assistance must include comprehensive guidance on the implementation process itself through various means such as assisting in the improvement of the infrastructure, or creating concrete recommendations and blueprints of action to be followed in the demanding implementation process.

To be summarized, the fundamental theme of the paper was to acknowledge the immense opportunity that a widespread adherence to the Hague Convention provides in protection of the fundamental rights of the children involved in the intercountry adoptions, and how the best interests of the child could be achieved through it. As the presented results on the research questions show, to protect the best interests of the child, any action resulting in a full stoppage of adoptions from the developing non-Hague countries shall not be conducted. However, the development and change in intercountry adoption standards the Hague Convention has effected and achieved requires strong supportive and incentivizing actions increasing the global compliance with it. Especially the findings and discussion on capacity building and implementation assistance provide also a real opportunity for a further research. Since it is evident that for many non-Hague countries a proper adherence to legal obligations set up by the Convention is impossible, a further and more precise study about the optimal assistance helping to comply with the provisions of the Convention has great promise to cultivate the debate.

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