

# Preventing and Addressing Illicit Practices in Intercountry Adoption

Fact Sheet No 3 for the 2015 Special Commission meeting

For discussion on Friday 12 June 2015

## Background

The safeguards in the 1993 Hague Convention (“1993 HC”) help to prevent illicit practices. Unfortunately, due to challenges in implementing the 1993 HC, and the fact that many States are not yet a Party to it, there have continued to be serious instances of illicit practices during the last twenty years.

States can do more to identify, prevent and respond to illicit practices. Appropriate responses to illicit practices are of the utmost importance in creating a stable and safe intercountry adoption (ICA) system.

The significance of the problem was recognised by the 2010 Special Commission, which devoted a day<sup>1</sup> to this topic. These discussions will be continued during the 2015 Special Commission in order to try to identify the appropriate next steps which might be taken to prevent and address illicit practices more effectively.

## What are the objectives?



Ensure that ICA takes place in the best interests of children and with respect for their rights



Promote the effective application of the subsidiarity principle in all cases of ICA



Ensure, in determining a child's adoptability, that there is free and informed consent to ICA



Promote co-operation between Contracting States in relation to illicit practices



Provide additional guidance to States on identifying, preventing and responding to illicit practices

## Some key rules and requirements in relation to illicit practices in ICA set out in the 1993 HC include:

- ❖ States are convinced of the necessity to take measures to prevent the abduction, sale of, or traffic in children (Preamble).
- ❖ The objects of the 1993 HC include establishing a system of co-operation amongst Contracting States to ensure that the 1993 HC's safeguards are respected and that abduction, sale of, or traffic in children is prevented (Art.1(b)).
- ❖ Central Authorities shall ensure that proper consents are given and that adoptability is well determined (Arts 4 and 16).
- ❖ Central Authorities shall keep one another informed about the operation of the 1993 HC and, as far as possible, eliminate any obstacles to its application (Art. 7(2)(b)).
- ❖ Central Authorities shall take all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the 1993 HC (Art. 8).
- ❖ No one shall derive improper financial or other gain from an activity related to an intercountry adoption (Art. 32(1)).
- ❖ A competent authority which finds that any provision of the 1993 HC has not been respected or that there is a serious risk that it may not be respected, shall immediately inform the Central Authority of its State. The Central Authority shall be responsible for ensuring that appropriate measures are taken (Art. 33).

## The challenges today

- Recognising the prevalence and seriousness of illicit practices in ICA.
- More effectively preventing illicit practices, including through identifying them and acknowledging why such practices occur (e.g., the strong demand for ICA and undue pressure, the possibility of improper financial gain).
- Addressing specific cases, including by applying appropriate remedies and ensuring accountability.
- Providing appropriate services and support to victims.

- Recognising the vulnerability of biological families and their communities.
- Establishing more active co-operation between States, as well as with NGOs and professionals in the field.
- Creating and implementing standards of practice and procedures when addressing the aftermath of illicit practices.

## What are illicit practices?\*

The term “illicit practice” can refer to any situation in which a child is adopted without respect for the rights of the child or for the safeguards of the 1993 HC. Examples of illicit practices include, e.g.:

- ☒ Improper payments or gifts to family members, intermediaries, officials, or others.<sup>2</sup>
- ☒ Other improper inducements to obtain the consent of the biological parents or family.<sup>3</sup>
- ☒ Fraud, such as misrepresentation of identity and obtaining children from biological families through false representations.<sup>4</sup>
- ☒ Forgery / falsification of documents.<sup>5</sup>
- ☒ Child laundering, whereby children are obtained illicitly by force, fraud, or funds, false documents of adoptability are created, and the child is then processed for ICA.<sup>6</sup>
- ☒ Bypassing the matching system.<sup>7</sup>
- ☒ Bypassing the ICA process,<sup>8</sup> e.g., by removing a child from the State of origin through guardianship arrangements<sup>9</sup> or other means.<sup>10</sup>
- ☒ Abduction of children for the purpose of ICA.<sup>11</sup>
- ☒ Directing children to ICA without regard to appropriate domestic solutions.<sup>12</sup>

\*The definition used in the 2012 “Discussion Paper on Co-operation between Central Authorities to develop a common approach to preventing and addressing illicit practices in intercountry adoption cases” was as follows:

*“[T]he term ‘illicit practices’ refers to situations where a child has been adopted without respect for the rights of the child or for the safeguards of the Hague Convention. Such situations may arise where an individual or body has, directly or indirectly, misrepresented information to the biological parents, falsified documents about the child’s origins, engaged in the abduction, sale or trafficking of a child for the purpose of intercountry adoption, or otherwise used fraudulent methods to facilitate an adoption, regardless of the benefit obtained (financial gain or other).”*

## The costs of failing to respond adequately to illicit practices

- ☒ Illicit practices can result in children being unnecessarily taken away from their families and / or being unnecessarily drawn into institutional care.
- ☒ Illicit practices often inflict lasting and profound harm on the persons, especially the children, involved.
- ☒ Illicit practices imperil ICA in many different ways. For example, they undermine the necessary trust between States, trust which the 1993 HC seeks to

establish through a system of co-operation and safeguards.<sup>13</sup>

- ☒ When the system does not provide adequate investigatory, regulatory and penal responses to illicit practices, it can lead to moratoria and shutdowns. In addition, the threat of illicit practices causes States to prohibit or severely limit ICA.
- ☒ When there are no consequences, there is no deterrence and rules become ineffective; impunity leads to further violations.
- ☒ It is difficult to improve existing preventive measures without information from thorough investigations of illicit practices.

## Obstacles to responding to illicit practices

- ☒ The lack of resources and sometimes political will to confront, investigate and respond to illicit practices.
- ☒ Fears that investigation may lead to children being returned to the State of origin.
- ☒ Fears that investigation may jeopardise ICA relations between States.
- ☒ Failure to fully acknowledge and implement the co-responsibility of States to prevent and address illicit practices.
- ☒ The power imbalance which may exist in ICA and, in particular, the difficulty for biological families to have their voices heard.

## Ideas for the way forward

### 1. Preventing illicit practices

#### Having effective laws in place and implementing them

WAY FORWARD:

- ✓ Adopt laws (both specific to adoption<sup>14</sup> and broader<sup>15</sup>) addressing the protection of children, the sale of children, child laundering, and child trafficking.
- ✓ Monitor and enforce compliance with those laws (e.g., this might take place through Central Authorities,<sup>16</sup> other authorities<sup>17</sup> and the judicial process<sup>18</sup>).
- ✓ Establish penalties, including fines or imprisonment,<sup>19</sup> as well as suspension or revocation of the accreditation of adoption bodies or persons (AAB)<sup>20</sup> or their dissolution.<sup>21</sup>
- ✓ Prohibit private and independent adoptions.<sup>22</sup>

#### Adopting effective safeguards

WAY FORWARD:

- ✓ Ensure that proper consents are given and that the child has been determined to be adoptable as established by the 1993 HC and internal legislation.

- ✓ Properly verify the identity of persons taking part in the adoption procedure.
- ✓ Properly scrutinise the documentation.
- ✓ More effectively screen<sup>23</sup> and train<sup>24</sup> prospective adoptive parents (PAPs).
- ✓ Effectively regulate (accreditation and authorisation) and supervise adoption accredited bodies (AABs).<sup>25</sup>
- ✓ Ensure transparency and accountability regarding costs.
- ✓ Ensure transparency and professionalism in relation to the matching process.
- ✓ Control the use of guardianship arrangements, and other measures, so that they are not used to circumvent the ICA process.<sup>26</sup>
- ✓ Properly apply the subsidiarity principle.
- ✓ Co-operate more closely with other States.<sup>27</sup>
- ✓ Open an ICA programme only if satisfied that the partner country has appropriate safeguards<sup>28</sup> and regularly review programmes to ensure ongoing compliance with the 1993 HC.<sup>29</sup>
- ✓ Apply the standards and safeguards of the 1993 HC to ICA arrangements with non-Contracting States.<sup>30</sup>
- ✓ Work co-operatively with concerned NGOs, experts and professionals.

## 2. Responding to illicit practices

### More effective co-operation between States in responding to illicit practices

#### WAY FORWARD:

- ✓ Ensure that the governments in *both* States (receiving State and State of origin) are able to identify illicit practices when they occur and that systems are in place such that these practices are brought to their attention.
- ✓ Encourage other actors in the ICA process to report information about illicit practices to governments.
- ✓ Ensure that the governments in *both* States have the political will and capacity to co-operate, investigate and respond to illicit practices.

### Taking effective action when illicit practices occur

#### WAY FORWARD:

Where appropriate, taking into account, among other things, the seriousness of the illicit activity and the stage of the adoption process which has been reached:

- ✓ Consider, if the adoption process is ongoing, whether it should be halted.<sup>31</sup>
- ✓ If the adoption decision has already been issued, consider whether to refuse to recognise the adoption.<sup>32</sup> However, non-recognition of the adoption would be an extreme sanction for very exceptional cases, for example, where there has been a violation of fundamental rights of the natural family.<sup>33</sup>

- ✓ Report the matter to the appropriate authorities for investigation and possible prosecution.<sup>34</sup>
- ✓ Impose new restrictions on accredited bodies,<sup>35</sup> requiring that they take corrective actions,<sup>36</sup> or consider the suspension or revocation of the accreditation of such bodies.<sup>37</sup>
- ✓ Restrict, suspend or close country programmes.<sup>38</sup>
- ✓ Provide services and supportive programmes to victims.
- ✓ Change ICA processes in response to the vulnerabilities revealed through discovery and investigation of illicit practices.

## The Working Group on Preventing and Addressing Illicit Practices

The Special Commission may wish to discuss:

### 1. The continuation of this Working Group

The Working Group on Preventing and Addressing Illicit Practices was established after the 2010 Special Commission meeting. Since then it has published a Discussion Paper on this issue (see below, further reading).

If the Special Commission decides that the work of this Group should continue:

- The United States of America has offered to co-ordinate the work of the Group.
- New members should be sought to expand and diversify the membership of the Group.

### 2. Possible work for the Group

If the Special Commission agrees that the work of this Group should continue, the Group may work on:

- a) Establishing a mechanism for a more robust and regular exchange of information between States on illicit practices, including consideration of how best to share that information with stakeholders and the public.
- b) Encouraging relevant actors in the ICA system to regularly seek and distribute specific information on trends in illicit practices, with the assistance, as relevant, of NGOs and professionals.
- c) Addressing the needs of victims, and the provision of appropriate services and support to them, including through recognition, research and training.
- d) Developing guidelines on responding to illicit practices when they occur:
  - Discussing past responses to illicit practices, both individual cases and also more general patterns.
  - Developing tools such as procedures, guidelines and models for responding to illicit practices, regarding both specific individual cases and more general patterns.

## Questions for participants to consider in preparation for the Special Commission meeting

In light of the above, participants are kindly requested to consider the following questions for discussion during the Special Commission meeting:

### Challenges & good practices

- What new challenges has your State experienced in recent years in relation to illicit practices and what good practices have been developed?
- In preventing illicit practices, what are the most important safeguards and practices?
- In what practical ways could co-operation between States regarding illicit practices be improved?

### Further work of the Working Group

- Do you agree with the resumption of the Working Group and its suggested future work?
- Would your State like to be part of the Group?
- What priority should this work be given in relation to other ICA projects?
- Do you have any further / other suggestions?

## Further Reading

*All documents mentioned below are available on the Hague Conference website < [www.hcch.net](http://www.hcch.net) > in the specialised "Intercountry Adoption Section".*

- Discussion Paper: Co-operation between Central Authorities to develop a common approach to preventing and addressing illicit practices in intercountry adoption cases
- Responses of States to Questionnaire No 1 for the 2015 Special Commission: Questions 11 and 12
- Responses of States to Questionnaire No 2 for the 2015 Special Commission: Questions 50, 51 and 52
- Responses of States to the 2014 Country Profiles, Part XI
- Previous Special Commission "Conclusions and Recommendations" from 2000 (No 11), 2005 (No 10 and 19) and 2010 (No 1, 2, 36 and 37)
- 2010 Special Commission Information Documents Nos 1, 2 and 6
- Guide to Good Practice No 1, Chapters 2 and 10
- Guide to Good Practice No 2, Chapter 12

- <sup>1</sup> Professor D.M. Smolin, Harwell G. Davis Professor of Constitutional Law, Cumberland Law School, Samford University, was one of the experts who made a presentation on this issue on that day, and has provided guidance and comments on a draft of this Fact Sheet.
- <sup>2</sup> Questionnaire No 1, Prel. Doc. No 1 of July 2014 (“Q1”), Question 11: Romania and United States of America; Question 12: Ireland and New Zealand; Questionnaire No 2, Prel. Doc. No 2 of October 2014 (“Q2”), Question 50: Canada (Ontario, Quebec).
- <sup>3</sup> Q1, Question 12: Moldova, South Africa and Spain; Q2, Question 50: Denmark.
- <sup>4</sup> Q1, Question 12: South Africa and Spain.
- <sup>5</sup> Q1, Question 12: Viet Nam.
- <sup>6</sup> See D.M. Smolin, “Abduction, sale and traffic in children in the context of intercountry adoption”, Info. Doc. No 1, for the attention of the Third Meeting of the Special Commission on the practical operation of the 1993 HC, 2010, p. 5.
- <sup>7</sup> Q1, Question 12: Ireland, South Africa and Spain.
- <sup>8</sup> Q2, Question 50: Belgium and Republic of Korea.
- <sup>9</sup> Q1, Question 12: South Africa; Q2, Question 50: Dominican Republic.
- <sup>10</sup> Q2, Question 50: Andorra, Chile, France, Netherlands, New Zealand and Philippines.
- <sup>11</sup> J.H.A. van Loon, Report on intercountry adoption, Prel. Doc. No 1 of April 1990, in Hague Conference on Private International Law, *Proceedings of the Seventeenth Session* (1993), Tome II, *Adoption – co-operation*, The Hague, SDU, 1994, p. 51, which states that there have been “many reports of outright abductions of children”. See also, D.M. Smolin, “Child Laundering”, 52 *Wayne Law Review* 113, 2006; and E. Siegal, *Finding Fernanda*, Cathexis Press, 2011.
- <sup>12</sup> Regarding domestic solutions, see International Social Service, Fact Sheet No 35, “The Principle of Subsidiarity”, April 2007.
- <sup>13</sup> J.H.A. van Loon, “Statement on the occasion of the deposit of the instrument of ratification of the 1993 HC by the United States of America” (12 Dec. 2007), reported in Info Doc. No 1, *supra*, note 6, p. 8.
- <sup>14</sup> For example, 2014 Country Profile for States of origin (“2014 CP SO”), Question 37 a): Haiti and Moldova; 2014 Country Profile for receiving States (“2014 CP RS”), Question 33 a): Australia and Denmark; Q1, Question 11: New Zealand and Spain.
- <sup>15</sup> For example, 2014 CP SO, Question 37 a): China and Dominican Republic; 2014 CP RS, Question 33 a): Canada and Luxembourg; Q1, Question 11: Haiti and Mexico.
- <sup>16</sup> For example, 2014 CP SO, Question 37 b): Haiti and Mexico; 2014 CP RS, Question 33 b): Australia and Ireland.
- <sup>17</sup> For example, 2014 CP SO, Question 37 b): Lithuania and Romania; 2014 CP RS, Question 33 b): China (Macao SAR) and Netherlands.
- <sup>18</sup> For example, 2014 CP SO, Question 37 b): Colombia and Togo; 2014 CP RS, Question 33 b): Luxembourg and Switzerland.
- <sup>19</sup> For example, 2014 CP SO, Question 37 c): Albania and Guatemala; 2014 CP RS, Question 33 c): Belgium and China (Macao SAR).
- <sup>20</sup> For example, 2014 CP SO, Question 37 c): Ecuador and Moldova; 2014 CP RS, Question 33 c): Denmark, Sweden and United States of America.
- <sup>21</sup> 2014 CP SO, Question 37 c): China (Macao SAR) and Romania.
- <sup>22</sup> 2014 CP SO, Question 38: Albania, Bulgaria, Cape Verde, Chile, China (Hong Kong SAR), China (Macao SAR), China, Colombia, Dominican Republic, Ecuador, Guatemala, Haiti, Latvia, Lesotho, Lithuania, Madagascar, Moldova, Panama, Philippines, Romania, Slovakia and Togo; 2014 CP RS, Question 34: Australia, Belgium, China (Hong Kong SAR), China (Macao SAR), Dominican Republic, Finland, Ireland, Luxembourg, Norway, Panama, Sweden, Switzerland and United Kingdom (Scotland). Some States permit private or independent adoptions but impose restrictions on them or allow them only in certain cases (2014 CP SO, Question 38: United States of America and Viet Nam; 2014 CP RS, Question 34: Germany, Netherlands and United States of America). See also Guide to Good Practice No 1, Chapter 10.1.1.6, paras 626-627.
- <sup>23</sup> Q1, Question 11: Peru.
- <sup>24</sup> Q1, Question 11: Belgium.
- <sup>25</sup> Q1, Question 11: Mexico and United States of America; Q2, Question 51: Canada (Ontario, Quebec). See also Guide to Good Practice No 1, Chapter 10.1.1.2, paras. 620-621.
- <sup>26</sup> Q1, Question 11: South Africa.
- <sup>27</sup> Q1, Question 11: Dominican Republic; Q1, Question 12: United States of America; Q2, Question 51: Albania, Canada (Ontario, Quebec), Chile, Monaco, Netherlands, New Zealand, Peru, Philippines and Romania. See also the 2012 Discussion Paper on “Co-operation between Central Authorities to develop a common approach to preventing and addressing illicit practices in intercountry adoption cases” prepared by the Australian Government.

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- <sup>28</sup> 2014 CP SO, Question 36: Slovakia; Q1, Question 11: Australia; Q2, Question 52: Andorra. See also the restricted list of countries maintained by Scottish authorities (Q2, Question 52: United Kingdom (Scotland)).
- <sup>29</sup> Q1, Question 11: Australia.
- <sup>30</sup> Conclusions and Recommendations of the 2010 Special Commission on the Practical Operation of the 1993 HC, No 36; Conclusions and Recommendations of the 2005 Special Commission on the Practical Operation of the 1993 HC, No 19; Conclusions and Recommendations of the 2000 Special Commission on the Practical Operation of the 1993 HC, No 11.
- <sup>31</sup> 2014 CP SO, Question 36: Albania; 2014 CP RS, Question 32: Canada, Dominican Republic, Germany, Monaco and Panama.
- <sup>32</sup> 2014 CP RS, Question 32: Belgium, Canada, Germany and Ireland.
- <sup>33</sup> Guide to Good Practice No 1, Chapter 8.7.1, para. 529.

- <sup>34</sup> 2014 CP SO, Question 36: China, Colombia, Haiti, Latvia, Lithuania, Mexico, Moldova, Panama, Philippines and Romania; 2014 CP RS, Question 32: Australia, Belgium, Canada, Dominican Republic, Greece, Luxembourg, Mexico, Netherlands, Slovenia and United Kingdom (Scotland); Q1, Question 12: United States of America; Q2, Question 50: Germany.
- <sup>35</sup> 2014 CP RS, Question 32: Canada.
- <sup>36</sup> 2014 CP SO, Question 36 and 2014 CP RS, Question 32: United States of America.
- <sup>37</sup> 2014 CP RS, Question 32: Canada, Denmark, Norway, Panama and Sweden; 2014 CP SO, Question 36: Ecuador; Q1, Question 11: United States of America.
- <sup>38</sup> 2014 CP RS, Question 32: Australia and Canada; Q1, Question 11: France and Spain; Q1, Question 12: United States of America; Q2, Question 51: Germany; Q2, Question 52: New Zealand, Norway, Romania and Spain.