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**ABDUCTION, SALE AND TRAFFIC IN CHILDREN
IN THE CONTEXT OF INTERCOUNTRY ADOPTION**

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Hague Convention of 29 May 1993 on Protection of Children and
Co-operation in Respect of Intercountry Adoption*

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I. Introduction: Recommendations for Effective Implementation of The Hague Convention on Intercountry Adoption in the Context of Contemporary Challenges

There can be little doubt that the Hague Convention on Intercountry Adoption¹ was created out of a set of positive ideals. The Treaty responds to the call, in Article 21 of the Convention on the Rights of the Child (CRC), for concluding “multilateral arrangements or agreements” that promote the objectives of the CRC’s adoption article.² Like the CRC, the Hague Convention accepts intercountry adoption as an ethical practice that may further the best interests of the child by providing a family environment for children.³ Like the CRC, the Hague Convention seeks to safeguard the ethical practice of intercountry adoption through the embrace of the subsidiarity principle, under which appropriate options for the child within her nation of origin take precedence.⁴ Like the CRC, the Hague Convention was concerned to avoid profiteering and abusive practices in intercountry adoptions.⁵

This background paper answers a call to address the most serious abuse of intercountry adoption, the “abduction, sale of, or traffic in children.”⁶ There is a danger that a paper that focuses attention on such unethical and destructive practices would be perceived as an unnecessarily negative commentary on either intercountry adoption, or the Hague Convention on Intercountry Adoption. Indeed, some have taken the position that the best way to promote or protect intercountry adoption is to minimize discussion of such negative practices.

This paper is based on the insight, embodied within the Convention itself, that the best way to develop intercountry adoption as an ethical child welfare practice is to safeguard it against abusive practices, particularly including the abduction, sale of, or traffic in children.⁷ Further, the only way to effectively safeguard intercountry adoption against abusive practices is to carefully analyze those abusive practices. The development of an ethical intercountry adoption, like that of any other complex international system, is subject to severe challenges. Failing to acknowledge and analyze those challenges is a prescription for defeat. Facing those challenges directly, with clear analysis, is the only way to implement effective safeguards that will positively develop the intercountry adoption system.

One of the challenging contexts in the current intercountry adoption system are the declining numbers of intercountry adoption. Unfortunately some blame the Hague Convention for unnecessarily diminishing the numbers of intercountry adoption by encouraging onerous regulations that create arbitrary obstacles to intercountry adoption. This background paper is based on the contrary view, that the real danger to the intercountry adoption system arises from inadequate implementation of the Hague Convention, leaving the system unduly

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¹Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1138 [hereinafter Hague Convention].

²Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 at art. 21(e) [hereinafter CRC].

³See Hague Convention, *supra* note 1; CRC, *supra* note 2, at art. 21(b).

⁴See Hague Convention, *supra* note 1; CRC, *supra* note 2, at art. 21(b).

⁵See Hague Convention, *supra* note 1, at art 1, 32; CRC, *supra* note 2, at art. 21(d).

⁶See Hague Convention, *supra* note 1, at art 1(b); see also CRC, *supra* note 2, at art 35.

⁷See Hague Convention, *supra* note 1, at art. 1.

exposed to abusive practices. It is those abusive practices, and the reaction against intercountry adoption produced by those abuses, that most endangers the future of intercountry adoption. De-regulating intercountry adoption through abandonment of the Hague Convention would only deepen the crisis in intercountry adoption, by leaving the system even more open to abusive practices. The path toward the ideal of an ethical, orderly, and sustainable intercountry adoption system therefore involves an increasingly effective implementation of the Convention.

The Hague Convention on Intercountry Adoption, like any multilateral Convention created out of diplomatic negotiations, is an imperfect instrument reflecting necessary compromises. Nonetheless, the Convention provides mechanisms for creating international cooperation, accountability, safeguards, and order, which are necessary requisites for the ethical practice of intercountry adoption. Thus, although this paper sometimes analyzes omissions or imperfections in the Convention, the Convention itself constitutes the best opportunity available for developing an orderly and ethical intercountry adoption system. The mere creation of the Convention, however, cannot in itself create an orderly and ethical intercountry adoption. As a practical matter, the success of the Convention is dependent on the actions of national governments in effectively implementing its norms, ideals, procedures, and safeguards.

This background paper is based on substantial evidence that inadequate implementation of the Convention poses severe challenges to the development of an ethical and orderly intercountry adoption system. Some of those challenges relate to the question of ratification, as many nations significantly involved in intercountry adoption delayed ratification for many years, or remain today still outside of the Hague Convention. Many of the challenges relate to a cycle of abuse in which receiving nations and adoption agencies open up new nations as substantial sending countries too quickly, outside the context of the Hague Convention, and with inadequate safeguards against abuse. This cycle produces a rapid increase in numbers in newly opened sending nations, followed in due course by abusive practices, scandals, moratoriums, and closures. In response, yet another set of nations are opened up to intercountry adoption, and the cycle repeats itself once again.⁸ A significant part of the problem occurs because Hague receiving nations choose not to apply Hague standards to adoptions from non-Hague sending nations. Finally, even in Hague adoptions officially processed under Hague procedures, abusive practices have continued through clearly inadequate implementation of basic norms of the Convention.

The challenge posed by this background paper, therefore, is to provide clear analysis of the specific problem of the abduction, sale of, and traffic in children, in the context of intercountry adoption, while providing clear recommendations as to how effective implementation of the Convention could minimize and eliminate these abusive practices. The hope is that such effective implementation could assist in the development of an intercountry adoption system that meets the high ideals of the Convention.

II. Abduction, Sale of, and Traffic in Children, in the Creation and Final Language of the Hague Convention on Intercountry Adoption

Evaluating the place of child trafficking concerns in the Hague Convention involves a two step-process: evaluation of the language of the Convention itself, and review of materials related to the creation of the Convention. Since the final language of the Convention is the best evidence of the Convention's purposes and concerns, the Convention will be analyzed first. Materials related to the preparation of the Convention will subsequently be explored, as a way of exploring how concerns with child trafficking shaped the work of preparation. The official preparatory materials provided by the Hague Conference on Private International Law are particularly helpful evidence regarding the Convention's creation, although other materials also are relevant.

⁸ See, e.g., David M. Smolin, *Child Laundering*, 52 *Wayne Law Review* 113, 132-135 (2006)(describing cycles of abuse in intercountry adoption system), available online at http://works.bepress.com/david_smolin/.

This analysis uses the term “child laundering” to denote a specialized form of the abduction, sale or, and traffic in children, in the context of adoption. The term child laundering refers to obtaining children illicitly through force, fraud, or funds (financial inducement), creating falsified paperwork that identifies the child as a legitimately abandoned or relinquished “orphan” eligible for adoption, and then placing the child for adoption through the official channels of the intercountry adoption system.

A. Final language

The preamble to the Hague Convention sets out some of the concerns and principles underlying the Convention. These include the following:

1. Children “should grow up in a family environment...”.⁹
2. Nations “should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin”.¹⁰
3. “[I]ntercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin.”¹¹
4. State parties recognize “the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children”.¹²

It is important to recognize that the Hague Convention did not, by its own terms, implement all of these concerns. First, the Convention does not in any way *mandate* that ratifying nations place children in intercountry adoption when no family environment is available for the child within their country of origin. Thus, although the Convention states the principle that children should “grow up in a family environment,” the Convention does not create a right of an institutionalized child to intercountry adoption, in the absence of a domestic adoptive placement.¹³ The Convention seeks to facilitate intercountry adoptions by safeguarding them from abusive practices, and by securing recognition in Contracting States of such adoptions;¹⁴ it does not go so far as to require that Contracting States send their children in intercountry adoption in any particular circumstance.¹⁵

Similarly, although the preamble recognizes that the first priority of nations should be “appropriate measures to enable the child to remain in the care of his or her family of origin,” the Convention itself does not explicitly require such efforts to be made as a condition precedent to intercountry adoption.¹⁶ Thus, the Convention’s operational terms never mention family preservation efforts. The Convention does require that birth parents consenting to an adoption be “counseled as may be appropriate and duly informed of the effects of their consents;”¹⁷ in addition, consents cannot be “induced by payment or compensation of any kind.”¹⁸ While such standards are necessary to prevent consents from being induced by fraud or misunderstanding, and to prevent baby buying, they fall well short of requiring any kind of active efforts to preserve the family. The Convention’s omission of an explicit requirement of family preservation efforts contrasts with the law governing the foster care system within the United States, which generally requires reasonable efforts to maintain a child with their families before removal, and reasonable efforts to re-unite the foster child

⁹ See Hague Convention, *supra* note 1.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ See Sara Dillon, The Missing Link: A Social Orphan Protocol to the United Nations Convention on the Rights of the Child, *Human Rights and Globalization L Rev*, Fall/Spring 2008 39, at 79.

¹⁴ See, .e.g. Hague Convention, art. 1; see also *infra* notes and accompanying text.

¹⁵ See Hague Conference on Private International Law, The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention, Guide to Good Practice, Guide No. 1 (2008), at pg. 100, 102 [hereinafter cited as Hague Good Practice Guide].

¹⁶ Hague Convention, *supra* note 1, at preamble.

¹⁷ Hague Convention, *supra* note 1, at art 4(c)(1).

¹⁸ Hague Convention, *supra* note 1, at art. 4(c)(3).

with their families prior to termination of parental rights and adoption.¹⁹ I have argued elsewhere that international law, taken as a whole, does not recognize intercountry adoption as an appropriate intervention for extreme poverty, and requires that at least modest financial assistance be offered as an alternative to intercountry adoption.²⁰ It is notable, however, that the operational terms of the Hague Convention omit any specific requirement for family preservation efforts, financial or otherwise, as a condition precedent of intercountry adoption.

Thus, while the preamble to the Convention states these principles that children “grow up in a family environment,” and that “appropriate measures” be taken to “enable the child to remain” with their original family, those principles are not repeated in the objects (goals or purpose) section of the Convention.²¹ Some might argue that these principles be read into the statement, in the objects section, “to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law.”²² Thus, some could argue that intercountry adoption is required to effectuate the best interests and rights of institutionalized children.²³ The difficulty with this argument, in terms of the Convention, is first of all that the Convention in this objects clause is addressing “safeguards.”²⁴ The emphasis is not upon intercountry adoptions as a means to facilitate the best interests and rights of children, but rather to ensure that those intercountry adoptions that do occur have adequate safeguards, such that the intercountry adoptions themselves do not violate the best interests and children’s rights standards. Given this context of “safeguards,” it is very difficult to read into the general language about best interests or children’s rights any requirement that nations allow their children to be placed internationally for adoption. The Guide to Good Practice, finalized in 2008 by the Hague Conference on Private International Law, confirms this interpretation, by stating “the general principle that the Convention does not oblige States to engage in intercountry adoption.”²⁵

It would be possible to argue that providing family preservation assistance to birth families is a necessary “safeguard” to ensure that intercountry adoptions are in the best interests of children and protect their rights. As a matter of child welfare, it is generally recognized that it is usually in the best interests of children to remain with their original families, and it violates a number of rights in the Convention on the Rights of the Child for the child to lose their original family.²⁶ Thus, a requirement that parent(s) considering relinquishment primarily due to extreme poverty be offered modest aid to assist them to keep their child, would apparently be a safeguard necessary to protect the best interests and rights of children. Children should not needlessly lose their families, and it is rational to make reasonable family preservation efforts prior to accepting a relinquishment.²⁷ If that is an “object” of the Convention, however, it is notable that the Convention does not explicitly include it in either the objects or operational sections. This contrasts, for example, with the preamble’s principle that domestic adoption be preferred over intercountry adoption, which finds expression in the operational portions of the Treaty.²⁸ Thus, it would appear that the Hague Convention recognizes some principles that the Convention itself does not specifically include as either goals or operational rules. The Hague Convention, while preeminent, is not designed to be a comprehensive implementation of all the fundamental principles governing intercountry adoption.

¹⁹ See Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980)(codified as amended in scattered sections of 42 U.S.C.)[hereinafter AACWA]; Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997)(codified at 42 U.S.C. sections 620-632, 670-679 (2000))[hereinafter ASFA]; see specifically 42 U.S.C. 671(a)(15). Under ASFA reasonable efforts to re-unite are not required under certain aggravated circumstances, such as torture or sexual abuse. 42 U.S.C. section 671(a)(15)(D).

²⁰ David Smolin, *Intercountry Adoption and Poverty: A Human Rights Analysis*, 36 *Capital University Law Review* (2007) [hereinafter *Intercountry Adoption and Poverty*].

²¹ Hague Convention, *supra* note 1, preamble and art. 1.

²² Hague Convention, *supra* note 1, at art 1(a).

²³ See, e.g., Sara Dillon, *supra* note 13.

²⁴ Hague Convention, *supra* note 1, at art. 1(a).

²⁵ Hague Good Practice Guide, *supra* note 15, at 102.

²⁶ See Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 at art. 7, 8, 9 [hereinafter CRC].

²⁷ See generally *Intercountry Adoption and Poverty*, *supra* note 20.

²⁸ See Hague Convention, *supra* note 1, at preamble, art. 4(b).

If the Hague Convention does not comprehensively address all aspects of intercountry adoption, which aspects of intercountry adoption does it address? The answer can be found by finding those principles that are stated in the preamble, specified in the objects section, and addressed in the operational portions of the treaty.²⁹ The most obvious candidate is found in the language of the preamble and objects sections addressing “the abduction, the sale of, or traffic in children.”³⁰ The language of the objects section makes clear that a primary purpose of the Convention is to create an intercountry adoption system with safeguards against those specific abusive practices: the practices which I have characterized as “child laundering.”³¹ The safeguards established by the Treaty are the creation of both a system of cooperation between sending and receiving nations, and a set of specified roles and obligations for the State and non-State actors functioning within the intercountry adoption system.³²

Even within this goal of combating child traffic in the intercountry adoption system, the Hague Convention is not designed to be comprehensive. Thus, the work of preparation indicates that the Convention is not designed to address criminal law responses to these practices; at most, the Convention would facilitate the reporting of criminal offenses to appropriate authorities.³³ The Convention is based on the assumption that other means, supplemental to the Convention, will address appropriate criminal law responses to such illicit practices. The Optional Protocol to the Convention on the Rights of the Child (Sale of Child), created about seven years after the Hague Convention on Intercountry Adoption, responds to this need by specifically requiring Contracting Parties to address in their criminal or penal law certain forms of buying children for purposes of adoption.³⁴

Even within the civil or regulatory realm, the Hague Convention is designed to prevent “only indirectly... ‘the abduction, the sale of, or traffic in children’... because it is expected that the observance of the Convention’s rules will bring about the avoidance of such abuses.”³⁵ Thus, proposals to term the Convention ‘an instrument against illicit and irregular activities in this field’ were rejected, in favor of the ultimate title: “Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.”³⁶ Thus, while preventing the abuses of child trafficking within the intercountry adoption system was a central impetus and object of the Convention, the Convention attempted to do so through the indirect means of establishing safeguards to protect children in relationship to intercountry adoption. Those safeguards, in turn, included, or were to be implemented through, an orderly system of international cooperation.³⁷

Upon closer examination, then, the Hague Convention, rather than representing a comprehensive approach to intercountry adoption, is an anti-trafficking treaty, and a very incomplete anti-trafficking treaty at that. A significant impetus and purpose of the Convention is to prevent abusive adoption practices, specifically targeting abducting, buying, and trafficking in children; the Convention’s response to this set of evils is to provide for a set of safeguards and international cooperation.³⁸ In a sense, the Convention is ambitious, for it aims to take the “chaotic, contradictory and unsatisfactory” practice of intercountry adoption which existed prior to the Convention, and replace it with an intercountry adoption system

²⁹ See Hague Convention, *supra* note 1 at preamble, art 1 and art.14-22.

³⁰ See Hague Convention, *supra* note 1, at preamble, art. 1(b).

³¹ See Hague Convention, *supra* note 1, preamble and art. 1.

³² See Hague Convention, *supra* note 1.

³³ Letter from the Secretary General of Interpol giving some information on the sphere of activities of this Organization concerning crime prevention in connection with intercountry adoption, Preliminary Document No 5 of April 1991, Proceedings of the Seventeenth Session, 10 to 29 May 1993, Tome II Adoption – co-operation [hereinafter cited as Interpol Letter]; Explanatory Report by G. Parra-Aranguren, Proceedings of the Seventeenth Session, 10 to 29 May 1993, Tome II Adoption – co-operation, Hague Conference on Private International Law, at 555 [hereinafter cited as Explanatory Report].

³⁴ See Optional Protocol to the Convention on the Right of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 263, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/Res/54/263 (2000), at art. 3(a)(ii), [hereinafter Optional Protocol (Sale of Children)].

³⁵ See Explanatory Report, *supra* note 33, at 555.

³⁶ *Id.*, at 555.

³⁷ *Id.*, at 555.

³⁸ *Id.*, at 555.

with regularized sets of procedures and accredited and defined sets of actors.³⁹ On the other hand, the Convention's agenda is modest, as the Convention leaves unaddressed significant principles of child welfare or child rights at stake in intercountry adoption, while providing only partial coverage even to issues, such as abusive child laundering practices, which it does seek to address. The point is not that the Treaty is deficient, but rather that the Treaty is designed to function within a broader context of other legal instruments, presumably including (among others) the Convention on the Rights of the Child.

B. Child Laundering and the Work of Preparation

1. The J.H.A. van Loon Report

One of the most significant documents in the preparatory materials for the Hague Convention is the 1990 *Report on Intercountry Adoption* prepared by J.H.A. (Hans) van Loon,⁴⁰ who would later become the Secretary General of the Hague Conference on Private International Law.⁴¹ On the occasion of the United States deposit of ratification on December 12, 2007, some seventeen years after his report, Secretary General Hans van Loon commented:

[A]t about the time work on the new Convention started, inter-country adoption itself was at risk, with countries closing borders or otherwise rendering adoption impossible. The Convention has created a global framework that provides stability by giving countries the control they need to trust their partners.⁴²

Hans van Loon's comments are interesting, given the current propensity of some adoption advocates to blame the Hague Convention for reducing the number of intercountry adoptions.⁴³ From Van Loon's perspective, intercountry adoption had been under threat before the Convention, and its viability was saved by the Convention.⁴⁴

What had placed adoption at risk? What had made nations mistrustful of intercountry adoption, and inclined to close their borders? Hans van Loon's 2007 comments do not answer that question. The 1990 Report, carefully read, suggests that the pre-Hague intercountry adoption system had been particularly subject to the risks of child laundering.⁴⁵ Certainly the report contains an excellent description of child laundering, although it does not use that term. The following are particularly notable regarding the Report's analysis of child laundering:

- (1) Section E of the Report is titled "Abuses of Intercountry Adoption: International Child Trafficking."⁴⁶ There are no other sections specifically on the topic of "Abuses." Hence, the Report characterizes child trafficking as the primary abuse of intercountry adoption.

³⁹ J.H.A. van Loon, Report on intercountry adoption, Preliminary Document No. 1 of April 1990, Preliminary Work, Proceedings of the Seventh Session, 10 to 29 May 1993 [hereinafter cited as J.H.A. van Loon Report], at pg. 101.

⁴⁰ J.H.A. van Loon, Report on intercountry adoption, Preliminary Document No. 1 of April 1990, Preliminary Work, Proceedings of the Seventh Session, 10 to 29 May 1993 [hereinafter cited as J.H.A. van Loon Report]; see Peter H. Pfund, Intercountry Adoption: The 1993 Hague Convention: Its Purpose, Implementation, and Promise, 28 Fam. L. Q. 53, 54 (1994)(listing the "very comprehensive report on intercountry adoption prepared by Hans van Loon of the Permanent Bureau" as one of the significant preparatory documents in the creation of the Convention.

⁴¹ See, e.g., Statement by Hans van Loon, Secretary General of the Hague Conference on Private International Law, on the occasion of the deposit of the instrument of ratification of the Hague Convention..., by the United States of America, 12 December 2007 [hereinafter Hans van Loon Ratification Statement]. Hans van Loon was First Secretary at the Permanent Bureau at the time that the Hague Convention on Intercountry Adoption was created. See, e.g., Proceedings of the Seventeenth Session, 10 to 29 May 1993, Tome II Adoption – co-operation, at 450.

⁴² Hans van Loon Ratification Statement, *ibid*.

⁴³ See Elizabeth Bartholet, Slamming the Door on Adoption, Washington Post, Nov. 4, 2007, at pg. B07, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/02/AR2007110201782.html> [hereinafter cited as Bartholet editorial].

⁴⁴ J.H.A. van Loon Report, *supra* note 39, at 51.

⁴⁵ *Id.*, at 51.

⁴⁶ *Id.* at 51.

- (2) The report discusses both “practices of international child trafficking either for purposes of adoption abroad, or under the cloak of adoption, for other—usually illegal—purposes.”⁴⁷ Hence, the report characterizes practices such as buying children for intercountry adoption to be, in itself, a form of child trafficking.
- (3) The Report describes the same three methods for illicitly obtaining children as have been described in more recent child laundering scandals. Thus, the Report states: “The three principal methods are the sale of children, consent obtained through fraud or duress and child abduction. Combinations are possible....”⁴⁸
- (4) The Report discusses the “extensive networks” involved in the “[o]rganization of the trafficking:” “In some countries lawyers and notaries, social workers (even in some cases those appointed by the courts), hospitals, doctors, children’s institutes, sometimes turned into complete ‘baby farms’, and others work together to obtain children and make profit out of the despair of parents, in particular women, in difficult situations, sometimes by deceiving them.”⁴⁹
- (5) Although the Report does not use the term “child laundering” for these forms of misconduct, it uses similar terminology and clearly describes the phenomenon. Thus, the Report refers to “those who bribe the competent authorities and ‘wash’ the ‘commodity.’⁵⁰ The Report also reports on various means of “[c]oncealing of civil status” of the child, such as creation of falsified birth certificates and abandonment declarations.⁵¹ “In order for the trafficking to be successful,” Van Loon noted, “it is essential that the child leave the country of origin in a legal or seemingly legal way.”⁵² Hence, the Report clearly describes the concept of “child laundering:” obtaining children illicitly, falsifying their status into properly relinquished or abandoned “orphans,” and then processing them through the intercountry adoption system.⁵³
- (6) The Report rejects rumors of a “traffic in children’s organs,” due to a lack of evidence, but notes that the investigation which found such rumors to be “without justification” also “attest to the existence of a large-scale traffic in children under the cloak of adoption” in two Central American countries.⁵⁴ Hence, the evidence of child laundering at the time of van Loon’s 1990 report was substantial.
- (7) The Report focused on the centrality of money and profits to the problem of abusive child laundering practices: “Child-trafficking means profit making by intermediaries at the expense literally of the biological parents and the adopters (to the extent that they acted in good faith), and in a broader sense also of the child.”⁵⁵ Hence, van Loon labeled the corrupt intermediaries as “profiteers.”⁵⁶ The Report admitted, however, that “drawing the line” between trafficking and “legal and regular intermediary services is in practice not always easy.”⁵⁷ Van Loon noted that some, during preparation of the Convention on the Rights of the Child, had resisted the concept that there could be legitimate financial gain from adoption; however, the ultimate language of the CRC, in forbidding “improper financial gain,” had implicitly permitted proper financial gain. Van Loon failed to provide guidance as to how this critical line between child trafficking and permissible financial gain could be drawn.⁵⁸

⁴⁷ *Id.* at 51.

⁴⁸ *Id.* at 51.

⁴⁹ *Id.* at 51.

⁵⁰ *Id.* at 51.

⁵¹ *Id.* at 53.

⁵² *Id.* at 53.

⁵³ See David M. Smolin, *Child Laundering*, 52 *Wayne Law Review* 113 (2006).

⁵⁴ J.H.A. van Loon Report, *supra* note 39, at 53.

⁵⁵ *Id.* at 53.

⁵⁶ *Id.* at 53.

⁵⁷ *Id.* at 53.

⁵⁸ See *Id.* at 53.

- (8) Hans van Loon's strategy for combating child trafficking in intercountry adoption seemed to be a new convention on intercountry adoption which would provide greater regulation and international coordination, and provide restrictions on "the freedom of agencies to act as intermediaries in intercountry adoption."⁵⁹

The van Loon report described three objectives of a new Convention. The first objective concerned the principal of subsidiarity: to "ensure that no child is adopted abroad unless it has been established that the original family cannot take care of him or her and that no other viable alternative in the country of origin is available."⁶⁰ The second objective was to "define criteria and improve practice and procedures" for intercountry adoption.⁶¹ The third objective was to "help eliminate abuses of intercountry adoption, in particular, abduction and/or sale of children."⁶²

Hans van Loon's sketch of the operational provisions of a new Convention confirms the centrality of the anti-trafficking goal to the structure of the Convention. Hans van Loon believed that "combating international child trafficking" required "above all, strict control over the activities of intermediaries, which should meet the criteria defined for them."⁶³ Similarly, "straightforward and well-structured procedures for intercountry adoption" would help prevent child trafficking.⁶⁴ Hans van Loon thus wanted to replace pre-Convention intercountry adoption practice, which he described as "chaotic, contradictory and unsatisfactory,"⁶⁵ and which often relied on profiteering intermediaries of dubious motivations,⁶⁶ with a highly ordered and regulated intercountry adoption system in which each significant actor was either the government, or else a non-profit entity accredited by the Government.⁶⁷

Hans van Loon's mechanism for achieving the required regulation, inter-governmental coordination, and ordered intercountry adoption system was a regime of "Central Authorities" modeled after prior Hague Conventions: especially the "Hague Abduction Convention."⁶⁸ Van Loon thus delineated a system whereby the Central Authorities were responsible either for carrying out all of the critical steps related to adoptions, or else licensing all actors involved.⁶⁹ Van Loon was particularly concerned to discourage or prevent "independent adoptions," "with their inherent risks of failure because of insufficient preparation and of susceptibility to child trafficking."⁷⁰

A review of the final version of the Convention indicates that van Loon's broad vision for the Convention, in terms of the objectives of the Convention and its method of achieving those objectives, are represented in the final version of the Convention. Thus, van Loon's proposal of a system of Central Authorities, providing for an ordered, regulated, and internationally-coordinated intercountry adoption system, is well reflected in the Convention's final language.

Not all of van Loon's goals were realized in the final language of the Convention. In particular, the United States successfully insisted that the final version of the Convention permit what could be regarded as a form of independent adoptions: the participation of for-profit individuals and agencies in the intercountry adoption system. Indeed, it appears that the goals of the United States during the negotiations were somewhat distinct from that of van Loon. Thus, while Peter Pfund, the head delegate for the United States, acknowledged that the Hague Convention was created in the shadow of reports about child trafficking in the intercountry adoption system, these anti-trafficking concerns apparently were far less central

⁵⁹ *Id.* at 55.

⁶⁰ *Id.* at 93-95.

⁶¹ *Id.* at 93 – 95.

⁶² *Id.* at 93-95.

⁶³ *Id.* at 95.

⁶⁴ *Id.* at 95.

⁶⁵ *Id.* at 101.

⁶⁶ *Id.* at 53, 95.

⁶⁷ *Id.* at 93 – 101.

⁶⁸ *Id.* at 95.

⁶⁹ See *Id.* at 95-99.

⁷⁰ *Id.* at 97.

to Pfund and the United States, than they had been to van Loon and other nations.⁷¹ Indeed, it seems likely that the United States entered the negotiations primarily from the perspective of trying to maintain the availability of children for intercountry adoption, and in trying to maintaining the eligibility of small agencies and individuals as independent participants in intercountry adoption.⁷² The ultimate compromise was to create a system of Central Authorities that left room for for-profit persons/organizations, which nonetheless would have to meet some minimum standards pertaining specifically to intercountry adoption, and hence would be licensed. Thus, the question of the respective role of government and private actors in intercountry adoption was largely left to national choice, with the treaty permitting systems like the United States that relied upon non-profit and for-profit individuals and agencies to carry out many of the critical tasks related to adoption, albeit subject to Central Authority regulation and oversight.⁷³ Similarly, the Hague Convention also permitted countries to implement the agreement through a government monopoly over all critical services and functions related to adoption, or to limit private agency involvement only to non-profit institutions.⁷⁴

2. Preparatory Materials Beyond the Hans van Loon Report

The creation of the Hague Convention on Intercountry Adoption was a large-scale and lengthy enterprise. The Permanent Bureau of the Hague Conference on Private International Law contributed “countless hours of preparation” in the five year effort, from 1988 to 1993, that created the Convention.⁷⁵ After dissemination of the Hans van Loon Report in April 1990 there were “three two-week preparatory sessions of a special commission of the Hague Conference...followed by the three-week Seventeenth Session...of the Hague Conference.”⁷⁶ Sixty-six nations, approximately half of which were sending countries, and eighteen organizations (mostly ngos) participated in the Seventeenth Session which unanimously approved the final language of the Convention on May 29th, 1993.⁷⁷

For the Hague Conference, the Convention has roots in the failure of an earlier, 1965 Hague Adoption Convention to generate a significant number of ratifications.⁷⁸ More fundamentally, the Convention was shaped by the Convention on the Rights of the Child (CRC), which was concluded in November 1989, just as the Hague Conference was beginning in earnest its work on a new adoption convention.⁷⁹ Article 21, the primary adoption article of the CRC, called on State Parties to promote that article’s objectives by “concluding bilateral or multilateral arrangements or agreements.”⁸⁰ Hence, the Hague Conference understood itself to be responding to the call of the CRC for a new multilateral adoption convention.⁸¹ In addition, the Hague Convention’s stated objective to “prevent the abduction, the sale of, or traffic in children” is a response to the call of the CRC to “take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.”⁸² Thus, the Hague Convention applies this general call to prevent child trafficking to the specific field of intercountry adoption, which by the late

⁷¹ See Pfund, *supra* note 40, at 56, 59–63.

⁷² See Pfund, *supra* note 40, at 59–63.

⁷³ See Comments on the Final Regulations Implementing the Hague Adoption Convention, Ethica, March 2006, available at: <http://ethicanet.org/HagueRegComments.pdf>.

⁷⁴ See Pfund, *supra* note 40, at 59–63.

⁷⁵ See Pfund, *supra* note 40, at 54.

⁷⁶ *Id.* at 54.

⁷⁷ *Id.* at 54–55.

⁷⁸ See Hague Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions.

⁷⁹ See Conclusions of the Special Commission of June 1990 on intercountry adoption, Preliminary Document No. 3 of August 1990, at 129 (“The starting point for the Convention should be the United Nations Convention on the Rights of the Child...and which calls for the conclusion of multilateral agreements to promote the standards set by its Article 21”).

⁸⁰ CRC, *supra* note 2, at art. 21(e); see also *supra* note 79 (Conclusions of the Special Commission, pg. 129).

⁸¹ See *supra* note 79.

⁸² CRC, *supra* note 2, at art. 35.

1980s and early 1990s was already known as a field subject to the abusive practices of abducting, selling, and trafficking in children.

The preparatory materials beyond the van Loon Report confirm both the central role of anti-trafficking concerns in the creation of the Convention, and also the indirect and partial response of the Convention to those concerns. The following are two examples relating to the early stages of preparation:

- (1) In November 1989, prior to the completion of the van Loon Report, the Permanent Bureau of the Hague Conference created a Memorandum “concerning the preparation of a new Convention...”⁸³ The Permanent Bureau noted:

“a need for a system of supervision in order to ensure that these standards are observed (what can be done to prevent intercountry adoptions from occurring which are not in the interest of the child; how can children be protected from being adopted through fraud, duress or for monetary duress; should measures of control be imposed upon agencies active in the field of intercountry adoption, both in the countries where the children are born and in those to which they will travel.”⁸⁴

- (2) A decision was made at the outset (in 1988) that “any new work by the [Hague] Conference on adoption without the participation of those countries of origin which were not at present Members of the Conference, would be of little use.”⁸⁵ Therefore, in 1988 contacts were made to ascertain the willingness of non-member nations to participate with the Conference in the creation of a new Convention, with encouraging results.⁸⁶ Ten Latin American countries, including both Member and non-Member countries, thus participated in the first session of the Special Commission.⁸⁷ The Secretary General of the Hague Conference “suggested that ‘given the considerable importance which the Latin American countries have in the field of intercountry adoption, there would be a great advantage in facilitating’ their participation by allowing them to speak in Spanish, and have their remarks translated into the “official working languages of French and English.”⁸⁸ This proposal was accepted upon a vote of the Member Nations of the Hague Conference.⁸⁹ The Latin American countries subsequently demonstrated their “great interest” by holding a seminar in Quito Ecuador in April 1991, “to examine the problems related to intercountry adoption in the perspective of the convention to be drawn up in the Hague Conference and four working groups were created...”⁹⁰ Of the four working groups, two concerned child trafficking, including one titled “child-trafficking in Latin America,” and a second titled “possible forms of international co-operation relating to adoptions and trafficking of children.”⁹¹

These two examples indicate that both the Permanent Bureau of the Hague Conference, and also the participating Latin American sending countries, were at the outset of the preparatory process quite concerned with child laundering/child trafficking as a primary abuse of intercountry adoption.

At the same time, the preparatory materials also confirm that the Convention, while designed to respond to these concerns with child laundering/child trafficking, approached this concern

⁸³ See Permanent Bureau, Memorandum concerning the preparation of a new Convention on international co-operation and protection of children in respect of intercountry adoption, cited in G. Parra-Aranguren, Report of the Special Commission [hereinafter Report of the Special Commission], Preparatory Materials, at 179 & n. 12.

⁸⁴ See *id.*

⁸⁵ Report of the Special Commission, *supra* note 71, at 177.

⁸⁶ See *id.* at 179.

⁸⁷ See *id.* at 181 & n. 21.

⁸⁸ *Id.* at 181.

⁸⁹ *Id.* at 183.

⁹⁰ *Id.* at 183.

⁹¹ *Id.* at 183.

only partially and indirectly.⁹² Thus, the Explanatory Report which comprise a part of the preparatory materials states:

“Despite the last part of the fourth paragraph of the Preamble [“to prevent the abduction, the sale of, or traffic in children”], it is always to bear in mind that the fundamental objects of the Convention are the establishment of certain safeguards to protect the child in case of intercountry adoption, and of a system of co-operation among the Contracting States to guarantee the observation of those safeguards. Therefore the Convention does not prevent directly, but only indirectly, ‘the abduction, the sale of, or traffic in children’, as is repeated in subparagraph b of Article 1, because it is expected that the observance of the Convention’s rules will bring about the avoidance of such abuses.”⁹³

This comment, which is that of the one individual (G. Parra-Aranguren) who authored the Report, rather than that of the various Special Commissions and Sessions who created the Convention, is interesting for its apparent conflict with the final language of the Convention.⁹⁴ G. Parra-Aranguren appears to be trying to state that the “fundamental objects” of the Convention are safeguards and international co-operation, and not the prevention of abduction, sale, or traffic in children, despite the inclusion of the latter clearly within both the preamble and the objects clause of the Convention.⁹⁵ G. Parra-Aranguren lacks the authority, as the author of a Report, to contradict the actual language of the Convention. However, G. Parra-Aranguren is attempting to express a theme that runs through all of the preparatory materials, including the van Loon report: the Convention is designed to address child trafficking and related wrongs in intercountry adoption only partially and indirectly.⁹⁶ Thus, while it is clear that child trafficking in intercountry adoption was a primary impetus for the Convention, and that the Convention was designed to respond to these abusive practices, the Treaty approaches these wrongs only indirectly. The Convention’s theory is that the ordered system of safeguards and international co-operation will prevent these wrongs. While G. Parra-Aranguren is wrong to try to remove the prevention of trafficking from the fundamental objects of the Treaty, he is correct that the Treaty’s primary strategy is the creation of safeguards and international co-operation, and is not intended to be a comprehensive response to trafficking in the intercountry adoption system.

Thus, G. Parra-Aranguren notes the Special Commission’s rejection of a proposal to expressly term the Convention “an instrument against illicit and irregular activities in this field.”⁹⁷ G. Parra-Aranguren also correctly noted the Hague Conference correspondence with Interpol concerning the Convention, which demonstrated that the Convention itself was not designed to address criminal law responses to child trafficking in adoption, but rather was to safeguard against such abuses while also facilitating the reporting such offenses to the proper authorities.⁹⁸ The Convention is not even a comprehensive response to the “abduction, sale of, or traffic in children,” let alone a comprehensive response to all abusive practices in the intercountry adoption field.

III. Child Laundering As a Continuing Problem in the Intercountry Adoption System

Part II of this background paper establishes that the purpose of the Hague Convention was to reform pre-Hague intercountry adoption practice, which was viewed as “chaotic,” “incoherent,” and particularly subject to the abuses of child laundering/child trafficking.⁹⁹ Reform was to be accomplished by creation of an ordered intercountry adoption system to be characterized by safeguards and international co-operation, to the end of preventing “the

⁹² See Dillon, *supra* note 13.

⁹³ G. Parra-Aranguren, Explanatory Report, para. 52, at pg. 555.

⁹⁴ See *id.*

⁹⁵ See Hague Convention, *supra* note 1, at preamble, art. 1(b).

⁹⁶ G. Parra-Aranguren, Explanatory Report, *supra* note 33, para. 52, at pg. 555.

⁹⁷ Explanatory Report, at para. 53, pg. 555.

⁹⁸ Explanatory Report, at para. 54, pg. 555; see also Interpol Letter, *supra* note 33.

⁹⁹ J.H.A. van Loon Report, *supra* note 39, at 129.

abduction, the sale of, or traffic in children.”¹⁰⁰ The primary mechanism for this reform was a system of Central Authorities, who would provide the necessary supervision and accountability for all significant functions, persons, and organizations involved in intercountry adoption, under minimum standards delineated in the Convention. The system of Central Authorities was also intended to facilitate the necessary international co-operation.

Unfortunately, child laundering has remained a systemic problem in the contemporary intercountry adoption system. Thus, this author’s published and draft articles, which are available online in English, have extensively documented pervasive child laundering/child trafficking scandals impacting a large number of sending and receiving nations since the creation of the Hague Convention.¹⁰¹ The scandals are so constant and numerous that despite writing six articles over approximately five years comprising several hundred pages, this body of work presents only a sampling of the trafficking/child laundering incidents of which this author has become aware. Sending nations particularly impacted by significant child laundering/child trafficking incidents over the last two decades have included Cambodia, Chad, China, Guatemala, Ethiopia, Haiti, India, Liberia, Nepal, Samoa, and Vietnam.¹⁰² Most (and probably all) significant receiving countries have accepted adoptive placements from channels significantly impacted by child laundering. (The author would be happy to discuss individual instances or particular nations, within the scope permitted by any applicable confidentiality limitations, at or outside the Special Commission.)

As will be discussed below, the continuing systemic problem of child laundering is principally due to inadequate implementation of the Convention, rather than due to the imperfections in the Convention itself. Most of the implicated sending nations had not ratified/implemented the Convention during the relevant periods. In most instances of child laundering involving Hague sending nations, there is clear evidence of fundamental lapses of implementation. The actions of receiving nations play a prominent role in the high incidence of child laundering. The United States, statistically responsible as a receiving nation for the majority of intercountry adoptions, did not effectively ratify the Convention until April 1, 2008. Even after ratification, the United States has chosen not to apply Hague standards to adoptions from non-Hague nations. Receiving nations have failed to effectively implement the safeguards of the Convention, even when choosing to operate within contexts where corruption and abusive adoption practices were known risks. Under these circumstances, it is

¹⁰⁰ See Hague Convention, *supra* note 1, preamble and art. 1

¹⁰¹ See http://works.bepress.com/david_smolin/.

¹⁰² Beyond the author’s own extensive works, available at http://works.bepress.com/david_smolin/, a small sampling of the available literature on child laundering/adoption trafficking includes the following: See, e.g., Embassy of the United States, Adopted Children Immigrant Visa Unit, Summary of Irregularities in Adoptions in Vietnam, April 25, 2008, available at: http://vietnam.usembassy.gov/irreg_adoptions042508.html; Hague Conference on Private International Law, International Adoption Technical Assistance Programme, Report of Mission to Nepal 23 -27 Nov. 2009 (Feb. 4, 2010), available at http://www.hcch.net/upload/wop/nepal_rpt09.pdf; Richard Cross, Rushton Distinguished Lecture Series – Reforming Intercountry Adoption: Present Realities and Future Prospects, Cumberland Law School, Samford University, “What Really Happened in Cambodia,” (Apr. 15, 2005), available at: <http://www.cumberland.samford.edu/faculty/david-m-smolin>; Trish Maskew, Child Trafficking and Intercountry Adoption: The Cambodian Experience, 35 Cumberland Law Review 619 (2005); U.S. Immigration and Customs Enforcement, Background, Operation Broken Hearts (Nov. 19, 2004); Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography 5-18, U.N. Comm’n on Human Rights, 56th Sess., Provisional Agenda Item 13, U.N. Doc. E/CN.4/2000/73/Add.2 (2000) available at: <http://daccessdds.un.org/doc/UNDOC/GEN/G00/101/54/PDF/G0010154.pdf?OpenElement>; Esben Leifsen, Child Trafficking and Formalisation: The Case of International Adoption from Ecuador, 22 Children & Society 212 (2008); The Schuster Institute for Investigative Journalism, including an extensive collection of media articles and country reports related to adoption, available at <http://www.brandeis.edu/investigate/gender/adoption/index.html>; <http://fleasbiting.blogspot.com/> (web blog by Desiree Smolin and Usha Smerdon collecting numerous press and other reports concerning abusive intercountry adoption practices in a variety of countries); Patricia J. Meier and Xiaole Zhang, *Sold Into Adoption: The Hunan Baby Trafficking Scandal Exposes Vulnerabilities in Chinese Adoptions to the United States*, 39 Cumb. L. Rev. 87, 91 (2009); Barbara Demick, Chinese babies stolen by officials for foreign adoption, L.A. Times, Sept. 20, 2009, available at <http://www.latimes.com/news/nationworld/world/la-fg-china-adopt20-2009sep20,0,491086.story>; Arun Dohle, Inside Story of an Adoption Scandal, 39 Cumberland Law Review 131 (2008); Foreign Correspondent (ABC News Australia), Fly Away Children & Fly Away Home (investigative reports on Ethiopia), available in print and video formats at <http://www.abc.net.au/foreign/content/2009/s2686908.htm> and <http://www.abc.net.au/foreign/content/2010/s2834100.htm>.

clear that the failure to ratify and effectively implement the Convention has been the primary cause of the continuing incidence of abusive adoption practices. This analysis gives hope that effective implementation of the Convention can minimize or eliminate child laundering.

Given the nature of this Special Commission, it seems unwise to employ the methodology of the author's academic papers, which is to use a particular scandal as an illustration, as it might appear that particularly nations were being unfairly singled out. In actuality the problem of child laundering in the intercountry adoption system, while not universal, is systemic, impacting intercountry adoption as a global practice. Further, some nations that generally avoid child laundering issues, suffer from related issues that arise from the common difficulty of poor practice standards in the actual operation of child welfare and adoption systems. Thus, it would be wrong to give an impression that the failures of the intercountry adoption system are due only to the failures of a few nations.

The failure to stem the constant stream of child laundering incidents and scandals imperils the continuing viability of the intercountry adoption system. The continuing association of intercountry adoption with trafficking and corruption encourages large numbers of potential sending nations to not participate, or participate only minimally, in intercountry adoption. Thus, most African and Latin American nations participate only minimally, or not at all, in intercountry adoption, and child laundering scandals have led to significant moratoriums in active Asian and Latin American nations. Decades of child laundering scandals have gravely damaged the reputation of intercountry adoption in a context where the long-term viability of the system depends on viewing intercountry adoption as an ethical child welfare practice.

The negative impact of continuing child laundering scandals was perhaps disguised by the large-scale increase in intercountry adoptions that occurred between 1993 (when the Hague Convention was finalized) and 2004. For example, intercountry adoptions to the United States, which generally has received more than half of all children placed internationally, approximately tripled in number from 1993 to 2004 (from 7,377 to 22,990 annual adoptions). Globally, intercountry adoptions peaked at an estimated 45,000 in 2004 (with almost 23,000 to the United States alone). However, this rise in intercountry adoption was created primarily by China, Guatemala, and Russia, and did not represent the creation of a broad-based, orderly intercountry adoption system. Subsequent substantial declines in China, Guatemala, and Russia, caused in part by systemic trafficking scandals in Guatemala, have led to sharp declines in intercountry adoptions from 2005 to the present. Thus, intercountry adoptions to the United States declined from a high of almost 23,000 in 2004, to less than 13,000 in 2009, with projections that it will fall under 10,000 in 2010. Some other significant receiving countries are also experiencing declines. Intercountry adoptions may fall to pre-Hague levels over the next several years. Thus, upon closer inspection, the contemporary intercountry adoption system remains subject to cycles of abuse, moratoriums and closures, scandals, and abusive practices, and these instabilities are significantly impacting the practical operation and reputation of intercountry adoption.

Beyond the harm to the intercountry system, the practices of child laundering have gravely harmed many families and individuals. Many original (or birth) families have suffered the agony of losing their children to adoption trafficking schemes, which represents a profound deprivation of human rights. Tens of thousands of adoptive parents face the uncertainty of not knowing whether their adopted children were legitimate orphans or stolen children, or have made the devastating discovery that they have adopted stolen or purchased children. A large but uncertain number of adopted children unnecessarily suffered the loss of their original families, constituting a deprivation of important rights guaranteed by the Convention on the Rights of the Child (CRC). Some older children adopted under these circumstances have suffered extremely serious psychological difficulties, while some adopted as infants have, as adult adoptees, had to endure the pain of learning of the illicit nature of their adoption. (The documentary Paper Orphans, to be presented in the afternoon session on June 17, provides a window into the experiences of some personally impacted by child laundering in Nepal; this author can upon request provide much more documentation of the harms to affected individuals and families from a variety of nations.)

IV. Causes of the Continuing Incidence of Child Laundering in the Intercountry Adoption System in the Hague Convention Era

The continuing incidence of child laundering in the intercountry adoption system has been caused by inadequacies in the implementation of the Convention. These inadequacies represent a failure of political will combined with poor child welfare and adoption practices in many---perhaps most---participating nations.

These inadequacies manifest themselves in a variety of ways:

- (1) The United States, the most important receiving nation statistically, did not succeed in effectively ratifying the Hague Convention until April 1, 2008. Thus, the first fifteen years of the Hague era passed with most intercountry adoptions falling outside of the Hague system, since the United States is involved in more than half of all intercountry adoptions.
- (2) The United States, in ratifying the Hague Convention, failed to provide legislatively or by administrative rule for some of the most basic tools or practices necessary for effective implementation. First, the United States has failed to provide a mechanism or legal authority for limiting the amount of money United States adoption agencies provide or spend within sending nations, thereby permitting agencies to continue to incentivize corruption and child laundering. Second, the United States failed to provide for implementation of Hague standards for adoptions from non-Hague nations, therefore making Hague ratification irrelevant in a significant percentage of adoptions. Third, the United States has failed to provide a rule by which United States private adoption agencies would be legally responsible for child laundering activities by their foreign partners or by independent facilitators with whom they contract. Fourth, United States has failed, as a matter of accreditation, to hold private United States adoption agencies to account for partnering with foreign agencies or persons who participate in child laundering or other corrupt practices. Fifth, the United States has continued to allow United States adoption agencies to shift the risks of intercountry adoption to adoption triad members (adoptees, adoptive parents, and original families) through contract clauses that generically identify risks and then disclaim/waive agency liability or responsibility.
- (3) Many significant receiving nations have failed to create or identify a credible protocol for dealing with cases of possible child laundering, particularly including cases where the child has arrived in the receiving nation. Thus, even in instances where original family members come forward or are identified, receiving country authorities and legal systems seem to be paralyzed, effectively stone-walling rather than investigating and intervening. This creates a sense of impunity in relationship to child laundering in the intercountry adoption system, as there is no accountability even in identified cases of child laundering.
- (4) Central authorities and significant placement agencies, public and private, in significant receiving nations frequently take a "see no evil" approach to child laundering scandals, making them apparently the last ones to know of such misconduct. Instead, investigation and follow-up of such instances often is left to the impacted adoption triad members, the press, and non-governmental organizations (ngos).
- (5) Many significant sending nations have not ratified the Hague Convention. It must be said, in this context, that it is possible to create a workable and ethical adoption system without ratifying the Hague Convention. Hague ratification, in itself, moreover, is not a panacea, for some sending nations that have ratified the Hague Convention nonetheless are subject to significant child laundering incidents, due to inadequate implementation of the Convention. However, it is also true that a number of nations particularly subject to child laundering have not ratified the Convention, and that the cycle of abuse frequently involves receiving nations and adoption agencies deliberately opening up non-Hague nations as sources for children.

- (6) Intercountry adoption has often been practiced in a way contrary to the subsidiarity principle, despite the acceptance of various versions of that principle in both the Hague Convention on Intercountry Adoption and the CRC. (The subsidiarity principle requires that certain domestic interventions be preferred over intercountry adoption.) Ironically, the most basic subsidiarity principle, that the child should remain with the original family where possible and not harmful to the child, has not been viewed as a principle requiring active implementation. Thus, intercountry adoption practices which do not include reasonable family preservation efforts, particularly in instances of extreme poverty, have been viewed as mainstream and licit; where such family preservation efforts are made, they are viewed as laudable or exceptional, rather than legally required. Once it became accepted practice to accept relinquishments for intercountry adoption based primarily on poverty, without any unconditional offer of assistance to allow the child to remain with the family, the ethical premise of intercountry adoption as a humanitarian act was undercut. Intercountry adoption at that point represented a decision to spend large sums of money to send a child abroad, even when a very small fraction of those funds would have been sufficient to assist the original family in remaining together. Intercountry adoption as a response to extreme poverty in developing nations creates an intercountry adoption system in service of the desire of persons in rich countries for children, rather than a genuinely humanitarian response to the best interests of children. Not surprisingly, in this context the rule that domestic adoption must be favored over intercountry adoption has often in practice been evaded, due in large part to the financial incentives provided to orphanages and facilitators to arrange international placements.

Once children could be obtained for international placement merely because their parents were poor, it was a small step to obtaining children through financial inducement, fraud, or force. In all these instances, the powerless vulnerability of original families was exploited. The line between allowing a hungry mother to give up her daughter because she couldn't feed the child, or paying the woman a small sum for relinquishing the child, is thin and thus particularly difficult to maintain.

An additional result of casting aside a rigorous practice of subsidiarity has been an intercountry adoption system that tends to either distort domestic child welfare systems, or else exists as a separate, parallel system, operating independently of both domestic child welfare and international economic development efforts. Thus, many organizations and persons involved in large-scale economic development, humanitarian assistance, or domestic child welfare work avoid any involvement in intercountry adoption, because they understand the tendency of intercountry adoption as currently practiced to distort and corrupt those systems.

These varied failures of political will and poor adoption and child welfare practice are often based on a failure to perceive accurately the contexts of intercountry adoption. The most fundamental context involves the inherent difficulty of safeguarding the process of obtaining a child from the child's parent(s) and/or family. Safeguarding the legitimacy of relinquishments requires that someone be in a position to supervise an interaction between often impoverished, vulnerable, and illiterate or poorly educated original family members, and the comparatively wealthy, literate, and powerful persons who obtain the children. Further, the interaction in question is necessarily a sensitive one that may require privacy and discretion, making investigation and review particularly difficult. Under those circumstances, it is likely impossible to develop a reliable method for directly safeguarding the fundamental interaction by which children are obtained from their original families for intercountry adoption. Merely reviewing the relinquishment or abandonment documents is obviously of very little regulatory meaning, in a context where the original parents may not be capable of reading, let alone understanding, the documents in question, and where creating false relinquishment or abandonment documents after the fact anyway could be done systematically. Further, abandonments may be substituted for relinquishments, when it becomes too dangerous for traffickers to name real original family members in relinquishment documents. Under these circumstances, the only way to guard against the illicit obtaining of children for intercountry adoption is to remove any incentives for such illicit

activity. This is why the failure to sharply and effectively limit the monetary aspects of intercountry adoption has been so devastating, for so long as intermediaries and orphanages in sending countries have an incentive to obtain children illicitly for intercountry adoption, it will be in practice impossible to prevent child laundering. The only way, in short, to prevent child laundering, or adoption trafficking, is to eliminate the incentives to engage in these actions.

It should be noted that this danger that monetary incentives could transform intercountry adoption into a form of child trafficking, if strict limits on all monetary aspects were not enforced, was foreseen as long ago as 1984/85 by the Supreme Court of India, in their significant *Laxmi Kant Pandey* decisions.¹⁰³ Unfortunately, despite these warnings, and the defining of monetary limits pursuant to the decisions of the Supreme Court of India, such limits have not been strictly enforced by the Government of India, leading to repeated child laundering scandals.¹⁰⁴ Tragically, the United States, in implementing the Hague Convention, has failed to provide any legal authority for limiting the funds spent by private agencies in sending countries, which allows United States adoption agencies to systematically provide monetary incentives for intermediaries and orphanages to obtain children for international adoptive placements. When the monetary aspects of intercountry adoption are left uncontrolled, all other regulatory safeguards may become impotent. Administratively, all of the various stages of regulatory control of intercountry adoption are based on the documents produced by the relinquishment or abandonment of the child; if that foundational process is not safeguarded, the rest of the process is a useless house built upon sand. Since the only way to safeguard relinquishments and abandonments is to avoid incentives to obtain children illicitly, the failure to control the monetary aspects of intercountry adoption renders all other regulation impotent against child laundering.

A further confusion in this regard has existed in regard to the so-called demand and supply aspects of intercountry adoption. (Children of course are not, and should not be viewed as, commodities, but unfortunately adoption trafficking involves a market in children, and thus aspects of this market must be examined frankly.) Due to a variety of factors in many developed countries, including a significance incidence of infertility, there is a great unmet need or desire for children: particularly children who are particularly “adoptable,” meaning that they have qualities such as youth (i.e., infants), good health, a preferred gender, or a particular race. This is true because in developed countries comparatively few individuals voluntarily relinquish healthy infants or toddlers for adoption, and the numbers of healthy and non-traumatized infants and toddlers made available for adoption through involuntary government action based on parental abuse/neglect is also comparatively small. (Most children in the foster care system in the United States, for example, are comparatively old, with an average age of approximately ten years, and about half or more of the children in the foster care system anyway are eventually returned to their original families.) Thus, there are potentially millions of persons in developed countries seeking certain kinds of infants and toddlers for adoption, with many willing to consider the adoption of certain kinds of healthy, somewhat older children. The “supply” of legally available infants and toddlers in developing nations meeting these desired characteristics of youth and health is in fact much smaller than the demand.

By contrast, most of the children, both in the United States, and many developing nations, truly in need of adoption, are much older children with significant physical, emotional, educational, or cognitive disabilities or difficulties and an experience of significant multiple

¹⁰³ See *Laxmi Kant Pandey v. Union of India*, (1984) 2 S.C.C. 244 (India); *Laxmi Kant Pandey v. Union of India*, (1985) Supp. S.C.C. 701. Additional decisions in this series include (1987) 1 S.C.C. 66; (1990) 4 S.C.C. 531; Unreported Judgments 1991 549. See David M. Smolin, *The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals*, 35 *Seton Hall Law Review* 403, 435-37 (2005) (discussing approach of Supreme Court of India to monetary issues in intercountry adoption).

¹⁰⁴ See *The Two Faces of Intercountry Adoption*, *supra* note 103; David M. Smolin, *Child Laundering*, 52 *Wayne Law Review* 113 (2006); David M. Smolin, *Child Laundering and the Hague Convention on Intercountry Adoption: the Future and Past of Intercountry Adoption*, 48 *University of Louisville Law Review* (forthcoming 2010). These published and draft articles are all available at: http://works.bepress.com/david_smolin/. See also Arun Dohle, *Inside Story of an Adoption Scandal*, 39 *Cumberland Law Review* 131 (2008).

traumas. As to such children, the number of available adoptive parents may be less than the supply.

Child laundering responds to these global imbalances in supply and demand in various kinds of children by creating a market in adoptable children. This market responds to the overwhelming demand for healthy infants and toddlers and particularly attractive older children by financially incentivizing the capture of such children in sending nations while bypassing significant numbers of much older, largely disabled and traumatized children. (A related abuse involves failing to reveal or falsifying the health status, psychological condition, and age of children in order to make them more adoptable.) Child laundering systems therefore exist in a parasitic way, employing the channels of the intercountry and Hague adoption systems to fulfill certain identified market demands in children, while ignoring the legitimate and true needs of other less desired children for adoption.

Given the supply/demand context in which intercountry adoption operates, it is particularly important that adequate safeguards exist to prevent child laundering, and to resist the market forces operating in relationship to adoption. Otherwise, the intercountry adoption system itself, even if dominated by nations that have ratified the Hague Convention, will be consistently used as a channel or means for a market in adoptable children. Instead, the ideals of the Hague Convention demand that intercountry adoption be maintained as a humanitarian child welfare intervention, employed only as dictated by the subsidiarity principle and the best interests of the child.

V. Conclusion

The Hague Convention was a response to the chaotic, corrupt, and abusive practices endemic to pre-Hague intercountry adoptions. The purpose of the Convention was to engender an orderly, ethical, intercountry adoption system free of child trafficking. Adoption advocates also saw the Hague Convention as providing a greater measure of legitimacy for intercountry adoption than exists under the Convention on the Rights of the Child.

Unfortunately, child laundering/child trafficking scandals have continued to arise in the Hague era in sending countries such as Cambodia, Chad, China, Ethiopia, Guatemala, Haiti, India, Liberia, Nepal, Samoa, and Vietnam. Many potential sending countries, particularly in Africa and Latin America, have decided to close themselves to all or almost all intercountry adoptions, in significant part based on concern over abusive practices, including particularly child trafficking. Years of determined cheerleading by the adoption community have failed to cleanse intercountry adoption from its associations with scandal, corruption, trafficking, and profiteering. The boom in intercountry adoption that accompanied the initial decade after the creation of the Hague Convention is now abating, with further declines anticipated. The legitimacy that intercountry adoption sought has been diminished by a sense of lawlessness, despite the extensive regulation and bureaucratic procedures which often accompany it.

Ironically, then, the United States is entering its own initial period of Hague implementation at a time of numeric decline for intercountry adoption. One danger is that the Treaty itself will be seen as the cause of these declines. In fact, the Hague Convention neither caused the boom in intercountry adoptions that occurred from 1993 to 2004, and has not been a primary cause of recent declines. The boom in intercountry adoption was fueled largely by developments in China, Russia, and Guatemala that operated independently of the Hague Convention. The declines have been due in part because of specific developments within these three nations, and in significant part because the continuance of child laundering has created a series of moratoriums and closures in some nations, and a reluctance to participate in intercountry adoptions in other nations.

It is true that sometimes nations that choose to close themselves off to intercountry adoption adhere to the Convention. Many other nations, however, which have never ratified the Convention are also largely closed to intercountry adoption. Similarly, some significant sending nations have joined the Convention, while others have not. The Convention, in short, is flexible enough to encompass sending nations which are either open or closed to

intercountry adoption. The Convention concerns minimum safeguards that must be put in place for intercountry adoptions; nations are left free to impose additional safeguards and limitations, or not, as they choose. Thus, it is wrong to blame the Convention itself for the choices some nations make to close themselves to intercountry adoption. It is the abusive practices which occur through inadequate implementation of the Convention, rather than the Convention itself, that leads many nations to be closed to intercountry adoption.

Thus, the Hague Convention has not yet been given an adequate opportunity to achieve its ideals. The Treaty could not be fully effective when the United States, by far the most significant receiving nation statistically, stood outside of its terms, and thus the fifteen year delay in United States ratification necessarily slowed the progress of the Convention. The most significant sending nation, China, did not implement the Convention until 2006 (although in structure the Chinese adoption system has been Hague compliant for many years). Many significant sending nations, including South Korea, Russia, Ethiopia, and Vietnam, have not yet ratified the Convention. Most significant child laundering scandals occurred in nations, like Guatemala and Cambodia, that had, at the time of the scandals, not yet implemented the Convention.

If the Treaty is going to be given a chance to become fully effective, certain lessons should be gleaned. Otherwise, the ratifications by China, the United States, and other significant nations in the intercountry adoption system will be inadequate. Mere ratification of the Hague Convention is insufficient to prevent child laundering. The goals of the Convention require effective implementation.

A brief summary of the relevant lessons would include the following:

- (1) The example of India teaches that merely having a central authority, accredited actors, and other formal procedural and bureaucratic features of the Hague Convention, are not sufficient to prevent significant corruption and child laundering practices. Although India did not ratify the Hague Convention until 2003, it has had in formal terms a Hague-style intercountry adoption system since approximately 1990---three years before the Hague Convention was even adopted. Yet, India, both before and after formal Hague ratification has suffered from very significant adoption scandals involving child laundering, profiteering, falsified documents, and corruption.¹⁰⁵
- (2) The example of India also teaches that it is critically important for governments to enforce strict limitations on fees and donations. The failure to do so is particularly dramatic in India, as the Indian Supreme Court as far back as 1984 emphasized the necessity to do so to avoid child trafficking, and the Indian government has for several decades published monetary limitations. Yet, the evidence is clear that those limitations have been systematically ignored by mainstream Indian and foreign (i.e., United States) actors in intercountry adoption. Both India and the United States have lacked the political will to enforce India's published limitations on fees and donations; without such political will, the formal and external features of the Hague Convention may facilitate, rather than limit, child trafficking.¹⁰⁶
- (3) The example of China teaches that a virtual government monopoly of a nation's child welfare and intercountry adoption practice does not eliminate the risks of corruption and child laundering/trafficking. Some have argued that it is largely the presence of private, non-governmental actors that has caused intercountry adoption to be subject to abusive practices. China is a test case of that theory, as its system has not only been Hague compliant in structure long before China formally ratified Hague, but also has relied entirely on governmental actors, including a central authority and governmental human welfare institutions/orphanages. Unfortunately, recent evidence indicates that once China ceased to have overwhelming numbers of abandoned babies in its institutions, some institutions which had become dependent on

¹⁰⁵ See *supra* sources cited in notes 103 and 104.

¹⁰⁶ See *id.*

intercountry adoption donations/fees began offering money for babies. Government orphanages, in short, are also subject to monetary incentives and corruption.¹⁰⁷

- (4) The past treatments of significant child laundering scandals in many sending nations, including Cambodia, China, Guatemala, India, Samoa, and Vietnam, indicate how difficult it can be for both receiving and sending nations to respond to this kind of wrongdoing. Authorities in sending nations often minimize the extent and significance of the misconduct; ironically, by the time authorities take action, political and public pressure has built, and the government imposes a moratorium or ban. Receiving nations seem to only seriously investigate the unusual cases where their own nationals were knowingly involved in intentional misconduct. Thus, the most common situations, where the institutions / agencies in receiving nations are merely negligent, while the intentional misconduct is done by foreign facilitators / intermediaries / orphanages, often escape real investigation by receiving nations. Further, even when investigations occur, receiving nations sometimes have a tendency to simply accept on faith the sometimes faulty assurances of authorities in sending nations. Sadly, in most child laundering cases the affected persons, including the original families, children, and adoptive parents, are left to largely fend for themselves, abandoned by their own agencies as well as the government actors who facilitated and allowed children to be laundered and trafficked.

These lessons suggest that if the Hague Convention is to be successful in its fundamental task of reducing “the abduction, the sale of, or traffic in children,” the following steps will be necessary as a part of effective implementation of the Convention:

- (1) Strict limitations on fees and donations related to intercountry adoption must be created and vigorously enforced by both sending and receiving countries. All financial aspects of intercountry adoption must be made fully transparent.
- (2) Receiving nations must recognize that they cannot simply outsource their own responsibilities for intercountry adoption to sending nations, due to limited government capacities, lack of political will, and corruption issues in many sending countries. Thus, receiving nations must be willing to seriously investigate the critical steps occurring in sending countries, including especially the processes by which children are obtained and labeled as eligible for intercountry adoption. Although the Hague Convention may understandably give sending nations an important role in determining the child’s eligibility for adoption, receiving nations as a matter of national sovereignty must make their own determinations of which children are eligible to enter their countries as adopted orphans. An interpretation of the Hague Convention that prevents or discourages receiving nations from independently investigating and evaluating the history and status of “orphans” would render the Convention itself counterproductive. The Convention was intended to create safeguards for intercountry adoption, not remove them, and receiving country investigations and evaluations of orphan status are an important safeguard.
- (3) Intercountry adoption agencies in receiving nations must be held responsible for child laundering and other abusive practices conducted by their foreign partners and independent contractors, even in instances where they lacked specific knowledge of such wrongdoing. Otherwise, there will be no incentive for such receiving nation entities to act to prevent such wrongdoing. In addition, such agencies should not be permitted to contractually waive responsibility or legal accountability for the standard risks of intercountry adoption, particularly including the illicit obtaining of children.
- (4) Specific cases of child laundering and child trafficking in the intercountry adoption system must be investigated in a manner analogous to an airplane crash. Such situations are tragic, but create opportunities to learn what has gone wrong, and what

¹⁰⁷ See, e.g., Patricia J. Meier and Xiaole Zhang, *Sold Into Adoption: The Hunan Baby Trafficking Scandal Exposes Vulnerabilities in Chinese Adoptions to the United States*, 39 *Cumb. L. Rev.* 87, 91 (2009); Barbara Demick, Chinese babies stolen by officials for foreign adoption, *L.A. Times*, Sept. 20, 2009, available at <http://www.latimes.com/news/nationworld/world/la-fg-china-adopt20-2009sep20,0,491086.story>.

can be done to avert future disasters. The current tendency to essentially privatize such wrongdoing as simply a problem for adoption triad members, without significant government investigation and involvement, must end.

- (5) Hague receiving countries, including particularly the United States, must apply equally vigorous regulatory and investigative approaches to adoptions from both Hague and non-Hague countries. While intercountry adoptions from non-Hague countries are permissible, receiving countries should be equally vigilant in regard to all intercountry adoptions. Otherwise, a two-tier system will develop in which agencies and receiving nations are constantly opening up adoptions in non-Hague countries in order to escape increased safeguards. The current approach by the United States of only applying increased regulatory safeguards to adoptions from Hague countries is dangerous and should be discontinued.
- (6) The Hague Convention was never intended to be a complete response to child laundering/adoption trafficking. Thus, responsible governments must enlist and employ other government ministries to supplement the work of their Central Authorities, particularly in relationship to the investigation and criminal prosecution of wrongdoing. In addition, responsible governments should enlist and encourage the assistance or involvement of other entities, including the Hague Conference, ngos, scholars, and the press, to respond adequately to the dangers posed by child laundering.
- (7) It is important that previously ignored stake-holders in intercountry adoption, including adult adoptees, and original family members, be involved and heard. The current system of intercountry adoption tends to be dominated by the voices of adoption agencies, adoptive parents, and prospective adoptive parents; these are certainly important stakeholders, but failing to equally account for the rights and views of adoptees and original family members leads to an unbalanced system with insufficient safeguards against child laundering.

The first seventeen years of experience since the creation of the Hague Convention teach that without effective implementation involving these specific steps, the Convention itself will be ineffective in preventing child laundering and other abusive practices. The question for the future, therefore, is whether there will be the political will to impose, through the Convention or otherwise, the necessary regulatory and investigatory safeguards. Increasing the numbers of ratifications of the Hague Convention, while it can be an important step, will not, in itself, be sufficient.

Optimistically, it is possible to hope that governments, institutions, and persons with a stake in intercountry adoption will act to implement the necessary reforms. Hopefully important stakeholders in intercountry adoption will realize that the only way to develop an ethical, orderly, and sustainable intercountry adoption system is to directly meet the challenges posed by abusive adoption practices, rather than avoiding the problem by minimizing the prevalence and significance of these abusive practices. Once significant stakeholders in intercountry adoption realize the necessity of reform, then the political will that created the Hague Convention can be marshaled toward effective implementation of the Convention.