

IT IS TIME TO MAKE AMENDMENTS IN THE HAGUE INTERCOUNTRY ADOPTION CONVENTION: THE NEW ACCREDITATION MECHANISM FOR SUPERVISING AND MONITORING ADOPTION AGENCIES WOULD ENSURE THE QUALITY OF ADOPTION AGENCIES AND GUARANTEE SUCCESSFUL ADOPTIONS

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Introduction

Imagine you are visiting a place where no one speaks your mother language and you wake up one day to find that the group you went with has all gone home and you are left there alone. Ironically, you will forget quickly about this relatively unpleasant first impression of being adopted by foreigners, when you then will be locked overnight in a damp unheated pump room by your new parents², who by the way were officially found eligible to adopt you and care about you; or you will be severely beaten by your new parents and have bruises, scars, cuts³; or you will be sexually abused

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² Viktor Matthey, age 6, of New Jersey, died of cardiac arrest due to hyperthermia after adoptive parents locked him overnight in a damp unheated pump room. Viktor was also severely beaten by his adoptive father. Both parents are sentenced to 10 years for confining Viktor to a pump room, 10 years for excessive corporal punishment and 7 years for failing to provide medical care. Viktor was in the US ten months before his death in 2001. See at http://adoption.about.com/od/adoptionrights/p/russian_children_murdered_by_adoptive_parent.htm

³ Alex Pavlis, age 6, of Illinois, was beaten to death by his US adoptive mother in 2003, six weeks after his adoption from Russia. He was found to have 32 bruises, scars, and cuts. Adopted mother was charged with involuntary manslaughter. See http://adoption.about.com/od/adoptionrights/p/russian_children_murdered_by_adoptive_parent.htm.

In the other case, Nikolai Emelyantsev, age 14 months, of Utah died in 2008 from a skull fracture, the result of what is believed to be blunt force trauma to the head. The infant also suffered from a bruised face, head, knee and anus. Adoptive mother was charged with one count of first-degree murder. http://adoption.about.com/od/adoptionrights/p/russian_children_murdered_by_adoptive_parent.htm

and exploited by your adoptive pedophile parent⁴; or you will be physically abused and neglected by your mentally ill and alcoholic parent⁵; or your adoptive parent will suddenly dissolve the adoption and send you, a little child, back to your home country, alone⁶. And, ironically, nobody will know about these continuing abuses in order to prevent them, even though the responsible authorities in this field were expected to monitor regularly your life conditions and prevent such abuses.

These scenarios are taken from the real stories in relatively recent intercountry adoption cases. Moreover, other examples⁷ indicate also the corruption and child trafficking practice in intercountry adoption. So, the questions in these cases are: how the

⁴ Masha Elizabeth Allen, was five-years-old in 1998 when 41-year-old Matthew Mancuso adopted her from a Russian orphanage and brought her to his home in the small western Pennsylvania hamlet of Plum. Over the next five years, Mancuso sexually abused and exploited Masha, videotaping and photographing her in various stages of abuse, and posting the images on the internet to share with others members of an online community of pedophiles and child pornography fans. Masha was rescued by the FBI in 2003. www.wikileaks.org/wiki/One_Child%27s_Unending_Abuse_-_From_Disney_World_Girl_to_Drifter

⁵See www.wikileaks.org/wiki/One_Child%27s_Unending_Abuse_-_From_Disney_World_Girl_to_Drifter

⁶ Bethanie Barnes, A critique of the US-Russian adoption process and three recommendations for the US-Russian bilateral adoption agreement; Comment; *Emory International Law Review* 2013, 401-403.

⁷ Peter S. Goodman, *Stealing Babies for Adoption; With U.S. Couples Eager to Adopt, Some Infants Are Abducted and Sold in China*, *Wash. Post*, Mar. 12, 2006, at A01- cited in Rachel J. Wechsler, *Giving Every Child a Chance: The Need for Reform and Infrastructure in Intercountry Adoption Policy*, *Article Pace International Law Review*, winter, 2010. For instance, in China was uncovered child trafficking group in 2005, and nine individuals in China were convicted of trafficking and twenty-three local government officials were fired for their involvement. A child trafficking enterprise was discovered in Cambodia in 2002. Two American owners of a US adoption agency had led the enterprise through which they collected approximately eight million dollars from American adoptive parents. In this scheme, Cambodian children were taken from their birth parents under false pretenses. The two Americans leading the enterprise were prosecuted for conspiracy to commit visa fraud, conspiracy to launder money, and structuring. See Trish Maskew, *Child Trafficking and Intercountry Adoption: The Cambodian Experience*, 35 *Cumb. L. Rev.* 619, 632 (2004-05).

alcoholics, mentally ill people, pedophiles can manage to adopt children and become parents? Or, how can the trade in children, child laundering⁸ and abduction occur in a “proper” intercountry adoption system? Whose fault is this? How to undermine or minimize this abusive practice?

These are quite ambitious questions and require complex research of different aspects of intercountry adoption. However, the above-described scenarios, to some extent, are also the results of improper and unethical work of adoption agencies, involved in intercountry adoption, their lack of professionalism and their failure to operate accountably and transparently. And the involvement of such unprofessional and poor quality adoption agencies in the adoption process becomes possible due to improper supervision over those agencies, failure to monitor them and improve their quality.

Adoption agencies are non-profit organizations that provide adoption services and are the main players in intercountry adoption, having their specific functions in all phases of intercountry adoption⁹. For instance adoption agencies screen and select prospective parents¹⁰, organize courses for the preparation of adoptive parents for an intercountry adoption¹¹, collect and disseminate information about the child (background, family and medical history, and any special needs of the child, etc.) to facilitate the adoption¹² in the pre-adoption phase; initiate and assist the

⁸ David M. Smolin, Desiree L. Smolin, [The Aftermath of Abusive Adoption Practices in the Lives of Adoption Triad Members: Responding to Adoption Triad Members Victimized by Abusive Adoption Practices](https://www.google.com/#q=David+and+Desiree+Smolin%2C+The+Aftermath+of+Abusive+Adoption+Practices+in+the+Lives+of+Adoption+Triad+Members), slide 12. Available <https://www.google.com/#q=David+and+Desiree+Smolin%2C+The+Aftermath+of+Abusive+Adoption+Practices+in+the+Lives+of+Adoption+Triad+Members>

⁹ Usually, an intercountry adoption process consists of three phases, *i.e.* pre-adoption, adoption, and post adoption phases

¹⁰ Georgia Gebhardt, [Hello Mommy and Daddy, How in the World Did They Let You Become My Parents?](#) Article, American Bar Association, Family Law Quarterly Fall, 2012, 433-434.

¹¹ Guide to Good Practice No 2, para 173, available at http://www.hcch.net/index_en.php

¹² Bethanie Barnes, [A critique of the US-Russian adoption process and three recommendations for the US-Russian bilateral adoption agreement](#), Comment, Emory International Law Review, 2013, 432-433.

adoption proceedings¹³, match the child with a suitable family in the adoption phase¹⁴, and also promote post-adoption services.¹⁵ Moreover, adoption agencies operate as intermediaries between the prospective adoptive parents, the various players referred to above, the various authorities of the receiving states and states of origin, and the children to be adopted¹⁶. Obviously, this critical and complex role of adoption agencies requires high professionalism, adequate resources, an ethical approach to intercountry adoption¹⁷ on the one hand, and strict supervision of adoption agencies on the other hand.

So, who should supervise adoption agencies and assure their quality and how? To this end the main international convention in this field, the Hague Intercountry Adoption Convention, requires the signatory states' authorities to supervise the adoption agencies by compulsory accrediting¹⁸ and verifying that the agency has the competence to properly carry out its tasks and functions¹⁹.

To sum up, there are adoption agencies that, indeed, exercise actual intercountry adoption; the state authorities that supervise the adoption agencies and the accreditation as the means of supervising and monitoring the adoption agencies and assuring their quality. However, the effectiveness of current accreditation, thereby supervision and monitoring the adoption agencies, is not satisfactory²⁰ and there are still cases in which poor quality adoption agencies are involved, which creates a high risk of abusive practice as it was in the above described scenarios.

So what is the problem? The problem that this paper addresses focuses on the lack of proper accreditation of adoption agencies as the means of supervision and monitoring the adoption agencies and

¹³ See Hague Intercountry Adoption Convention, Art. 9 (a)

¹⁴ See Guide to Good Practice No 2, para. 211., available at http://www.hcch.net/index_en.php

¹⁵ See Bethanie Barnes, *id.*

¹⁶ See Guide to Good Practice No 2, para. 211.

¹⁷ See Guide to Good Practice No 2, para. 5.

¹⁸ Hague Convention, Art. 10, 11

¹⁹ See *Id.*

²⁰ Guide to Good Practice No 2, para. 211

assuring their quality. And in order to suggest possible solutions to this problem it seems reasonable to discuss the causes of this problem and their effects on intercountry adoption practice.

The main cause of mentioned problem is the failure of the Hague Convention to regulate many issues of accreditation leaving the signatory states free and flexible to determine those issues at the national levels. This very flexible approach of the Convention leads to negative effects and, ultimately, to the improper supervision and monitoring of adoption agencies and to their poor quality.

Particularly, the Convention's failure to define what accreditation is results in the practice in which the signatory states are mixing up accreditation and licensing processes, whereas accreditation is more than mere licensing. Except for supervising and punishing elements, accreditation includes elements of continuous monitoring and assuring adoption agencies' quality.

The Convention's failure to determine which authority of a signatory state is in charge of accrediting, thereby, supervising and assuring the quality of adoption agencies may bring about a state's government monopoly and corruption in adoption practice, as well as improper supervision and poor quality of agencies.

Finally, the Convention's failure to provide uniform accreditation procedure leads to the very diverse accreditation practice in the signatory states, the negative effects of which are confusions and difficulties in adoption process as well as inconsistency in quality of adoption agencies and the degree of their supervision in the signatory states.

Thus, as potential solutions, this paper suggests the following: first, defining accreditation, thereby, recognizing it as a tool of supervision, monitoring and quality assurance and as a safeguard for proper and professional work of adoption agencies; second, providing uniform accreditation procedure (that combines supervising, monitoring and quality improving elements) as dealing with diverse accreditation practice and ensuring the consistency in quality and degree of supervision of adoption agencies; third, introducing at the national level a new accrediting and supervising

body - Quality Assurance Body (hereafter QAB), that would not only supervise and assure the quality of adoption agencies through accreditation, but also regularly monitor adoption agencies and improve their quality. This professional body would also create accreditation standards and criteria.

All those three proposed amendments to the Hague Convention together form the new mechanism for accreditation and should be made together as a whole in order to affect positively the adoption practice.

It is worth mentioning that the problems of supervision over the adoption processes were widely discussed in academia and several solutions were proposed to oversee the adoption processes in whole and the signatory states' compliance with the Convention, including, creating an International Ombudsman office²¹; International Family Court,²² International Supervising Agency,²³ and an International Committee of participating member,²⁴ etc.

However, the proposal in this paper would work better: first, because the QAB would be a national body that would strongly consider the local needs and traditions of a signatory state in creating the accreditation standards and criteria, whereas other suggested mechanisms would be international supervising bodies from outside that with their rules and decisions, somehow, may push the countries to refuse ratifying and/or opt-out from the Convention.

Second, QAB would be not only a supervising, but also quality assurance body that would continuously monitor and improve the quality of adoption agencies, whereas the suggested international

²¹ "Problems and Solutions" Before the House Committee on International Relations, Testimony of Cindy Freidmutter, Esq. Executive Director, Evan B. Donaldson Adoption Institute. International Adoptions, May 22, 2002 at http://commdocs.house.gov/committees/intlrel/hfa79760.000/hfa79760_0f.htm

²² Rachel J. Wechsler, Giving Every Child a Chance: the need for reform and infrastructure in intercountry adoption policy, Article Pace International Law Review, winter, 2010

²³ See *Id.*

²⁴ See the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption: are its benefits overshadowed by its shortcomings?

mechanisms would have mostly supervising and/or punishing effects.

Third, the structure and specific working procedure of QAB would guarantee its own accountability and transparency and exclude monopoly or corruption in this body, whereas the mentioned international mechanisms sometime may be seen as external levers on signatory states lacking transparency and accountability in their operations.

Fourth, the mechanism of QAB and the proposal of uniform accreditation procedure are focused on supervision over the adoption processes, hence, through accrediting adoption agencies and improving their quality. This mechanism emphasizes the accreditation as a supervising tool and its goal to assure the quality of adoption agencies as a guarantee of successful adoptions. In contrast, other proposals suggested in academia are focused on general supervision over adoption processes and not through accreditation but through examining a signatory states' compliance to the Convention's provisions in general. So those proposals are more general and are not specifying the accreditation or focusing on the quality of adoption agencies as the proposal in this paper does. Thus, the tasks and functions of other suggested in academia solutions may be too broad to ensure their effectiveness.

And fifth, the proposal in this paper suggests supervising adoption agencies through the new mechanism of accreditation. Indeed, the signatory countries somehow are accrediting adoption agencies now, and already have some background and resources, rather than they would start from zero²⁵ as in other suggested mechanisms. So, the new mechanism for accreditation, including creation of QAB would be less expensive than the other above suggested solutions (Ombudsman, Family Court, etc.).

²⁵ Hague Conference published many materials, including guides, explanatory reports, and recommendations to support good intercountry adoption practice. It also lunched training programs for signatory states. Other international organizations develop rules and standards for successful intercountry adoptions. They are the Nordic Adoption Council (NAC), EurAdopt, the Danish Adoption Group, International Social Service, and International Reference Centre for the Rights of Children Deprived of their Family (IRC), etc.

Thus, Section I of this paper emphasizes the role and functions of adoption agencies and shows the need of proper supervision and monitoring of adoption agencies through proper accreditation process. Section II presents the history of intercountry adoption and discusses the establishment of compulsory accreditation requirement in the Hague Convention and also analyzes the deference between accreditation and licensing. Section III introduces the problems in current accreditation practice, shows their effects on the adoption process and emphasizes the need for changes in the Hague Convention. Section IV proposes the new accreditation mechanism for supervising and monitoring the adoption agencies. This section discusses the role, functions, working procedures of the QAB, provides definition of accreditation and uniform accreditation procedures. Also this section points out the strengths and weaknesses of the new accreditation mechanism.

I. The role and functions of adoption agencies involved in intercountry adoption

Usually, an intercountry adoption process consists of three phases: pre-adoption, adoption and post adoption²⁶. And numerous players, such as psychologists, social workers, lawyers, public officials, adoption agencies, etc., are involved in this process having their special duties and functions in the mentioned phases. Of course a successful adoption requires all players in the adoption process to perform their duties and functions properly. However, the proper performance by adoption agencies²⁷ of their functions and duties are crucial for a successful adoption, because of their significant role in all phases of intercountry adoption.

Adoption agencies are private non-profit organizations that provide adoption services. Their functions as well as the minimum requirements to their composition, operation and financial situation are set forth in the main international convention in this field, the

²⁶ Under the Hague Convention on Intercountry Adoption.

²⁷ Adoption agencies are not necessary to be involved in adoption process. A state decides itself to have or not to have adoption agencies, consequently, to perform adoption functions through other competent authorities.

Hague Convention of May 29, 1993 on the Protection of Children and Co-operation in Respect of Intercountry Adoption (hereafter also “the Hague Convention” or “the Convention”). The Convention was the result of a multi-year process hosted by the Permanent Bureau of the international organization known as the Hague Conference on Private International Law²⁸.

Incidentally, the Convention uses the term “accredited body” for an adoption agency. Also the Convention does not require but encourages the signatory states to use the adoption agencies in intercountry adoption process. Instead, the Convention provides the regime of Central Authorities that requires each signatory state to create a Central Authority (usually as the Central Authority, a state appoints its Ministry of Justice, Ministry of Education, Ministry of Labor and Social Issues etc.) to oversee all intercountry adoptions involving that state and also to perform actual adoptions. However, the Central Authority of a state may delegate its functions pertaining to the actual adoptions to private adoption agencies, considering, inter alia, the lack of its adequate resources for implementing actual adoptions. So, it is the province of a single state in the face of its Central Authority to involve or not adoption agencies in adoption processes.

However, usually the Central Authority of a state keeps the functions of the development of policy, procedures, standards and guidelines for the adoption process²⁹, whereas the function of actual adoptions (Article 9, Articles 14-22 of the Convention) delegates to adoption agencies³⁰. For instance, Articles 14-22 of the Convention set forth the procedural requirements for intercountry adoption.³¹

²⁸ Jena Martin, Esq, The Good, the Bad & the Ugly? A New Way of Looking at the Intercountry Adoption Debate, Article, U.C. Davis Journal of International Law and Policy, Spring 2007, 192-193. See also Peter H. Pfund, Intercountry Adoption: The 1993 Hague Convention: Its Purpose, Implementation, and Promise, Special Issue on International Family Law, Family Law Quarterly, American Bar Association, Spring, 1994, 55-56.

²⁹ Guide to Good Practice No 1, *supra*, note 22, para. 173.

³⁰ Guide to Good Practice No 2, *supra*, note 22, para. 189.

³¹ Bethanie Barnes, A critique of the US-Russian adoption process and three recommendations for the US-Russian bilateral adoption agreement, Comment, Emory International Law Review, 2013, 432.

Particularly, prospective adoptive parents must apply for an adoption through the Central Authority of their state.³² The Central Authority must determine whether the prospective adoptive parents are “suitable” and have been adequately “counselled as may be necessary.”³³ Also it should reveal the information about the applicant, family and medical history, social environment, reasons for adoption, and overall suitability to adopt.³⁴ The Central Authority must prepare a report about the adoptive child including information on his or her background, family, medical history, and any special needs of the child³⁵ and ensure the proper consents are obtained³⁶. Also it must determine whether the adoption is in the child's best interests.³⁷

Thus, most of the states³⁸ now use adoption agencies to perform the above-described functions of Central Authorities supporting the prospective adoptive parents during and after the adoption process³⁹. To this end, the general responsibilities of adoption agencies in whole adoption procedure are: collecting and disseminating

³² See *Id.*

³³ Donovan M. Steltzner, Intercountry Adoption: Toward a Regime That Recognizes the “Best Interests” of Adoptive Parents, Note, Case Western Reserve Journal of International Law, Winter 2003, 140.

³⁴ Bethanie Barnes, *Id.* 432.

³⁵ Hague Convention Article 16(1)(a)(b).

³⁶ Hague Convention Article 16(1)(c).

³⁷ Hague Convention Article 16(1)(d).

³⁸ See the laws of Canada (Quebec) (Youth Protection Act, R.S.Q. c. P-34.1, Division VII, §2), Italy (Law No 184 of 4 May 1983, Article 31(1)), Norway (Act of 28 February 1986 No 8 relating to adoption, section 16(f)), and Sweden (Intercountry Adoption Intermediation Act (number 1997:192), section 4).

³⁹ International Social Service, Accredited Adoption Bodies of receiving States – AABs (I): The Nature and Advantages of their Intervention, Fact Sheet, No 38, July 2007, available at www.iss-ssi.org (last consulted on 14 April 2012, hereinafter, “ISS Fact Sheet No 38”), page 2. For a discussion on independent adoptions, see Guide to Good Practice No 1, *supra*, note 22, para. 191, and I. Lammerant and M. Hofstetter, Adoption: at what cost? For an ethical responsibility of receiving countries in intercountry adoption, Lausanne, Terre des hommes, 2007, available at www.terredeshommes.org under “Resources and Links” then “Publications” (last consulted on April 14, 2012, hereinafter, “Adoption: at what cost?”), pages 11 and 29.

information about the child to facilitate the adoption⁴⁰; initiating and assisting the adoption proceedings;⁴¹ promoting pre-adoption counseling and post-adoption services⁴², and creating transparency between governments concerning particular adoptions⁴³. The particular functions⁴⁴ of adoption agencies associated with these general responsibilities and with their delegated obligations in Articles 14-22 of the Convention may include:

Pre-adoption phase

a) Informing persons interested in adopting a child about adoption in general and the current situation of intercountry adoption in different countries;

b) Organizing courses for the preparation of adoptive parents for an intercountry adoption;

c) Informing the prospective adoptive parents of the requirements for adoption in the specific State of origin, the procedures to be observed, the documents required, the profile and health of adoptable children;

d) Ensuring that the prospective adoptive parents are assisted to meet the requirements of the State of origin, by preparing complete and correct case files;

e) Sending the completed dossier to the State of origin concerned;

f) Establishing good collaboration with all the parties and authorities in the receiving State in order to secure the proper performance of each adoption case;

g) Keeping the prospective adoptive parents informed of the progress of their application⁴⁵;

After matching

h) Forwarding details of the child to the prospective adoptive

⁴⁰ See *Id.* Art. 9 (a).

⁴¹ See *Id.* Art. 9 (b).

⁴² See *Id.* Art. 9 (c).

⁴³ See *Id.* Art. 9 (d-e).

⁴⁴ By the way, adoption agencies have functions in both the receiving State (the state of adoptive parents) and the State of origin (the state of the adoptive child).

⁴⁵ See the whole list in Guide N 2. Para 211

parents and ensuring that they have obtained all the information and services required for an informed decision;

i) Replying to any additional request by the authority of the receiving State in charge of supervising adoptions, and of the State of origin, for each adoption case, if appropriate;

j) Offering any services and advice relating to the proposed adoption, including preparation for travel;

Post-adoption phase

k) Informing the authorities concerned in the receiving State of the child's arrival;

l) Ensuring that the prospective adoptive parents finalize all the steps to secure the legal status for the child,

m) Preparing and sending the child's follow-up reports to the State of origin;

n) Supporting adoptive parents and the child during the integration of the child into the family.

All above-mentioned functions determine the significant role of adoption agencies in the adoption process, as, *inter alia*, "guarantors of the ethics, professionalism and multidisciplinary nature of the intercountry adoption process"⁴⁶. In addition, such role and functions of adoption agencies justify the minimum standards that the Hague Convention sets forth for an adoption agency desiring to be involved in adoption process. Those minimum standards assure that an adoption agency will pursue non-profit objectives;⁴⁷ employ personnel who are qualified by ethical standards and trained to work in the field of intercountry adoption⁴⁸; and be subject to supervision by competent authorities of that state⁴⁹. And one of the forms of supervision of adoption agencies by competent authorities is the accreditation⁵⁰.

However, accreditation of adoption agencies seems imperfect

⁴⁶ Articles 20 and 21 of the UNCRC. See also International Social Service Fact Sheet No 38, *ibid*.

⁴⁷ Hague Convention Article 11(a).

⁴⁸ See *Id.* Article 11(b).

⁴⁹ See *Id.* Article 11(c).

⁵⁰ Articles 10-11.

and not satisfactory nowadays⁵¹. Consequently, the current intercountry adoption practice is described with the lack of proper supervision, monitoring, and assuring the quality of adoption agencies through proper accreditation. And the below-described problems as causes of the created situation in accreditation practice require quick measures of changes and improvements.

II. The problems in current accreditation practice and the need for changes

The imperfect and not satisfactory accreditation of adoption agencies is mostly determined by the gaps and deficiencies of the Hague Convention, *i.e.* the Convention's silence to the meaning of accreditation and the Convention's failure to identify the accrediting and supervising body and to provide a uniform accreditation procedure. The effects of those failures ultimately lead to the involvement of poor quality adoption agencies in the adoption process and to the high risk of their abusive practice.

A. The Convention's failure to define accreditation causes identification of accreditation with licensing which results in the improper supervision and the poor quality of adoption agencies

The Convention's failure to define what accreditation is reduces the significant role of accreditation as a tool of supervision, continuous monitoring and assurance of adoption agencies' quality. This lack of the Convention allows the signatory states to interpret the accreditation as a mere permit or a license. This confusion brings about improper supervision and lack of monitoring and improvement of the quality of adoption agencies.

Before discussing the meaning of accreditation and its differences from mere licensing, it is worth to briefly describe the evolution of accreditation and its establishment as a compulsory requirement for all adoption agencies involved in intercountry adoptions.

The history of intercountry adoption shows that shortly after

⁵¹ Guide to Good Practice No 2, para. 225.

increased popularity⁵² of this phenomenon in the 1980s the world community recognized that intercountry adoption was causing “serious and complex human and legal problems”⁵³, and admitted that the adoption practice was “chaotic,” “incoherent,” and vulnerable to child trafficking⁵⁴. They also recognized the lack of existing legal tools and regulations⁵⁵ both in national and international levels, which signifies the necessity of “multilateral”⁵⁶ solution in this field.⁵⁷ To this end, the Hague Convention was adopted⁵⁸.

The abusive pre-Hague intercountry adoption practice was emphasized by J.H.A. (Hans) van Loon⁵⁹ in his 1990 Report on Intercountry Adoption,⁶⁰ which constitutes one of the most significant document in the preparatory materials for the Hague Convention⁶¹.

The Report described the abduction, buying, or selling children for intercountry adoption as a form of child trafficking, and pointed out three methods of existing at the time abuses: the sale of children,

⁵² Explanatory Report to the Hague Convention of May 29, 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, by G. Parra-Aranguren, at para. 6, available on the www.hcch.net

⁵³ Outline. Hague Intercountry Adoption Convention, page 1, available on the www.hcch.net

⁵⁴ David M. Smolin, Child Laundering and the Hague Convention on Intercountry Adoption: The Future and Past of Intercountry Adoption, Article, University of Louisville Law Review 2010, 461-462.

⁵⁵ Andrew C. Brown, International Adoption Law: A Comparative Analysis, Comment, International Lawyer Fall 2009, American Bar Association, 1138-1140.

⁵⁶ Outline *Id.*

⁵⁷ See *Id.*

⁵⁸ The Convention was the result of a multi-year process hosted by the Permanent Bureau of the international organization known as the Hague Conference on Private International Law⁵⁸. It was the first time that the non-member states of Hague Conference also participated in drafting of the Convention⁵⁸ because of the “chaotic,” “incoherent,” and vulnerable to child trafficking⁵⁸ practice of international adoption.

⁵⁹ J.H.A. van Loon later became the Secretary General of the Hague Conference on Private International Law. See David M. Smolin *Id.* 452-54.

⁶⁰ J.H.A. van Loon, Report on Intercountry Adoption, Preliminary Document No. 1 of April 1990, in Preliminary Work, Proceedings of the Seventh Session 101 (May 10-29, 1993).

⁶¹ David M. Smolin *Id.* 453.

consent obtained through fraud or duress and child abduction, and combinations of those three.⁶² The Report raised out the issues of corrupt intermediaries in the adoption process, such as lawyers, notaries, social workers, hospitals, doctors, children's institutes, who "sometimes turned into complete 'baby farms,' and work together to obtain children and make profit"⁶³.

And as the main reasons for that chaotic situation the Report identified the commonplace private and independent adoptions⁶⁴; the absence of supervision by public authorities, and the absence of involvement of professional licensed agencies in intercountry adoption.⁶⁵

Hans van Loon, thus, wanted to replace this pre-Convention intercountry adoption practice with a highly ordered and regulated intercountry adoption system, in which each significant actor was either the government, or a non-profit entity accredited by the Government.⁶⁶ Hans van Loon's mechanism for achieving the required regulation, inter-governmental coordination, and ordered intercountry adoption system was a regime of "Central Authorities"⁶⁷ and the strategy of the new Convention of greater regulation, international coordination, and restrictions on "the freedom of agencies to act as intermediaries in intercountry adoption."⁶⁸

⁶² J.H.A. van Loon, Report on Intercountry Adoption *Id.* 51-52.

⁶³ See *Id.*

⁶⁴ Independent adoptions are those that are arranged directly between adoptive parents and biological parents without assistance from an accredited adoption agency. See Georgia Gebhardt, Hello mommy and daddy, how in the world did they let you become my parents? Article, American Bar Association, Family Law Quarterly Fall, 2012, 432.

⁶⁵ Guide to Good Practice No 2, para 27.

⁶⁶ David M. Smolin, Child Laundering and the Hague Convention, page 456.

⁶⁷ See *Id.*

⁶⁸ See *Id.* page 455. So, the draft of the new Convention was examined in the Seventeenth Session of the Hague Conference on Private International Law convened on May 10, 1993 and unanimously approved on May 29, 1993⁶⁸. The new Convention set forth the purposes: (1) to establish safeguards to ensure that intercountry adoption is in the best interests of the child (and with respect of his fundamental rights); (2) to establish a system of co-operation amongst contracting states to ensure that those safeguards are respected; (3) to prevent abduction, child trafficking, and baby buying; and (4) to make sure that adoptions between the states are given "full faith and credit".⁶⁸

Thus, the pre-Hague intercountry adoption was described as poorly regulated with the commonplace private adoption practice and the rare involvement of licensed adoption agencies, which lead to abusive and unethical adoption practice⁶⁹. As a solution, among other things, was recommended the compulsory accreditation of adoption agencies involved in intercountry adoption⁷⁰. And it was the unethical adoption practices of some adoption agencies and individuals that a number of delegates to the Convention negotiations wanted the agencies and individuals excluded from the procedure at all⁷¹.

However, a compromise was reached in the Convention that allows only public authorities and private bodies (adoption agencies) that are duly accredited and that comply, at least, with certain minimum requirements established by the Convention⁷², to perform Convention adoption functions. The Convention, thereby, recognized that the adoption agencies continue to play an active role in intercountry adoptions, but they must be properly accredited and more closely supervised⁷³.

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⁶⁹ Guide to Good Practice No 2, para 92.

⁷⁰ See *Id.*, para 32.

⁷¹ See *Id.*

⁷² See *Id.*

⁷³ See *Id.* para 34.

⁷⁴ Jennifer M. Lippold, Transnational Adoption From an American Perspective: The Need for Universal Uniformity, Note, Case Western Reserve Journal of International Law Spring/Summer, 1995, 492.

given “full faith and credit”.⁷⁵

As to accreditation, the Hague Convention states: “Accreditation shall only be granted to and maintained by bodies demonstrating their competence to carry out properly the tasks with which they may be entrusted” (Article 10). “An accredited body shall – *a*) pursue only non-profit objectives according to such conditions and within such limits as may be established by the competent authorities of the State of accreditation; *b*) be directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of intercountry adoption; and *c*) be subject to supervision by competent authorities of that State as to its composition, operation and financial situation” (Article 11).

Thus, the Hague Convention stipulates the requirement of compulsory accreditation of adoption agencies and sets forth minimum international standards on adoption agencies for their structure, accountability, ethics and professionalism⁷⁶.

While now, the involvement of accredited adoption agencies in intercountry adoption is the norm, and accreditation of adoption agencies is one of the Convention's important safeguards⁷⁷, the very flexibility of the Convention in regulating accreditation issues threatens the proper supervision of adoption agencies and the improvement of their quality. Particularly, the Convention's failure to define what accreditation is creates the practice in which the states mix up the processes of accreditation and licensing. Indeed, the Convention is vague⁷⁸ about those two processes, and Articles 10 and 11 of the Convention leave room for two possible interpretations.

First version: the Convention uses the term “accreditation” but implies mere “licensing” under that concept and sets minimum requirements that adoption agencies should meet to be involved in adoption process. So in this case Convention equates accreditation

⁷⁵ Jena Martin, Esq, The good, the bad & the ugly? A new way of looking at the intercountry adoption debate, Article, U.C. Davis Journal of International Law and Policy, Spring 2007, 192.

⁷⁶ Guide to Good Practice No 2, para 144.

⁷⁷ See *Id.* para 36.

⁷⁸ The vague terminology of Hague Convention was widely criticized.

with licensing. Second version: the Convention requires only licensing for the adoption agencies under the minimum standards (to their structure, adequate personnel); however, it also encourages the signatory states to create higher standards⁷⁹ for ensuring adoption agencies' competence to properly carry out their tasks. Nonetheless, this ambiguity creates confusion and difficulty in accreditation practice and should be clarified.

It is worth mentioning that the main difference between accreditation and licensing is that licensing requires meeting the minimum standards⁸⁰. Accreditation exceeds the minimum requirements for licensing, and focuses on the quality helping to reach the highest quality⁸¹. In theory, there is little room for the licenser's discretion in evaluating compliance. Accreditation, specifically allows for a varying level of compliance rather than a fixed level⁸². In other words, licensing requires supervising and ensuring the minimum standards, whereas accreditation requires supervising, monitoring to achieve the highest possible standards, the assurance of quality, and improved efficiency and effectiveness⁸³.

Accreditation as a tool is widely used in educational space and constitutes a professional peer review process by which educational institutions and programs are provided technical assistance and are evaluated for quality based on pre-established academic and administrative standards. A primary goal of accreditation in educational system is to assist postsecondary institutions to identify and achieve goals in order to protect the public and to establish and maintain high educational standards and ethical business practices for the accredited, member schools.⁸⁴ Moreover, accreditation procedure usually includes monitoring, when the accrediting agency monitors each accredited institution or program throughout the

⁷⁹ Guide 2

⁸⁰ See at http://aplaceofourown.org/question_detail.php?id=161

⁸¹ See at http://aplaceofourown.org/question_detail.php?id=161

⁸² Mary Eschelbach Hansen; Daniel Pollack, [The Regulation of Intercountry Adoption](#), Articles Brandeis Law Journal Fall, 2006, 118.

⁸³ See http://tiger.uic.edu/depts/ovcr/research/protocolreview/irb/aahrpp/DOC_7.pdf

⁸⁴ See e.g. http://azppse.state.az.us/student_info/accreditation.asp

period of accreditation granted to verify that it continues to meet the agency's standards and improve its quality⁸⁵.

Thus accreditation is more than mere licensing and is designed to assure the quality of adoption agencies to the higher standards. And we think that the Hague Convention should define accreditation and recognize it as the tool of supervision of adoption agencies and assurance of their quality. This would strengthen the position of accreditation among other supervising tools and allow the states to supervise and improve all aspects of adoption agencies' operations, including financial operations.

The meaning and goals of accreditation in intercountry adoption should include supervision over the composition, operation and financial situation of an adoption agency, as well as the continuous monitoring of its quality and assuring its compliance with high standards.

These goals of accreditation may be achieved only in the existence of a corresponding accreditation mechanism that this paper suggests, *i.e.* the Quality Assurance Body and the uniform accreditation procedure. QAB would create high standards and criteria for accreditation, and due to its transparent working procedure and the uniform accreditation procedure QAB would ensure the proper supervision, monitoring of the adoption agencies and assure their quality.

B. The Convention's failure to assign the accrediting and monitoring body causes unprofessional accreditation and improper supervision of adoption agencies

The Convention is silent as to the authority that is to issue or withdraw the accreditation. Currently in many states these functions perform the Central Authorities of these states⁸⁶. However, The Explanatory Report⁸⁷ provides enlightenment, specifying that it is not necessarily the Central Authority's role: "since accreditation is not a specific task of the Central Authority, it was included neither in

⁸⁵ See e.g. <https://www.google.com/#q=goals+of+accreditation>

⁸⁶ Guide to Good Practice No 2, *supra*, note 22, para. 113.

⁸⁷ Explanatory Report, *supra*, note 19, para. 245, available at www.hcch.net.

Article 7 nor in Articles 8 or 9⁸⁸. The Special Commission of 2000 made a Recommendation that the state should make an official public designation of the authorities competent to grant accreditation, to supervise accredited bodies⁸⁹.

So what is the problem that the Central Authority of a state accredits adoption agencies as it does now in many states? First, when the Central Authority is in charge of accrediting and supervising adoption agencies, it may have a monopoly over intercountry adoptions, because the Central Authority is the key authority that is responsible for all adoption processes and implementing Convention's functions. Due to its role and functions, the Central Authority may be involved in each phase of an adoption process, so it may simply come into agreement about corruption or other illegalities, in a particular phase of an adoption process, with adoption agencies that are accountable before the Central Authority.

Second, since the Convention does not provide an enforcement mechanism for accreditation that would require the Central Authority of each state to be accountable for granting or refusing accreditation, the risk of illegal actions of the Central Authority increases. For instance, the Central Authority of a state, which is not accountable before anyone, may simply "close the eyes" on violations and failures of the adoption agencies, simply because, for example, the Central Authority with adoption agencies are involved in corruption or child-trafficking practice, or the Central Authority does not want to punish its agencies, etc. This may lead to the involvement of improperly accredited and unprofessional agencies in adoption processes and ultimately to violations and abuses.

⁸⁸ Parra-Aranguren G., Explanatory Report to the Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, in Hague Conference on Private International Law, *Proceedings of the Seventeenth Session (1993)*, Tome II, *Adoption – co-operation*, pages 539-651, paras 242-243, available at www.hcch.net.

⁸⁹ Report of the 2005 Special Commission, *supra*, note 60, para. 55: the receiving States shared the same practice, *i.e.* that "the accredited body was appointed by a competent authority according to published criteria and supervised by the Central or other government Authority".

To this end a correct criticism in academia was expressed. For instance, some scholars argue that “[a]lthough the Convention has good intentions, it lacks any form of enforcement mechanism to ensure compliance”⁹⁰. This allows each country to police international adoption as it sees fit⁹¹. In addition, when each country's Central Authority is essentially its own judge, it is highly unlikely to admit to its own faults and failures with regard to international adoption procedures and harmful consequences⁹². Other scholars argue that the governmental system in a country that would allow for child-trafficking or corrupt adoption procedures could simply appoint a corrupt Central Authority that would look the other way or justify such procedures allowing them to continue or expand⁹³. Other arguments lead to the conclusion that the Convention lacks the enforcement mechanisms to hold the Central Authorities accountable for their own actions.⁹⁴ Since no specific enforcement mechanism is suggested by the Convention, the operation of its functions depends on each member nation's good faith⁹⁵. The system under the Hague Convention allows each country to police its own intercountry adoptions, as was the case prior to the treaty⁹⁶.

⁹⁰ See Id.

⁹¹ See Id.

⁹² Notesong Srisopark Thompson, “Hague is enough?: A call for more protective, uniform law guiding international adoptions”, Notes and Comments, Wisconsin International Law Journal, Spring 2004, 466.

⁹³ Erica Briscoe, “The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption: are its benefits overshadowed by its shortcomings?” Comment, Journal of the American Academy of Matrimonial Lawyers, 2009, 449.

⁹⁴ Lindsay K. Carlberg, The Agreement Between the United States and Vietnam Regarding Cooperation on the Adoption of Children: a more effective and efficient solution to the implementation of the Hague Convention on Intercountry Adoption or just another road to nowhere paved with good intentions? Notes, Indiana International & Comparative Law Review, 2007, 134.

⁹⁵ See Jennifer M. Lippold, Transnational Adoption from an American Perspective: The Need for Universal Uniformity, Note, Case Western Reserve Journal of International Law Spring/Summer, 1995, 497.

⁹⁶ See Rachel J. Wechsler, Giving Every Child a Chance: The Need for Reform and Infrastructure in Intercountry Adoption Policy, Article, Pace International Law Review, Winter 2010, 28.

Third, the Central Authority may lack of adequate human and other resources and professionalism to duly accredit adoption agencies and supervise them as well as create accreditation criteria and procedures. So, this situation may lead to improper accreditation and to the involvement of poor quality adoption agencies into adoption processes.

Thus, we think that the function of accrediting and supervision over adoption agencies should be taken from the Central Authority and be vested to a professional and independent body.

The new proposed body, the QAB, solves this problem, because it would be a professional body possessing adequate human and other required resources for properly accrediting, monitoring and improving the quality of adoption agencies. As opposed to the Central Authority of a state, this body would have no adoption functions; consequently, it would not be involved in actual adoptions with adoption agencies. And finally due to its unique structure, working procedure and the uniform accreditation procedure this body would not only supervise and assure the quality of adoption agencies but also operate accountably and transparently.

C. The Convention's failure to provide a uniform accreditation procedure causes very diverse accreditation practice that is characterized by inconsistency, unfairness and the improper supervision

Although the Hague Convention recognizes the accreditation as a Convention safeguard and suggests minimum standards which the adoption agencies must meet, the Convention is either silent or very flexible pertaining to some important issues of accreditation. Instead, the Convention leaves the establishment of accreditation standards and procedures to the discretion of the states. Each state develops its own standards and procedures for accreditation that differ widely from similar regulations of other states. So, the understanding and implementation of Convention's obligations and terminology vary greatly. This diverse accreditation practice creates inconsistency in criteria and procedures of accreditation; in types and levels of supervision over adoption agencies; in quality and professionalism of adoption agencies not only among different states but also within the

same state⁹⁷.

Moreover, this practice may cause a state not to trust the accredited agencies of another state that do not comply with its requirements. In addition, in this confusing situation intercountry adoptions may be not in harmony with the Convention's objectives, and may cause more difficulty and confusion for participants involved in legitimate adoption procedure. Also this situation may lead to improper supervision over adoption agencies and to their poor quality. Ultimately, this may lead to the evils in intercountry adoptions that were described in the real cases mentioned before.

Finally, this situation creates unfairness because in the same adoption process may participate duly and unduly accredited adoption agencies respectively from the sending and receiving states, and although one of agencies is duly accredited and provides quality adoption services, the unduly accredited agency may affect negatively the whole adoption process.

All of the above mentioned justify an urgent need to bring some common or shared understanding to this important aspect of intercountry adoption.

If accreditation criteria are more difficult to unify and require strong consideration of local traditions and needs, accreditation procedure may be successfully unified. The uniform accreditation procedure that this paper suggests is one of the elements of new accreditation mechanism and can work in conjunction with the other elements of the new mechanism of accreditation, *i.e.* within the QAB system. This procedure includes self-study or self-evaluation, on-site evaluation, accreditation, monitoring, and re-evaluation of adoption agencies.

III. Proposal. The new accreditation mechanism: definition of accreditation; creation of the Quality Assurance Body, and the introduction of the uniform accreditation procedure

Pertaining to the current intercountry adoptions, this paper argues the need for recognition of the significant role of accreditation, the need for proper supervision over adoption agencies

⁹⁷ Guide to Good Practice 2, Para 331.

and assuring their quality through the proper accreditation, the need for the new mechanism of accreditation.

Thus, this paper suggests introducing in the Hague Convention the definition of accreditation, the uniform accreditation procedure, and the Quality Assurance Body as the professional accrediting, supervising and quality assurance body.

A. Definition of accreditation

The definition of accreditation would be: “Accreditation shall mean the recognition by the component authority of the compliance of adoption agencies (their operation, composition, financial situation) and the quality of their services with state standards and criteria”. This would emphasize accreditation as the tool for monitoring, supervising and quality assurance.

“Quality assurance shall mean the continuous process of compliance of adoption agencies and their services quality with state accreditation criteria and with accreditation standards and the improvement thereof”. So, the goal is to gain the maximum benefits from accreditation.

B. QAB as the professional accrediting, supervising and monitoring body: the role and functions

QAB would be the national body for accrediting, supervising, monitoring and quality assurance that would have adequate resources to properly carry out its functions. Those functions would be: a) to develop accreditation standards and criteria, b) to supervise adoption agencies and accredit them, c) to monitor continuously adoption agencies and improve their quality.

Due to its structure, working procedures and the uniform accreditation procedure, QAB ensures the quality of adoption agencies, their accountability and transparency as well as the transparency of its own operations.

C. QAB’s structure and working procedure as safeguards for transparency and accountability

QAB would be an independent (from Central Authority) nonprofit organization, which would consist of Executive Director and the Governing Board. The Governing Board would consist of governmental and nongovernmental experts and stakeholders in intercountry adoptions, and also experts from the Hague Conference.

This representativeness of the Governing Board that includes private, public and international experts would ensure the transparency of QAB operations and the objectiveness of QAB decisions. The Governing Board would make decisions on accreditation and other issues pertaining to QAB's functions.

In developing the accreditation criteria and standards, QAB would widely cooperate with the Hague experts and get their substantial assistance. This would ensure the development of high standards and criteria and their compliance with Convention's objectives. And finally QAB would give regular reports to the Hague Conference about its accreditation and the quality assurance practice.

Thus, the structure and working procedure for QAB would ensure the representativeness and transparency of QAB and would also include Hague indirect (through sending experts and also admitting reports from QAB) participation to the accreditation process.

D. The uniform accreditation procedure

The uniform accreditation procedure would include:

Self-study: Adoption agency prepares an in-depth self-evaluation study that measures its performance against the standards established by the accrediting body, the QAB. So, an adoption agency observes its goals and objectives, structure and staff, its activity, achievements and failures, and presents a report.

On-site Evaluation: A team of experts selected by the accrediting body visits the adoption agency to determine first-hand if the applicant meets the established standards. So, the experts observe if the information is correct or incorrect, to examine other documents and information, to take surveys. Then make a report and point out the problems, including violations.

Accreditation: QAB's Governing Board discusses the report and makes final decision on accreditation, assuring or not the quality of an adoption agency.

Monitoring: QAB monitors adoption agencies throughout the period of accreditation granted to verify that it continues to meet the stated standards and assists in improving the quality of adoption agencies.

D. The strengths and weaknesses of the new mechanism

Strengths of this solution are:

- a) Accountability and transparency in adoption agencies' operations and also in their accreditation processes.
- b) Uniformity in the accreditation practice due to the uniform accreditation procedure.
- c) Trust of states to each other pertaining to the adoption agencies which they accredit through the uniform mechanism.
- d) The increased quality of adoption agencies.

Weaknesses of this solution are:

a) QAB would not work in states where the Central Authority does not delegate its adoption functions to adoption agencies, therefore, does not use adoption agencies. However, considering the roots of Convention that supports the accredited agencies' involvement in adoption processes, maybe it is the time also to require mandatory participation of the accredited adoption agencies in adoption processes. This is question for the future and is beyond of this paper. The other suggestion may be to allow QAB to supervise other public agencies (at least in terms of their financial situation) that would be involved in an adoption process instead of adoption agencies.

b) It may be argued that the QAB system would impose a new financial burden on states. However, this argument seems to be weak, because the accreditation of adoption agencies is a compulsory requirement and Convention's obligation imposed on a state, which uses adoption agencies in its intercountry adoptions. In other words, all states that use adoption agencies are bound by the Convention to accredit adoption agencies. And usually the Central authority of a state accredits the adoption agencies. Thus a state finances accreditation processes within its territory and equips it with human and other resources. And it does not matter the quality of such accreditation, funds are spent on it and they are spent ineffectively. From this point of view, the proposed mechanism seems not to burden the state with a new financial obligation but rather suggest the scheme of effective distribution and use of funds designed by the state for the accreditation of its adoption agencies.

c) The lack of adequate human resources and local quality assurance experts in a state; however the Hague Conference would help with trainings and preparations.

Conclusion

This paper addressed the issues of unprofessional and unethical adoption agencies that are involved in intercountry adoption due to their improper accreditation. Considering on the one hand the critical role of adoption agencies as intermediaries between the prospective adoptive parents, the various players referred to above, the various authorities of the receiving states and states of origin, and the children to be adopted, and the corrupt and abusive practice of such agencies on the other hand, this paper concluded that if we “cure” the “ill” adoption agencies and improve their quality, many problems may be simply eliminated. And the accreditation seems the exact tool that combines elements of supervision, quality assurance and continuous monitoring of adoption agencies.

Thus, by focusing on accreditation and discussing the problems in current accreditation practice and the effects of those problems on intercountry adoptions, this paper emphasized the need for changes in the Hague Convention. Particularly, this paper proposed that the Hague Convention take strict approach to accreditation issues and to provide the definition of accreditation, assign a professional accrediting body and suggest the uniform accreditation procedure. Thus, the new mechanism of accreditation that this paper suggested as a solution for proper accreditation includes amendments to the Hague Convention, which would define the meaning of accreditation by recognizing it as a powerful tool for supervision of adoption agencies and assurance of their quality; introduce the Quality Assurance Body as a professional accrediting body, and provide for a uniform accreditation procedure. These amendments, if made together as a whole, will ensure successful intercountry adoptions.