

COMMENTS

CURTAILING THE SALE AND TRAFFICKING OF CHILDREN: A DISCUSSION OF THE HAGUE CONFERENCE CONVENTION IN RESPECT OF INTERCOUNTRY ADOPTIONS

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1. INTRODUCTION

Intercountry adoption of children is not a new phenomenon, nor is the sale and trafficking of children during the adoption process.¹ In the last twenty years, however, intercountry adoptions have increased remarkably, and along with them, a profitable black market in baby selling has arisen.² Despite

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¹ For a general discussion of the history of intercountry adoption, see J.H.A. VAN LOON, REPORT ON INTERCOUNTRY ADOPTION, Hague Conference on Private International Law, Permanent Bureau of the Conference, Prelim. Doc. No. 1 and Annexes (1990); Richard R. Carlson, *Transnational Adoption of Children*, 23 TULSA L.J. 317 (1988).

² The United Nations Economic and Social Council reported:

A lawyer was recently charged in Bogota with buying two children for \$600 each and then selling them illegally for adoption for \$10,000 each and was accused of having sold 500 Colombian and 100 Peruvian children in this way [P]rivate Adoption Agencies in the Netherlands and the Federal Republic of Germany . . . offer babies from poorer countries for adoption by mail order. In May 1982 the Swiss federal authorities began an inquiry into allegations of a baby smuggling syndicate between Sri Lanka and Switzerland which charges Sw[iss] fr[ancs] 10,000 . . . for a baby, but pays Sw[iss] fr[ancs] 25 to its mother.

U.N. ESCOR, 7th mtg. at 49, U.N. Doc. E/1983/7 (1983), *cited in* Jonet, *International Baby Selling*, *infra* note 40, at 82. Jonet also cites 39 U.N. ESCOR 25th mtg. at 3-13, U.N. Doc. E/CN.4/Sub.2/1987/25 (1987); 39 U.N. ESCOR 28th mtg. at 6-13, U.N. Doc. E/CN.4/Sub.2/1987/28 (1987); *Alien Adopted Children, 1977: Hearings on H.R. 5804, H.R. 6488, H.R. 1956, and H.R. 871 Before the Subcomm. on Immigration, Citizenship and International Law of*

laws in almost every country prohibiting the sale and trafficking of children, no international convention substantially addressed the problem prior to 1993.³ Since 1988, however, the Hague Conference on Private International Law has worked to formulate an international agreement to curb the sale of children during the adoption process.⁴ The Final Act of the Convention in Respect of Intercountry Adoptions was completed at the Seventeenth Session of the Hague Conference in May 1993, and is now open for signature and ratification.⁵

This Comment examines efforts of the Hague Conference and other international bodies to prevent the sale of children. Section 2 discusses the development of intercountry adoptions as an international business, particularly the role of independent adoption agents in the process. Section 3 focuses on international responses to the problems associated with intercountry adoptions by analyzing the three United Nations ("U.N.") documents that address the sale of children: (1) The 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery;⁶ (2) the 1986

the House Comm. on the Judiciary, 95th Cong., 1st Sess. 31 (1977); Adoption and Foster Care, 1975: Hearings on Examination and Exploration of Existing and Proposed Federal Policies Affecting the Adoption of Children, and Their Placement in the Foster Care System, Baby Selling and Adoption of Children With Special Needs Before the Subcomm. on Children and Youth of the Senate Committee on Labor and Public Welfare, 94th Cong., 1st Sess. 979 (1975); NANCY C. BAKER, BABYSELLING: THE SCANDAL OF BLACK-MARKET ADOPTION (1978).

³ See generally DEFENCE FOR CHILDREN INTERNATIONAL, PROTECTING CHILDREN'S RIGHTS IN INTERNATIONAL ADOPTIONS: SELECTED DOCUMENTS ON THE PROBLEM OF TRAFFICKING AND SALE OF CHILDREN (1989) [hereinafter DCI, PROTECTING CHILDREN'S RIGHTS] (for a description of these materials, see *infra* note 19); VAN LOON, *supra* note 1.

⁴ *Hague Conference On Private International Law: Final Act of the 17th Session, Including the Convention on Protection of Children and Co-Operation In Respect of Intercountry Adoption*, 32 I.L.M. 1134 (1993) [hereinafter *Convention*].

⁵ *Id.* at 1134; see also U.S. Dep't of State, 1993 Hague Convention on Intercountry Adoption Briefing Paper, at 5 (June 1993) [hereinafter Briefing Paper] (discussing the political process in the United States prior to ratification of the Convention). Once three Hague Conference member States or other States participating in the 17th Session sign and ratify the Convention, it will enter into force and be open to accession by other States. *Id.* at 8.

⁶ *1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 266 U.N.T.S. 40 [hereinafter *1956 Supplementary Convention*].

Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally;⁷ and (3) the 1989 Convention on the Rights of the Child.⁸

The final sections of this Comment focus on the Hague Conference on Private International Law Intercountry Adoption Convention Project. This Conference produced the Convention on International Co-Operation and Protection of Children In Respect of Intercountry Adoption⁹ for the centennial meeting of the Hague Conference held in May 1993. Section 4 outlines the background of the Project, and then examines how the Convention seeks to curtail the baby selling business. Section 5 critiques the Convention in light of its objective of preventing the sale of children, and offers several suggestions for federal implementing legislation which would better enable the United States and other countries to achieve the Convention's goals. These proposals suggest that the National Central Authority required to be established by the Convention should monitor the activities of independent adoption agents through reporting and auditing requirements, establish penalties for breach of the Convention, and define which children are suitable for adoption in the United States. Finally, this Comment considers the problems of defining non-profit objectives and determining what constitutes reasonable compensation for individuals involved in the adoption process.

2. BACKGROUND

"Babies, like any commodity, are subject to the law of supply and demand."¹⁰ In the United States and Western Europe, declining birth rates and the largest number of infertile couples in history have created a situation where the demand for children

⁷ 1986 Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children with Special Reference to Foster Placement and Adoption Nationally and Internationally, G.A. Res. 41/85, U.N. Doc. A/Res/41/85 (1986) [hereinafter *Declaration*].

⁸ 1989 Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/Res/44/25 (1989).

⁹ See *Convention*, *supra* note 4.

¹⁰ Margaret V. Turano, Article, *Black-Market Adoptions*, 22 CATH. LAW., Winter 1976, at 48.

exceeds the supply.¹¹ As a result, childless couples have turned to intercountry adoptions, and impoverished, war-torn countries anxious for hard currency have produced a ripe market.¹² Approximately 20,000 children are involved in intercountry adoptions each year. These adoptions often deliver much-needed foreign currency to poor nations.¹³ For example, the adoption business in South Korea yields an estimated \$15-20 million annually.¹⁴ In Guatemala, adoptions account for \$5 million a year.¹⁵ During the first nine months of 1991, adoptions in Honduras netted approximately \$2 million.¹⁶

Given that the demand for children substantially exceeds the supply, it is not surprising that profit-making activities have developed, "creating a small but thriving 'baby black market.'" ¹⁷ The average adoption is estimated to cost between \$7,000 and \$13,000, but may be as high as \$20,000.¹⁸

Intercountry adoptions are usually accomplished through licensed adoption agencies or through independent adoption agents.¹⁹ Licensed adoption agencies are private institutions

¹¹ Michael Serrill, *The Global Baby Chase: Wrapping the Earth in Family Ties*, TIME INT'L, Nov. 4, 1991, at 40, 42.

¹² See Kathleen Hunt, *The Romanian Baby Bazaar*, N.Y. TIMES, Mar. 24, 1991, (Magazine), at 23, 38; Matthew Rothschild, *Babies for Sale*, THE PROGRESSIVE, Jan. 1988, at 18; Michael Serrill, *The Global Baby Chase: The Gray Market in Third World Children*, TIME INT'L, Nov. 4, 1991, at 47; *Honduras: Trafficking of Children*, CENTRAL AM. REP., Dec. 13, 1991, at 371.

¹³ Serrill, *supra* note 11, at 41.

¹⁴ See Rothschild, *supra* note 12, at 20.

¹⁵ See Serrill, *supra* note 12, at 47.

¹⁶ See *Honduras: Trafficking of Children*, *supra* note 12, at 371.

¹⁷ Turano, *supra* note 10, at 49. Of the approximately 20,000 children involved in intercountry adoptions each year, Serrill, *supra* note 11, at 41, a substantial percentage of adoptions is accomplished through independent adoption agents. DCI, INDEPENDENT INTERCOUNTRY ADOPTIONS, *infra* note 19, at 18. It is believed that a large number of the independent agents are involved in baby selling activities. *Id.* See also Serrill, *supra* note 11, at 42-43; Bart Eisenberg, *Road to Foreign Adoptions Gets Rockier*, CHRISTIAN SCI. MONITOR, Feb. 28, 1990, at 13 (charting the number of children being adopted from source countries).

¹⁸ KENNETH J. HERRMAN, JR., INTERCOUNTRY ADOPTION: REPORT ON THE UNITED STATES OF AMERICA: INVESTIGATION PROJECT IN RELATION TO THE WORK OF THE SPECIAL COMMISSION ON INTERCOUNTRY ADOPTION, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW 22 (1991) (commissioned by Defence for Children International et. al) [hereinafter DCI INVESTIGATIVE REPORT].

¹⁹ Hunt, *supra* note 12 (discussing the role of independent agents throughout

that have been given “official permission to operate from either an administrative or judicial government body. These bodies usually grant permission through recognition, certification, or authorization.”²⁰ Frequently cited requirements for authorization are the presence of a professional staff that meets certain professional and ethical standards, non-profit status, and contacts with other international adoption agencies in the countries in which they wish to operate.²¹ Some countries also allow institutions not specifically defined as adoption agencies, such as children’s homes, child welfare services, and orphanages, to place children.²²

In contrast, independent adoption agents or intermediaries “are defined as individuals or organizations which are not authorized to place children for adoption but intervene in some manner in the process of adoption.”²³ Independent adoptions “are defined as adoptions which occur without the involvement of an authorized or permitted professional adoption agency.”²⁴ Throughout this Comment, the terms “independent adoptions” and “independent adoption agents” will be used interchangeably to discuss the adoption process and the individuals who fall outside the licensed agency structure.

Prospective adoptive parents often choose independent agents over licensed agencies because of the independent agents’ ability to circumvent bureaucratic channels.²⁵ Trafficking and sale

the adoption process); Mary Jo McConahay, *The Baby Trade*, L.A. TIMES, Dec. 16, 1990, (Magazine), at 12 (discussing independent agents in Honduras); Rothschild, *supra* note 12 (discussing the role of licensed adoption agencies in South Korea); see also DEFENCE FOR CHILDREN INTERNATIONAL ET AL., PRELIMINARY FINDINGS OF A JOINT INVESTIGATION ON INDEPENDENT INTERCOUNTRY ADOPTIONS (1991) [hereinafter DCI, INDEPENDENT INTERCOUNTRY ADOPTIONS] (examining both agency and independent adoptions and the questionable and illicit activities that arise from intercountry adoptions); DCI, PROTECTING CHILDREN’S RIGHTS, *supra* note 3 (discussing the context and methods of trafficking in children in a number of countries, national studies, regulation of the adoption business, and recent international legislation).

²⁰ DCI, INDEPENDENT INTERCOUNTRY ADOPTIONS, *supra* note 19, at 5.

²¹ *Id.*

²² *Id.* at 6.

²³ *Id.* at 4.

²⁴ *Id.*

²⁵ *Id.* at 9. Prospective parents often choose independent adoptions for a number of reasons: long delays with regard to agency adoptions; reluctance to be assessed by agencies; ability to choose a child; and administrative difficulties. *Id.* See also Hunt, *supra* note 12 (discussing prospective adoptive

of infants are most prominent when independent adoption agents are involved.²⁶ These individuals are attorneys, social workers, or simply persons acting as intermediaries between the adoptive parents and the birth parents or institutions such as orphanages, children's homes, and hospitals.²⁷ They may be hired by prospective adoptive parents for a number of purposes: to identify and locate a child, to secure consent of the biological parents for adoption, and to handle the paperwork necessary for completion of a foreign adoption.²⁸ At each stage of the process, there is the opportunity for improper financial gain; the commodification of children is particularly acute during the identification and location stage. Agents are often paid thousands of dollars by desperate parents to find a child suitable for adoption.²⁹ Orphanages and maternity wards are essentially bribed to turn over children, regardless of whether the children are truly adoptable,³⁰ and women are often coerced to give up

parents' preference for independent agents during the adoption process in Romania).

²⁶ See DCI, INDEPENDENT INTERCOUNTRY ADOPTIONS, *supra* note 19, at 15-18.

²⁷ See Hunt, *supra* note 12; McConahay, *supra* note 19.

²⁸ Hunt, *supra* note 12; McConahay, *supra* note 19; DCI, INDEPENDENT INTERCOUNTRY ADOPTIONS, *supra* note 19, at 14-17.

²⁹ See Hunt, *supra* note 12, at 28 (noting that immediately after the fall of the communist government in Romania, fees ranged from \$2,500-15,000); *Honduras: Trafficking of Children*, *supra* note 12 (stating that attorneys who participate in the adoption business receive approximately \$7,000 per child).

³⁰ Under the Convention, each Contracting State may determine which children are adoptable. *Hague Conference on Private International Law, Preliminary Draft Convention on International Co-Operation and Protection of Children In Respect of Intercountry Adoption and Report by G. Parra Aranguren*, Prelim. Doc. No. 7 (for the attention of the 17th Session) at 74 (1992) [hereinafter *Report of the Special Commission*] (Mr. Aranguren is the Reporter for the Intercountry Adoption Project, and his *Report* describes the work of the project. The *Report* also gives guidance as to the interpretation of various provisions of the Convention.). (Although the Special Commission's *Report* refers to the Preliminary Draft Convention, *infra* note 47, the propositions for which it is cited throughout this Comment have not changed in the Final Act. Therefore, the analysis found in the *Report of the Special Commission* is applicable to the Final Act. The Report for the Final Act was unavailable at the time of this Comment's publication.). Consequently, which children are adoptable will vary from State to State. In general, children who are considered "abandoned" will also be considered adoptable. Broadly defined, abandonment is the "voluntary relinquishment of all right[s] . . . includ[ing] both the intention to abandon and the external act by which the intention is carried out . . . [It is the] willful forsaking, [the] forgoing [of]

their infants in exchange for a small sum of money.³¹ Sometimes, children are simply abducted and then sold to the adoptive parents.³²

3. INTERNATIONAL RESPONSES

Although most countries have statutes prohibiting the sale of children,³³ the international community has not responded effectively to the problem of baby selling.³⁴ To date, no international convention or declaration has satisfactorily addressed the issue of child trafficking and sale, although three U.N. documents have touched on the problem.³⁵

In 1956, the United Nations passed the Supplementary

parental duties." BLACK'S LAW DICTIONARY 2 (6th ed. 1990).

The Convention has defined adoption as "any legal institution which create[s] a permanent social and legal relationship of parent and child." *Report of the Special Commission, supra* at 58.

³¹ See Hunt, *supra* note 12, at 38; McConahay, *supra* note 19, at 14-15; Serrill, *supra* note 12, at 47. In Sri Lanka, mothers received approximately \$50 out of the \$1,000-5,000 paid for the infants. *Id.* See also DCI, INDEPENDENT INTERCOUNTRY ADOPTIONS, *supra* note 19, at 17 (discussing costs involved and coercion). See generally DCI, PROTECTING CHILDREN'S RIGHTS, *supra* note 3, at Part One (giving examples of the context in which trafficking takes place and the methods used for engaging in such activity).

³² DCI, PROTECTING CHILDREN'S RIGHTS, *supra* note 3, at 5.

³³ See Ahilemah Jonet, *Legal Measures to Eliminate Transnational Trading of Infants For Adoption: An Analysis of Anti-Infant Trading Statutes in the United States*, 13 LOY. L.A. INT'L & COMP. L.J. 305 (1990); Kristine C. Karnezis, Annotation, *Criminal Liability of One Arranging for Adoption of Child Through Other Than Licensed Child Placement Agency ("Baby Broker Acts")*, 3 A.L.R. 4TH 468 (1981) (discussing case law in several jurisdictions with statutes that impose criminal liability for improper financial gain during the adoption process); Adoption Act, 1976, ch. 57 (Eng.) (concerning prohibition on certain payments); DCI, PROTECTING CHILDREN'S RIGHTS, *supra* note 3, at 31 (discussing legislation enacted by the Supreme Court of India); see also George W. Myers, Comment, *Independent Adoptions: Is the Black and White Beginning to Appear in the Controversy Over Gray-Market Adoptions*, 18 DUQ. L. REV. 629 (1980); see generally INTERCOUNTRY ADOPTION: A MULTINATIONAL PERSPECTIVE (Howard Altstein & Rita J. Simon eds., 1991) (presenting an overview of the intercountry adoption process in several countries, as well as examining applicable domestic law).

³⁴ See VAN LOON, *supra* note 1; see also DCI, PROTECTING CHILDREN'S RIGHTS, *supra* note 3, at Part Three. The first note on child sale and trafficking was written in 1977 by the U.N. Secretary General. U.N. Doc. E/CN.4/Sub.2/AC.2/11 (1977) (cited in DCI PROTECTING CHILDREN'S RIGHTS, *supra* note 3, Introduction, at vi n.2).

³⁵ 1956 *Supplementary Convention, supra* note 6; *Declaration, supra* note 7; 1989 *United Nations Convention on the Rights of the Child, supra* note 8.

Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery. Article 1(d) provides that it shall be unlawful for:

Any institution or practice whereby a child or young person under the age of 18 years is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.³⁶

While the Convention prohibits trafficking of children, it covers only the sexual exploitation of children or the use of children as laborers. In contrast, today most trafficking of children occurs for the ostensibly legitimate purpose of providing childless couples with a child³⁷ and a parentless child with parents. Such an adoption "is not abusive, and is quite obviously designed to serve the best interests of the child. The child's basic rights seem generally respected and all abuse eliminated by the presence or, if required, the intervention of child protection services."³⁸

In 1986, the U.N. Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally was announced.³⁹ Article 20 of the Declaration prohibits "improper financial gain," but fails to define that term or provide appropriate mechanisms to address the problem of agents or agencies engaging in such profit-making activities.⁴⁰

In 1989, the U.N. Convention on the Rights of the Child was passed, providing the first statement specifically addressing child trafficking.⁴¹ Article 35 calls upon States to "take all appropriate

³⁶ 1956 *Supplementary Convention*, *supra* note 6; see also DCI, PROTECTING CHILDREN'S RIGHTS, *supra* note 3, at iv.

³⁷ DCI, PROTECTING CHILDREN'S RIGHTS, *supra* note 3, at iv.

³⁸ *Id.*

³⁹ *Declaration*, *supra* note 7.

⁴⁰ *Id.* See Ahilemah Jonet, *International Baby Selling for Adoption, and the United Nations Convention on the Rights of the Child*, 7 N.Y.L. SCH. J. HUM. RTS. 82 (1989) [hereinafter Jonet, *International Baby Selling*]; see also DCI, PROTECTING CHILDREN'S RIGHTS, *supra* note 3, at v; VAN LOON, *supra* note 1, at 180.

⁴¹ 1989 *United Nations Convention on the Rights of the Child*, *supra* note 8; see Jonet, *supra*, note 39; DCI, PROTECTING CHILDREN'S RIGHTS, *supra* note

national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form."⁴² The types of measures by which this goal is to be met are unclear. What had become clear to the international community, however, was the need to seriously address the issue of child trafficking. Recognizing the importance of this goal, The Hague Conference's Intercountry Adoption Convention Project sought to develop a system of cooperation among participating countries that would give substance to the directive of the 1989 Convention.

4. THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW: INTERCOUNTRY ADOPTION CONVENTION PROJECT

4.1. Background

The 1988 session of the Hague Conference on Private International Law created the Intercountry Adoption Convention Project.⁴³ The Permanent Bureau of the Conference prepared a study of the issues involved in intercountry adoption,⁴⁴ and the first meeting was held in June 1990.⁴⁵ News reports of child trafficking in Romania at this time helped focus attention on the project. In 1991, a first draft of the Convention was produced.⁴⁶ A second meeting convened in February 1992, and

3, at v; VAN LOON, *supra* note 1, at 180; *see generally* DEFENCE FOR CHILDREN INTERNATIONAL, ROMANIA: THE ADOPTION OF ROMANIAN CHILDREN BY FOREIGNERS (1991) (expert report on implementation of the Convention on the Rights of the Child regarding intercountry adoption).

⁴² 1989 United Nations Convention on the Rights of the Child, *supra* note 8, art. 35.

⁴³ U.S. Dep't of State, Fact Sheet: *Project of Hague Conference on Private International Law to Approve in 1993 a Convention on the Intercountry Adoption of Children 1* (Sept. 1992) [hereinafter Fact Sheet]. The Hague Conference on Private International Law is an international organization, comprised of 38 member States, headquartered in the Hague, Netherlands. *Id.* The United States became a member State in 1964. *Id.*

The high mark for intercountry adoptions was 1987 when there were 10,097 intercountry adoptions in the United States alone. DCI INVESTIGATIVE REPORT, *supra* note 18, at 16. In fiscal year 1992, there were more than 6,500 intercountry adoptions in the United States. Briefing Paper, *supra* note 5, at 1.

⁴⁴ VAN LOON, *supra* note 1.

⁴⁵ Fact Sheet, *supra* note 43, at 1.

⁴⁶ *See id.* at 1-2. The 1991 meeting was attended by 53 countries: the permanent members of the Hague, several non-member states who may be

a final working draft of the Convention was prepared during a special session in the summer of 1992.⁴⁷ In May 1993, this Preliminary Draft was presented to the Seventeenth Session of the Hague Conference on Private International Law, where the text of the Final Act was adopted.⁴⁸ The Convention is now open for signature and ratification by States.⁴⁹

4.2. *The Convention*

Article 1 states that the three objectives of the Convention are: (1) to ensure that intercountry adoptions occur when they are in the best interests of the child; (2) to create a system of cooperation among States to assure that the agreements made by them are respected and help prevent the sale of children; and (3) to secure recognition of adoptions that meet the requirements of the Convention.⁵⁰ To accomplish these ends, the Convention calls for the regulation of the intercountry adoption business by "competent authorities" in accordance with the Requirements For Intercountry Adoptions which are outlined in Articles 4-6

classified as "source" countries, and several international non-governmental organizations actively involved in children's rights. *Id.*; see also DCI MONITOR, *A Flying Start: Towards a Convention on Inter-Country Adoption*, (1990) (report on positive prospects for an intercountry adoption convention).

⁴⁷ *Hague Conference on Private International Law, Preliminary Draft Convention On International Co-Operation And Protection Of Children In Respect Of Intercountry Adoption*, Prelim. Doc. No. 7, 17th Sess. (1992) [hereinafter *Preliminary Draft Convention*].

⁴⁸ Briefing Paper, *supra* note 5, at 1.

⁴⁹ *Convention*, *supra* note 4; Briefing Paper, *supra* note 5, at 5.

⁵⁰ The actual text of the objectives of the Preliminary Draft is as follows:

- a. 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;
- b. to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children;
- c. to secure the recognition in Contracting States of adoptions made in accordance with the Convention.

Convention, *supra* note 4, art. 1. The term "recognition" in Article 1(c) refers to the acknowledgement and approval of international adoptions by Contracting States. The *Report of the Special Commission* explains that recognition of the adoption decree is crucial "because if the adoption decree is not recognized abroad, it does not make much sense to establish certain safeguards for protection of the child and to agree on a system of co-operating amongst the Contracting States." *Report of the Special Commission*, *supra* note 30, at 60.

of the Final Act.⁵¹ These Articles are intended to set forth the fundamental provisions that should apply to all adoptions covered by the agreement.⁵² Under the Requirements For Intercountry Adoptions, an adoption may take place only if the competent authorities have determined that the child is suitable for adoption,⁵³ that consent has been freely given, and that such consent has “not been induced by payment or compensation of any kind.”⁵⁴ Until these requirements have been satisfied, no contact “between the prospective adoptive parents and the child’s parents or any other person who has care of the child” is permitted. The only exception would be when “the adoption takes place within a family” or the State of origin provides otherwise.⁵⁵ Furthermore, an adoption may take place only if the competent authorities of the receiving State determine that the prospective adoptive parents are “eligible and suited to adopt” and authorization has been given for the child to “enter and reside permanently” in the receiving State.⁵⁶ The Central Authorities (which are intended to be the administrative agencies for intercountry adoptions) in both States must verify that there is no bar to adoption in either State,⁵⁷ and should ensure that the transfer of the child takes place “in secure and appropriate circumstances and, if possible, in the company of the adoptive or prospective adoptive parents.”⁵⁸

Chapters III and IV of the Convention set forth the mechanics for regulating intercountry adoptions.⁵⁹ Each Contracting State is to create a Central Authority which will “discharge the duties which are imposed by the Convention upon such authorities.”⁶⁰ These duties include an obligation “to prevent improper financial

⁵¹ *Id.* arts. 4-6.

⁵² See *Report of the Special Commission*, *supra* note 30, at 68.

⁵³ *Convention*, *supra* note 4, art. 4(a). The *Report of the Special Commission* comments that each State may determine which children are suitable for adoption “according to their own criteria, and consequently they are at liberty to apply either their internal legislation or the law designated by that State’s conflict rules.” *Report of the Special Commission*, *supra* note 30, at 74.

⁵⁴ *Convention*, *supra* note 4, art. 4(c)(2)-(3).

⁵⁵ *Id.* art. 29.

⁵⁶ *Id.* art. 5(a), (c).

⁵⁷ *Id.* art. 17(c).

⁵⁸ *Id.* art. 19(2).

⁵⁹ *Id.* chs. III (arts. 6-13), IV (arts. 14-22).

or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention."⁶¹

The Central Authorities may, in turn, license various agencies and agents within their own countries to perform the functions described in Article 9 and in accordance with Articles 10 and 11.⁶² Article 11(a) requires such accredited bodies to "pursue only non-profit objectives"⁶³ in order to reduce the profit-making activities associated with the adoption business.⁶⁴ Nevertheless, under Article 22, independent agents or agencies not qualifying for accreditation are still permitted to operate.⁶⁵ While not subject to the Requirements For Intercountry Adoptions outlined

⁶¹ *Id.* art. 8. The change in the Final Act from the *Preliminary Draft Convention*, *supra* note 47, making the prevention of "improper financial gain" language contained in Article 8 stand on its own, reflects a commitment to this goal of the *Convention*. This language was previously incorporated in Article 10 of the *Preliminary Draft Convention*, *supra* note 47, which corresponds to Article 9 of the *Convention*, *supra* note 4. Furthermore, unlike the *Preliminary Draft Convention's* language, under the language found in Article 9 of the *Convention*, the Central Authorities may not delegate to "other bodies" the responsibility for ensuring that there is no improper financial gain in the intercountry adoption process. *Preliminary Draft Convention*, *supra* note 47, art. 10.

⁶² *Convention*, *supra* note 4, arts. 9-11.

⁶³ *Id.* art. 11(a).

⁶⁴ *See Report of the Special Commission*, *supra* note 30, at 106.

⁶⁵ *Convention*, *supra* note 4, art. 22; *see* U.S. Dep't of State, Office of the Legal Adviser, Memorandum from Peter H. Pfund, Assistant Legal Adviser for Private International Law to Members of the Advisory Committee on PIL [Private International Law] and of the Study Group on Intercountry Adoption, and Others Interested (Mar. 25, 1992) (Subject: Final Draft Text of Intercountry Adoption Convention Prepared by Hague Conference Special Commission) [hereinafter Memorandum]. The Memorandum states in relevant part:

Persons or bodies (lawyers, doctors, licensed social workers, agencies not qualifying for accreditation pursuant to the convention criteria in Articles 11 and 12) who meet the requirements of integrity, professional competence, experience and accountability of the State (country) in which they are permitted to operate may, subject to the supervision of that State's competent authorities, perform the functions of [the] Central Authority under Chapter IV if that State (country) so declares to the convention depository (Netherlands government) with regard to intercountry adoptions involving another Contracting State (country that has become a party to the Convention), provided that other State has not itself declared to the Netherlands government that adoptions of "its" children may only take place if the functions of Central Authority are performed by public authorities or bodies accredited under Chapter III, i.e., Articles 11 and 12, meaning accredited adoption agencies or other accredited bodies.

in Chapter II, these other independent persons and organizations are obligated to follow the General Provisions outlined in Chapter VI.⁶⁶

The General Provisions contained in Articles 28-42 specify and reiterate regulations considered crucial by the Special Commission.⁶⁷ Overall, the General Provisions are aimed at "strengthening the observance" and on-going regulation of the Convention.⁶⁸ Among the provisions is Article 32, which states that no one involved in the intercountry adoption process is to derive improper financial gain, that remuneration for services is not to be unreasonably high, and that the only costs to be reimbursed are those that are reasonable.⁶⁹ Chapter V of the Convention covers Recognition and Effects of the Adoption.⁷⁰

Throughout the Convention, there is a tremendous emphasis on the role of the Central Authorities in curtailing both the sale of children and the accompanying improper financial gain reaped by the adoption agencies and agents.⁷¹ However, several loopholes exist which make it uncertain whether the Convention will accomplish its objectives.⁷²

⁶⁶ See *Convention, supra* note 4, art. 32; *Report of the Special Commission, supra* note 30, at 126.

⁶⁷ *Report of the Special Commission, supra* note 30, at 142.

⁶⁸ *Id.*

⁶⁹ *Convention, supra* note 4, art. 32. Article 32 reiterates the Convention's concern with curbing the profit-making, black market aspect of intercountry adoptions:

- (1) No one shall derive improper financial or other gain from an activity related to an intercountry adoption.
- (2) Only costs and expenses, including reasonable professional fees of persons involved in the adoption, may be charged or paid.
- (3) The directors, administrators and employees of bodies involved in an adoption shall not receive remuneration which is unreasonably high in relation to services rendered.

Id.; see also *supra* notes 11-18 and accompanying text (discussing current fees paid by prospective parents for intercountry adoptions).

⁷⁰ *Convention, supra* note 4, arts. 23-27; see Briefing Paper, *supra* note 5, at 7-8 (summarizing the various aspects of the Recognition Chapter of the Convention).

⁷¹ *Convention, supra* note 4, arts. 1(b), 4(c)-(d), 8, 11(a), 32.

⁷² *Id.* art. 1(b).

5. SHORTCOMINGS OF THE CONVENTION AS A MEANS OF CURBING THE BLACK MARKET BABY BUSINESS

5.1. Introduction

The Report of the Special Commission states that the Convention's purpose is to establish certain safeguards for intercountry adoptions and to create "a system of co-operation among the Contracting States to guarantee" that these standards are observed.⁷³ Consequently, the Report states that the Convention prevents "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."⁷⁴ This statement by the Special Commission provides the framework within which this Comment analyzes the shortcomings of the Draft Convention as an international instrument to curb the sale and trafficking of children.

5.2. Independent Adoptions Still Permitted

The Convention's coverage of independent adoption agents is problematic.⁷⁵ Article 22 requires them to "meet the requirements of integrity, professional competence, experience and accountability of th[e] State [in which they operate]"⁷⁶ and makes Article 32 applicable to all persons involved in the adoption

⁷³ *Report of the Special Commission*, *supra* note 30, at 54.

⁷⁴ *Id.* Although the *Report of the Special Commission* refers to the *Preliminary Draft Convention*, its analysis is applicable to the Final Act. See *supra* note 30.

⁷⁵ The *Report of the Special Commission* notes that "[a] substantial number of participants were against 'independent' or 'private' adoptions, arguing that they facilitate abuses, such as child trafficking and improper financial gain . . . and that they are usually motivated by the needs and the wishes of the prospective adoptive parents rather than by the best interests of the child." *Report of the Special Commission*, *supra* note 30, at 124, 126. Thus, many participants believed that excluding independent adoptions entirely from the Convention would deprive them of legitimacy and make them more difficult to accomplish. *Id.* This view, however, did not prevail.

⁷⁶ *Convention*, *supra* note 4, art. 22; see also Briefing Paper, *supra* note 5, at 6-7 (summarizing how independent adoptions are addressed in the Convention); see generally Memorandum, *supra* note 65, at 1-3 (providing more background on how the *Preliminary Draft Convention* deals with independent adoptions); Fact Sheet, *supra* note 43, at 4.

business.⁷⁷ The Convention also allows States to require that adoptions be processed through accredited agencies.⁷⁸ While the "competent authorities" referred to in Chapter II appear to be responsible for the independent agents,⁷⁹ the competent authorities themselves are never defined in the Convention, making it somewhat unclear to whom the independent adoption agents are accountable.⁸⁰

Given the already existing preference for using independent adoption agents instead of licensed agencies because of their ability to hasten the process and circumvent bureaucratic red tape,⁸¹ it seems likely that independent agents may flourish even if they are acting pursuant to the Convention's requirements. This prospect is troublesome because independent adoption agents account for the greatest abuses of sale and trafficking of children in the adoption business.⁸² The problem becomes acute when

⁷⁷ *Convention*, *supra* note 4, art. 32; *see also*, Memorandum, *supra* note 65, at 3 ("Under Article 27 [of the Preliminary Draft Convention] no one (accredited or other agencies, lawyers, doctors, licensed social workers, etc.) is to derive improper financial or other gain from an activity related to an intercountry adoption."). The use of the phrase "no one" is critical because Article 32 is the only section of the Preliminary Draft Convention that requires independent agents to refrain from baby selling. All of the other prohibitions on improper financial gain apply only to the competent authorities or to the Central Authorities.

⁷⁸ *See Convention*, *supra* note 4, art. 22; Briefing Paper, *supra* note 5, at 4; Memorandum, *supra* note 65, at 2. Both the Briefing Paper and the Memorandum state that the Convention only seeks to create a framework for regulation of intercountry adoption, and that any State may initiate more stringent requirements for adoptions taking place within its borders. Briefing Paper, *supra* note 5, at 4; Memorandum, *supra* note 65, at 2.

⁷⁹ *Convention*, *supra* note 4, art. 22 ("Any Contracting State may declare to the depositary of the Convention that the functions of the Central Authority under Articles 15 to 21 may be performed in that State, to the extent permitted by the law and subject to the supervision of the competent authorities of that State . . .").

⁸⁰ *See Jonet, International Baby Selling*, *supra* note 40, at 95-96. Jonet has made a similar point with regard to Article 20 of the 1986 Declaration, *Declaration*, *supra* note 7, and Article 11 of the 1989 Convention, *1989 Convention on the Rights of the Child*, *supra* note 8. Both Articles 20 and 11 require children to be placed by "competent authorities" but fail to define that phrase. *Id.* at 102.

⁸¹ *See supra* note 25 and accompanying text; DCI, INDEPENDENT INTERCOUNTRY ADOPTIONS, *supra* note 19, at 9. *See also* Hunt, *supra* note 12.

⁸² *See* DCI, INDEPENDENT INTERCOUNTRY ADOPTIONS, *supra* note 19, at 15-18; Jonet, *International Baby Selling*, *supra* note 40, at 107 & n.94 (*citing Hearings on A Bill Entitled the "Anti-Fraudulent Adoption Practices Act of*

the agents are professionals such as doctors, attorneys, and social workers.⁸³ When independent agents are not professionals, it is relatively easy to discover illegal payments, since "placements for payment" are prohibited.⁸⁴ When professionals are involved, however, it becomes very difficult to determine what constitutes an illicit payment since reasonable fees and compensation are permitted.⁸⁵ Furthermore, the Convention does not penalize independent agents who engage in the sale and trafficking of children. It only requires that such activities be reported to the Central Authorities, although the Central Authorities do not appear to be accountable to anyone.⁸⁶

In light of the Convention's weaknesses with respect to independent adoptions, it is necessary for the United States to include in its federal implementing legislation⁸⁷ provisions addressing the issues outlined above, particularly those concerning the monitoring of professional fees and the lack of penalties for engaging in improper behavior. Although the United States may not appear prone to the abuses of independent adoptions usually associated with other countries,⁸⁸ this country is far from exempt.⁸⁹ In addition, if the United States includes such

1984" *Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 22,999 (1984); see generally DCI, PROTECTING CHILDREN'S RIGHTS, *supra* note 3.

⁸³ See Jonet, *International Baby Selling*, *supra* note 40, at 107 (citing Myers, *supra* note 33, at 638).

⁸⁴ See Jonet, *supra* note 33, at 318-19 (discussing the role of intermediaries in the adoption process).

⁸⁵ *Convention*, *supra* note 4, art. 32(2); Jonet, *supra* note 33, at 318-19.

⁸⁶ *Convention*, *supra* note 4, art. 33 ("A competent authority which finds that any provision of the Convention has not been respected or that there is a serious risk that it may not be respected, shall immediately inform the Central Authority of its State. This Central Authority shall be responsible for ensuring that appropriate measures are taken.").

⁸⁷ Although "[t]he Convention is self-executing in form and does not legally require federal implementing legislation . . . it is difficult to imagine effective implementation of the Convention throughout the 50+ U.S. jurisdictions without federal legislation to ensure its full and relatively uniform implementation." Briefing Paper, *supra* note 5, at 8. See U.S. Dep't of State, Office of the Legal Advisor, Paper, Hague Convention on Intercountry Adoption: U.S. Federal Implementing Legislation, Issues for Discussion on October 4, 1993 (Sept. 1993) [hereinafter Federal Implementing Legislation Paper] (outlining issues covered by federal implementing legislation in order to provide for U.S. ratification of, and compliance with, the Convention).

⁸⁸ See *supra* Section 2.

⁸⁹ Robert Lindsey, *Adoption Market: Big Demand, Tight Supply*, N.Y.

provisions in its implementing legislation before ratifying the Convention, other States may follow its lead and enact similar legislation.

The federal implementing legislation will require the creation of a National Central Authority in the United States.⁹⁰ To enable the United States to meet the goals prescribed by the Convention, the National Central Authority⁹¹ should require the reporting of costs and fees by all adoption service providers, and should perform regular financial audits of individuals involved in the intercountry adoption process.⁹² The language in such reporting and auditing legislation should explicitly subject professionals to these requirements.⁹³ The legislation should also mandate that the Central Authorities compile the information gathered from these reports and audits. Over time, as fees and expenses are reported to the Central Authorities, such a compilation will create a standard for what is a reasonable cost for an intercountry adoption from any given State of origin.⁹⁴

As part of making the Convention applicable to individual states within the United States, the federal implementing legislation should establish criminal and civil penalties for the sale and trafficking of children. In addition, individual states should consider amending their state statutes to make violations of the Convention violations of their own "Baby Broker Acts."⁹⁵

TIMES, Apr. 5, 1987, at 2; Julie Johnson, *Baby Brokering: Desperate Girl's Case Reveals Shadowy World*, N.Y. TIMES, Oct. 29, 1987, at B1.

⁹⁰ See Federal Implementing Legislation Paper, *supra* note 87, at 5-6 (discussing various schools of thought on how a National Central Authority should be structured and what should be its functions).

⁹¹ The actual regulation of this provision may be a function that could be delegated to the individual states, with a comprehensive annual report submitted to the National Central Authority. See generally the Federal Implementing Legislation Paper, *supra* note 87, at 6-7 (discussing the possible delegation of accreditation to states), for the factors that would also be applicable in determining whether the states or the Federal Government should devise a reporting and auditing system.

⁹² Agencies should also be audited (presumably they already are). This section refers primarily to the necessity of auditing independent agents, particularly professionals, because of their ability to hide financial abuse. See *supra* notes 82-85 and accompanying text.

⁹³ See *supra* notes 83, 85, and accompanying text.

⁹⁴ Current statistics on intercountry adoption costs provide a benchmark, see *supra* note 18 and accompanying text, from which to work until the results from reporting are compiled.

⁹⁵ See *Karnezis*, *supra* note 33; see generally *supra* note 33 (summarizing

Although Article 32, which prohibits improper financial gain, applies to independent agents, federal implementing legislation should also make the provisions of Article 22 applicable to independent agents. Applying this Article directly to independent agents will reinforce the principle that under no circumstances should they receive improper financial gain for their services during any part of the adoption process.

Given the substantial opposition to independent agents and the abuses associated with them, it is reasonable to question why they should be permitted to operate at all. The reasons are pragmatic. Independent agents are "a fact in international life that cannot be denied and, undoubtedly, they [would] not disappear just because of being forbidden by the Convention."⁹⁶ Furthermore, the inclusion of independent agents in the Convention is necessary "to facilitate the ratification of the Convention by as many States as possible"⁹⁷

5.3. *The Convention Must Ensure That Children Involved In Intercountry Adoptions Are Truly Adoptable*

Article 4 of the Convention requires that the authorities of the State of origin ensure that the child is adoptable,⁹⁸ that it is in the best interests of the child to participate in an intercountry adoption, and that free and informed consent has been given by all necessary parties.⁹⁹ Nevertheless, the

different countries' prohibitions against baby selling).

⁹⁶ *Report of the Special Commission, supra* note 30, at 126.

⁹⁷ *Id.* Throughout the Convention's development, the United States has worked to ensure that "the Convention would remain sufficiently flexible and capable of support by the various elements of the U.S. adoption community to permit the United States to become a party The Convention as adopted [therefore] clearly permits private adoptions" Briefing Paper, *supra* note 5, at 3. As the largest receiving State, *see* Serrill, *supra* note 11, at 41, 43, it is imperative that the United States become a party to this Convention if the Convention is to have any impact.

⁹⁸ *See* *Convention, supra* note 4, art. 4(a); *supra* note 30 and accompanying text.

⁹⁹ *Convention, supra* note 4, art. 4(b)-(d). Consent is required of the "persons, institutions and authorities whose consent is necessary for adoption" *Id.* art. 4(c)(1). These persons explicitly include the birth mother and the child if appropriate, "having regard to the age and degree of maturity of the child" *Id.* art. 4(d). By including these provisions, the Convention makes clear that an intercountry adoption is to take place only if it is in the best interest of the child as defined by the 1989 Convention. *See* *1989 Convention*

Convention does not seem to address situations which facially appear to meet the requirements of adoptability and consent, but still are uncomfortably similar to baby selling. For example, South Korea's system of marketing children was conducted by quasi-state sponsored agencies, but these agencies still appeared to engage in activities of questionable legality.¹⁰⁰ In Brazil, "abandoned minors," those children who are suitable for adoption, include both truly abandoned children, defined as those who have " 'no parent or person in charge attending to [their] basic needs;' " and deprived minors, those children " 'whose parents or persons in charge are unable to attend to [their] basic needs' "¹⁰¹ By combining these two distinct categories, many more children become available for adoption.¹⁰² A report from Chile indicates that there is a well-developed network for targeting low-income parents and then "negotiating" consent for adoption.¹⁰³

It seems unlikely that the text of the Convention could have provided more language than it did on the requirements of adoptability and consent.¹⁰⁴ It is critical, however, that the

on the Rights of the Child, *supra* note 8, arts. 10 and 11; *see also Report of the Special Commission*, *supra* note 30, at 76-86 (discussing the consent provisions in Article 5(c) and 5(d) of the *Preliminary Draft Convention*, *supra* note 47). *See generally* Jonet, *International Baby Selling*, *supra* note 40, at 99-110.

Article 4 also appears to prohibit surrogacy contracts between the birth mother and the prospective adoptive parents. *See Convention*, *supra* note 4, art. 4(c)(4) (requiring competent authorities to ensure that "consent of the mother, where required, has been given only after the birth of the child."); *see also* Memorandum, *supra* note 65, at 3.

¹⁰⁰ *See* Rothschild, *supra* note 12. Technically, South Korea's adoption program would probably meet the requirements of the Convention. What is facially valid, however, may not be so in substance. For example, social workers were instructed to "cultivate" mothers to give a child up for adoption. *Id.* at 21. According to one social worker, money changed hands: "I would pay the doctor for her (the mother's) medical fees and ask the doctor to pay the mother. . . ." *Id.* In describing the agency adoption process, the social worker remarked that "it's really like dealing with a product. . . . Our weekly staff meetings were all about numbers: how many babies did we get that week?" *Id.*

¹⁰¹ DCI, PROTECTING CHILDREN'S RIGHTS, *supra* note 3, at 2 (emphasis omitted).

¹⁰² *Id.*

¹⁰³ *See id.* at 13.

¹⁰⁴ There was some discussion about consolidating the consent requirements of Articles 4(c) and 4(d) (formerly, Articles 5(c) and 5(d) of the *Preliminary*

Central Authorities in both the State of origin and the receiving State investigate each adoption carefully to ensure that these requirements have been satisfied. In addition, given the relative flexibility of each Contracting State to define which children are suitable for adoption,¹⁰⁵ the United States should declare to the depository of the Convention what that definition includes for this country, and should require as a condition for adoptions with other countries that those States also define the term.¹⁰⁶ This requirement will allow for on-going regulation. Moreover, the federal implementing legislation should require the enactment of domestic laws to penalize individuals who act coercively in securing consent for adoptions, regardless of whether they derive any financial benefit from such work.

5.4. Central Authorities And Accredited Bodies

Chapter III of the Convention outlines the role of the Central Authorities and accredited bodies. Articles 7 and 8 enumerate the specific obligations assigned to the Central Authorities that cannot be delegated¹⁰⁷ to "public authorities or other bodies

Draft Convention, supra note 47) since their language parallels one another (concerning parental and child consent, respectively). See *Report of the Special Commission, supra* note 30, at 84. As the *Report of the Special Commission* recommended, and as the *Convention* reflects, it was critical that these two sections of Article 4 remain distinct from one another in order to emphasize the importance of the child's role in the adoption process. *Id.*

¹⁰⁵ See *supra* notes 30 and 53.

¹⁰⁶ Article 39 provides in part that "[a]ny Contracting State may enter into agreements with one or more other Contracting States, with a view to improving the application of the Convention in their mutual relations. These agreements may derogate only from the provisions of Articles 14 to 16 and 18 to 21." *Convention, supra* note 4, art. 39(2). Article 16 discusses the procedural requirements for an intercountry adoption once the State of origin has determined that the child is adoptable. *Id.* art. 16(1).

¹⁰⁷ Article 7 provides:

- (1) Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their States to protect children and to achieve the other objects of the Convention.
- (2) They shall take directly all appropriate measures to:
 - a) provide information as to the laws of their States concerning adoption and other general information, such as statistics and standard forms;
 - b) keep one another informed about the operation of the Convention and, as far as possible, eliminate any obstacles to its application.

duly accredited in their State"¹⁰⁸ Article 8 states that "Central Authorities shall take, directly or through public authorities, all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention."¹⁰⁹

Given the Convention's emphasis on curtailing illegal activities,¹¹⁰ the choice of the word "prevent" as opposed to "prohibit" diminishes the strength of this objective.¹¹¹ Prohibitory language is important to the Central Authorities' ability to regulate licensed agencies, and thus to ensure that at least this adoption mechanism functions properly. Therefore, the federal implementing legislation should use prohibitory language when creating the National Central Authority's obligations that will be necessary to make the United States conform to the Convention. Independent agents, which are still permitted, are beyond the scope of Article 8.

Under Article 11(a), an accredited body may only pursue non-profit objectives pursuant to the regulations established by the competent authorities of the accrediting State.¹¹² However, the Convention fails to define non-profit objectives.¹¹³ While the phrase may appear to be self-explanatory, when it is considered in light of provisions for payment of "costs and expenses, including reasonable professional fees of persons involved in the adoption,"¹¹⁴ what constitutes profit and what constitutes proper remuneration becomes somewhat clouded. Without guidance, even "non-profit" fees could become excessive. By clearly defining what constitutes non-profit objectives, the federal implementing legislation will reinforce Article 32's requirement that the allowable fees not be excessive or in any

Id. art. 7.

¹⁰⁸ *Id.* art. 9.

¹⁰⁹ *Id.* art. 8.

¹¹⁰ See *supra* note 71 and accompanying text.

¹¹¹ Cf. Jonet, *International Baby Selling*, *supra* note 40, at 98 (discussing the importance of prohibitory language, rather than permissive language, with respect to Article 19 of the 1986 Declaration (see *Declaration*, *supra* note 7), which addresses illicit placement of children).

¹¹² *Convention*, *supra* note 4, art. 11(a).

¹¹³ The meaning of "non profit objectives" was an issue to be discussed during a meeting of the United States Study Group on Intercountry Adoption. See *Fact Sheet*, *supra* note 43, at 5.

¹¹⁴ *Convention*, *supra* note 4, art. 32(2).

way resemble profit rather than remuneration. If agencies are found in violation of their non-profit status, the Central Authorities should enforce appropriate sanctions. Such penalties might include disgorgement of excessive fees,¹¹⁵ suspension from operation, or revocation of licenses in extreme cases.

5.5. *Proper And Improper Financial Gain*

Article 32 is the most concrete statement in the Convention concerning the curtailment of the black market baby business: “[n]o one shall derive improper financial or other gain from an activity related to an intercountry adoption.”¹¹⁶ However, the sections following the opening statement create an enormous loophole for profit-making activities. The second section of the Article undercuts the first section’s mandate by stating that “[o]nly costs and expenses, including reasonable professional fees of persons involved in the adoption, may be charged or paid.”¹¹⁷ The Article then concludes with the third section, which states that “[t]he directors, administrators and employees of bodies involved in an adoption shall not receive remuneration which is unreasonably high in relation to services rendered.”¹¹⁸ The result is to prohibit improper financial gain, while allowing numerous circumstances for payment without consideration of who shall regulate such payment.

Despite the Convention’s emphasis on eliminating baby selling as a profit-making activity, the Convention fails to define improper financial gain anywhere in the text.¹¹⁹ Article 32 also leaves open the question of who is to define “reasonable” in any given State. Moreover, the Convention provides no guidance for what constitutes “costs and expenses” and who should determine them. For example, is \$200 reasonable medical expenses in a country

¹¹⁵ See *infra* Section 5.5 (discussing the proposed role of Central Authorities in establishing financial guidelines for payment of adoption services).

¹¹⁶ *Convention, supra* note 4, art. 32(1); see also *Report of the Special Commission, supra* note 30, at 146-48 (discussing generally Article 27 of the *Preliminary Draft Convention*). For a discussion of the applicability of analysis of the *Preliminary Draft* to the *Final Act*, see *supra* note 30.

¹¹⁷ *Convention, supra* note 4, art. 32(2).

¹¹⁸ *Id.* art. 32(3).

¹¹⁹ Cf. *Jonet, supra* note 40, at 95-96 (discussing the failure to define improper financial gain in Article 20 of the 1986 Declaration (*Declaration, supra* note 7)).

where the average annual income is \$300?¹²⁰ Remuneration is not to be “unreasonably high in relation to services rendered,”¹²¹ but the Convention is silent as to what services are generally appropriate and who should make that decision.¹²²

Clearly, the Convention could not cover every scenario for what is reasonable or appropriate, nor should it have attempted to do so. But some language is needed in the U.S. implementing legislation, and in all other countries, to allocate authority to set standards. The Central Authority in each State is the appropriate institution to issue guidelines as to what would constitute reasonable payment and services. Moreover, it can function as an oversight organization to ensure that these guidelines are being followed. In creating standards for payments, costs for services should be scaled to the State of origin’s average per capita income, rather than to the prospective parents’ ability to pay. Otherwise, the potential for abuse and child trafficking will continue. Each State should take responsibility for declaring to the depositary of the Convention such guidelines as established by the Central Authorities. This will allow for continuing evaluation and regulation, and will ensure that no one State’s guidelines are dramatically different from another State’s with a similar average per capita income.

Finally, the U.S. implementing legislation should contain language expressing the intent that Article 32 be considered on par with the Requirements for Intercountry Adoptions enumerated in Articles 4-5. Since “[t]he rules included in Chapter II are more fundamental than the other provisions of the Draft,”¹²³ having such language in the implementing legislation will reinforce the Convention’s purpose of prohibiting the sale

¹²⁰ See Serrill, *supra* note 11, at 42.

¹²¹ *Convention, supra* note 4, art. 32(3).

¹²² See DCI, INDEPENDENT INTERCOUNTRY ADOPTIONS, *supra* note 19, at 12 (quoting VAN LOON, *supra* note 1, at 92):

Child trafficking means profit making by intermediaries at the expense literally of the biological parents and the adopters (to the extent that they act in good faith), and in a broader sense also of the child. Although the principle is clear enough, drawing the line between such practices and legal and regular intermediary services is in practice not always easy.

Id. See generally Myers, *supra* note 33, at 638 (discussing possible ways of controlling excessive fees paid to intermediaries in the adoption process).

¹²³ *Report of the Special Commission, supra* note 30, at 68.

of children, and will buttress the requirement in Article 4(c)(3) that the consents necessary for an adoption "have not been induced by payment or compensation of any kind."¹²⁴ In addition, it will reinforce the competent authorities' power to oversee the independent agents in this area. Currently, by treating Article 32 as a General Provision, the Convention is essentially relying on self-regulation to accomplish its objective. In light of all the facts surrounding the sale and trafficking of children, self-regulation is unacceptable.

5.6. Application To Other Conventions

The Preamble to the Convention makes reference to the 1989 United Nations Convention on the Rights of the Child,¹²⁵ and to the 1986 United Nations Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally.¹²⁶

In the article *International Baby Selling For Adoption, and The United Nations Convention on the Rights of the Child*, Ahilemah Jonet advocates including in the preamble references to the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others of 1949,¹²⁷ and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.¹²⁸ By including a reference to these agreements in the federal implementing legislation, "[the United States] would

¹²⁴ *Convention, supra* note 4, art. 4(c)(3). Article 4 is included in the Requirements of Intercountry Adoption of the Convention. The *Report of the Special Commission* indicates that Articles 5 and 27 of the *Preliminary Draft Convention* (the predecessors of Articles 4 and 32, respectively) are to be read together. *Report of the Special Commission, supra* note 30, at 82.

¹²⁵ *Convention, supra* note 4, pmb. para. 6; *1989 Convention on the Rights of The Child, supra* note 8.

¹²⁶ *Convention, supra* note 4, pmb. para. 6; *Declaration, supra* note 7.

¹²⁷ Jonet, *supra* note 40, at 84 & n.8, citing *Convention for the Suppression of the Traffic of Persons and the Exploitation of the Prostitution of Others*, G.A. Res. 317(IV), 4 U.N. GAOR at 33, U.N. Doc A/1251 & Corrs. 1 and 2 (1949).

¹²⁸ Jonet, *supra* note 40, at 110-15, citing *1956 Supplementary Convention, supra* note 6. Jonet also advocates including the 1986 *Declaration, supra* note 7, and the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*, Dec. 9, 1948, 78 U.N.T.S. 277, in the 1989 Convention. Jonet, *International Baby Selling, supra* note 40, at 110-15.

be mindful of the detailed provisions of those instruments.”¹²⁹ Jonet understands the 1949 Convention to expand the scope of earlier prohibitions against trafficking of human beings; thus, trafficking of children is also “incompatible with the dignity and worth of the human person and endanger[s] the welfare of the individual, the family and the community.”¹³⁰ Article 1 of the 1956 Supplementary Convention explicitly prohibits traffic in children.¹³¹ For these reasons, these two Conventions should be referenced in the federal implementing legislation for the U.S. ratification of the Hague Convention. By doing so, the U.N. documents reinforce one of the Convention’s purposes: preventing the “abduction . . . sale of, or traffic in children.”¹³²

5.7. *The Issue Of Criminalization*

The Hague Conference on Private International Law focuses only on the civil aspects of the issues it addresses. Most States have criminal statutes prohibiting the sale and trafficking of children,¹³³ but they are rarely enforced because obtaining sufficient evidence of black market activity is virtually impossible.¹³⁴ While the Convention cannot mandate that States adopt penalties for breach of its terms, it is crucial that States take the initiative to do so. By having stringent regulations, and then enforcing them, it should be possible to curtail the sale and trafficking of children.

6. CONCLUSION

The Hague Conference’s Convention on Intercountry Adoptions is a long overdue and much needed international instrument.

¹²⁹ Jonet, *International Baby Selling*, *supra* note 40, at 110.

¹³⁰ *Id.* at 113.

¹³¹ *See supra* note 36 and accompanying text.

¹³² *Convention*, *supra* note 4, art. 1(b).

¹³³ *See supra* note 33 and accompanying text.

¹³⁴ *See* DCI INVESTIGATIVE REPORT, *supra* note 18, at 10, 23-24 (courts are forced to rely on what they are told by adopting parents); McConahay, *supra* note 19, at 15; *see also* Jonet, *supra* note 33, at 311-12; *see generally* VAN LOON, *supra* note 1, at 84 (discussing the difficulties of fact-finding with respect to child trafficking because of its black market nature); DCI, PROTECTING CHILDREN’S RIGHTS, *supra* note 3, at Part Two (National Studies and Regulation) and Part Three (International Standards and Decisions).

It provides a legal framework to address the problem of black market adoptions, which, if implemented, should help curtail the sale and trafficking of children.

The Convention, however, is not a panacea. Independent adoptions are still permitted, and while this practice is essentially a fact of life, reporting and auditing requirements are needed to ensure that independent agents are not engaging in improper practices. Explicit language is also needed in the federal implementing legislation to make the provisions of Article 22 applicable to independent agents. Adding such language would reinforce the principle that independent agents should never derive improper financial gain from their involvement in the adoption process.

The Convention leaves many terms undefined, such as reasonable compensation, non-profit objectives, and which children are adoptable. For the Convention to be effective, these terms must be defined by legislation not only in the United States, but in all the States party to the Convention. The Convention creates an enormous loophole for profit-making activities in Article 32 by not addressing how "reasonable compensation" should be decided. To correct this shortcoming, the Central Authorities should set guidelines for reasonable compensation for their respective States. Each State must define which children are suitable for adoption. This addition will reduce the possibility that those adoptions which appear to meet the requirements of adoptability and consent have no elements of baby selling.

Finally, federal implementing legislation in the United States should contain language expressing the view that the prescriptions outlined in Article 32 are as important as Articles 4 and 5 (Requirements for Intercountry Adoptions). Listing Article 32 as a General Provision detracts from the Convention's objective of curbing the sale of children, and signals to those contemplating improper activities that the Convention is not to be taken seriously.

Despite the existence of these provisions in the federal implementing legislation, it is still possible that some individuals and agencies will engage in the sale and trafficking of children. Therefore, it is necessary that the federal implementing legislation address the issue of penalties for breach of the Convention. Additionally, individual states should also consider amending their statutes to make breach of the Convention a penalty under state law.

Addressing these issues in the federal implementing legislation will ensure the United States' compliance with the goals of the Convention, while setting an example for other States party to the agreement. This approach will strengthen the Convention's ability to curb the financial abuses associated with intercountry adoptions and help eliminate the "baby black market."¹³⁵

¹³⁵ Turano, *supra* note 10, at 49.