Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption*

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At its Seventeenth Session - its Centennial - in May 1993, the Hague Conference on Private International Law completed and adopted the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. It was immediately signed on 29 May 1993 by Mexico, Costa Rica, Romania and Brazil, and hence bears that date.

The Hague Conference had previously drafted a Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoption at its Tenth Session in 1964, but this Convention was not signed until 15 November 1965. It had not been a success mainly because it was based on the European situation of the 1960s: international adoptions spanning relatively short geographical distances and between countries with more or less comparable socio-economic, cultural and legal systems. When this Convention finally entered into force, in 1978, the social reality underlying intercountry adoption of children had already changed dramatically, as a result of increased placement of children from the Third World with families in industrialized countries. It is estimated that since the early 1980s, approximately 20,000 children have migrated annually for purposes of adoption to Western Europe, North America, Israel and Australia from rising numbers of developing countries, and more recently from Eastern Europe, as well. While this has opened up new avenues for permanent child care for the benefit of children, it has also increased uncertainty and delay in the proceedings, as well as the risks of ill-prepared adoptions and of abuse.

The phenomenon of intercountry adoption, thus having taken on world-wide dimensions, called for a new approach: a framework for international cooperation with more emphasis on the need to define substantive safeguards and procedures for courts, administrative authorities and private intermediaries than on traditional rules of conflict of jurisdiction and of applicable law. Spontaneous worldwide agreement on the rules of jurisdiction and applicable law was highly unlikely, given existing divergences between legal systems as illustrated by the partly conflicting regimes of the Inter-American Convention of 24 May 1984 on Conflicts of Law Concerning the Adoption of Minors and those of the 1965 Hague Convention.

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The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (Child Abduction Convention) was an important precedent for creating the new Intercountry Adoption Convention. That treaty had also stepped aside from the traditional techniques of private international law in order to respond to a specific international phenomenon by establishing a system of judicial and administrative cooperation (through Central Authorities designated by each State Party), for the immediate return of wrongfully abducted or retained children. The United Nations Convention on the Rights of the Child became a major source of inspiration during the negotiations for the new convention. Adopted on 20 November 1989, its article 21 calls upon States to conclude inter alia multilateral agreements to protect children in intercountry adoption.

First, the idea for the new Intercountry Adoption Convention was tested before the International Law Association, after which it was submitted by the Permanent Bureau to the Hague Conference’s Sixteenth Session in 1988, where it was warmly received. The topic was included in the agenda for the next session, on the condition that countries of origin of adopted children, most of which were not Members of the Conference, would participate. The Permanent Bureau, with the help of a special fund to which many Member States contributed, was able to assure the participation of a large number of then non-Member countries. Almost seventy States and twenty international organizations, both governmental and intergovernmental, took part in the negotiations, which took place under the Chairmanship of Mr. T. B. Smith, QC (Canada). For the first time, interpretation from Spanish to English and French was ensured in order to facilitate participation by the numerous Latin American countries. As of 15 December 1995 the Convention had been signed by twenty-three States and ratified by Mexico, Romania, Sri Lanka, Cyprus, Poland, Spain, Equador, Peru and Costa Rica. It entered into force on 1 May 1995.

Objectives and scope of the Convention

The objectives of the Convention are defined in article 1:

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 cooperation 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.

The Convention, therefore, clearly puts the rights of children first in intercountry adoption, as does the Convention on the Rights of the Child in its article 21. Furthermore, it is based upon the recognition that unilateral action by either the State of origin or the receiving State, is not enough, but that there needs to be coordination between their policies, including those on emigration and immigration, and direct cooperation with one another when it comes to intercountry adoptions. Finally, the Convention does not
pretend to unify the rules of conflicts of jurisdiction or of applicable law amongst the Contracting States, but does provide for recognition of adoptions that have been properly carried out.

According to article 2, the Convention applies, mandatorily, wherever a child habitually resident in one Contracting State (the 'State of origin') has been, is being, or is to be moved to another Contracting State (the 'receiving State'), either for purposes of adoption in the receiving State, or after having been adopted in the State of origin. It therefore applies both in the configuration where the adoption takes place for the first time in the receiving country (e.g., adoptions from the Philippines, Korea, India) and where the country of origin insists that the adoption order is made there before the child leaves for abroad (e.g., adoptions from Latin American countries, Sri Lanka, Eastern Europe). It should be noted that the Convention does not impose the institution of adoption upon any legal system and can also be applied where the internal laws of a country do not provide for or allow adoption.

The Convention covers both full adoptions (leading to a termination of the parent-child relationship) and simple adoptions (where this parent-child relationship remains at least partially intact). It applies to adoptions without regard to whether they are created by judicial order, by an administrative decision or by a private arrangement, or whether the adoption involves relatives or strangers. The Convention applies to all children, whatever their nationality or legal status, provided they have their habitual residence in the country of origin. Similarly, the Convention applies to all spouses and single persons, whatever their nationality and legal status, as long as they are habitually resident in the receiving State. Concerning the specific questions which arise when the Convention is to be applied to refugee children, a Special Commission of the Hague Conference, which met from 17 to 21 October 1994, drew up a Recommendation on the application of the Convention to refugee children and other international displaced children.

**Substantive requirements**

The cooperative framework of the Convention is based upon an agreed division of responsibilities. Chapter II of the Convention defines a number of substantive requirements of the Convention, responsibilities for which lie partly with the country of origin (article 4), partly with the receiving State (article 5). These responsibilities are neither exhaustive nor mutually exclusive. They are not exhaustive because other substantive requirements may be found elsewhere in the Convention, in particular in Chapter VI and, additionally, the Convention only sets minimum standards and does not prevent a State from setting higher standards for intercountry adoption. The responsibilities are, moreover, not mutually exclusive in the sense that they merely require each of the two States involved to do what it is in the best position to do. Therefore, the State of origin is primarily responsible for ensuring that the child is 'adoptable', that due consideration has been given to alternatives to intercountry adoption,¹ that the

¹ In particular, permanent care by a suitable family, see article 4(b) and preamble, second and third paragraphs.
necessary consents have been freely given after counselling, with information of the effects of the consent \(^2\) including, where appropriate, the consent of the child.\(^3\) Likewise, the receiving State is primarily responsible for determining that the prospective adoptive parents are eligible and are suited to adopt, that they have been appropriately counselled and that the child will be effectively allowed to enter and reside permanently in the State. As is explained below, article 17 offers a procedure to resolve any conflicts that may arise between the State of origin and the receiving State as a result of diverging adoption requirements.

**Central authorities and accredited bodies**

Chapter III deals with the Central Authorities which are to be designated by each Contracting State (Federal States may designate more than one such Central Authority). Central Authorities have an international, as well as an internal aspect to their functions: internationally, their task is to cooperate with their counterparts in other Contracting States; internally they are to promote cooperation among the competent authorities. Their responsibilities are both of a general and of a case-specific character. However, the latter responsibilities may be delegated to 'accredited bodies.'\(^4\)

While the device of the Central Authority is well known from other Hague Conventions, including the Hague Child Abduction Convention, the appearance of 'accredited bodies' is a novelty. It reflects the present reality that private organizations play an important role as intermediaries in the intercountry adoption process. Their role is recognized, but also defined and regulated by the Convention, in particular as to their competence, non-profit objectives and the need for supervision.\(^5\)

\(^2\) See the model form for the statement of consent to the adoption recommended by the Special Commission of 17-21 October 1994.
\(^3\) See article 4.
\(^4\) See articles 9-12.
\(^5\) See article 11, see also article 32.
Procedural requirements

Chapter IV deals with the procedures which precede and which follow the making of the adoption and for which the Central Authority and its delegates have special responsibility. These requirements concern: the preparation of reports, both on the prospective adopters (home study) and the child; the placement process; emigration from the State of origin and immigration into the receiving State; the making of arrangements for the transfer of the child, exchange of information during the adoption process; and measures to be taken in the hopefully exceptional case when, before the adoption, the placement turns out not to be in the child's best interests.

Of special importance is article 17 which exemplifies the basic idea of cooperation between the State of origin and the receiving State, as well as of coordination of child care and migration policies. While recognizing the right of the State of origin to decide on the placement of the child, article 17(c) gives the Central Authority of the receiving State the right to veto a placement to which it does not agree. One reason may be that the receiving State finds that the adoption would be contrary to mandatory provisions of its law, most often its own internal law, concerning adoption (e.g., age requirements). Once the receiving State has given the green light, however, it may no longer raise any barriers to the adoption (article 17(d)).

Article 22 of the Convention deals with the problem of so-called 'independent' or 'private' adoptions (adoptions carried out through intermediaries other than accredited bodies). While all applications have to be made to a Central Authority, another public authority or an accredited body, other bodies and persons may act as intermediaries under the Convention, but only under certain conditions: firstly, the Contracting State must have made a specific declaration to that effect; secondly, they must meet the requirements fixed by the Convention; thirdly, the names and addresses of these bodies and persons must be made known to the Secretariat of the Hague Conference; fourthly, the reports on the child and prospective adoptive parents should in all cases be prepared under the responsibility of the Central Authority or an accredited body; and, finally, any State of origin may veto the activities of such other bodies or persons in the adoption process concerning its children.

Recognition and effects of the adoption

Where the Convention requires the approval of the two States directly involved (the State of origin and the receiving State) for the entrustment of the child to the prospective adoptive parents (article 17(c)), there is no reason why the resulting adoption made in either of the two States should not be recognized by the other State and, hence, in all, other Contracting States. This is the principle of article 23 which

See article 14.
provides for recognition by operation of law of a certified adoption to which article 24 makes an exception only for extreme cases, such as fraud or duress exerted on a mother while giving her consent. The Convention also specifies some of the effects of the recognition which extend in all cases to the legal parent-child relationship and the vesting of parental responsibility on the prospective adoptive parents. Where the adoption, under the laws of the State where it was made, terminates all legal bonds with the child's mother and father (full adoption), the Convention guarantees rights 'equivalent' (not necessarily equal) to those of a child adopted in full adoption in the recognizing State. The latter provision does not, therefore, apply to simple adoptions, but the Convention contains a special provision for the conversion of simple adoptions to full adoptions.8

General provisions

Chapter VI contains, in addition to a number of standard articles, several important substantive provisions. Article 29 restricts contact between the prospective adoptive parents and the child's parents before it has been determined that the child is free to be adopted and that the applicants are eligible and suited to adopt. The purpose of this is to avoid situations such as those that have been frequently seen recently in Romania - but that are also well-known in Latin America and Asia - where prospective adopters, often guided by local brokers, visit the birth parents at home who then, in exchange for money or under pressure, consent to the adoption of their child.

Articles 30 and 31 (which should be read in conjunction with article 16(2)) contain provisions on the information of the child's origin, including the identity of the birth parents as well as the medical history. All Contracting States are required to preserve such information even where, as is the case in certain Asian countries, they do not yet allow children to have access to such information. As such societies evolve, they may in the future decide to disclose such information, which will then be available because it will have been preserved. Article 31 adds that personal data gathered or transmitted under the Convention must be treated confidentially. Article 32 includes a general provision against the making of improper financial gain. Article 33 underlines the supervising role of the Central Authority: any competent authority, which finds that any provisions of the Convention has not been respected, is to inform immediately the Central Authority of its State. The Convention also for the first time codifies in article 42 what has become a practice under several other Hague Conventions on judicial and administrative cooperation: periodic meetings of Special Commissions to review the practical operation of the Convention.

7 See the model form for the certificate of conformity of intercountry adoption recommended by the Special Commission of 17-21 October 1994.
8 See article 28.

In close cooperation with the secretariat of the Hague Conference, International Social Service (ISS) has set up an International Resource Center on the Protection of Children in Adoption, based at Geneva, to facilitate the implementation of the Convention.

For further information about the Convention, contact: Permanent Bureau of the Hague Conference on Private International Law, Scheveningseweg 6, 2517 KT The Hague, The Netherlands; Tel. (+31) 70 3633303; Fax: (+31) 70 3604867