

The World Organisation
for Cross-border Co-operation
in Civil and Commercial Matters



L'Organisation mondiale pour
la coopération transfrontalière
en matière civile et commerciale

Presentation of The Hague Conference on Private International Law by Jennifer Degeling, Principal Legal Officer

Introduction

I would like to thank Terre des Hommes for the opportunity to participate in the launch of their Report "Adoption: at what cost". We recall with gratitude the support Terre des Hommes gave, together with other non governmental organisations during the negotiations of the 1993 Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption, and the pioneering studies made at that time, with International Social Service and Defence for Children International, on "Independent Intercountry Adoptions", and on "The Waiting Period" in Intercountry Adoptions".

We also welcome the opportunity to comment on the report, which deals with a subject we consider to be of great importance, namely, the responsibility of receiving countries to improve their ethical practices in intercountry adoption.

Hague Intercountry Adoption Convention: Guide to Good Practice

As some of you know, the Hague Conference on Private International Law has developed a Guide to Good practice on the Implementation of the 1993 Hague Intercountry Adoption Convention, and in this Guide we try to give a strong message about ethical approaches to intercountry adoption, which, I am pleased to say, is similar to the Terre des Hommes Report in many areas. (The Guide, which is already available in draft form on our website, has now been finalized and will be published this spring.)

In particular, I would point out the following themes that appear throughout the Guide to Good Practice:

- That intercountry adoption is a child-centred process to find a family for a child who needs one through intercountry adoption; intercountry adoption is not a process to satisfy the needs of prospective adoptive parents to find a child. A "child-centred process" means that intercountry adoptions will be made in the best interests of the child.
- That receiving States have at least an equal responsibility (if not a greater responsibility – due to their greater resources) with States of origin for improving intercountry adoption practices, for example, by enforcing Hague Convention standards, by regulating costs and by supervising accredited bodies and intermediaries; the burden of keeping intercountry adoption at Convention standards should not be placed solely on countries of origin.
- That States of origin should be empowered to resist the pressures from receiving States and their accredited bodies to keep up the "supply" of adoptable children; - empowerment of the State of origin comes through their better understanding of the extent of their powers and the limits of their obligations under the convention – to help resist pressures from receiving States and their intervening parties; for example, States of origin do not always understand that they do not have to have adoption arrangements with every receiving country in the Convention.

What do we like about the Terre des Hommes Report?

1. Its emphasis on the 1993 Hague Intercountry Adoption Convention and the United Nations Convention on the Rights of the Child as providing the essential legal framework in which all intercountry adoptions should be conducted (i.e. with convention and non-convention countries) (p.9-10).



- The comparative study showed that the Hague Convention is recognised as “having the potential to improve the quality of procedures and their control, as well as the professionalism of its affiliates and the protection of children’s rights”.
- But even in this small group of comparable, similar receiving States, the “ethical scope and implementation of reforms” varies from one country to another. The fact that contradictory outcomes are sometimes reached, *e.g.* in one country the adoption process was expedited, in another it created delays. The conclusion reached is that it is not the content of the Convention itself which is to blame but the manner of its implementation.
- Another contradictory outcome is that some countries have reduced the numbers of authorities and intervening parties, while others have increased them. This is also a factor which leads to improvements from the specialisation of fewer bodies or inefficiencies from having too many authorities / bodies who process too few adoptions and therefore do not acquire the necessary levels of experience.
- We acknowledge that the political reality in some countries concerning the division of powers, means that countries cannot reduce the number of Central Authorities, but we have the example of China which will only deal with one Central Authority in each country.

2. The Report supports the position we have taken in our Guide to Good Practice on the shared responsibility of receiving States and States of origin to co-operate in ensuring good practices are followed in intercountry adoption. Some examples given of what receiving States should do are:

- regulation of accredited bodies and intermediaries;
- ensure accredited bodies understand their great responsibility as actors in international treaty procedures;
- regulation or prohibition of private and independent adoptions which are contrary to the Hague Convention;
- avoid pressure on authorities in States of origin;
- control adoption costs through transparency and accountability;
- prevent contact before matching – Art. 29 (few receiving countries have laws against contact).

3. Exposure of practices that are inconsistent with Hague Convention. The six nations study found the following inconsistencies:

- competition between receiving countries and their accredited bodies in Countries of origin to “procure the supply” of young healthy children to adopt;
- the same receiving countries target the same Countries of origin for the same supply of children (p.7);
- public policy of some receiving States to increase intercountry adoptions for benefit of prospective adoptive parents (France, Italy, Spain) (p.6);
- private adoptions are not discouraged and may even be encouraged;
- excessive numbers of accredited bodies;
- little if any attempt to control numbers of prospective adoptive parents, *e.g.* when inviting prospective adoptive parents to apply to adopt or to be evaluated – not one receiving State takes into account the number of children adoptable in a country of origin (therefore numbers are increasing, unrealistic expectations on prospective adoptive parents, more pressure on State of origin, more competition for children, risk of improper practices). Can this problem be addressed by approving the prospective adoptive parents for only 1 country, or group of countries of origin?

4. Intercountry adoption, a child-centred process:

- The presentation of the Report is child-focussed;
- best interests recommendations – all recommendations in the Report are framed in terms of keeping the best interests of the child at the centre of the process (p.8, 10);
- highlights of the principle of subsidiarity / double subsidiarity;
- reduce competition between receiving countries and increase responsible cooperation with State of origin;
- responsible messages to the public – a family for a child not a child for a family; no “right to adopt” (p. 4, 6, 33);

- exchange of information on numbers and characteristics of children in need of intercountry adoption;
 - declining numbers of healthy babies in need of intercountry adoption, and an increasing number of children with special needs who require adoptive parents with special skills;
 - same high standards for intercountry adoptions from Non Convention States as or Convention States.
5. A strong Central Authority – with sufficient legal and administrative powers (p. 6-7):
- with an active role in all intercountry adoptions, specially in exercising control of the process of decision making, monitoring, and verification of the intercountry adoption, in particular before matching occurs;
 - responsible for coordinating a coherent policy on intercountry adoption;
 - establish a framework of effective cooperation with Central Authorities of States of origin, so that the files of prospective adoptive parents sent to the State of origin reflect the numbers and profiles of children in need of intercountry adoption;
 - in summary, a proactive and professional Central Authority.
- The suggestion made in the report for each State to develop a binding legal charter which sets out the ethical approaches to adoption to be followed in by its government, Central Authorities, competent authorities, and accredited bodies, seems to be a good idea. We would hope that our Guide to Good Practice would form the basis of any such charter as it contains many good practice recommendations to implement the general principles and the specific procedures of the Convention.
6. Detailed good practice recommendations on each topic in the Report:
- clear statements of good practices;
 - practical and helpful resource;
 - encourage coherent and united approach of each country's ministries, authorities and accredited bodies (p.6-7).

Some small criticisms

1. Private/independent adoptions: The Report does not distinguish between a purely private adoptions (between birth parents and adoptive parents) and independent adoptions (which have the approval, but not necessarily the supervision, of the Central Authority). Our Guide to Good Practice makes a clear distinction between the two but supports neither.
2. Public authorities / "public" accredited bodies: there is some confusion around the so-called "public" accredited bodies and the term is misleading. The Report is not clear on this issue, e.g. it questions why certain German public authorities (local Child and Youth Services) are not listed on the Hague website as accredited bodies. The functions of Central Authorities may be performed by other public authorities (Art.22(1)). The Hague Convention does not require that the Permanent Bureau be notified of these arrangements. But the details of accredited bodies must be notified to the Permanent Bureau (Art.13).
3. The role of the Hague Convention to protect the interests of the prospective adoptive parents, and the birth parents, is not given enough emphasis in the Report.

Conclusion

As a respected non government organisation, Terre des Hommes has the independence and authority to call the attention of European authorities to the state of affairs in receiving countries and to call for political measures to rectify the shortcomings in adoption laws and procedures, in the interests of all children. This Report should also be of great value to the EU project which was tendered for last year, to do a comparative study of adoption in all EU countries.

When I read the Report I was pleased to find:

- a report which discussed openly some practices in receiving countries which are not in the spirit or intention of the Hague Convention;
- that the willingness to embrace the opportunity for reform, presented by the Hague Convention framework, to develop coherent and ethical procedures, depends on the attitude to intercountry adoption fostered by governments and authorities – and not on the content of the Convention itself;

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26/02/2008

- a Report which reflects and supports the recommendations for good practice taken in the Hague Convention Guide to Good practice on Implementation;
- a report which recommends closer observance of the principles and rules of the Hague Convention.

The Report is a significant contribution to the literature to develop good practices in intercountry adoption. It is a valuable empirical study of comparable receiving Countries, to draw attention to those good practices to be encouraged – what works well, what achieves the objects of the Hague Convention and the UN Convention – and those other practices which do not work well or are too focused on the needs of prospective adoptive parents.

I commend Terre des Hommes for this valuable work.