

Intercountry Adoption Some Issues in Implementing and Supplementing the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption.

(Paper presented by Professor William Duncan at the International Conference.
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Introduction

This paper explores two areas of concern which arise as various States prepare to implement the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption. The first part has to do with States of Origin and some of the challenges which they face in making the Convention effective. The second part of the paper looks at some situations which fall outside the scope of the Convention and the suggestion is made that States, especially receiving States, should consider the unilateral application to them of some of the Convention's principles and safeguards.

Part I. The Challenge for States of Origin

The burden of responsibility.

The Convention is designed to enable States of origin to exercise a high degree of control over the process of intercountry adoption. By the same token a heavy responsibility falls on such States. While the Convention is based on a model of cooperation and shared responsibility between receiving and sending States, there is no doubt that the main burden of regulating and controlling the process of intercountry adoption is placed on the authorities of the State of origin. In particular, it is the State of origin which has the principal responsibility for ensuring that intercountry adoption is in the interests of a particular child, that the rights of the child and the biological parents are protected, that intercountry adoption is not employed where there are suitable alternatives for the child in the country of origin, that the "matching" of the child with suitable parents is carried out professionally, and that profiteering and other forms of malpractice are eliminated.

Much is expected of States of origin, most of which are struggling with serious economic problems, many of which will have only small budgets available and other important projects and priorities in the area of child protection, and some of which face the added difficulties of control which come with the administration of vast geographical areas. It is especially important given these limitations, that initial measures of implementation, legal and administrative, are realistic and soundly based.

Implementing measures.

The setting up of an effective Central Authority, the exercise of effective control over bodies accredited to act under the Convention, and the development within them of the highest standards of practice, are some of the more obvious priorities for States of origin. Discussion of these important matters is outside the scope of this paper.

In addition there are several matters in relation to which the Convention lays down only broad principles and frameworks, leaving to States of origin considerable discretion as to the detail of their practical implementation. The success of the Convention will depend in part upon how wisely and effectively individual States of origin apply flesh to these Convention bones. It is to be hoped that implementing measures in States of origin, including national legislation where appropriate, address at least some of these matters. The following are just three examples of matters to which States of origin may need to give special attention in implementing the Convention.

1. Article 29 and contacts with the child's parents.

Article 29 restricts contact between prospective adopters and the child's parents in the early stages of the adoption process. International experience has demonstrated the need for such restriction, given the great vulnerability of parents living in poverty to pressures, whether deliberately imposed or not, from or on behalf of comparatively wealthy adopters. It is left to the State of origin to decide how exactly to enforce this principle. The Convention does not render invalid an adoption which follows a breach of Article 29, though, if as a result of that breach the consent of the parent is adjudged not to be free, the adoption is prohibited under Article 4 c. Use by the State of origin of the criminal law to sanction Article 29 will need to be considered. It should also be noted that Article 29 does not prohibit contact which is in compliance with conditions established by the competent authority of the State of origin. Again it is left to the State of origin to determine what if any those conditions should be. For example, the possibility of permitting supervised contact might be considered.

2. Article 4b and the principle of "subsidiarity".

Article 4 b requires the competent authorities of the State of origin to determine "after possibilities for placement of the child within the State of origin have been given due consideration," that an intercountry adoption is in the child's best interests. This important provision inspired by Article 21(c) of the 1989 UN Convention on the Rights of the Child, again leaves much to the discretion of the State of origin. It is for that State to decide what constitutes "due consideration", by what procedure that consideration is to be given, and what local alternatives to intercountry adoption are to be regarded as acceptable "possibilities for placement" of the child. The following are some general comments on these matters.

- (a) The Convention's preamble implies that the State of origin should, when considering local alternatives for the child, have principally in mind 'in-family' rather than institutional alternatives. The emphasis in the Hague Convention is in this respect rather different from that of the US Convention.
- (b) "The principle of subsidiarity, while of central importance, should not be applied in an inflexible manner. There will sometimes occur cases where, in the interests of the child, a placement with parents from abroad may be more appropriate than with prospective adopters in the country where the child is resident, as for example where the child's roots are in fact in that foreign country. Also it would be unfortunate if the principle were operated in a way which led to excessive delay in the placement of a child, as for example by the adoption of rigid administrative practices such as the imposition of quotas for foreign adoption on placing agencies. It is important that the idea of subsidiarity be always interpreted and applied in the context of the 'best interests' principle."
- (c) ...(T)he successful operation of the subsidiarity principle requires that the placing agency in the country of origin should have the capacity to explore the alternatives to intercountry adoption. This implies a placement system which is in some way integrated into, or at least has ready access to and information about, the childcare services generally within the country of origin.
- (d) It follows from (c) above that it may be particularly difficult to ensure that the subsidiarity principle is respected if the State of origin permits, as it may do under Article 22.2, so called 'independent' adoptions to be arranged.

3. *Article 4. c & d. The consent requirements.*

The consent provisions of Article 4. c&d for which the competent authorities of the State of origin have responsibility, are a mixture of specific requirements and more general open-textured principles whose precise application will differ from one State to another. The specific requirements are that the person or body whose consent is required must be informed of its effects, that the consent must be expressed or evidenced in writing, that the consent must have been free and not induced by payment or compensation, and that, in the case of the mother's consent, where required, it must be given only after the birth of the child. On the other hand it is left to the State of origin to determine whose consent is required, in what precise form it is to be given, when it may be dispensed with what constitutes 'free' consent, what form of counselling and advice is to be available, and, in the case of the child, whether, having regard to his/her age and degree of maturity, his/her consent is required.

This is not the place to enter into a general discussion of consent requirements and how they differ from one State to another, nor of the great difficulty in achieving a satisfactory definition of "freedom" when applied to the consent of a parent whose freedom to choose will usually be constrained if not dictated by economic factors. Suffice it to say that, if radical differences do exist between the consent laws obtaining

in the State of origin and the receiving State, this may obviously create difficulties for cooperation. In a case of serious differences arising, it would be possible for the Central Authority of the receiving State to veto the adoption under Article 17. Even if the adoption proceeds, there remains the possibility in an extreme case of non-recognition (in the receiving State or other contracting States) under Article 24.

There may therefore be a need for the development of a consensus among Contracting States as to certain essential elements in laws and procedures applying to consent, i.e. going beyond the specific requirements of Article 4 b & c. The work currently being undertaken by the Hague Conference towards the acceptance of common forms for consent is an important part of this. No doubt further common understandings will be promoted by the regular meetings which are to be convened at the Hague under Article 42 to review the practical operation of the Convention.

Part II. Convention Principles for Non-Convention Cases?

The scope of the Convention of 1993 is defined in Article 2. Paragraph 1 of that Article applies the Convention to any case in which a child in one Contracting State has been, is being, or is to be moved to another Contracting State following adoption in the first State or for the purposes of adoption in either State. Paragraph 2 confines the Convention to adoptions which create a permanent parent-child relationship. Viewing these provisions from the perspective of a receiving State, it is obvious that there will be a number of adoption situations having an international character which, although they involve residents of the receiving State will not be covered by the Convention. One is where the State of origin is not a Contracting State; another is where the child, though resident in the receiving State, has significant continuing links with another jurisdiction (for example, a refugee or unaccompanied child). It is equally obvious that cases involving long-term care arrangements which fall short of the Convention definition of adoption (for example, long-term fostering arrangements or the Islamic institution of “kafalah”) will not come within the Convention even where they are “intercountry” and involve two Contracting States.

An underlying purpose of the Convention is to secure the interests of the child and to combat the abuse and bad practise which has been an unfortunate feature of intercountry arrangements for adoption. These same risks will continue to be present in many of the cases mentioned which fall outside the scope of the Convention. It is therefore worth considering the extent to which Convention principles might, perhaps on a unilateral basis, be extended to some of these extra-Convention situations. This is a matter of some relevance both to receiving States and States of origin. However, this discussion is confined to receiving States and it explores the possibility of such States, by means of implementing or other legislation, extending certain Convention principles to non-Convention cases.

1. *Where the State of origin is not a contracting State.*

It would be surprising if receiving States, having accepted the need for regulation of intercountry adoption under the Convention, were not to consider actively the application of at least some of its basic safeguards to cases where the State of origin is not a party to the Convention. After all, it is not so much reciprocity which inspires the Convention as a desire to adopt measures which will offer protection to children in situations which are known to be fraught with risk. The Convention is founded on principles which are good for all intercountry adoptions not simply for those which fall within the scope of the Convention.

It should also be born in mind that some of the worst abuses of intercountry adoption have occurred in situations of war, civil disturbance or natural disaster. In such situations the Convention principles may be inapplicable because the State of origin concerned is not a party to the Convention. Moreover, even if the State of origin is a contracting State, there may occur a breakdown of the Convention procedures in that State, and it may become necessary for the receiving State to regulate matters on a more or less unilateral basis. The alternative of not allowing or recognising adoptions where the State of origin is not a contracting State, or where it is a contracting State but the Convention procedures have as a result of a catastrophe broken down, is somewhat stark and may not necessarily be in the best interests of children.

Clearly many of the Convention provisions which involve cooperation at an administrative level would be difficult to implement where only the receiving State has an established Central Authority and a system of accredited agencies. On the other hand, a number of the controls in respect of prospective adopters which the Convention entrusts to receiving States could be applied in all cases where the prospective adopters have their habitual residence in the receiving State. It may also be possible, by means of conditions attached to recognition or to the admission of the child into the receiving State, for that State indirectly to ensure conformance with some of the requirements which under the Convention are to be carried out in States of origin. The following is a more detailed list of Convention provisions which might be directly or indirectly utilised by a receiving State to regulate intercountry adoption where the State of origin is not a Contracting State.

- (i) Article 5, as a condition of adoption, requires the competent authorities of the receiving State (a) to determine that the prospective adoptive parents are eligible and suited to adopt, b) to ensure that they have been counselled as may be necessary, and (c) to determine that the child is or will be authorised to enter and reside permanently in that State. In the non-Convention situation, and in the absence of any bilateral agreement, it is not possible for a receiving State to impose conditions on the making of an adoption in a State of origin. But the receiving State could set the first two requirements of Article 5 as conditions for the recognition of an adoption made in the State of origin for the admission of the child into the receiving State, or for the making of an adoption in the receiving State.

- (ii) Article 4, as a condition of adoption, requires the competent authorities of the State of origin (a) to establish that the child is adoptable, (b) to determine, after possibilities for placement within the State of origin have been given due consideration, that an intercountry adoption is in the best interests of the child, and (c) to ensure that a number of consent requirements relating inter alia to the mother and the child himself/herself have been complied with. Again, in a non-Convention situation and in the absence of bilateral arrangements, it would not be possible for a receiving State to ensure that these conditions are met where the adoption is made in the State of origin. They could, with some modification, be retained as conditions for the grant of an adoption in the receiving State. Thus where prospective adopters who are resident in the receiving State apply in that State for an adoption in respect of child resident in a non-contracting State, it might be made a condition of the adoption that the requirements of Art. 4 be met. If more flexibility is needed (in a situation, for example, where it is not possible to obtain assurances in respect of Article 4 conditions from authorities in the State of origin), the obligations under Article 4 might be imposed directly on the authority granting the adoption in the receiving State.

With more substantial modification the Article 4 requirements might also become conditions for the recognition of a non-Convention adoption made in the State of origin. What in effect is being suggested is the development of recognition principles for non-Convention adoptions which incorporate some of the important Convention safeguards. The following might be a simplified model.

"A foreign adoption, which is not a Convention adoption, shall, where the adopters are habitually resident in this (the receiving) State, not be recognised unless competent authorities (which would include the body/court granting the adoption) in the State of the child's habitual residence have complied with the conditions (or some specified conditions) set out in Article 4 of the Convention."

- (iii) Elements of Article 17 might be employed in a similar fashion in the context of recognition, again with modifications. Thus the conditions for the recognition of a non-Convention adoption, where the adopters are resident in a Convention State, might include that the Central Authority in that State should have approved that the child should be entrusted to the prospective adopters and have agreed in advance that the adoption should proceed.
- (iv) It may be appropriate to give Central Authorities in Contracting States certain responsibilities in respect of non-Convention adoptions involving their own residents. There could be a requirement, similar to that in Article 14, that persons habitually resident in a Contracting State who wish to adopt a child habitually resident in a non-contracting State should first apply to the Central Authority of their own State as a first step towards having their eligibility and suitability assessed (on the assumption

that a modified Article 4 would apply, as suggested above), and as a necessary prelude to obtaining the agreement of the Central Authority to the adoption proceeding (on the assumption that a modified Article 17 would apply, as suggested above).

Some of the more general responsibilities of Central Authorities might also be exercised in non-Convention situations. The Article 8 obligation to take all appropriate measures to prevent improper financial or other gain in connection with an adoption is an obvious one. Some of the obligations under Article 9 (for example, the development of adoption counselling and post-adoption services) are also in point.

2. *Where the adoption has international features but is not strictly “intercountry”.*

The Convention (Article 2.1) only applies to cases where a child is moved from one Contracting State to another either after adoption or for the purpose of adoption. There will be cases of adoption having strong international or intercountry features which do not meet this definition. Once again it needs to be considered whether it might be appropriate to extend certain Convention principles and procedures to such situations.

One example is the case of the refugee or internationally displaced child who is adopted in the State of his or her residence following displacement. If the recommendations of the Hague Working Group (on the application to refugee children of the 1993 Convention) are accepted, the child in such case is to be regarded as having his or her habitual residence in that State. As a result the adoption of the child in that State would not come within the scope of the Convention because there is no further movement of the child following or for the purposes of adoption. The adoption would not be “intercountry”, it would be internal. The Working group recognised this problem, and acknowledged that this would be the most frequent and typical case where adoption occurs.

However, clearly such a case has international dimensions which call for special protections for the child, and demand a very cautious approach to any measure, such as adoption, which will sever the child's links with his or her parents. For this reason the Working Group has recommended that States should consider applying to internal adoptions of this kind a number of special provisions designed primarily to protect refugee and internationally displaced children whose adoption is within the scope of the Convention. There is a certain curiosity in recommending for the typical case measures which have been designed to deal with the more exceptional case. Nevertheless, the measures which are recommended are important. They place great emphasis on the efforts that should be made to trace the child's parents and family members, to reunite the child with his or her family, to consider

repatriation of the child for such purpose where this would not involve risk for the child and to ensure that consent requirements are rigorously applied.

In effect, the Working Group has recommended that certain Convention principles, supplemented and reinforced in various ways, should be applied to a special class of domestic adoptions. This naturally raises the question whether there may be other Convention provisions which could usefully be applied. Because of the international dimension of adoption involving refugee and internationally displaced children, should some of the Convention's procedural safeguards be considered? Should not the making of adoption arrangements in such cases be placed within the competence of agencies or bodies accredited under the Convention? Might this, as well as the involvement where appropriate of Central Authorities, not help to ensure that the special safeguards recommended by the Working Group are effectively applied?

Another example of a domestic adoption having international characteristics arises where a pregnant woman moves from the State of her habitual residence to another State with the purpose of having her child when born adopted in that second State. There is a difficult question of determining the child's habitual residence in such case. However, even if the assumption is made that the child has a habitual residence in the mother's home State, the adoption may still fall outside the scope of the Convention because there has, following the child's birth, been no movement of the child from one State to another to bring the situation within Article 2.1. In order to establish that such movement has occurred it would be necessary to argue that a child for Convention purposes includes a child *en ventre sa mère*. There is therefore a distinct possibility that the subsequent adoption may not be a Convention adoption. It may not be too outlandish to suggest that this loophole could be exploited by wealthy prospective adopters who are prepared to pay for the mother's travel and birth costs. The matter could be addressed by implementing legislation in individual States which makes clear that such a situation will be treated as coming within the scope of the Convention. The difficulty would remain that the cooperation between the two States required by the Convention might be difficult to achieve where there is a difference of view as to whether or not the Convention is applicable.

3. *Where the arrangement does not create a permanent parent-child relationship.*

The range of adoptions covered by Article 2.1 of the Convention is deliberately broad. Adoptions “ which create a permanent parent-child relationship ” include both simple and full adoptions. Despite the difficulties that this created in areas such as recognition, in the Special Commission discussions a strong view emerged that the Convention should be as inclusive as possible because of the importance of extending the Convention safeguards to as wide a range of children as possible. However, the Convention draws the line at adoption. It does not include other long-term alternative-

care arrangements such as fosterage or kafalah. It is probably fair to suggest that there was an assumption among delegates at the Special Commission that, where intercountry arrangements for long-term alternative care for a child are necessary, adoption usually provides the most appropriate basis.

As time passes it is possible that this assumption may be increasingly questioned. There are several reasons for suggesting this. First, it has to be remembered that in most Islamic States adoption is not permitted, while the form of fosterage known as kafalah is. No statistics were available to the Special Commission on the frequency of intercountry kafalah and no evidence was presented concerning possible abuses in that area. However, it remains possible that there is a need for the kind of international cooperation that is provided for in the Hague Convention of 1993.

Second, it is becoming increasingly accepted in many Western States that long-term alternative care arrangements should be tailored to meet the needs of individual children, and there is a tendency, in seeking the necessary flexibility to achieve this, for some of the more rigid legal boundaries to be broken down, such as the boundary between adoption and fosterage. Open adoption, involving some continuing links between the child and the birth parent, is becoming more common and accepted. Indeed there is a body of opinion that suggests that the "clean-break" model of adoption embraced in some Western States may have done a disservice to some children, especially older children, for whom continuing links with the family of origin might have proved beneficial. How far this movement in thinking about adoption will go is difficult to predict. The problem will be to find a balance between the need for flexibility and the importance of securing permanence and stability for the child in long-term alternative care arrangements. We may be sure that this movement in thinking will impinge on intercountry adoption. Of course there will remain many intercountry cases where the idea of anything less than a "clean-break" adoption for the child will be unrealistic and contrary to the child's interests. But there will be some cases where something less permanent than adoption may be appropriate. Take the case of refugee and other internationally displaced children. It may sometimes be necessary for intercountry arrangements to be made for their care, but it is by no means obvious that this should always take the form of adoption.

"Since adoption, and intercountry adoption in particular, usually has the irreversible effect of severing the legal bonds with the original family and establishing new family relationships between the child and the adoptive parents, adoption should not be considered lightly. Due to the possible re-emergence of the parents, the importance of more temporary or 'non-permanent' solutions should be stressed."
(Hague Working Group Report. para. 6.)

In summary, what is being suggested is that intercountry alternative care arrangements falling short of adoption may with the passage of time assume more significance than was attached to them when the Intercountry Adoption Convention was being drafted. If this is true, serious consideration will have to be given to the question of international regulation, and to the possibility of an extension in the scope of the Convention.

Conclusion

The Convention of 1993 is an important first step. Much more needs to be done if it is to realise its full potential for protecting children from the special hazards involved in intercountry arrangements concerning their long-term care. The responsibilities which the Convention places on States of origin are as onerous as they are crucial. The task of establishing fully effective systems of control in many of those States is likely to take time. There is a moral as well as a practical obligation on the more wealthy receiving States to lend assistance in this process. Part of that assistance should take the form of help in ensuring that initial measures of implementation, both legislative and administrative, are realistic and as comprehensive as possible.

The Convention is much more than a vehicle for cooperation between States in arranging intercountry adoptions. It is founded on universally accepted principles concerning the protection of children in general for whom substitute care across frontiers has become necessary. It builds on the practical experience gained through the operation of bilateral and regional agreements. It is important that the principles and safeguards contained in such a Convention should achieve the widest possible application.