

**European Network of Ombudspersons for Children (ENOC)****Position Statement on “Intercountry Adoption”<sup>1</sup>****Adopted at the 22<sup>nd</sup> ENOC General Assembly, 21<sup>st</sup> September 2018, Paris**

*“Towards a policy and practice with full respect for the perspective and the rights of the child”*

**We, members of the European Network of Ombudspersons for Children (ENOC), express our concerns regarding the situation of children in intercountry adoption in our respective countries and the notable deficiencies in European, national and local policies in responding to their needs and interests. Our aspiration is to work towards an organization of intercountry adoption, focusing on the rights of children. The perspective of the child in intercountry adoption and the rights and welfare of the child him/herself need to be the guiding principles.**

ENOC strongly stresses the need for substantial review and where necessary improvement of existing laws, policies and practices across Europe, in line with the UN Convention on the Rights of the Child (UNCRC) and other relevant international instruments and standards.

We make this call based on our experience with individual complaints from adoptees or those representing adoptees, as well as on the results of the survey conducted among ENOC members in 2018. Also having considered the relevant international legal instruments, and in particular:

- The European Convention on Human Rights (1950)
- The UN Convention on the Rights of the Child (1989)
- The Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption (1993),
- The (revised) European Convention on the Adoption of Children (2008)<sup>2</sup>

We urge that various measures and recommendations should be endorsed, implemented and supported by European States.

**Introduction**

Adoption is a welfare and protection measure that enables an orphaned or definitively abandoned child to benefit from a permanent family. Intercountry adoption (ICA) entails a change in the child’s habitual country of residence, whatever the nationality of the adopting parents.<sup>3</sup> There exist two legal categories: simple adoption (does not break off the filial tie between a child and the biological parents) and full adoption (the filial tie between a child and his/her biological parents is broken and all the rights and duties of the adoptive parents are in force). Distinction can also be made between closed adoptions (in which there is no longer any contact between the child and its family) and open adoptions (in which this contact is still possible).

At first sight, adoption seems to be a quite simple action: a child without parental care is offered a permanent home and family. In reality, however, it is one of the most complex measures in the

<sup>1</sup> We heartily thank all the ENOC members as well as the external reviewers (Nigel Cantwell, Prof. Geoffrey Shannon and the International Social Service (ISS)) for their time and valued contributions.

<sup>2</sup> This Convention is not entered into force yet in several European States.

<sup>3</sup> Intercountry adoption, United Nations Children’s Fund, 1998.

field of child welfare and protection, more than ever in its intercountry form, because it involves transfer beyond national borders and consequently the child's transfer from his physical environment.

Europe provides a unique opportunity to examine the practices of intercountry adoption because it contains States that act as countries of origin for children entering into intercountry adoption as well as States that act as receiving countries, where children are placed with adoptive parents. A minority of European States act as both sending and receiving country.

The focus of the position paper is specifically on the rights of children in intercountry adoption placements with unknown prospective adoptive parents; relative and stepparent adoptions fall outside the scope. Although the rights of birth parents and adoptive parents, as well as public policy interests cannot be disregarded dismissed, the perspective of the child, his/her rights and welfare will be the guiding principle of the position paper. This approach is mandated by the UNCRC, which under article 21 requires that States that recognize or permit adoption, ensure that the best interests of the child shall be the paramount consideration. While the majority of the rights in the UNCRC are subject to the requirement that the welfare of the child be a primary consideration – as provided for in article 3 – this wording makes clear that in matters of adoption, no other rights or interests, including those of birth parents, prospective adopters, or economic or political considerations, should override those of the child.<sup>4</sup>

### **ENOC recommends the following actions to strengthen the process of intercountry adoption:**

First of all, we want to clarify that ENOC neither encourages greater use of intercountry adoption as a placement for children, nor proposes that it needs to be curtailed or abolished. We recognize that intercountry adoption can be a beneficial placement option for certain children, provided that it is appropriately regulated, implemented and carried out in accordance with the rights and best interests of the child.

Secondly, ENOC recognizes the importance of subsidiarity as a founding principle of the 1993 Hague Convention (art. 4 b) and the UNCRC (art. 21). Although the formulation and interpretation are somewhat different in both international instruments, the importance of this principle lies in the integration of intercountry adoption into the national child protection system. States must ensure that no appropriate domestic or internal measures are available before considering intercountry adoption. To further promote the principle of subsidiarity, we encourage European States and regions to strengthen their domestic child protection system. Lack of resources in some sending countries remains one of the most significant challenges to the implementation of the subsidiarity principle. Therefore, we also encourage European States and regions to support other countries to improve their domestic child protection system.

#### **1. Data base must be strengthened**

The lack of accessible and useful data on the adoption situation in many countries is an obstacle to have a reliable indication of practices. The questionnaire highlights how difficult it is to have access to reliable information on intercountry adoption, especially the data of sending countries, disaggregated data regarding child profiles (country of origin, age, gender, special needs,...) as well as the costs of adoption and the number of individuals/couples who are interested to adopt and effectively adopt. In this light, greater transparency and accountability are necessary to effectively

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<sup>4</sup> UNITED NATIONS COMMISSION ON HUMAN RIGHTS, "Report of the Working Group on a Draft Convention on the Rights of the Child", 1989, E/CN.4/1989/48, 359-364; C. FENTON-GLYNN, *Children's Rights in Intercountry Adoption*, Cambridge-Antwerp-Portland, Intersentia, 2014, 15; Cantwell, N (2014). *The Best Interests of the Child in Intercountry Adoption*. Innocenti Insight, Florence: UNICEF Office of Research. Available at: [https://www.unicef-irc.org/publications/pdf/unicef%20best%20interest%20document\\_web\\_re-supply.pdf](https://www.unicef-irc.org/publications/pdf/unicef%20best%20interest%20document_web_re-supply.pdf).

develop a clear view of the European adoption landscape and to establish adequate policies. On the other hand, it is important to recognize the work done by many European Central Authorities to get accessible statistics, and for some, such data is disaggregated.

The ENOC questionnaire has also identified a lack of harmonization in the collection, compilation and dissemination of information on adoption as an obstacle to understand the adoption landscape. There is currently no standardized or unified system for recording statistics on child adoption at EU level. Moreover, systems of data recording and disaggregation vary between – and sometimes also within – countries, which raises issues of comparability.<sup>5</sup> However, we want to refer to the Hague statistics/template as a good model to compile information.<sup>6</sup>

Data regarding children in intercountry adoption should be systematically and comprehensively collected, elaborated, harmonized, and disaggregated and should be available and accessible. ENOC recommends that all European States and regions ensure that they collect sufficient, reliable and appropriately disaggregated data on children in the intercountry adoption. It is important to submit the general statistics on an annual basis to the Permanent Bureau of the Hague Conference using the the Hague template.<sup>7</sup> This data must serve as the basis of evidence-policy-making in the context of intercountry adoption and is important to improve procedures and services for children and families.

## **2. The necessity to comply with the obligations of the Hague Convention and to encourage Non-State Parties to ratify the Convention**

The 1993 Hague Convention is the principal international instrument, exclusively focusing on the intercountry adoption of children. This treaty under private international law deals with procedural safeguards to ensure an efficient system of intercountry adoption by allocating responsibilities between receiving and sending States. When countries ratify the 1993 Hague Convention, they are bound to implement its provisions.<sup>8</sup> However, since adoption remains a national competence, there are significant differences in national legislations and practices between States. Despite ratification, countries interpret and implement provisions of the Hague Convention in their own way.<sup>9</sup> There is no central institution that monitor the implementation of the convention by the contracting States and possibly sanctions them to the Hague Convention.

Although the Hague Convention has been in force for more than twenty years, and despite the ever-growing number of countries that have ratified it, a critical number of intercountry adoptions still take place outside this legal framework. In 2016, 4 of the top 10 countries of origin did not ratify the 1993 Convention.<sup>10</sup> This means that a substantial number of adoptions are carried out where there are less rules and more possibilities of illegal trade.<sup>11</sup> the ENOC questionnaire indicates also that a lot of countries/regions still allow the intercountry adoption process with non-Hague countries.<sup>12</sup> Some of them still permit private and independent adoptions.

<sup>5</sup> EUROPEAN PARLIAMENT, "Adoption of children in the European Union", 2016, [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/583860/EPRS\\_BRI\(2016\)583860\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/583860/EPRS_BRI(2016)583860_EN.pdf), 8.

<sup>6</sup> <https://www.hcch.net/en/instruments/conventions/publications1/?dtid=32&cid=69>.

<sup>7</sup> *Ibid.*

<sup>8</sup> All the receiving States ratified the 1993 Hague Convention.

<sup>9</sup> EUROPEAN PARLIAMENT, "Adoption of children in the European Union", 2016, [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/583860/EPRS\\_BRI\(2016\)583860\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/583860/EPRS_BRI(2016)583860_EN.pdf), 2.

<sup>10</sup> <https://assets.hcch.net/docs/a8fe9f19-23e6-40c2-855e-388e112bf1f5.pdf>.

<sup>11</sup> HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, "20 years of the 1993 Hague Convention assessing the impact of the convention on laws and practices relating to intercountry adoption and the protection of children", 2015, <https://assets.hcch.net/docs/f9f65ec0-1795-435c-aadf-77617816011c.pdf>, 4-5.

<sup>12</sup> Fifteen of the twenty responding countries/regions allow the adoption with non-Hague countries, only five out of twenty do not.

ENOC strongly stresses the need for full compliance of existing laws, policies and practices across Europe with the 1993 Hague Convention. In accordance with the recommendation of the Special Commission on the 1993 Hague Convention, we urge States to ban private adoptions – adoptions which are arranged directly between birth and adoptive parents, as well as independent adoptions where the adoptive parent is approved to adopt in the receiving state and sending state without the intervention of a Central Authority or accredited body.<sup>13</sup> In dealing with non-convention countries, ENOC recommends that the countries that have acceded to the 1993 Hague Convention should apply the standards and safeguards of the Convention, again as urged in a recommendation from the Special Commission.<sup>14</sup> The Hague Convention countries have an ethical responsibility to ensure children from non-Hague countries benefit from the same legal protection as children from Hague countries.

### 3. Considering the changing landscape of intercountry adoption

In intercountry adoption, there is a common perception that children are adopted as young healthy orphans. The reality, however, is quite different. Many children who are presented for international adoption are not orphans. They have at least one living parent.<sup>15</sup> Moreover, The majority of children put forward for intercountry adoption now have special needs, meaning that they are older (generally older than 6 or 7), are in a sibling group or have a disability/serious (mental/physical) illness.

ENOC acknowledges that the landscape of intercountry adoption has changed over the past years and encourages European States and regions to ensure that their laws and practices adequately respond to the changing reality of ICA. We strongly emphasize the need for:

- Collecting reliable and complete information from the country of origin. Based on this information, suitable adoptive parents for a child can be searched for. In case of serious doubt about the reliability of given data, the cooperation with the related country or organization should be suspended
- An individual assessment of the child's adoptability and of his or her specific needs by a multidisciplinary team of trained professionals
- Counselling and preparation of the child
- Taking into the account the views of the child
- Selection, mandatory preparation and counselling of prospective adoptive parents
- A professional matching process by an independent multi-disciplinary expert group to ensure that the needs of the child are matched with the capacities of the parents.
- The implementation of open adoption for certain children with adequate professional support. Special attention must be given to older children in intercountry adoption. As they have the opportunity of getting to know their own relatives, family and country, it is a much bigger step leaving everything behind

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<sup>13</sup> HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, Special Commission 2010, Conclusions and Recommendations, 1.g [https://assets.hcch.net/upload/wop/adop2010\\_rpt\\_en.pdf](https://assets.hcch.net/upload/wop/adop2010_rpt_en.pdf)

<sup>14</sup> HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, Special Commission 2000, Recommendation 11, <https://assets.hcch.net/upload/scrpt33e2000.pdf>

<sup>15</sup> Save the Children signals that worldwide a minimum of four out of five children in institutions has one or two parents who are still alive. Save the Children (2009), Keeping Children out of harmful Institutions, London, Save the Children UK, [http://www.crin.org/en/docs/Keeping\\_Children\\_Out\\_of\\_Harmful\\_Institutions\\_Final\\_20.11.09.pdf](http://www.crin.org/en/docs/Keeping_Children_Out_of_Harmful_Institutions_Final_20.11.09.pdf).

- A European ethical commission or working group that reflects on the challenges of the changing landscape of intercountry adoption. Adopted children should be represented therein.

#### **4. Providing ongoing post-adoption support adapted to the specific needs of the child**

The situation in which families and adopted children find themselves is sometimes difficult. An intercountry adoption is a major change in a child's life, so children and families need the support of specialists when necessary (interpreters, psychological counselling, assistance and contacts with the country of origin). This support must be provided in a post-adoption system. In some European countries however, no official services are offered to families. The adoptive families are only entitled to ordinary social welfare services, as any other family. Or post-adoption support is only provided for a short period of time.

ENOC recognizes that post-adoption services are essential and should consider the life-long nature of adoption. Adequate post-adoption support should be provided in all European States. States have the responsibility to allocate sufficient resources to competent authorities for post-adoption services. In countries where aftercare is already implemented, there should be a low-threshold access. In most European countries, post-adoption support is offered for by the adoption agencies. Adoptees however do not always trust these agencies. By providing members of (an) independent regulated profession(s) who are not linked to any institution, States can offer guarantees of professionalism and independency.

#### **5. Ensuring meaningful participation of every child in intercountry adoption**

Child participation, the right of a child who is capable of forming his or her views to express those freely in all matters affecting the child (art. 12), is one of the four general principles of the UNCRC. In intercountry adoption, however, up until now the right to participation has received little attention. The common perception is that children are adopted as young babies and are not able to express their views. Two remarks on this perception should be made. First of all, as indicated before, older children are also placed in intercountry adoption. Secondly, we want to point out that all children, including those of pre-school age, have a right to be heard in all matters affecting them. ENOC is convinced that hearing children and giving due weight to their views in accordance with their age and maturity is necessary for the effective implementation of their right to have their best interests be the paramount consideration in adoption.

ENOC recommends that European States ensure that all children can exercise their right to be heard, to be taken seriously and to participate in decision making in all matters affecting them during the adoption process. Their views have to be given due weight in accordance with their age and maturity. The child should be heard by qualified professionals. Information conveyed to the child should be age-appropriate, accessible, in child-friendly formats and in (native) language that children understand.

#### **6. Respecting and fulfilling the right of the child to have access to biological information**

Another significant challenge in intercountry adoption concerns the issue of access to birth records and information concerning an adoptee's origin. Two issues arise: whether the information is collected and whether the child is allowed to have access to this information. Other issues that also

should be addressed are: which info is being collected, for how long, who is keeping records, who can access and how.

The principal provisions addressing this issue in the UNCRC are article 7 (*The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.*) and article 8 (*States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to speedily re-establishing his or her identity*). Surely reference should also be made to article 30 of the 1993 Hague Convention (*The competent authorities of a Contracting State shall ensure that information held by them concerning the child's origin, in particular information concerning the identity of his or her parents, as well as the medical history, is preserved.*).

First of all, The questionnaire makes clear that further work is required to collect and preserve information on the origins of the children. Incomplete information concerning birth parents and other aspects of children's origins in some states of origin makes it difficult for adoption professionals to comply with Article 30 of the Hague Convention and respect children's rights and meet their needs. Concerning the access to information, the questionnaire reveals that only a few countries or regions fully recognize the right of a child of knowing his or her origins and thus require adoptive parents to tell their child that he/she is adopted. In most European countries, however, the child's right to know his or her origins is protected, although its extent is restricted by the age of the child or other circumstances (consent of the adoptive parents, consent of the biological parents, consent of an authority,...).

ENOC recommends European countries and regions to assure that all relevant (birth) information of adopted children is collected and retained at the earliest possible opportunity. In accordance with the UNCRC, countries and regions have to ensure that all children have the right to know that they are adopted and to access information on their origins and provide the children with adequate professional support.

## 7. Avoiding sibling separation

Closed adoption "closes" the biological relation and kinship between siblings. If adoptive parents are not willing to establish or maintain contacts and relationship between siblings, this relationship shall be disconnected, causing children's emotional and psychological suffering.

UNCRC poses a duty on State Parties to respect the right of the child to preserve his family relations (Article 8). Furthermore, adoption of siblings by the same adoptive family is widely and mainly considered as the siblings' best interest. This is due to the fact that relationship of siblings promotes the development of the children, their identity and self-esteem. Sibling separation can be the cause of great suffering and grief, can negatively effect the child's development and can have lifelong consequences.

The legal framework in many countries recognizes the importance of relation between adoptees and their relatives, especially siblings. Also, the UN Committee for the Rights of the Child stressed the importance of a relationship between a child and close family members, including siblings.

ENOC recommends that all European States and regions avoid sibling separation and enhance their respective legal framework in a way which will allow national authorities to enforce, maintain and protect established closed relationships between adoptees and his/her siblings.