The international legal framework for adoption

Ladies and Gentlemen,

Thank you for your invitation to participate in this Hearing on behalf of the Hague Conference on Private International Law.

In my intervention this morning I will briefly present the international legal framework for adoption. I will focus my presentation on intercountry adoption (and I will come back to exactly what this means in a moment) and, in this respect, the 1993 Hague Convention on the Protection of Children and the Co-operation in respect of Intercountry Adoption (“1993 Hague Convention”). Regarding this Convention,

1. I will first recall its scope and its objectives;
2. Secondly, I will explain its current status;
3. Thirdly, I will mention some of the challenges concerning its implementation; and
4. I will finish my presentation by explaining the benefits and proven results of this international instrument.

First, turning to the broader international legal framework, at the global level, the United Nations Conventions on the Rights of the Child (UNCRC) sets down certain minimum standards which must be adhered to by States Parties which permit adoption (Art. 21). These minimum standards include that:
- the best interests of the child must be the paramount consideration in adoption;
- adoption should only be authorised by competent authorities, in accordance with applicable law and procedures;
- the persons who have to consent to an adoption must have given their informed consent to the adoption on the basis of such counselling as may be necessary.

In relation to intercountry adoption specifically, the UNCRC states that:
- the principle of subsidiarity of intercountry adoption should be applied;
- all appropriate measures should be taken to ensure that intercountry adoption does not result in improper financial gain; and
- States Parties should conclude further bilateral or multilateral agreements to promote the objectives of the UNCRC in this regard.

The 1993 Hague Convention was a direct response to this call in the UNCRC to conclude multilateral arrangements relating to intercountry adoption. This Convention therefore refines, reinforces and augments the broad principles of the UNCRC by adding substantive safeguards and procedures. I will be speaking in more detail about this Convention in a moment.

Before doing so, I would like to make a brief reference to Council of Europe’s European Convention on the Adoption of Children. This Convention was adopted in 1967 and was revised in 2008. Today, 7 States are party to the 2008 revised Convention. This Convention seeks to harmonize substantive laws on adoption to a degree, by ensuring that States Parties’ laws are in line with certain common principles and practices in relation to adoption.
**Scope**

In contrast, the 1993 Hague Convention does not intend to serve as a uniform law of adoption. It applies only to so-called "intercountry adoptions" which are defined by Article 2 of the Convention as those: "where 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 after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin."

Habitual residence (of the child and of the adopter(s)) is the important connecting factor, and not their nationality. For example, if adopters, who are nationals of France, but habitually resident in Belgium, wish to adopt a child who is habitually resident in another Contracting State, it is the Central Authority of Belgium that will be responsible for receiving and processing the application (see Art. 14).

**Objectives**

The 1993 Hague Convention:

1. establishes minimum standards to protect the rights of children who are the subjects of intercountry adoption, as well as respecting and protecting the rights of families of origin and adoptive families;

2. establishes a legal framework for co-operation between authorities in "States of origin" and "receiving States". This co-operation is done through Central Authorities, competent authorities and accredited bodies;

3. prevents the abduction, sale and trafficking of children and helps to eliminate the different abuses related to intercountry adoption (for example, corruption, bribery, solicitation of children, falsification of documents, unqualified intermediaries);

4. guarantees the automatic recognition of intercountry adoptions made in accordance with the 1993 Hague Convention in all States Parties (not just the two countries involved in the adoption), thereby giving immediate certainty to the status of the child across, today, some 90 countries. Consequently, there is no longer a need to undertake a separate procedure to ‘recognise’ an adoption order in a receiving State, or to undertake a second adoption in this country (perhaps even with a second probationary period), as was happening prior to the Convention, and still occurs in some non-Convention cases. This is one of the major “practical” achievements of the Convention.

The Convention also ensures that children who have been the subject of an intercountry adoption are able to enter and reside permanently in the receiving State (see Article 5 – the competent authorities of the receiving State shall determine – before the adoption is finalised – that the child is, or will be, authorised to enter and reside permanently in that State). This prevents situations arising where adoptive families discover after an adoption has already been concluded in a State of origin that the child will not fulfill the immigration requirements of the receiving State. Prior to the Convention, there were cases where adoptive families had to relocate to live in the State of origin in such cases because the child could not enter or reside in the receiving State.

On the contrary, there is a possibility that purely domestic adoptions which have been undertaken in a specific State may not be recognised in another State, and the child adopted domestically may even not be able to enter and reside in that second State. As I said before, this is because the cross-border recognition of domestic adoptions is not covered by the 1993 Hague Convention. I understand that the Committee on Legal Affairs is specifically worried about these cases which can cause uncertainty and problems when families decide to relocate to another country. The *Hague Convention of 15 November*
1965 on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions dealt with certain aspects of this problem, but this Convention is no longer in force. Therefore, there is presently no multilateral treaty available which would ensure the automatic recognition of adoptions as there is for intercountry adoptions which are carried out under the 1993 Hague Convention.

**Status**

The guarantees of the 1993 Hague Convention are applicable to intercountry adoptions carried out between the 90 States Parties to the Convention. The last States to become Parties were Montenegro, Fiji, Rwanda, Lesotho and Swaziland. Approximately 5 new States become Parties to this treaty each year. Many of the new States Parties are from Africa, which has been defined as the ‘new frontier for intercountry adoption’. All major receiving States are Party to the Convention. Nowadays, over two thirds of States Parties are States of origin, and the rest are receiving States. This shows that there is a great trust in the Convention by all States. In the case of Europe, most of the States are receiving States, and a minority are States of origin. In addition, some traditional States of origin are becoming receiving States.

However, if we turn to the statistics presented in this first table, you will see that, from the ‘top ten’ States of origin, only half of them are Party to the Convention (Parties to the Convention are written in capitals). This is concerning as it means that almost half of the intercountry adoptions taking place globally do not benefit from the guarantees in the Convention.

Globally, the number of intercountry adoptions is decreasing. In the best cases, this is because steps have been taken by States of origin to support birth families, and, if applicable, to promote permanent domestic alternative care outcomes within the country. Unfortunately, however, a reduced “need” for intercountry adoption as a result of these kinds of measures is unlikely to be the main reason for the global decline in the number of intercountry adoptions. In fact, in many cases, the decline in numbers is linked to the closures and moratoriums which are put in place to stop systemic abuses in intercountry adoption, including, sometimes, the sale of children. This has been the case in countries which, prior to the closures, were principal “sending countries” (e.g., Cambodia, Guatemala and Romania). Where the 1993 Hague Convention is in force in such countries, it is a tool to fight these abuses and it helps to establish a proper legal framework for adoptions. In such cases, the Convention is not the reason for the decline, as it is only a tool to stop those abuses.

**Challenges**

I would like now to introduce some of the challenges for the proper implementation of the Convention.

The first is that States Parties need to implement the Convention “properly”. If they do not do so, the Convention will not achieve its objectives. In fact, one of the major challenges of the Convention is that it relies on the existence of a child protection system within a State Party with at least basic services and resources. If this is not the case, it is very difficult to implement the principle of subsidiarity. According to this principle, States Parties to the Convention recognise that a child should be raised by his or her birth family or extended family whenever possible. If that is not possible or practicable, other forms of permanent family care in the State of origin should be considered. Only after due consideration has been given to national solutions should intercountry adoption be considered, and then only if it is in the child’s best interests. However, national solutions for children such as remaining permanently in an institution cannot, in the majority of cases, be considered as preferred solutions ahead of intercountry adoption. In this context, institutionalisation is considered as “a last resort.”

There is also a need to act expeditiously in adoption procedures. I understand that this is another of the concerns of the Committee on Legal Affairs, i.e. “to eliminate unnecessary bureaucracy, whilst committing themselves to safeguarding the rights of children from third countries”. It should be noted that acting expeditiously does not mean that procedures have to
be fast-tracked. On the contrary, to “act expeditiously” should be understood to mean “to act as quickly as a proper consideration of the issues will allow.” States should use procedures which seek to fulfil the purposes of the Convention but which do not cause unnecessary delay that could affect the health and well-being of children.

The Convention itself does not set any specific time-limits for particular actions. It is important to distinguish between necessary delay, such as the time taken to find the best family for a particular child, and unnecessary delay, such as that created by cumbersome procedures or inadequate resources. Necessary delay may also include using care and diligence in the adoption preparations for both the child and the prospective adoptive parents. The appropriate amount of time which should be taken to process an adoption will vary from case to case: for example, it may take longer to ascertain if an abandoned child is adoptable compared to an orphaned child.

States also have to establish that children being put forward for intercountry adoption are genuinely adoptable. This means that the child’s origins and background must be checked, and the subsidiarity principle applied, before declaring that the child can, legally, be adopted. One of the key issues in determining “adoptability” is ensuring that birth parents are properly informed about what an adoption is and what it means and have been counselled about their decision and its effect. Regrettably, this is still a challenge in many States and some birth parents may think that their child is going abroad for studies, or that they will continue to be in touch with him or her.

As the 2009 Report on intercountry adoption in the European Union and the 2011 Resolution of the European Parliament underlined, nowadays children with special needs are increasingly the children in need of intercountry adoption. Healthy babies can usually be taken care of in-country. The challenge in relation to special needs children is to properly select, inform and counsel those prospective adoptive parents who are willing to adopt such a child, as well as to properly accompany them before, during and after the adoption procedure. Specialized adoption accredited bodies are also needed to undertake these cases.

The Convention demands that States Parties establish Central Authorities. However, these Central Authorities need to be efficient and well-resourced with the necessary professionals and materials. If not, it will be very difficult to implement the Convention.

One of the reasons the 1993 Hague Convention was drafted was to regulate agencies: many of the abuses in intercountry adoption were related to the work of adoption agencies. Therefore, the system of accreditation and authorization introduced by the Convention brings great benefits. Paradoxically, today, undertaking an intercountry adoption through an ethical adoption body, which is duly accredited and which has experience, is considered a good practice. However, there is still a lot to do to ensure that all adoption accredited bodies work ethically and respect the Convention.

As we have seen, the number of intercountry adoptions taking place globally is decreasing. However, the number of people interested in having a child is, in many cases, rising. Intercountry adoption is one of the options for childless couples or persons. This means that there is competition between prospective adoptive parents, accredited bodies and receiving States to find children to adopt. This intense ‘demand’ can place tremendous pressure on States of origin.

The financial regulation of intercountry adoption is also a major challenge. The lack of clarity and consistency in deciding what are the “reasonable” costs of intercountry adoption has led to situations where prospective adoptive parents are required to pay excessive amounts to complete an adoption. Furthermore, although the Convention clearly prohibits improper financial or other gain, regrettably, this is still common and leads, in many cases, to abuses, including, in extreme cases, the abduction, sale of, and traffic in children for intercountry adoption. How to achieve more transparency and reasonability is one of the objectives of the Expert Group on these issues coordinated by the Hague Conference. The work of this group is available on our website.
I would like to end the challenges chapter with the fact that we need to remember to take into consideration the real protagonists of adoption: the adoptees. We have to hear their voices and support them and their adoptive families through the appropriate post-adoption services.

**Benefits and proven results**

Finally, I would like to present some of the benefits and proven results of the 1993 Hague Convention. This Convention has:

- provided a safe procedure for those children who cannot be placed with a family in their State of origin to find a family in another country;
- guaranteed the automatic recognition of intercountry adoptions made in accordance with the 1993 Hague Convention in all States Parties to the Convention;
- led to more awareness of (good) practices concerning (intercountry) adoption;
- led to increased efforts to combat and prevent abduction, sale and traffic in children;
- stimulated programmes for in-country adoption and in-country child-care generally;
- empowered States of origin to:
  - resist inappropriate pressures of receiving States and accredited bodies to “supply” children; and
  - deal only with the most professional authorities and bodies in intercountry adoption;
- enhanced the shared responsibility of receiving States and States of origin to combat abuses and ensure intercountry adoptions only take place in the best interests of children;
- promoted joint efforts to ensure the effective regulation of intercountry adoption;
- mobilised political will to curb corruption and malpractice; and
- stimulated community building between Central Authorities, other accredited bodies and all adoption actors.

If you would like to have more information about the Convention and the work of the Hague Conference, I invite you to consult the two Guides to Good Practice on the Convention, as well as the specialised intercountry adoption section of our website.

Ladies and Gentlemen, thank you very much for your attention. I would be very honoured to answer any questions you may have.

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