



EUROPEAN COMMISSION

DIRECTORATE-GENERAL JUSTICE, FREEDOM AND SECURITY

Directorate C : Civil justice, rights and citizenship

Unit C1 : Civil Justice

Brussels, 6 October 2005

JLS.C.1/ME/ic – D/05/10685

MISSION REPORT

**Object: Special Commission concerning the Hague Convention of 29 May 1993 on co-operation in respect of inter-country adoption
The Hague, 17-23 September 2005**

I attended the Special Commission concerning the application of the 1993 Hague Convention on **inter-country adoption** which took place in the Hague 17-23 September. Approximately 230 participants from 66 States attended the conference. To date, 67 States have ratified or acceded to the Convention (all EU Member States except Greece). The seminar was highly interesting and the role of the **European Commission** with regard to the new **Romanian law on adoption** was invoked on several occasions.

1. Introduction

The Special Commission, which was organised by the Hague Conference on Private International Law, was devoted to the functioning and implementation of the 1993 Convention on Protection of Children and Cooperation in respect of Inter-country Adoption (“the 1993 Hague Convention”). The Convention, which been in force for ten years, is **ratified by 67 States**. China, which has the largest number of inter-country adoption (over 11.000 children in 2003), deposited its instrument of ratification on the eve of the meeting. The discussions took place on the basis of a **Draft Practice Guide** drawn up by the Secretariat of the Hague Conference on Private International Law.

Statistics presented at the Special Commission showed that **inter-country adoption is steadily increasing at a global level**. The U.S., which adopts an increasing number of children (21.000 children in 2003) have signed but not yet ratified the Convention. Although inter-country adoption predominantly remains a movement of children from poorer to richer countries, cultural differences remain. Hence, no Islamic State has ratified the Convention since the notion of “adoption” is not recognised in Islam. Moreover, very few African States have ratified the Convention, since there is little or no inter-country adoption in Africa due to cultural factors.

2. General structure and objectives of the 1993 Hague Convention

The 1993 Hague Convention does not intend to serve as a uniform law on adoption, but to **establish general principles and minimum standards**. The over-riding principle is that **inter-**

country adoption shall take place “in the best interests of the child” with respect for his or her fundamental rights. The purpose of the Convention is to define substantive principles for the protection of children, establish a legal framework of co-operation between authorities in the Sending States and the Receiving States and, to a certain extent, unify private international law rules on inter-country adoption. However, the fact that many questions are regulated by national law has led to **divergent interpretations** of certain key concepts under the Convention, such as “improper financial gain”. This led certain delegations to call for unification or clear guidelines with respect to e.g. fees and accreditation.

Another inherent weakness of the Convention seems to be that it does not require acceding States to present an implementation plan how they intend to fulfil the obligations enshrined in the Convention. As an example, Guatemala acceded to the Convention in 2002, despite objections of several States, although it was clear that the situation in Guatemala was such that the Convention could not be applied properly. Another example is Turkey, which acceded to the Convention in 2004, but had not yet designated a central authority as required by the Convention.

The 1993 Hague Convention refers only to “Contracting State” without making any **distinction between “Sending States” and “Receiving States”**. However, these concepts are commonly used and influenced the discussions. Hence, the Receiving States had a certain tendency to approach a question from the point of view of the adoptive parents. This perspective did not necessarily coincide with the perspective of the Sending States.

3. Inter-country adoption within the European Union

3.1. The role of the European Community

Interestingly, the **European Union comprises now both “Sending States” and “Receiving States”**. The Eastern European States are all Sending States (except Romania, see point 3.2.) whereas the “old” Member States are all Receiving States. Within the European Union, France, Italy, Spain and Sweden have the highest number inter-country adoptions. Inter-country adoptions have doubled in Spain during the recent years (4.000 children in 2004). Sweden has the highest number of inter-country adoptions per capita (approximately 1.000 children per year).

There is currently **no Community instrument** dealing with inter-country adoption. Adoption is for example explicitly excluded from the scope of Regulation (EC) No. 2201/2003 on parental responsibility. The subject is therefore a matter of national competence. All EU Member States, except Greece, have ratified or acceded to the 1993 Hague Convention.

At a general level, I explained that **child protection** is a key **priority for the European Commission** and **Vice President Frattini**. In this context, I informed the participants of the **future Commission Communication on Children’s Rights** which will be presented at the end of 2005 or beginning of 2006. This was met with interest and I discussed with several NGO’s, UNICEF and the Hague Conference of Private International Law on their possible involvement in this project.

In the context of **enlargement**, I mentioned that **children’s rights form part of the political criteria that all candidate countries must fulfil**. I recalled that the Community acquis in the form of the **Charter of Fundamental Rights and the 1989 UN Convention on Children’s Rights (UNCRC)** constitute crucial references and benchmarks for the Commission in the assessment of the situation in candidate countries. This implies that all Member States, in line with the UNCRC, are bound to have sufficient protection in place for children who are temporarily or permanently deprived of parental care.

3.2 The new Romanian law on inter-country adoption:

Although not being an item on the agenda, the **new Romanian law on inter-country adoption** was frequently invoked during the meeting. The new law, which entered into force on 1 January 2005, limits inter-country adoption from Romania to grandparents living abroad.

I explained that the Commission has actively encouraged the Romanian reform of its child care sector by financial assistance (the PHARE programme) and that Bulgaria has been given similar support. **The Commission has supported the efforts made by the Romanian government to reform its child protection policy by closing down large, old-style residential institutions and replacing them with alternative measures**, including smaller homes and foster homes, and large awareness-raising campaign. I explained that the Commission and the Romanian government had been advised on the reform by an Independent Panel of Family law expert from different Member States.

I underlined that the Commission will continue to support the Romanian authorities in their efforts and that the new Romanian law on inter-country adoption brings it into line with the practice of EU Member States. The new law is also in line with the **principle of subsidiarity enshrined in the 1993 Hague Convention and Article 21 of the UNCRC**, which implies that **inter-country adoption can only be the last resort after all other solutions have been exhausted, i.e. not only national adoption but also e.g. foster care. Inter-country adoption shall thus be based solely on the best interests of the child and scrupulously respect the principle of subsidiarity.** I finally assured that the Commission will continue to support current and future candidate countries in their efforts to respect the rights of the child.

Following my intervention, certain participants (e.g. Nordic Adoption Forum) took the floor and **advocated a broader interpretation of the principle of subsidiarity**, implying that inter-country adoption should not be the last resort, but a possibility whenever the biological family cannot take care of the child in the State of origin. A permanent home in a receiving State would always be preferable to a provisional home in the State of origin. Some Receiving States also argued that the Sending States did not have the necessary resources to take care of their children and that such efforts must not be at the expense of the welfare of the children.

Although the Hague Conference on Private International Law and other participants were generally **very supportive of action of the European Commission with regard to Romania, which has led to considerable progress**, certain people voiced concerns that the new Romanian law was “too strict” and not sufficiently flexible.

I was later told by the **Romanian delegation** that the **Hague Conference on Private International Law has expressed some doubts on the compatibility of the new Romanian law with the 1993 Convention.** However, as is stated in the Draft Practice Guide, the ratification of the Convention does not in itself entail a duty to organise inter-country adoption.

3.3. The so-called Romanian “pipe-line” cases

During the conference, **certain delegations, notably Germany, Austria and Israel, openly requested the Romanian authorities to clear so-called “pipeline” cases** where applications had been introduced during the moratorium 2001-2004. The U.S. delegation emphasised the risk of letting children wait too long as a result of “pipe-line” cases.

To Romanian delegation explained that the **moratorium on international adoptions which was in place between October 2001 and December 2004**, was introduced to tackle the wide-spread abuse and corruption that took place in Romania during the 1990's. During the moratorium, the Romanian government approved the international adoption for the cases registered before the moratorium. Despite the fact that Romania had no legal framework for processing new cases of international adoptions **during the time of the moratorium, foreign families continued to file**

requests to adopt Romanian children based on false expectations that the ban on international adoptions would be lifted. These applications were **pure administrative acts and did not signify approval of the request** since no decision on “matching” had taken place as prescribed by the 1993 Hague Convention. To clarify the situation of these cases, a **Working Group** of Romanian specialists has been set up which will analyse each file to **assess the situation of each child**. The Group will publish its final report before the end of this year.

4. Other issues

➤ **Fees and charges**

The 1993 Hague Convention allows Receiving and Sending States to charge “**reasonable fees and charges**” for services provided. Concerns arise when fees and payments are not properly regulated and/or adoptive parents pay families of origin directly. In certain States, it is common practice that adoptive parents are asked for high “donations”. It was generally called for clear and harmonised criteria to tackle the problem of corruption, falsified documents and the sale of children. It was also recognised that financial aid, if not correctly channelled, may lead to **abuse** and **pressure** on Sending States to accept more applications. As an example, the Estonian delegation explained that Estonia does not accept monetary help from accredited bodies, since “they want our children in return”. Certain countries would offer babies and healthy children to applicants who offer the higher fees or even sell children using falsified documents.

➤ **Accreditation**

The 1993 Hague Convention allows designated bodies, and in some cases, non-accredited persons to perform some of the functions of the Central Authority. All bodies must meet the standards set out in the Convention, e.g. only pursue non-profit objectives and be subject to supervision by competent authorities. The great majority of States use accredited bodies to perform certain tasks. However, the U.S. consistently uses non-accredited bodies for the purpose of inter-country adoptions. Certain States, e.g. Austria, Australia and Malta, do not use accredited bodies at all, but work only through central authorities.

➤ **The “right” to adopt**

The representative of UNICEF stressed that the term “applicant” used in the 1993 Convention and the Draft Practice Guide is misleading, since it gives the impression that a couple who have submitted an application to register as potential adoptive parents have an unconditional right to adopt. The applications should be treated merely as an offer to receive a child. UNICEF stressed also that the concept of the “child best interests” should not be seen in isolation from the child’s fundamental rights, e.g. the right to identity and the right to be cared for by one’s parents.

➤ **The right to information concerning “available adoptive children”**

Many Receiving States emphasised the rights of adoptive parents and their need to have reliable information on the number of “available adoptive children” and their profile (e.g. whether they are young and healthy) from the receiving States so that prospective adoptive parents would not have “false hope” on the “availability of children”.

However, as e.g. Slovakia pointed out, such information would not only be impossible to provide, but it would be problematic from an ethical point of view, since it would convey the misleading message to prospective parents that they have an unconditional right to adopt these children. The Sending States explained that they could only give an estimate on the number of applications that their central authorities can handle.

➤ The right to post-adoption reports

The practice of sending a report on the situation of the adoptive child to the Sending Country is not regulated in the 1993 Hague Convention. However, it is wide-spread practice in many Sending States to request adoptive parents to present such reports, sometimes several times a year until the child reaches the age of majority. The representative of UNICEF pointed out the risk that post-adoption reports replace a careful control before the adoption.

This question caused a certain tension between Sending and Receiving States. Certain **Receiving States**, e.g. Austria, Germany, Finland and the U.S., **emphasised the adoptive parents' right to private life** and argued that they could not be legally obliged to submit a report. **The Sending States** tried to explain the reasons why they ask for such reports. Lithuania explained that they may help to change the very negative attitude of the general public towards inter-country adoption. Kazakhstan argued that they wanted such reports in view of their experiences when children had gone missing and been abused after inter-country adoption. Also Brazil mentioned the risk of sexual abuse as an objective reason for these reports. There are also differences of national law, since the laws of several Sending States require post-adoption reports whereas such reports are unknown under the laws of Receiving States.

5. Conclusion

It was very useful that a COM representative attended the 5-days meeting, which treated **topics that are highly relevant** for the Commission's current and future activities in the field of children's rights. The question of inter-country adoption is also very topical in the context of **Romania's accession**. In view of the sensitive political nature of the latter question, it **would be useful that a representative from DG ELARG attend meetings of this kind**. The meeting also allowed for very interesting discussions and contacts concerning the Commission's future Communication on Children's Rights.

(Signed)
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