

The Hague Convention

4. The Hague Convention is consistent with UNHCR policy and incorporates the CRC. It provides safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights. It establishes a system of co-operation among Contracting States to ensure respect for those safeguards thereby preventing the abduction, sale of or traffic in children. The Hague Convention requires that intercountry adoptions be made only through a Central Authority designated by each Contracting State. Any foreign adoption, once certified by the Central Authority of a Contracting State, will be recognized in another Contracting State. It is noted that intercountry adoption of refugee children occurs in very limited circumstances.

5. Articles 4 and 16 of the Hague Convention are particularly important in enhancing protection. Article 4 provides, inter alia, that the competent authorities must determine that intercountry adoption is in the best interests of the child and sets out the various consents that must be obtained prior to any adoption. Article 16 requires, inter alia, that due consideration be given to "the child's upbringing and his or her ethnic, religious and cultural background".

6. As at 22 August 1995, the Hague Convention has been signed by the following 23 States (those marked with an asterisk have also ratified the Convention):

Brazil, Burkina Faso, Canada, Colombia, Costa Rica, *Cyprus, Ecuador, Finland, France, Israel, Luxembourg, *Mexico, the Netherlands, Peru, the Philippines, *Poland, *Romania, *Spain, *Sri Lanka, Switzerland, the United Kingdom, the United States of America and Uruguay.

The Recommendation

7. The Recommendation is a non-binding instrument which specifically addresses the concerns relating to refugee children and other internationally displaced children in the context of intercountry adoption and the applicability to these children of the Hague Convention. Issues such as tracing, family reunification and repatriation, confidentiality, and the facilitation of the fulfillment of the protection mandate of UNHCR are covered. Furthermore, it urges States to take the principles of the Recommendation and those of the Hague Convention into account for adoptions occurring within their respective territories.

CONVENTION ON THE RIGHTS OF THE CHILD

(The Convention on the Rights of the Child was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. It entered into force 2 September 1990, in accordance with article 49.)

Article 20, Article 21, Article 22 (see original hard copy).

Refugee children (Special protection shall be granted to a refugee child or to a child seeking refugee status. It is the State's obligation to co-operate with competent organizations which provide such protection and assistance).

(Extracts)

Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
2. States Parties shall in accordance with their national laws ensure alternative care for such a child.
3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 21

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

- (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

- (b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin; (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
- (d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;
- (e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

Article 22

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.
2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

**CONVENTION ON PROTECTION OF CHILDREN AND
CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION**

(Concluded 29 May 1993)

The States signatory to the present Convention,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Recalling that each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin,

Recognizing that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin,

Convinced of the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children,

Desiring to establish common provisions to this effect, taking into account the principles set forth in international instruments, in particular the United Nations Convention on the Rights of the Child, of 20 November 1989, and the United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (General Assembly Resolution 41/85, of 3 December 1986),

Have agreed upon the following provisions –

CHAPTER I – SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are –

- a)* to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law;
- b)* to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children;
- c)* to secure the recognition in Contracting States of adoptions made in accordance with the Convention.

Article 2

(1) The Convention shall apply 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.

(2) The Convention covers only adoptions which create a permanent parent-child relationship.

Article 3

The Convention ceases to apply if the agreements mentioned in Article 17, sub-paragraph *c*, have not been given before the child attains the age of eighteen years.

CHAPTER II – REQUIREMENTS FOR INTERCOUNTRY ADOPTIONS

Article 4

An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin –

a) have established that the child is adoptable;

b) have determined, 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;

c) have ensured that

(1) the persons, institutions and authorities whose consent is necessary for adoption, have been counselled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin,

(2) such persons, institutions and authorities have given their consent freely, in the required legal form, and expressed or evidenced in writing,

(3) the consents have not been induced by payment or compensation of any kind and have not been withdrawn, and

(4) the consent of the mother, where required, has been given only after the birth of the child; and

d) have ensured, having regard to the age and degree of maturity of the child, that

(1) he or she has been counselled and duly informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required,

(2) consideration has been given to the child's wishes and opinions,

(3) the child's consent to the adoption, where such consent is required, has been given freely, in the required legal form, and expressed or evidenced in writing, and

(4) such consent has not been induced by payment or compensation of any kind.

Article 5

An adoption within the scope of the Convention shall take place only if the competent authorities of the receiving State –

- a)* have determined that the prospective adoptive parents are eligible and suited to adopt;
- b)* have ensured that the prospective adoptive parents have been counselled as may be necessary; and
- c)* have determined that the child is or will be authorized to enter and reside permanently in that State.

CHAPTER III – CENTRAL AUTHORITIES AND ACCREDITED BODIES

Article 6

(1) A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

(2) Federal States, States with more than one system of law or States having autonomous territorial units shall be free to appoint more than one Central Authority and to specify the territorial or personal extent of their functions. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

(1) Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their States to protect children and to achieve the other objects of the Convention.

(2) They shall take directly all appropriate measures to –

- a)* provide information as to the laws of their States concerning adoption and other general information, such as statistics and standard forms;
- b)* keep one another informed about the operation of the Convention and, as far as possible, eliminate any obstacles to its application.

Article 8

Central Authorities shall take, directly or through public authorities, all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention.

Article 9

Central Authorities shall take, directly or through public authorities or other bodies duly accredited in their State, all appropriate measures, in particular to –

- a)* collect, preserve and exchange information about the situation of the child and the prospective adoptive parents, so far as is necessary to complete the adoption;
- b)* facilitate, follow and expedite proceedings with a view to obtaining the adoption;
- c)* promote the development of adoption counselling and post-adoption services in their States;
- d)* provide each other with general evaluation reports about experience with intercountry adoption;
- e)* reply, in so far as is permitted by the law of their State, to justified requests from other Central Authorities or public authorities for information about a particular adoption situation.

Article 10

Accreditation shall only be granted to and maintained by bodies demonstrating their competence to carry out properly the tasks with which they may be entrusted.

Article 11

An accredited body shall –

- a) pursue only non-profit objectives according to such conditions and within such limits as may be established by the competent authorities of the State of accreditation;
- b) be directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of intercountry adoption; and
- c) be subject to supervision by competent authorities of that State as to its composition, operation and financial situation.

Article 12

A body accredited in one Contracting State may act in another Contracting State only if the competent authorities of both States have authorized it to do so.

Article 13

The designation of the Central Authorities and, where appropriate, the extent of their functions, as well as the names and addresses of the accredited bodies shall be communicated by each Contracting State to the Permanent Bureau of the Hague Conference on Private International Law.

CHAPTER IV – PROCEDURAL REQUIREMENTS IN INTERCOUNTRY ADOPTION

Article 14

Persons habitually resident in a Contracting State, who wish to adopt a child habitually resident in another Contracting State, shall apply to the Central Authority in the State of their habitual residence.

Article 15

(1) If the Central Authority of the receiving State is satisfied that the applicants are eligible and suited to adopt, it shall prepare a report including information about their identity, eligibility and suitability to adopt, background, family and medical history, social environment, reasons for adoption, ability to undertake an intercountry adoption, as well as the characteristics of the children for whom they would be qualified to care.

(2) It shall transmit the report to the Central Authority of the State of origin.

Article 16

(1) If the Central Authority of the State of origin is satisfied that the child is adoptable, it shall –

- a)* prepare a report including information about his or her identity, adoptability, background, social environment, family history, medical history including that of the child's family, and any special needs of the child;
- b)* give due consideration to the child's upbringing and to his or her ethnic, religious and cultural background;
- c)* ensure that consents have been obtained in accordance with Article 4; and
- d)* determine, on the basis in particular of the reports relating to the child and the prospective adoptive parents, whether the envisaged placement is in the best interests of the child.

(2) It shall transmit to the Central Authority of the receiving State its report on the child, proof that the necessary consents have been obtained and the reasons for its determination on the placement, taking care not to reveal the identity of the mother and the father if, in the State of origin, these identities may not be disclosed.

Article 17

Any decision in the State of origin that a child should be entrusted to prospective adoptive parents may only be made if –

- a)* the Central Authority of that State has ensured that the prospective adoptive parents agree;
- b)* the Central Authority of the receiving State has approved such decision, where such approval is required by the law of that State or by the Central Authority of the State of origin;
- c)* the Central Authorities of both States have agreed that the adoption may proceed; and
- d)* it has been determined, in accordance with Article 5, that the prospective adoptive parents are eligible and suited to adopt and that the child is or will be authorized to enter and reside permanently in the receiving State.

Article 18

The Central Authorities of both States shall take all necessary steps to obtain permission for the child to leave the State of origin and to enter and reside permanently in the receiving State.

Article 19

- (1) The transfer of the child to the receiving State may only be carried out if the requirements of Article 17 have been satisfied.
- (2) The Central Authorities of both States shall ensure that this transfer takes place in secure and appropriate circumstances and, if possible, in the company of the adoptive or prospective adoptive parents.
- (3) If the transfer of the child does not take place, the reports referred to in Articles 15 and 16 are to be sent back to the authorities who forwarded them.

Article 20

The Central Authorities shall keep each other informed about the adoption process and the measures taken to complete it, as well as about the progress of the placement if a probationary period is required.

Article 21

(1) Where the adoption is to take place after the transfer of the child to the receiving State and it appears to the Central Authority of that State that the continued placement of the child with the prospective adoptive parents is not in the child's best interests, such Central Authority shall take the measures necessary to protect the child, in particular –

- a)* to cause the child to be withdrawn from the prospective adoptive parents and to arrange temporary care;
- b)* in consultation with the Central Authority of the State of origin, to arrange without delay a new placement of the child with a view to adoption or, if this is not appropriate, to arrange alternative long-term care; an adoption shall not take place until the Central Authority of the State of origin has been duly informed concerning the new prospective adoptive parents;
- c)* as a last resort, to arrange the return of the child, if his or her interests so require.

(2) Having regard in particular to the age and degree of maturity of the child, he or she shall be consulted and, where appropriate, his or her consent obtained in relation to measures to be taken under this Article.

Article 22

(1) The functions of a Central Authority under this Chapter may be performed by public authorities or by bodies accredited under Chapter III, to the extent permitted by the law of its State.

(2) Any Contracting State may declare to the depositary of the Convention that the functions of the Central Authority under Articles 15 to 21 may be performed in that State, to the extent permitted by the law and subject to the supervision of the competent authorities of that State, also by bodies or persons who –

a) meet the requirements of integrity, professional competence, experience and accountability of that State; and

b) are qualified by their ethical standards and by training or experience to work in the field of intercountry adoption.

(3) A Contracting State which makes the declaration provided for in paragraph 2 shall keep the Permanent Bureau of the Hague Conference on Private International Law informed of the names and addresses of these bodies and persons.

(4) Any Contracting State may declare to the depositary of the Convention that adoptions of children habitually resident in its territory may only take place if the functions of the Central Authorities are performed in accordance with paragraph 1.

(5) Notwithstanding any declaration made under paragraph 2, the reports provided for in Articles 15 and 16 shall, in every case, be prepared under the responsibility of the Central Authority or other authorities or bodies in accordance with paragraph 1.

CHAPTER V – RECOGNITION AND EFFECTS OF THE ADOPTION

Article 23

(1) An adoption certified by the competent authority of the State of the adoption as having been made in accordance with the Convention shall be recognized by operation of law in the other Contracting States. The certificate shall specify when and by whom the agreements under Article 17, sub-paragraph *c)*, were given.

(2) Each Contracting State shall, at the time of signature, ratification, acceptance, approval or accession, notify the depositary of the Convention of the identity and the functions of the authority or the authorities which, in that State, are competent to make the certification. It shall also notify the depositary of any modification in the designation of these authorities.

Article 24

The recognition of an adoption may be refused in a Contracting State only if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child.

Article 25

Any Contracting State may declare to the depositary of the Convention that it will not be bound under this Convention to recognize adoptions made in accordance with an agreement concluded by application of Article 39, paragraph 2.

Article 26

(1) The recognition of an adoption includes recognition of

- a) the legal parent-child relationship between the child and his or her adoptive parents;
- b) parental responsibility of the adoptive parents for the child;
- c) the termination of a pre-existing legal relationship between the child and his or her mother and father, if the adoption has this effect in the Contracting State where it was made.

(2) In the case of an adoption having the effect of terminating a pre-existing legal parent-child relationship, the child shall enjoy in the receiving State, and in any other Contracting State where the adoption is recognized, rights equivalent to those resulting from adoptions having this effect in each such State.

(3) The preceding paragraphs shall not prejudice the application of any provision more favourable for the child, in force in the Contracting State which recognizes the adoption.

Article 27

(1) Where an adoption granted in the State of origin does not have the effect of terminating a pre-existing legal parent-child relationship, it may, in the receiving State which recognizes the adoption under the Convention, be converted into an adoption having such an effect –

- a) if the law of the receiving State so permits; and

b) if the consents referred to in Article 4, sub-paragraphs *c* and *d*, have been or are given for the purpose of such an adoption.

(2) Article 23 applies to the decision converting the adoption.

CHAPTER VI – GENERAL PROVISIONS

Article 28

The Convention does not affect any law of a State of origin which requires that the adoption of a child habitually resident within that State take place in that State or which prohibits the child's placement in, or transfer to, the receiving State prior to adoption.

Article 29

There shall be no contact between the prospective adoptive parents and the child's parents or any other person who has care of the child until the requirements of Article 4, sub-paragraphs *a)* to *c)*, and Article 5, sub-paragraph *a)*, have been met, unless the adoption takes place within a family or unless the contact is in compliance with the conditions established by the competent authority of the State of origin.

Article 30

(1) 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.

(2) They shall ensure that the child or his or her representative has access to such information, under appropriate guidance, in so far as is permitted by the law of that State.

Article 31

Without prejudice to Article 30, personal data gathered or transmitted under the Convention, especially data referred to in Articles 15 and 16, shall be used only for the purposes for which they were gathered or transmitted.

Article 32

(1) No one shall derive improper financial or other gain from an activity related to an intercountry adoption.

(2) Only costs and expenses, including reasonable professional fees of persons involved in the adoption, may be charged or paid.

(3) The directors, administrators and employees of bodies involved in an adoption shall not receive remuneration which is unreasonably high in relation to services rendered.

Article 33

A competent authority which finds that any provision of the Convention has not been respected or that there is a serious risk that it may not be respected, shall immediately inform the Central Authority of its State. This Central Authority shall be responsible for ensuring that appropriate measures are taken.

Article 34

If the competent authority of the State of destination of a document so requests, a translation certified as being in conformity with the original must be furnished. Unless otherwise provided, the costs of such translation are to be borne by the prospective adoptive parents.

Article 35

The competent authorities of the Contracting States shall act expeditiously in the process of adoption.

Article 36

In relation to a State which has two or more systems of law with regard to adoption applicable in different territorial units –

a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;

b) any reference to the law of that State shall be construed as referring to the law in force in the relevant territorial unit;

c) any reference to the competent authorities or to the public authorities of that State shall be construed as referring to those authorized to act in the relevant territorial unit;

d) any reference to the accredited bodies of that State shall be construed as referring to bodies accredited in the relevant territorial unit.

Article 37

In relation to a State which with regard to adoption has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 38

A State within which different territorial units have their own rules of law in respect of adoption shall not be bound to apply the Convention where a State with a unified system of law would not be bound to do so.

Article 39

(1) The Convention does not affect any international instrument to which Contracting States are Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument.

(2) Any Contracting State may enter into agreements with one or more other Contracting States, with a view to improving the application of the Convention in their mutual relations. These agreements may derogate only from the provisions of Articles 14 to 16 and 18 to 21. The States which have concluded such an agreement shall transmit a copy to the depositary of the Convention.

Article 40

No reservation to the Convention shall be permitted.

Article 41

The Convention shall apply in every case where an application pursuant to Article 14 has been received after the Convention has entered into force in the receiving State and the State of origin.

Article 42

The Secretary General of the Hague Conference on Private International Law shall at regular intervals convene a Special Commission in order to review the practical operation of the Convention.

CHAPTER VII – FINAL CLAUSES

Article 43

(1) The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Seventeenth Session and by the other States which participated in that Session.

(2) It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 44

(1) Any other State may accede to the Convention after it has entered into force in accordance with Article 46, paragraph 1.

(2) The instrument of accession shall be deposited with the depositary.

(3) Such accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in the six months after the receipt of the notification referred to in sub-paragraph *b*) of Article 48. Such an objection may also be raised by States at the time when they ratify, accept or approve the Convention after an accession. Any such objection shall be notified to the depositary.

Article 45

(1) If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in the Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention

shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

(2) Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.

(3) If a State makes no declaration under this Article, the Convention is to extend to all territorial units of that State.

Article 46

(1) The Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the third instrument of ratification, acceptance or approval referred to in Article 43.

(2) Thereafter the Convention shall enter into force –

a) for each State ratifying, accepting or approving it subsequently, or acceding to it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;

b) for a territorial unit to which the Convention has been extended in conformity with Article 45, on the first day of the month following the expiration of three months after the notification referred to in that Article.

Article 47

(1) A State Party to the Convention may denounce it by a notification in writing addressed to the depositary.

(2) The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

Article 48

The depositary shall notify the States Members of the Hague Conference on Private International Law, the other States which participated in the Seventeenth Session and the States which have acceded in accordance with Article 44, of the following –

- a) the signatures, ratifications, acceptances and approvals referred to in Article 43;
- b) the accessions and objections raised to accessions referred to in Article 44;
- c) the date on which the Convention enters into force in accordance with Article 46;
- d) the declarations and designations referred to in Articles 22, 23, 25 and 45;
- e) the agreements referred to in Article 39;
- f) the denunciations referred to in Article 47.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

Done at The Hague, on the 29th day of May 1993, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Seventeenth Session and to each of the other States which participated in that Session.

(Source: Web site of the Hague Conference on Private International Law, <http://www.hcch.net/>, accessed 19 October 2001)

Hague Conference on Private International Law

**Recommendation Concerning the Application to Refugee Children and
Other Internationally Displaced Children of the Hague Convention on
Protection of Children and
Co-Operation in Respect of Intercountry Adoption
adopted on 21 October 1994**

Hague Conference on Private International Law

Pursuant to the Decision of the Seventeenth Session of the Hague Conference on Private International Law, held at The Hague from 10 to 29 May 1993, to convene a Special Commission to study the specific questions concerning the application to refugee children and other internationally displaced children of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption,

The Special Commission gathering at The Hague from 17 to 21 October 1994, in consultation with the Office of the United Nations High Commissioner for Refugees,

Adopts the following Recommendation

RECOMMENDATION

Whereas the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption was concluded at The Hague on 29 May 1993,

Considering that in the application of the Convention to refugee children and to children who are, as a result of disturbances in their countries, internationally displaced, account should be taken of their particularly vulnerable situation,

Recalling that according to the Preamble of the Convention each State should take as a matter of priority appropriate measures to enable the child to remain in the care of his or her family of origin, and that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State,

The Hague Conference on Private International Law recommends to the States which are, or become, Parties to the Convention that they take into consideration the following principles in applying the Convention with respect to refugee children and to children who are, as a result of disturbances in their countries, internationally displaced.

1. For the application of Article 2, paragraph 1, of the Convention, a State shall not discriminate in any way in respect of these children in determining whether they are habitually resident in that State.

With respect to these children, the State of origin referred to in Article 2, paragraph 1, of the Convention, is the State where the child is residing after being displaced.

2. The competent authorities of the State to which the child has been displaced shall take particular care to ensure that -

abefore any intercountry adoption procedure is initiated,

- all reasonable measures have been taken in order to trace and reunite the child with his or her parents or family members where the child is separated from them; and

- the repatriation of the child to his or her country, for purposes of such reunion, would not be feasible or desirable, because of the fact that the child cannot receive appropriate care, or benefit from satisfactory protection, in that country;

ban intercountry adoption only takes place if

- the consents referred to in Article 4 c of the Convention have been obtained; and

- the information about his or her identity, adoptability, background, social environment, family history, medical history including that of the child's family, the child's upbringing, his or her ethnic, religious and cultural origins, and any special needs of the child, has been collected in so far as is possible under the circumstances.

In carrying out the requirements of sub-paragraphs a and b, these authorities will seek information from the international and national bodies, in particular the Office of the United Nations High Commissioner for Refugees, and will request their co-operation as needed.

3. The competent authorities shall take particular care not to harm the well-being of persons still within the child's country, especially the child's family members, in obtaining and preserving the information collected in connection with paragraph 2, as well as to preserve the confidentiality of that information according to the Convention.

4. The States shall facilitate the fulfilment, in respect to children referred to in this Recommendation, of the protection mandate of the United Nations High Commissioner for Refugees.

The Hague Conference also recommends that each State take these principles and those of the Convention into account for adoptions creating a permanent parent-child relationship between, on the one hand, spouses or a person habitually resident in that State and, on the other hand, a refugee or internationally displaced child in the same State.

Explanatory Note on the Recommendation

Preamble

Vulnerability of Refugee Children

Considering that in the application of the Convention to refugee children and to children who are, as a result of disturbances in their countries, internationally displaced, account should be taken of their particularly vulnerable situation,...

1. The needs of refugee and other internationally displaced children (hereafter “refugee children”) for protection in respect of intercountry adoption is best understood in light of the phenomenon of exile as experienced by these children. The central fact of the refugee experience is forced displacement. Unlike others their age, refugee children have been uprooted from their homes and their country of origin as a result of grave human rights abuses, the threat of persecution or armed conflict. In addition, many refugee children are involuntarily separated from their parents or other relatives during flight. Thus, in addition to the fact of exile and their often difficult living conditions in countries of asylum, refugee children’s lives often have, been profoundly affected by the brutality of war, the persecution of family or friends, the danger of flight, and in many cases forced separation from family members.

2. The experience of UNHCR in the field suggests that the following three components of the adoption procedure are of heightened importance and complexity where refugee children are involved:

- a.family tracing;
- b.the exploration of alternative care arrangements; and
- c.ensuring the informed consent of parents or other relevant persons.

3. Special efforts on the part of Governments, international organizations and non-governmental organizations are often necessary to meet the particular protection needs of refugee children in these areas.

Family Unity and Alternative Care

Recalling that according to the Preamble of the Convention each State should take as a matter of priority appropriate measures to enable the child to remain in the care of his or her family of origin, and that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State,

4. The need of every child to grow up in a family environment can normally be met by their own families and communities, provided these families and communities themselves receive the protection and assistance necessary to assume their responsibilities. As the international community seeks to-respond to the need of refugee children for protection and assistance, a primary objective should therefore be to maintain or restore the child’s own family environment, if at all possible. Where the child is separated from his or her family, and where family reunification proves to be impossible, UNHCR’s experience shows that appropriate alternative care can usually be found, and should in the first instance be sought, within the child’s own community, whether in the country of asylum or elsewhere.

5. In certain cases, however, no satisfactory alternative care can be found in that community and it is necessary to look elsewhere in order to meet the refugee child's need for care in a family environment. In deciding whether alternative care should take the form of placement with relatives in the extended family, long-term foster care, Islamic Kafala, adoption (including intercountry adoption), or some other suitable arrangement, the best interests of the refugee child must always be the paramount consideration.

Paragraph 1 Non-discrimination

For the application of Article 2, paragraph 1 of the Convention, a State shall not discriminate in any way in respect of these children in determining whether they are habitually resident in that State.

6. The Hague Convention, unlike the CRC, only protects a refugee child if he or she is considered "habitually resident" in the Contracting State (Article 2 (1)). The mere fact that a child is a refugee child should not be a relevant factor for determining whether that child is "habitually resident" in that State in the sense of Article 2 (1). In other words, Contracting States should not, when applying the safeguards and procedures and the co-operative framework of the Hague Convention to children habitually resident on their territories, discriminate between refugee children and other children.

Terminology-"the State of origin"

With respect to these children, the State of origin referred to in Article 2, paragraph 1 of the Convention, is the State where the child is residing after being displaced.

7. This is to clarify terminology. The Hague Convention uses the terminology "State of origin" to mean the state in which the child is "habitually resident", which in the case of a refugee child would normally be the country of refuge rather than the child's home country. However, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and common UNHCR terminology refer to the "country of origin" as the State from which the child has fled, which is normally the child's home country.

Paragraph 2 a Tracing/Family Reunification and Repatriation

The competent authorities of the State to which the child has been displaced shall take particular care to ensure that-

a. before any intercountry adoption procedure is initiated,

-all reasonable measures have been taken in order to trace and reunite the child with his or her parents or family members where the child is separated from them; and

-the repatriation of the child to his or her country, for purposes of such reunion, would not be feasible or desirable, because of the fact that the child cannot receive appropriate care, or benefit from satisfactory protection, in that country;

8. Tracing the relatives of refugee children who have been separated from their families may necessitate additional efforts not required where non-refugee children are concerned. When refugee children are separated from their families, the separation often (but not always) occurs involuntarily and in circumstances such that the whereabouts and even the survival of the other family members is unknown to the child, and vice versa. Even where parents voluntarily send a child to safety, they may be unable to re-establish contact. It is important in refugee situations that separation should not be considered equivalent to abandonment, even where a parent has deliberately sent a child away to safety. Flight across national frontiers, continuing armed conflict and the absence of effective protection by the authorities of the country of origin complicate communications and impede the flow of information.

9. In UNHCR's experience, the period during which tracing should be continued varies depending on the nature of the refugee situation and the particular circumstances of the refugee child and his or her family. UNHCR has recommended that tracing normally be conducted for a minimum period of two years before a placement that could lead to a permanent severing of links with the natural family is envisaged. A flexible approach should be adopted. The required period may be extended where appropriate in light of circumstances in the countries of asylum and origin as well as specific factors affecting the situation of the child. It may be reduced where it is clear from the circumstances that there is no possibility of successful tracing and where earlier adoption is necessary in the best interests of the child.

10. Alternative care arrangements for refugee children should be pursued with due regard for the impact of flight and exile on families. Particular consideration should be given to possibilities for suitable long-term foster care and placements within the extended family or refugee community. The best interests of the refugee child may often be met through placements with a family within the refugee community itself. UNHCR experience with unaccompanied refugee children in various regions has revealed the prevalence and appropriateness of customary adoption or informal placements of unaccompanied refugee children within their extended families. With the refugee community, both through such placement and through long-term foster care often leading to de facto or de jure adoption. The Office's experience also points to the importance of material assistance, both directly to families and through support of health and education programmes, to enable refugee families to adequately provide for the material needs of refugee children.

11. Besides placement in the refugee community, the possibility of suitable care arrangements in the child's home country must also be considered and, where appropriate pursued. Voluntary repatriation, when circumstances permit, is the ideal solution to refugee problems and may also offer the best opportunity for suitable alternative care for a refugee child. However repatriation must be consistent with the principle of non-refoulement. Given the Office's mandate to seek solutions to refugee problems, inter alia through voluntary repatriation, UNHCR can appropriately assist the competent authorities to explore the possibility of caring for a refugee child in his or her home country.

Paragraph 2 b Consents and Collection of Information

The competent authorities of the State to which the child has been displaced shall take particular care to ensure that—

b. an intercountry adoption only takes place if

- the consents referred to in Article 4 c of the Convention have been obtained; and
- the information about his or her identity, adoptability, background, social environment, family history, medical history including that of the child's family, the child's upbringing, his or her ethnic, religious and cultural origins, and any special needs of the child, has been collection in so far as is possible under the circumstances.

In carrying out the requirements of sub-paragraphs a and b, these authorities will seek information from the international and national bodies, in particular the Office of the United Nations High Commissioner for Refugees, and will request their co-operation as needed.

12. Informed consent to the adoption of a refugee child may require special counselling as well as material assistance. When refugee parents, guardians or relatives who have themselves undergone traumatic experiences, lack basic subsistence requirements, and are uncertain about their future, they may conclude that the only way to provide for the child's welfare is to surrender him or her for adoption. States should be invited to declare it their policy that the free and informed consent of the child's parents or guardians is a crucial element of the determination that the child is adoptable under Article 4 (c) of the Hague Convention and Article 21 (a) of the CRC.

13. Both counselling and the humanitarian assistance envisaged in CRC Article 22 (1) may be necessary in such situations to ensure that consent to adoption by parents or guardians is truly free. In cases where a refugee parent voluntarily chooses to give up the child, it is also important to ensure that the parent understands the full legal consequences of this decision, as well as to ensure, where necessary, that the other parent and other relevant parties are duly notified and give their consent. It is important in refugee situations that absence of parents, guardians or relatives should not be treated as tantamount to consent.

Paragraph 3 Confidentiality

The competent authorities shall take particular care not to harm the well-being of persons still within the child's country, especially the child's family members, in obtaining and preserving the information collected in connection with paragraph 2, as well as to preserve the confidentiality of that information according to the Convention.

14. States should recognize that refugee children and their families may be particularly vulnerable for reasons related to their situation as refugees, particularly with reference to their situation vis-a-vis the authorities of their country of origin. Tracing, alternative placement and adoption procedures involving such children should be conducted with due regard for the need for confidentiality in view of the particular vulnerability of refugee children. It is reconciled with the refugee child's right to have access later in life to information concerning the identity of his or her parents and other aspects of his or her family background (CRC Article 7 and 8).

Paragraph 4 Facilitation of UNHCR's Protection Mandate

The States shall facilitate the fulfillment, in respect to children referred to in this Recommendation, of the protection mandate of the United Nations High Commissioner for Refugees.

15. UNHCR has a crucial role to play in intercountry adoptions involving refugee children. The Special Commission of the Hague Conference acknowledged that to the extent compatible with character of the adoption proceedings:

- a. In all cases of prospective adoptions involving refugee children, UNHCR should be given notice of the proceedings by the competent authorities;
- b. States should ensure and facilitate access to UNHCR by any refugee child who is the subject of a prospective adoption and all interested parties to the proceedings;
- c. UNHCR should be invited to participate in the adoption proceedings and to provide advice to the competent authorities, particularly regarding the adequacy of family tracing and efforts to identify appropriate alternative placement possibilities, the determination that a refugee child is adoptable, the adequacy of counselling and the giving of consent and the evaluation of the best interests of the refugee child;
- d. UNHCR should be permitted to provide counselling to the child and interested parties, and to provide information to appropriate parties concerning principles, legal instruments and guidelines relevant to the protection of refugees and the intercountry adoption of refugee children.

16. The essential role of UNHCR in providing international protection to refugees and seeking solutions to refugee problems should not obscure the vital roles of other United Nations, international and non-governmental organizations in providing protection and assistance to refugee children. UNICEF and ICRC, in particular, have programmes which are important to the welfare of refugee, as well as other, children; ICRC's tracing activities may be relevant to intercountry adoption. UNHCR works in partnership with numerous NGOs as well as Governments to meet the needs of refugee children for protection and assistance. The experience of the Office in family tracing as well as in procedure to determine the best interest of refugee children demonstrates the usefulness of a team or interdisciplinary approach combining the expertise of various agencies.

Closing Paragraph Broader Scope of the Recommendation

The Hague Conference also recommends that each State take these principles and those of the Convention into account for adoptions creating a permanent parent-child relationship between, on the one hand, spouses or a person habitually resident in that State and, on the other hand, a refugee or internationally displaced child in the same State.

17. The Hague Convention only applies to situations where adoptions take place from one country to another country. The final paragraph recommends that each State take the principles of the Recommendation and those of the Hague Convention into account for adoptions occurring within the State territory, that is, adoptions of refugee children which take place in the country of asylum or in the country of origin following repatriation. This is of particular importance to refugee children, given that the most common form of adoption of a refugee child will normally occur in these contexts.