



Agreement that the adoption may proceed Article 17 c) of the 1993 Hague Convention Synthesis of the survey – May 2018

Introduction

Following the request from a Central Authority (CA) in a receiving country, the ISS/IRC decided to launch a survey concerning the **agreement that the adoption may proceed** as in article 17 c) of the 1993 Hague Convention (see insert). The objective of this survey is to clarify the key role of this article, and to identify obstacles, as well as solutions, in order to improve the implementation of the **guarantees** of the adoption procedure, as laid down in the article.

As underlined in the explanatory report of the 1993 Hague Convention, and as explicitly mentioned in the Guide to Good Practice No1, article 17 c) “*offers one of the most important procedural guarantees of the Convention*”. In effect, “if it appears that the proposed adoption is not in the best interest of the child, or that the procedure is fundamentally flawed, the Central Authorities must not allow the adoption to proceed, according to article 17 c)” (see annex 1). In the absence of an agreement that the adoption may proceed, the child will not be entrusted to the prospective adoptive parents (PAPs). The CAs can therefore interrupt an adoption at this stage of the procedure, and thus prevent potential illegal adoptions or adoption breakdown (see chapter I).

Furthermore, the agreement that the adoption may proceed (AAP) must not only precede the decision to entrust a child to the PAPs and the final adoption decision, but also the issue of the certificate of conformity of the adoption with the Convention by the contracting State where the adoption takes place (article 23). Paragraph a) of article 23 specifies that “the certificate indicates when and by whom the consents mentioned in article 17 c) have been given”.

What is the agreement that the adoption may proceed?

It concerns an act delivered in principle by the CAs in the receiving country and the country of origin, once the proposed matching has been made. Through this agreement the two CAs will recognise the relevance of the matching, and will verify that all the preliminary steps have been respected.

Article 17 of the 1993 Hague Convention

Any **decision to entrust a child** to prospective adoptive parents **can only be taken** in the State of origin:

- a) if the Central Authority of this State has ensured that **the prospective adoptive parents agree**;
- b) if the **Central Authority of the receiving State has approved such a decision**, where such approval is required by the law of the State or by the Central Authority of the State of origin;
- c) **if the Central Authorities of both States have agreed that the adoption may proceed**;
- d) if 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 authorised to enter and reside** permanently in the receiving State.

However this important step (see chapter I) is not perceived as such by all the countries, as the ISS/IRC survey reveals, which raises practical problems, particularly where the authorities responsible for issuing the AAP (see chapter II) are concerned, and also aspects such as the difficulty in obtaining certain essential information for the decision-making process (see chapter III).

The ISS/IRC warmly thanks the 20 Central Authorities¹ who have generously shared their perception of article 17 c), and the practical obstacles they encounter, together with their suggested solutions to these problems. The ISS/IRC is also grateful for the contributions from the Permanent Bureau of the Hague Conference on Private International Law (hereafter HCCH), from Mrs. T. Sawadogo, former Director of the Burkinabe Central Authority, and from Mr. J. Messineo, International Adoption and Child Protection Officer at the French Embassy in Haiti. Their points of view have greatly contributed to this synthesis.

Abbreviations

AAB	Adoption Accredited Body
CA	Central Authority
GGP1	The implementation and operation of the 1993 Convention on Intercountry Adoption : Guide to Good Practice No1
GGP2	Accreditation and Adoption Accredited Bodies : General Principles and Guide to Good Practice No2
HCCH	Permanent Bureau of the Hague Conference on Private International Law
ISS	International Social Service
ISS/IRC	International Social Service/International Reference Centre for the rights of children deprived of their family
PAP(s)	Prospective adoptive parent(s)
1993 Hague Convention	The Hague Convention of 29 May 1993 on Child Protection and Cooperation in respect of Intercountry Adoption

¹ Armenia, Belgium (French- and Flemish-speaking), Canada (Prince Edward Island), France, Germany, India, Ireland, Luxembourg, Malta, Norway, New Zealand, Peru, the Philippines, Southern Australia, Spain, Sweden, Switzerland (Federal and Geneva Authority) and Vietnam.

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I. The agreement that the adoption may proceed : key guarantee for the respect of the obligations and principles of the 1993 Hague Convention

The majority of countries who participated in the survey define the AAP as laid down in article 17 c) of the 1993 Hague Convention as the essential guarantee of the **legality and the transparency of the adoption procedure**, on condition, to quote the words of the Flemish-speaking Belgian CA, “that the agreement that the adoption may proceed is issued by the Central Authority, after thorough examination of the files of the child and the PAPs concerned”.

The AAP intervenes at a vital stage of the adoption procedure: after the matching has been proposed by a matching committee, whose role is to choose the most eligible PAPs to care for the specific needs of the child. In practice this proposition is normally made by the country of origin to the receiving country, which in turn transfers it to the PAPs for acceptance. At this stage in the procedure, the authorities have the opportunity to verify – before finalising the procedure – that the following have been respected:

- the fundamental principles of the Convention – such as respect of the best interests of the child, the principle of subsidiarity, the adoptability of the child and the prevention of abduction, sale or trafficking of children – as well as the conditions (obtaining consent, authorisation of the accredited adoption bodies implicated in the procedure, etc.);
- the applicable national laws and reciprocal obligations (adoption in accordance with the national laws of States, etc.);
- the adoption procedure as laid down by the Convention.

This double control allows:

- the CA in the country of origin to reconfirm the adoptability of the child and subsidiarity of the intercountry adoption;
- the CA in the receiving country to reconfirm the eligibility of the PAPs;
- the two CAs to approve the actual matching proposal.

Furthermore, the control occurs sufficiently early on in the procedure to allow any potential problems to be detected. **The child being proposed will therefore only be entrusted to PAPs after these eventual problems have been solved and the two States have confirmed that the adoption in question respects the above-mentioned conditions. The issue of the AAP then guarantees that at this stage of the procedure nothing should interfere with the adoption and/or its recognition, on condition that the certificate of conformity is issued (article 23).**

This guarantee signifies in concrete terms a stronger respect of the best interests of the child, and the effective prevention of illicit practices and potential adoption breakdowns.

A. Respect of the best interests of the child and his or her rights

As emphasized by the CAs of Peru and South Australia, the AAP is a means for the country of origin – as for the receiving country – to check that the proposed adoption is truly in the best interests of the child and respects all his or her rights. It is a question of verifying, among other points, that the adoption has been envisaged after every effort has been made – and failed – to find a permanent, family-based care solution for the child in his or her country of origin, and that these efforts have been documented. The CAs must also be certain that the child is actually participating in the procedure – according to his or her age and level of maturity – and that he or she has an unconditional authorisation to enter and reside permanently in the receiving country. As pointed out by the Spanish CA, the double control as provided by article 17 c) must be based on the well-being of the child, according to the technical criteria used to ensure that his or her needs are compatible with the eligibility of the PAPs.

To this end, a certain flexibility concerning deadlines must be granted to countries in order for them to access the available, necessary information to confirm that the adoption conforms to their respective laws and the fundamental principles of the Convention. Furthermore, because of the implications of article 17 c), certain CAs have emphasized that it is important not to allow this function to be delegated to other actors (see chapter II).

An effective implementation of article 17 c) must be able to guarantee that the adoption in question is sure and does not infringe on the rights of either the child, the biological parents, or the PAPs, as detailed below. It is the opportunity to solve potential problems before it is too late.

B. Prevention of illicit practices

Article 17 c) allows CAs to check that the procedure has been conducted **without flaws and that no stage has been missed/circumvented**. The CAs of each State must verify in particular that:

- ✓ the PAPs and the child have undergone a thorough medico-psycho-social and legal assessment;
- ✓ the required consents have been given clearly and without pressure;
- ✓ the matching has been conducted according to a multidisciplinary and impartial procedure;
- ✓ the file for the child is complete, and contains all the required documents – police inquiry in the case of abandonment, social report – and they are up-to-date;
- ✓ the adoption is not a private adoption, this type of adoption being incompatible with the Convention²;
- ✓ no payment has been involved in the adoption in question, etc.

² The Special Commission on the operation of the 1993 Hague Convention, 8-12 June 2015, para. 46: Recalling 2010 SC C&R Nos 22 and 23 and the fact that private and independent adoptions are not compatible with the Convention, the SC encouraged Contracting States to move towards the elimination of private and independent adoptions.

Therefore if these verifications, as required by article 17 c), are conducted thoroughly by the Central Authorities, this stage represents an efficient means of avoiding illegal adoptions, and their dramatic consequences³, as mentioned by the French-speaking Belgian CA.

C. Prevention of adoption breakdowns

Two essential aspects of the prevention of adoption breakdowns are close cooperation between countries – and especially CAs – and the most thorough assessment possible of the eligibility of the PAPs and the adoptability of the child. Another advantage of article 17 c) is that it reinforces the above-mentioned aspect by allowing the CAs of both countries to verify that the legal conditions and the medico-psycho-social conditions of the child and the PAPs have been correctly assessed⁴ and that the latter are apt to accept the prospective child. The Authorities can then also validate (or not) that the proposed matching conforms to the project of the PAPs, and that the restrictions presented by the PAPs – for example, the conditions of eligibility concerning the age and medical conditions of the child – have been truly respected. The countries are thus able to guarantee, as far as that is possible, a successful outcome to the adoption.

Furthermore, as pointed out by the Norwegian CA, article 17 c) helps to improve the preparation of the PAPs, based on the concrete matching proposition, especially where a child with special needs is concerned. The detailed, respective study of each file renders it possible to ensure that the needs of the child to be adopted will be met by the selected PAPs. This is when the relevance of the matching can be confirmed. The CA of the Swiss Federation emphasized that the implementation of this function signifies that the whole procedure can be followed closely and so increase the awareness and handling of potential crises.

Comments/recommendations of the ISS/IRC

- The ISS/IRC wishes to point out the importance of article 17 c) of the 1993 Hague Convention – with reference to all previous articles – and encourages all Contracting States to give full value to this article and to guarantee its proper implementation (see chapters II and III).
- It occurs at a key moment in the procedure, when the relevance of the proposed matching presented to the specific PAPs can be confirmed by the States on the basis of available information, or even additional information. The States have the possibility to ensure that the PAPs have the capacity to meet the specific needs of the child concerned. They should then be able to guarantee that the adoption conforms to the rights and interests of the child, and to foresee potential breakdowns.

³ ISS/IRC Baglietto, C. Cantwell, N. and Dambach, M. (Ed.) (2016). *Responding to illegal adoptions: a professional handbook*. Geneva, Switzerland: International Social Service.

⁴ ISS/IRC Jeannin, C. (Ed.) (2017). *Towards greater competence: learning from intercountry adoption breakdowns*. Geneva, Switzerland. See the contributions from Patricia Fronck and Raquel Morales (pages 104 and 110).

➤ Furthermore, this article constitutes a safeguard against illicit practices since it allows States to detect procedural irregularities at this stage in the process. The CA must seize this opportunity to ask essential questions, such as:

- What proofs are available to guarantee that alternative family solutions in the country of origin have been researched?
- What procedure has been followed to obtain the required consents?
- On the basis of which criteria have the PAPs been assessed?
- Which methodology was used for the proposed matching?
- Are the payments which have been made justified? Etc.

If the answers to such questions are not satisfactory, the procedure should be suspended.

II. Actors and practical implementation of the Agreement that the Adoption may proceed

A. Actors concerned

1. Function exercised by the Central Authority at federal and/or local level

Most of the countries which participated in the survey emphasize that it is important for this function to be conducted by the national/federal Central Authority (Armenia, Burkina Faso, for example) or the competent authorities at local level (France, Spain, Sweden, for example), or shared between the two according to the organisation of the countries (Switzerland for example). Several reasons justify this choice:

- The responsibility of the CAs to oversee/control all the adoption procedures according to the 1993 Hague Convention, and, in order to implement this function, to issue such acts as the AAP, which precede entrusting the child to the PAPs;
- The guarantee that the procedure is centred on the child and respects all his or her rights and best interests;
- The intervention of two authorities with equal decision-making powers;
- The existence of a certain homogeneity in the criteria for implementing the adoption procedures;
- Their independence and the absence of any interest linked to the finalisation of this adoption (economic or any other form of interest);
- Their privileged position because of their overall vision of the adoption procedure and the administrative documentation;
- The process is facilitated (particularly where the exchange of information and communication are concerned), there is continuity, and data recording is easier;
- The opportunity for the CA to supervise the activities of the Adoption Accredited Bodies (AABs);
- The guarantee of improved cooperation between CA, especially if additional information is required.

Few disadvantages have been raised as to CAs' intervention. An additional workload is however mentioned as well as the potential lack of resources, power and necessary expertise needed to ensure an adequate implementation of this function (see Chapter III.1.b.i).

It is important to note that the responsibility taken by the CAs at the delivery of the AAP is high because they validate the matching and expose themselves to potential critics if the adoption proved to be unsuccessful in the future.

2. Implementation delegated to Accredited Adoption Bodies

A small number of countries provide for the possibility to delegate this function to AABs, i.e. Germany⁵, France⁶ or Norway, in cases where the children for adoption do not present specific needs.⁷ In fact for this type of adoption, Norway entrusts the issue of the AAP to a professional Committee⁸ designated by the Ministry for Children and Equality.

a) Conditions for this delegation, and for its withdrawal

In France, this delegation is not covered by specific conditions, and intervenes in the case of collaboration with certain countries of origin. However, it does not occur in the framework of collaboration with a country of origin which has just accessed the 1993 Hague Convention. In such cases the French CA wishes to conduct this function in order to give support to the country of origin and to improve practices.

In Norway, the delegation of this function is subject to conditions. The AAB can only grant the AAP if the proposed matching is in accordance with prior consent from the PAPs. Furthermore, the Norwegian CA controls and supervises the activities of the AABs within this framework.

In France and in Norway this delegation can be withdrawn at any time. In fact, the French CA has taken over this function concerning its collaboration with Vietnam. No specific formality is required for this, a simple notice from the AAB and the CA is sufficient. However, in Germany the law⁹ has to be amended for the delegation to be withdrawn.

b) Advantages and disadvantages of this delegation

The French CA points out that this delegation corresponds to the intention to dissociate the functions of control – conducted by the CA – and of support given by the AABs. The objective is to give more proximity to this support. The Spanish CA also mentions the privileged position of the AAB which, thanks to its role in the management of adoptions, is more apt to access and transmit information.

⁵ Delegation based on Para. 2 (1) Adoption Convention Implementation Statute (AdUbaG).

⁶ Delegation based on the article R 148-11-2 of the Family and Social Action Code.

⁷ Child having reached the age of 5; siblings of more than two children; special health needs.

⁸ Bulletin ISS/IRC No. 216 October November 2017. *The Norwegian professional Council for adoptions, and its role in the approval of matching* (page 8).

⁹ Ibid. 4

Norway emphasizes the time saved in the adoption procedure, in the best interests of the child. On the other hand the Norwegian CA points out the difficulty sometimes, in practical terms, to assess the specific needs of children, and therefore the advantage of the possibility to delegate or not this function to the AAB. When any doubt exists, the case must be submitted to the professional Committee mentioned above.

The GGP1 (Para. 197) mentions that this delegation sometimes occurs because certain CAs lack the expertise to implement article 17 c) in an appropriate manner (see chapter II.A). By choosing to delegate this function the CA is able to conduct more efficiently other functions that it cannot delegate. Furthermore, it should be remembered that the CA is still responsible for the manner in which delegated tasks are accomplished.

However, certain disadvantages have been mentioned, by France in particular. France says that this practice results in delays in the intervention by the CA and its control at the end of the procedure, once the agreements that the adoptions may proceed have been granted, and even the certificate of conformity. To quote the words of the French CA “this delayed intervention prevents it from conducting a full control of the procedure and, among other things, rectifying or stopping the procedure if an anomaly is detected (...)”. To compensate for this important disadvantage, France is planning during 2018 to take over this function linked to the establishment of AAP in a certain number of countries of origin.

Finally, the HCCH includes the problems which occur when countries do not exercise adequate supervision and control of the activities of their AABs, as recommended by the conclusions of the Special Commission of June 2010¹⁰, and the GGP2.

c) Opposition to this practice

Various countries, both receiving countries and countries of origin, have expressed their clear opposition to the delegation of article 17 c) to an AAB (or any other entity). Among the reasons given for this opposition the following are mentioned: the economic motivation of certain AABs and their potential lack of impartiality during the procedure, this impartiality being necessary for the objective control required by this article. Where independent adoptions are concerned, which the ISS and the international community wish to make illegal¹¹, the AAP issued by the AAB does not constitute a safeguard against the anomalies generated by this type of adoption. For the Indian CA, entrusting the issue of the AAP to the CA of the receiving country constitutes an additional guarantee, for both the child and the proper implementation of the 1993 Hague Convention.

¹⁰ Available at https://assets.hcch.net/upload/wop/adop2010_rpt_fr.pdf

¹¹ Ibid, 2.

B. Various practices in the implementation of the AAP

1. Initiation of the APP

Burkina Faso – through Mrs. T. Sawadogo, intercountry adoption consultant – and Vietnam describe their practices, and point out that their AAP are initiated by their CA and submitted to the CA of the receiving country, at the same time as the matching proposition and the report on the child. The practice is the same for India, who initiates the AAP, and also includes in the procedure a third stage, after reception of the AAP from the receiving country, which consists of the issue of the certificate of non objection.¹² Vietnam has pointed out that it intends in the future to transpose article 17 c) into its national law.

For Mrs T. Sawadogo, the CA of the country of origin which draws up a matching proposition based on a rigorous, multidisciplinary and independent procedure, such as the procedure established in Burkina Faso, logically initiates the AAP. In fact, within the framework of the matching proposition, the CA has just conducted a thorough examination of the files of the PAPs and of the child, which have been submitted to it, and has therefore already performed the checks on the basis of which the AAP can be granted. The CA then transmits this agreement to the CA of the receiving country, together with the matching proposition, so that the latter can in turn conduct the necessary checks. Once the agreement is returned, it also confirms the check conducted by the CA of the receiving country, and the legal stage of the procedure can be launched in Burkina Faso. The initiation of the AAP by the CA of the country of origin is then therefore relevant, on condition, as Mrs T. Sawadogo points out, that the file of the child is complete (see chapter III.A.1), and that the country of origin has a matching procedure which conforms to the rights of the child¹³.

2. Issue of the AAP

If chapter II. A shows that the majority of countries entrusts the granting of the AAP to the CA, in practice, it is not systematically granted by **both CAs**.

For countries such as Burkina Faso, India, the Philippines and Vietnam, it is obvious that the AAP is issued by both CAs, whereas other countries of origin, such as Chile, China, Lithuania, the Fiji Isles or South Africa do not systematically issue the AAP, for the reasons developed below (see chapter III.A.3).

¹² “Certificate of non-objection” and pre-adoption care: the CARA will issue a certificate of non-objection in favour of prospective adoptive parents in a timeframe of 10 days from the date of reception of the acceptance of the child by the prospective adoptive parents, and of a letter of endorsement or authorisation from the receiving country where applicable; a copy of the certificate of non-objection will also be registered in CARINGS. After the issue of the certificate of non-objection, the prospective adoptive parents can receive the child within a pre-adoption family setting for a temporary period in India, while waiting for the decision of the tribunal. The prospective adoptive parents will be given custody of the child by the SAA as soon as the passport and visa are issued, and the adoption judgement by the competent tribunal has been delivered.

¹³ See ISS (2015). *Manifesto for the ethics of intercountry adoption*, page 21. Available at : <http://www.iss-ssi.org/index.php/fr/ressources>.

3. Refusal to issue AAP

It would appear that in fact the refusal to issue an AAP is not very frequent, which implies that the correct implementation of article 17 c) gives reason for concern, when, for example, one sees the significant number of irregularities which are later reported. Vietnam mentions certain cases of refusal because the PAPs are too advanced in age or their health is not compatible with taking care of a child with special needs. What is certain is that it is important for the adoptees and for their adoptive family that the two CAs (or the AAB) have done everything in their power to ensure, as far as possible, that the adoption proposition is appropriate for the child and for his or her parents.

ISS/IRC Comments/recommendations

- The ISS/IRC encourages States to entrust the issue of AAP exclusively to their CA and to provide the means for the CA to have the necessary resources and expertise. In fact the control of the documents required by article 17 c) should be in the hands of an impartial, independent authority. This is a difficult position for AABs because of their proximity to the PAPs and the potential economic interest.
- In accordance with article 22 (1) of the 1993 Hague Convention, this function can however be delegated – under clearly defined conditions – to an AAB which sometimes has knowledge of the case in question and the necessary expertise to issue the AAP. In such cases the CA must guarantee sufficient support to and supervision of the AAB in the exercise of this function, resorting to sanctions if necessary.
- The wide range of procedures observed in the implementation of the AAP involves the risk of depriving the AAP of its key role in the adoption; possible solutions must be identified in order to achieve a greater harmonisation of practices at this level (see chapter III.B).

III. Obstacles and possible solutions in order to ensure that the guarantee presented by the agreement that the adoption may proceed is effective

The survey reveals, in its modest way, the problems involved in the diversity of practices mentioned above, as there is no clear, harmonised implementation of article 17 c) on an international level. Furthermore, other aspects which compromise the correct implementation of the AAP are identified below. In the face of these obstacles, possible solutions must be taken into consideration in order to give article 17 c) its full meaning and power.

A. Obstacles to the implementation of the AAP

1. Incomplete information and problems of access

Among the obstacles found, several countries mention incomplete, even incorrect information regarding the child or the PAPs. It appears that sometimes the original version of certain documents, accompanied by a clear, official translation, is missing.

Where the child is concerned, especially when, for example, he or she has special medical needs, it is often difficult to take a decision based on the available information: on the one hand because it is insufficient, and on the other hand because interpretation is complicated.

Where the PAPs are concerned, information relative to their expectations and their capacity to care for the child is not always available or correctly up-to-date.

Access to independent, adequate information can also be a problem. The CAs are sometimes dependent on the good will of other actors such as the AABs or the institutions caring for the children.

These obstacles make it difficult to assess the correct implementation of the Convention in the adoption procedure in question.

2. Inappropriate delays

Article 17 c) can also raise problems because of the timeframes that are too long, or, on the contrary, too short. Potential disagreements on this subject between receiving countries and countries of origin have been raised.

In effect, as mentioned above, the checking and study of all the information (the files of the child, of the PAPs, the matching proposition, etc.), even the request for the additional information sometimes necessary in order to be able to issue the AAP, can involve delays. When faced with these situations, some countries of origin wish to accelerate the procedure in the interests of the child.

On the other hand, from the point of view of the receiving countries, the delays imposed by certain countries of origin before accepting a matching proposition sometimes hinder a thorough evaluation of the files, which then requires further information as seen above.

Faced with these problems, the ISS/IRC published an article in its bulletin no. 199, February 2016, which underlines the impact of this aspect of the adoption procedure, and presents the various practices adopted by the countries. It would appear that the timeframe granted to the receiving countries – and to the PAPs – to accept the matching proposition and issue the AAP should be flexible – within reasonable limits – according to the quality of the files, the language, and the medical or psychological problems of the child. It should be of a sufficient

duration for the receiving country to be able to take an informed decision. Some countries intend to suspend the response time when there is a request for additional information.

3. Confusion or fusion of the AAP with other acts/decisions

A range of practices can also be observed concerning the nature of the actual decision to grant the AAP.

In Switzerland for example the decision to approve the matching and the AAP are one and the same decision.

In other countries, the AAP seems to duplicate other acts or decisions which already exist in their national law. This situation runs the risk of depriving the AAP of its true meaning and reducing it to a purely bureaucratic act.

In Haiti for example, the 2013 Law on adoption requires not only that the Haitian CA and the CA of the receiving country agree to the matching, and that the adoption procedure continues (article 51), but also that the Haitian CA, within ten days after the familiarisation period, delivers or refuses the “adoption authorisation” based on an evaluation report (article 53).

In Chile, China or Lithuania, the matching proposition is interpreted as constituting the AAP, which is then not issued as such, and this presents a problem when the certificate of conformity is issued, which necessitates the presentation of an AAP. Vietnam also points out the possible confusion between these two decisions. The same happens in the Fiji Isles which, for adoptions outside the family do not issue the AAP, but a certificate of conformity as in article 23 of the Convention, based on the AAP of the receiving country and the conclusion of the adoption. South Africa does not issue an AAP in the case of interfamily adoption, but confirms or not the AAP delivered by the receiving country.

All this confusion reveals the lack of understanding of the function of the AAP in certain countries, which results in the non-respect of the adoption procedure as stated in the Convention. Over and above the respect of guarantees provided by the correct implementation of this article (see chapter I), it should be remembered that article 17 c) is closely linked to article 23 of the 1993 Hague Convention, and is at the same time distinct from it. The HCCH specified, in its conclusions and recommendations of the 2005 Special Commission (see annex 1), that it was necessary “to really understand the difference [between articles 17 and 23]: in article 17 **both CAs must give their agreement to the adoption**. Article 23 requires that the State which takes the final adoption decision should issue a certificate of confirmation that all the procedures of the Convention have been followed (and not only those covered by article 17) and that the adoption conforms to the Convention”.

When confronted with these difficulties, which can deprive article 17 c) of meaning, it is necessary to find solutions to clarify the procedure for issuing the AAP and to harmonise practices (see point B of this same chapter).

4. The lack of material and human resources

Local authorities faced with the lack of material and human resources are among the problems mentioned by Vietnam. These authorities do not have a multidisciplinary team of experts, in the fields of psychology, social work and health, to enable them to conduct a thorough assessment of the family and the social and psychological conditions of the child. The absence of national AABs in this country also signifies that these functions cannot be delegated to a competent body.

The lack of resources both in the country of origin and the receiving country also make it difficult to access certain essential information in order to make a reliable assessment of the best interests of the child, as mentioned by the CAs of South Australia and Spain. To complete this procedure successfully is costly in time and money.

5. Occurrence of irregularities/circumventing procedures

Irregularities have been reported during this survey, concerning the interpretation of what constitutes “reasonable” costs. It has also been pointed out that points of view vary as to how consent is sometime obtained, legally for some and questionably for others.

Another delicate situation has been mentioned: when a proposal for pre-matching is made directly by the AAB to the PAPs, without consulting the CA of the country of origin. In reaction to this type of situation, certain countries like New Zealand only issue the AAP if the CA of the country of origin has confirmed the pre-matching proposed by the AAB. Other cases exist where the AAP is transmitted directly to the AAB – and not to the CA – of the receiving country, as mentioned by the Spanish CA.

Finally, as mentioned above, independent and private adoptions are situations of high risk (see chapter I.B).

The search for consensus and dialogue between countries to overcome these obstacles constitutes the very spirit of the Convention, which cannot solve everything alone.

6. Specific cases of interfamily adoptions, and adoptions by nationals of the country of origin living abroad

The problems involved in applying article 17 c) where interfamily adoption and adoption by nationals of the country of origin living abroad are concerned have also been mentioned frequently.

In the case of interfamily adoptions Vietnam points out, for example, that it is impossible to provide the documents required by certain receiving countries before candidates are able to submit their adoption file, in other words the report on the family situation of the child and the assessment of the conditions of adoption. Vietnam also indicates that the situation is not covered by national law.

Other countries which have in fact ratified the 1993 Hague Convention consider that the Convention does not apply to intercountry, interfamily adoptions, which therefore cannot benefit from the guarantees covered by article 17 c). The HCCH has however said, through the conclusions and recommendations of the 2010¹⁴ Special Commission that “all intercountry adoptions in the field of application of the Convention by virtue of article 2 (1), including interfamily adoptions and adoptions by nationals from the State of origin are subject to the procedures and guarantees covered by the Convention”.

Adoptions by nationals from the country of origin of the child living in another country can also impede the issue of the AAP. The Geneva and Armenian CAs mention the frequent cases of resorting to national adoptions, which, contrary to article 2 (1) of the 1993 Hague Convention¹⁵, are based on the nationality of the candidates and not on their normal residence. Practices such as these prevent the application of the Convention, and in particular the guarantees provided by article 17 c). The HCCH has just published an important document on this subject, which clarifies the situation and defines the field of application of the Convention¹⁶.

B. Possible solutions

1. Raise awareness among the actors of the guarantees provided by the AAP

One possible solution is to raise awareness among countries of the importance of guarantees included in article 17 c) (see I) and to encourage the clear distinction between this decision and any other decision included in the national law of these countries, which are considered by some to be equivalent.

2. Harmonisation of practices through the elaboration of standard forms

In order to facilitate the gathering and content of information concerning the child, a solution would be the proposition of a **model report on the medico-psycho-social and legal situation of the child**. With this objective in mind, the ISS/IRC is happy to share a model, in annex 2 of this document, which is based on a practical manual for the use of professionals, as part of the project “Another future is possible” for disabled children in institutions¹⁷.

Furthermore, a **model form for the AAP** would also facilitate the implementation of article 17 c) for the CA of the countries of origin and receiving countries, and create a certain harmonisation of procedures. The elaboration of this model form would also prevent potential irregularities and the risk of document falsification. At the last Special Commission in 2015 on

¹⁴ See https://assets.hcch.net/upload/wop/adop2010_rpt_fr.pdf.

¹⁵ See also Guide to Good Practice no. 1 on the implementation and operation of the 1993 Hague Convention, Chapter 8, section 8.4 “Habitual residence and nationality” (p.110).

¹⁶ Note on habitual residence and scope of the application of the 1993 Hague Convention. March 2018. Available in English at: <https://assets.hcch.net/docs/12255707-4d23-4f90-a819-5e759d0d7245.pdf>.

¹⁷ For further information, see: <http://www.iss-ssi.org/index.php/fr/que-faisons-nous/cwd-fr>.

the operation of the 1993 Hague Convention, the HCCH was mandated to work on and develop a model form.

3. Harmonisation of practices through closer cooperation

To mitigate the considerable differences in practices concerning article 17 c) it is necessary to:

- Reinforce cooperation between countries: Vietnam points out that before establishing cooperation, it and the country concerned should communicate their respective legal provisions, exchange important information in the field of adoption and formulate agreements resulting from this process. All this information constitutes a memorandum concerning the application of administrative procedures for adoption.
- Achieve a harmonized, clear procedure, at least through respective cooperation agreements concluded between countries as mentioned above.
- Identify which actor is responsible for supplying detailed information on the child and the PAP.
- Decide which competent authority in which country first grants the AAP.

4. Respect of respective obligations

As emphasized by Vietnam, article 17 c) depends on the respect by States of their respective obligations through their commitments as party to the 1993 Hague Convention.

Conclusions/recommendations of the ISS/IRC

- The implementation of article 17 c) raises several obstacles which complicate the thorough assessment as to whether the adoption in question complies with the best interest of the child: timeframes in the country of origin and the receiving countries which are too long or too short, depending on the case; the lack of or difficulty of access to essential information on the child or the PAPs; the lack of material or human resources; different procedures for the granting of the AAP (initiation of the procedure, actors responsible for issuing the AAP, nature of the decision, etc.); problems caused by interfamily adoptions and adoptions by nationals from the country of origin living abroad; irregularities (costs, circumventing the procedures, conditions for obtaining consent, etc.).
- In order to remove these obstacles, several steps can be undertaken:
 - All actors must be made aware regularly of the importance of article 17 c), which represents one of the most important procedural guarantees of the Convention.
 - A model form for the report on the child should be elaborated (see the model drawn up by the HCCH¹⁸ as well as the ISS/IRC proposition in annex 2) and of a model form for the granting of the AAP (see ongoing project at the HCCH).

¹⁸ See <https://assets.hcch.net/docs/b6be0608-ee2b-4882-81e5-02056d41759d.pdf>.

- Because of the different laws and respective practices in the various countries, it is necessary to promote a dialogue and close cooperation between countries in the true spirit of the Convention.
 - It is essential for a correct implementation of the Convention, that, apart from cooperation, countries respect their reciprocal obligations as laid down by the Convention. Discussions and agreements prior to the initiation of cooperation should be encouraged to oversee this implementation (for example, anticipate the refusal to grant the AAP when information is insufficient).
 - Resorting to official channels should always be encouraged, and the matching proposition in particular should systematically transit through the Central Authorities, and not be directly transmitted to the AAB or the PAP.
- According to the ISS/IRC, if the thorough evaluation required by article 17 c) cannot be carried out, because for example key information is missing, the States should suspend the adoption procedure.

ANNEXES

ANNEXE 1

Hague documents related to the agreement that the adoption may proceed

Wording of the provision

Article 17 of the **1993 Hague Convention**¹⁹ :

“Any decision to entrust a child to prospective adoptive parents can only be taken in the State of origin:

- a) if the Central Authority of this State has ensured that the prospective adoptive parents agree;
- b) if the Central Authority of the receiving State has approved such a decision, where such approval is required by the law of the State or by the Central Authority of the State of origin;
- c) if the Central Authorities of both States have agreed that the adoption may proceed;** and
- d) if 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 authorised to enter and reside permanently in the receiving State.”

Guide to Good Practice No 1

The **Implementation and Operation of the 1993 Intercountry Adoption Convention : Guide to Good Practice**²⁰ specifies, in its chapter 7.2.8 “Article 17 stipulates that no child shall be entrusted to the adoptive parents until the Central Authority of the State of origin has ensured that the adoptive parents agree to the placement, and until the Central Authorities of both States agree to the adoption. In some receiving States, the Central Authority may also be required to approve the placement, and consequently, the entrustment. Article 17 repeats the requirements of Article 5 that the parents must be eligible and suited to adopt and that the child is or will be authorised to enter and reside permanently in the receiving State.

Article 17c) provides one of the most important procedural safeguards in the Convention. If it becomes apparent that the proposed adoption is not in the best interests of the child, or that there has been a significant defect in the procedure, the Central Authorities must not give their agreement under Article 17 c) that the adoption can proceed. In those States where agreements under Article 17 c) may be given by bodies other than the Central Authority, the bodies that may perform this function should be specified”.

¹⁹ See <https://www.hcch.net/fr/instruments/conventions/full-text/?cid=69>.

²⁰ See <https://assets.hcch.net/docs/bb168262-1696-4e7f-acf3-fbbd85504af6.pdf>

Chapter 7.4.9 outlines that “After the prospective adoptive parents have accepted the match or referral, and after place, provided that the Central Authorities of both countries agree that the adoption may proceed (Art. 17 c)). The agreement should not be given unless it is clear that, up to this point, the Convention requirements have been met in both countries concerned. The importance of this step is discussed further in Chapters 7.2.8 and 7.2.10. It is generally accepted that the prospective adoptive parents should not be permitted to contact the Central Authority of the State of origin directly, or to travel there to try to make contact with the child or the child’s carers without invitation, before agreements under Article 17 are given. Such practices open the possibility for pressure on States of origin. In some cases, such as special needs cases, direct contact may be appropriate and does not violate Article 29 when the competent authority in the State of origin has authorised the contact. See also Chapters 7.2.8 and 7.2.10 for details on agreements and entrustment in the country of origin”.

Chapter 8.8.2 is related to the interpretation of article 17 c) and specifies: “As is stated in the Explanatory Report on the Convention at paragraph 337, the intention behind Article 17 c) is to enable either State, the State of origin or the receiving State, to stop an adoption from going ahead if it appears to either that it presents major legal obstacles. The Convention and the Explanatory Report do not specify what those major legal obstacles may be. That is a matter that the Convention leaves for determination by individual States. How precisely the Central Authority may operate its discretion under Article 17 c) is, therefore, a matter for the law of the State concerned. It is quite possible that, under the law of that State, there exist general requirements in relation to the exercise of a discretion of this type ñ for example, that it should be exercised reasonably. Where that is the case, it could well be argued that a reasonable exercise of discretion is one which takes account of the general principles underlying the Convention which are set out in the Preamble, and which focus on the interests of the child (see also Chapters 8.2.5, 8.6.1, 8.6.2, 8.7.1 and 8.8.3)”.

Conclusions of the Special Commissions on the practical operation of the 1993 Hague Convention

2000 Special Commission:

Two of the conclusions of the 2000 Special Commission on the practical operation of the Hague Convention of 1993²¹ were related to article 17 and outlined that “The importance within the adoption process of the requirements of Article 17 were re-emphasised. In those States where agreements under Article 17 c) may be given by bodies other than the Central Authority, the bodies that may perform this function should be specified. (para. 68)²²”.

²¹ Report and conclusions of the Special Commission on the practical operation of the 1993 Hague Convention, 28 November-1st December 2000, conclusions n° 15 and 16. Available at: <https://assets.hcch.net/upload/scrpt33e2000.pdf>

²² 68. On the other hand, it was pointed out that the practice in some States (including some Nordic countries) is for Article 17 c) agreements to be given by accredited agencies responsible for the practical aspects of the adoption process, and it would not be practical in these countries for Article 17 c) agreements to be given by the Central Authority. Any problems which arise tend to be dealt with by dialogue on a bilateral basis. It was also pointed out that, in accordance with Article 22, Article 17 functions may be delegated to accredited bodies. It was generally agreed that in those States where agreements under Article 17 c) may be given by bodies other than the Central Authority, the bodies that may perform this function should be specified. See also:

2005 Special Commission²³ :

“Entrustment of the child to the parents must not take place until all agreements under Article 17 have been given. This is an important safeguard in the Convention. It is possible that some countries are skipping this step in the mistaken belief that it is identical to Article 23. It is important to understand the difference. In Article 17 both Central Authorities are required to agree that the adoption can proceed. Article 23 requires the State which makes the final adoption order to issue a certification that all the convention procedures have been followed (not only those in Article 17) and the adoption is in compliance with the Convention (para. 99)”.

2010 Special Commission²⁴ :

“The Permanent Bureau recalled that the agreements given under Article 17 are an important procedural safeguard. They are essential steps for the future issuing Article 23 certificate of conformity (para. 41)”.

Explanatory report²⁵

“Sub-paragraph c requires the agreement of the Central Authorities of both States "so that the adoption may proceed", the word "proceed" meaning that the adoption could advance to the next stage in the process towards its completion. Consequently, it is a notion larger than "entrustment", "placement" or "transfer" of the child, but not so extensive as to cover the final granting of the adoption.

The agreement provided by sub-paragraph c does not guarantee that the adoption will be made, because its granting depends on compliance with all other conditions required by the applicable law, as determined by the conflict rules of the State of origin or of the receiving State, depending where the adoption is to be made.

Article 7, sub-paragraph a, of the draft required that the competent authorities of both States verify that there existed "no bar" to the adoption, but this formulation was considered to be too strong by the special group, taking into account the practical difficulties to make such a determination and because it would not be binding on the court, when the final decision on the adoption is pronounced. However, the special group considered necessary to include a provision enabling both States, the State of origin or the receiving State, to stop an adoption from going ahead if it appears to either that it presents major legal obstacles. For this reason, sub-paragraph c was included, thereby also regulating implicitly the conditions for the

69. There was also some discussion of the circumstances which would justify a refusal to give agreement under Article 17 c). An expert of France suggested that a manifest violation of the basic principles of the Convention would justify a refusal (for example the making of an improper payment), and that grounds for refusal should always be stated.

²³ Report and conclusions of the Special Commission on the practical operation of the 1993 Hague Convention, 17-23 September 2005, para 99. Available at: https://assets.hcch.net/upload/wop/adop2005_rpt-e.pdf

²⁴ Report and conclusions of the Special Commission on the practical operation of the 1993 Hague Convention, 17-25 June 2010, para. 41. See also para. 28. Available at : https://assets.hcch.net/upload/wop/adop2010_rpt_fr.pdf

²⁵ Available at : <https://www.hcch.net/en/publications-and-studies/details4/?pid=2279>

adoption, because if one of them believes that there is a bar to the adoption, the Central Authority of the State of origin or of the receiving State has the right not to agree on the continuation of the adoption, and the procedure is blocked.

The special group exemplified the idea behind sub-paragraph c as follows: "if a prospective adoption were deemed acceptable in a State of origin, but the receiving State had legal problems about the age of the child or the difference in age between the child and the prospective adoptive parents, this was the point at which the receiving State could step in and voice its objection to the adoption going ahead" (Minutes No 14). The same reasoning applies to the case where the receiving State were to require a post-adoption probationary period for the recognition of the adoption granted in the State of origin and, therefore, sub-paragraph c takes care of the problem regulated by article 23 of the draft, which was deleted and is not directly solved by the Convention.

Sub-paragraph c should be read in conjunction with Article 23, paragraph 1, second sentence.

Sub-paragraph d only requires from the State of origin to verify that, in accordance with Article 5, the competent authorities of the receiving State have determined 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. Nevertheless, before agreeing to the continuation of the adoption, as permitted by sub-paragraph c, it is also possible for the State of origin to control such determinations, and also that the prospective adoptive parents have been counselled as may be necessary, according to sub-paragraph b of Article 5.

The verification required by sub-paragraph d merely refers to sub-paragraph a of Article 5, which establishes, in abstracto, the qualifications of the prospective adoptive parents but, even though not expressly mentioned, it is understood that the particular adoption has to be kept in mind before any decision is taken on the "entrustment" of the child.

Sub-paragraph d does not expressly provide that the verification shall be made by the Central Authorities and therefore, this duty is to be discharged by the competent authorities of the State of origin. Consequently, it should be read in conjunction with sub-paragraph c of Article 36 in the case of a State having two or more systems of law with regard to adoption applicable in different territorial units".

ANNEXE 2

Child's dossier (alternative care and adoption matrix)

Information	Individual experience (subjective)	General context (objective)
Who collects information	Staff working with the child and family, Staff in residential institutions,	Central authority (e.g. HCCH country profiles, ISS/IRC country situation, own sources)
REPORT 1. Child enters alternative care (firstly, collect information on support to family of origin and then secondly, collect information as to why child cannot remain with family)		
Access to basic services (e.g. health, education, social services etc)	Record experience of family <ul style="list-style-type: none"> - Barriers to access (unemployment, distance, live in rural area etc.) - Professional support (government or NGO etc.) 	Examples: enrolment rates at school, cost of schooling, maternal health, birth registration policies, use of baby boxes, etc.
Access to targeted services for families at risk (e.g. respite care for children with disabilities, single mother programs)		Examples: national programs targeting specific groups – such as specialised foster care for children with disabilities, free creches for single mothers, etc.
Efforts for reintegration after initial separation	Record experience of family <ul style="list-style-type: none"> - Specific efforts to locate family - List reasons why family cannot be found - List reasons why family cannot care for the child) 	Reintegration law and policy (e.g. Cambodia has national policy to reintegrate 30% of children in alternative care)
Reason(s) for separation	Record reason(s) <ul style="list-style-type: none"> - Relinquishment, abandonment, death, abuse, violence etc - Include « official » records 	Political environment (policies, family support etc.) Social (discrimination, Economy (GDP, poverty and unemployment rates etc.)
Authority in charge of making decision that child can no longer remain with family of origin	Record of child's dossier <ul style="list-style-type: none"> - Background information - Any police records (if abandoned, violence etc.) - Participation of child and his/her family in decision - Official judgments and/or reports from court/administrative body - Professional support 	Who makes the decision and under what circumstances (relevant laws and policies)
REPORT 2: Alternative care options for the child (depending on which care option(s) were experienced by the child such as informal care, kinship care, foster care, small group, residential care)		
Identify type of care²⁶	<ul style="list-style-type: none"> - Why this option was/was not selected (informal care, kinship care, foster care, small group, residential care etc.) 	What are the different options available. What are the numbers, budget etc.

²⁶ <http://www.iss-ssi.org/images/practices/ISS-ManualEnglish.pdf> – see from pages 112

	<ul style="list-style-type: none"> - assessment preparation - matching if applicable - Participation of child and his/her family in decision 	
Daily environment for the child	<p>Record child's experience</p> <ul style="list-style-type: none"> - Daily routine (eating, sleeping, recreation, culture and traditions etc.) - Reference person for the child (name, contact details) - Contact with others such as significant relationships (friends, workers, families etc.) - Favourite/least preferred activities 	<ul style="list-style-type: none"> -Forms of kinship care (family, community based care such as religious care) - Forms of foster care (emergency, MT/LT) - Forms of residential care (small, large scale, specialised) - registration - accreditation - supervision/monitoring - complaint mechanism - support/follow-up
Milestones achieved and identified needs	<ul style="list-style-type: none"> - Physical, Psycho-social and education etc. - Needs (siblings, disability, emotional, older etc) 	
Professional support	<ul style="list-style-type: none"> - Government/NGO - Trained, volunteer, etc - Challenges, difficulties and attempts to resolve 	<ul style="list-style-type: none"> - supervision/monitoring - complaint mechanism - support/follow-up - fees/remuneration
National adoption		
Which authority makes the decision (conditions)	Record efforts to find national PAPs (police report, regional matching, proposed to any families)	Relevant laws and practices (list of national PAPs, costs, etc)
Intercountry adoption		
Independent/private adoptions	Record type of adoption and involvement of CA/AAB	Relevant laws and practices
Child assessment including adoptability	Legal, psycho-social and medical assessment ²⁷ Professional involvement Child participation	Relevant laws and practices
PAPs assessment	Legal, psycho-social assessment Professional involvement	Relevant laws and practices
Consents	Child, parents, significant others (what was explained to the mother as to effects of adoption)	Relevant laws and practices
Matching	Record reasons for why match was made and by whom	Process (e.g. Composition of matching committee)
Child Preparation	Type of preparation and participation Professional involvement Child's view about the adoption	Relevant laws and practices
PAPs Preparation	Content of preparation and participation Professional involvement	Relevant laws and practices

²⁷ <http://www.iss-ssi.org/images/practices/ISS-ManualEnglish.pdf> - see Annexes

Probationary Period	Support available during period	As above
AAB	Professional involvement	Accreditation criteria of AABs
Fees	Amounts paid with receipts	Fee schedule
Sanctions	If any applied	As above
Follow up reports	Frequency and costs/content	Country of origin needs
Search of origins	Conditions for access to origins	As above



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