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Hidden Potential

Using the Overlooked Provisions in the Hague Convention to Ensure Children Have Families

BY CHAD TURNER

In the early 1990s a treaty was drafted, debated, and eventually finalized that would shape the course of international adoption forever. The treaty, later known as The Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, was actually the second convention put forth by The Hague Conference on Private International Law concerning adoptions. The first, finalized in 1965¹, was formally denounced by the governments of Austria, Switzerland, and the U.K, and never saw a single country ratify or accede to it². That first convention dealt only with the recognition of adoption decrees and was nowhere near as comprehensive in scope as the convention that would follow in 1993 (commonly referred to as the Hague Convention). However, the 1965 convention did provide a template for the Hague Convention, or at least a warning that for an international adoption treaty to be successful it needed to be broader in scope and have more robust engagement in the drafting stages.

The Hague Convention was the product of many years of debate and negotiation and multiple drafts of nearly every provision. Over 60

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¹ <https://www.hcch.net/en/instruments/conventions/full-text/?cid=75>

² <https://www.hcch.net/en/instruments/conventions/status-table/?cid=75>

countries sent delegations to the session where the Hague Convention was discussed and eventually finalized³. However, the document discussed by those delegates was a product of nearly three years of meetings amongst a smaller group of drafters⁴. After multiple versions were considered over those three years, a proposed draft was submitted before the hundreds of delegates present, representing over 60 countries. As with any treaty, there was much debate and many compromises resulted. Some provisions were intentionally left with ambiguity, allowing for multiple interpretations and permitting different constituencies to all feel satisfied that their desires were achieved. This meant that the text of the convention was in some ways rather malleable. Ultimately, however, the Hague Convention emerged as a successful treaty that currently has over 100 countries as parties to it, including the United States.

After its finalization in 1993, some academics and diplomats began capitalizing on the many possible interpretations of certain provisions. The intentional ambiguity allowed for a conquest of persuasion. Over time, certain problematic beliefs and practices settled in. The Hague Convention began to be consistently viewed in a certain light, with a minority view being quickly discarded. Some of these interpretations of the convention superseded even the text itself, and certain provisions, such as the highly contested subsidiarity principle found in the Preamble and Article 4⁵, began to be more widely read and discussed than the text itself. Many important provisions of the Hague Convention began to be completely overlooked while others were highly emphasized.

The Highly Emphasized Articles

The Hague Convention has 48 provisions, known as articles, along with a Preamble⁶. Thirteen articles deal with jurisdictional, ratification, and other issues that are more administrative in nature. Of the remaining 35 articles, at least four are the subject of frequent debate.

Perhaps no article has received as much attention as Article 4. This article, combined with certain sections of the Preamble, contains what is known as the subsidiarity principle. This principle attempts to clarify what forms of care are to take precedence over an adoption and which forms shall be beneath, or subsidiary, to a permanent adoption under the Hague Convention. This article also links the subsidiarity principle with the best interests of the child, a concept that in and of itself is hotly debated.

³ <https://www.hcch.net/en/publications-and-studies/details4/?pid=2964&dtid=28>

⁴ <https://assets.hcch.net/docs/78e18c87-fdc7-4d86-b58c-c8fdd5795c1a.pdf>

⁵ <https://www.adoptioncouncil.org/publications/2019/01/adoption-advocate-no-127>

⁶ <https://www.hcch.net/en/instruments/conventions/full-text/?cid=69>

Another article that is a subject of frequent discussion, particularly in the recent past, is Article 16. A portion of that article calls for central authorities (the government bodies that are responsible for managing international adoptions) to “give due consideration to the child’s upbringing and to his or her ethnic, religious and cultural background” when making adoption determinations. This article is linked to Article 4 and is often misused to state that ethnic, religious, or cultural considerations should take precedence over permanent loving families.

A third article that is often analyzed and emphasized is Article 32. This article explicitly decries the practice of “improper financial gain” and unreasonably high compensation for those involved in the adoption process. Although the Hague Convention mentions human trafficking twice (once in the Preamble and once in Article 1), it is Article 32 that is often invoked in response to human trafficking or other unethical practices related to the adoption process.

Lastly, another article is quickly emerging as a point of emphasis for discussions about the Hague Convention. Article 2 discusses the concept of “habitual residence” and sets forth the basic distinctions between an intercountry adoption and an intra-country adoption. This article is frequently discussed at meetings of adoption professionals, including the Special Commissions periodically organized by The Hague Conference on Private International Law (through their Permanent Bureau), and in publications put out by The Hague Conference and other adoption experts. Ultimately, however, this article only has a minor impact on the population of prospective adoptive parents, although for those parents it does touch, the impact can be quite large.

None of the above mentioned articles are inherently bad. In fact, discussion around each of them is warranted, and informed debate and consensus building around each one is a desirable thing. However, along with emphasizing the important principles contained in the four articles mentioned above, there remain many other very important articles in the Hague Convention that are frequently overlooked. Many of these provisions are just as important to the success of international adoptions as these highly emphasized provisions, and many of them, if given a chance, may actually help to resolve some of the points of contention so frequently discussed in relation to principles like subsidiarity and habitual residence.

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The Overlooked Articles

Preamble

Although not a numbered article, one of the primary sections that is often overlooked is the Preamble. Within the Preamble is an important concept that is often neglected in discussions about The Hague Convention. It is the concept of families. The word “family” is mentioned nine times in the convention. Four of those mentions are in the Preamble where phrases like “permanent family” and “family environment” are found. This emphasis on family is often discounted, particularly when discussing subsidiarity, but the fact remains that the Hague Convention is a family-centered document. Children should grow up in loving permanent families, and the Hague Convention explicitly acknowledges and even promotes this viewpoint. This should be the guiding star for all discussions and debates about The Hague Convention and when reasonable differences in interpretation exist they should be resolved in favor of permanent loving families.

Article 7

Article 7 is another frequently overlooked part of the Hague Convention that, if given more emphasis, could go a long way in solving many of the frustrations of countries, prospective adoptive parents, and adoption professionals and ultimately lead to more children spending less time outside of a permanent loving family. The article starts with a general call for countries to “cooperate with each other” and to promote cooperation amongst the various government agencies that may be involved in the intercountry adoption process, protecting children, and in the implementation of the convention. Admittedly, many governments do a relatively good job of communicating with other countries about their adoption processes. However, sometimes these communications appear to be more like directives than attempts at cooperative communication. When governments shut their doors to intercountry adoption they often do so without first seeking to cooperate with other countries, or even their own internal agencies, to act in a way that is best for the children concerned.

In addition to the mandate to cooperate, countries commit via Article 7 to provide information to other countries about their own adoption laws and to provide general information, such as statistics and standard forms. While many countries, such as the U.S.⁷, do make annual adoption statistics available, others do not. Also, many countries fail to fully answer questionnaires that are sent out by the Permanent Bureau in advance of

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⁷ https://travel.state.gov/content/travel/en/Intercountry-Adoption/adopt_ref/adoption-publications.html

each Special Commission meeting⁸. Many countries do not respond at all. Without this sharing of information, countries are left with an incomplete picture of international adoption, leading to increased difficulty in evaluating the effectiveness of local laws, cooperation between countries, and the Hague Convention itself. This failure to abide by Article 7 is rarely discussed openly, perhaps because nearly every country is falling short in some way.

Even if the above noted shortcomings of countries were minor, there is one portion of Article 7 that is rarely discussed but is crucial to the success of the convention and its ultimate goal of protecting children and ensuring they are part of loving families. In the second section of Article 7 we find the requirement that countries “keep one another informed about the operation of the Convention and, as far as possible, *eliminate any obstacles to its application*” [emphasis added]. Having an objective judgment of the situation is impossible for anyone with a link to the Hague Convention or international adoptions, but it seems fair to argue that countries are not doing what they could be doing to eliminate obstacles to the aims of the Hague Convention. Rapidly declining numbers of intercountry adoptions are one indicator, but perhaps an even stronger indicator is the increased delays in adoption processes. Children who will eventually be adopted are spending more time in orphanages and foster care situations than before. If, as the Preamble states, one of the primary goals of The Hague Convention is for children to be protected, in large part through being part of a permanent family, then it is hard to convincingly argue that countries are doing everything in their power to eliminate obstacles to the implementation of the convention. Rather, some may even say that many countries are creating more obstacles than they are eliminating.

Articles 9 and 35

Along with the call to eliminate obstacles that may hinder the fulfillment of The Hague Convention’s aims, perhaps the directive found in Articles 9 and 35 could do more to further the protection of children in permanent families than any other. In both Article 9 and Article 35 the convention calls for expediency in carrying out the obligations of the convention. Article 9 calls on countries to “facilitate, follow and expedite proceedings with a view to obtaining the adoption” and Article 35 obligates countries to “act expeditiously” in adoption processes.

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⁸ Special Commission meetings are held roughly every five years and bring together both countries that are parties to the Hague Convention and those that are not (but may be considering joining) to discuss the interpretation of the convention and what is working well and what is not working.

Although data is sparse, it is clear that average times to complete an intercountry adoption have increased significantly in the past 15 years. In the United States alone, the average time to complete an intercountry adoption increased by 222 days between 2008 and 2013⁹. Rather than the process becoming more expedient, children were now waiting 3.5 times longer to join a permanent loving family than before. If countries can develop systems to expedite business visas and citizenship processes, why should they be unable to find better and faster ways to facilitate the international adoption process? The principles enshrined in Articles 9 and 35 need no further explication; countries simply need to cease overlooking these provisions and instead follow their directives.

Article 23

Article 23 was drafted to encourage countries to recognize the adoption process of other countries that are parties to the Hague Convention. The logic behind this article is clear. If two countries are both parties to the convention and both are fulfilling the obligations they undertook by becoming parties to the convention, then both countries should feel comfortable that the other has well founded processes that protect children and ensure the integrity of international adoptions. However, in practice the recognition of foreign adoption decrees, even for children coming from countries that are parties to the convention, does not always happen automatically. Just under half of U.S. States require additional steps for the recognition of a foreign adoption decree¹⁰. The friction caused by this failure to recognize the adoption process of another country can have potentially devastating effects, especially for the adopted children¹¹.

Article 39

Although admittedly less specific than some of the other overlooked provisions of the convention, Article 39's permission for countries to enter into side agreements with respect to certain provisions of the convention¹², so long as they "improv[e] the application of the Convention in [the countries'] mutual relations," helps to illustrate the spirit of the Hague Convention. The convention was drafted to help protect children in the intercountry adoption process and ensure that children have the

⁹ <https://assets.hcch.net/docs/f9f65ec0-1795-435c-aadf-77617816011c.pdf> See page 25. Australia and Denmark also saw increases over the same period, increasing from 3 months to 5 months and 26 months to 35 months, respectively. More recent data from the Permanent Bureau seems unlikely as questionnaires for the next Special Commission do not contain any questions about the average time for an adoption process (See <https://www.hcch.net/en/publications-and-studies/details4/?pid=6668&dtid=57>).

¹⁰ <https://www.childwelfare.gov/pubPDFs/intercountry.pdf>

¹¹ Numerous stories have been told of adopted children being deported because their adoption decrees were not properly recognized or the parents of the children never applied for citizenship for their children. The non-fulfillment of Article 23 only adds to these challenges.

¹² This includes the articles touching on habitual residence, one of the issues that is frequently debated in the current discussion around international adoption and The Hague Convention.

best chance possible at being part of a permanent loving family. The Hague Convention limits the parties that sign on to deviating from the obligations in the convention, except in situations where countries feel they can make improvements to the adoption process. This captures the spirit of the convention. The Hague Convention serves as a baseline for promoting the aims of ethical and expeditious international adoption. However, countries are encouraged, in the convention itself, to seek to improve the processes and better protect the interests of children. What a tragedy that this spirit and the provisions that evoke it are all too frequently overlooked!

Conclusion and a Call to Action

After all the virtual ink has been spilled above, the real question is: What should be done? The good news is that The Hague Convention is actually a relatively good treaty, from a textual perspective. It was well crafted after much debate, discussion, and some compromise. Many countries provided learned input and carefully sought for a treaty that would improve international adoption and help children find permanent families. Thus, the treaty itself does not need to be annulled or a new treaty drafted. However, that is also the bad news. The ways in which the Hague Convention has been interpreted and implemented, as well as the provisions that have been emphasized, have often led to complications and delays in the international adoption process.¹³ These complications and delays result in more children spending more time waiting for, and less time in, permanent loving families.

And so, the duty falls to all who advocate for the welfare of children to re-educate themselves; to become familiar with the Hague Convention and its provisions; to understand the arguments that are being made and their flaws; to know what portions of the convention are being minimized and overlooked. Then we must begin to re-emphasize the portions of the Hague Convention that have been ignored for so long. We must also re-emphasize correct interpretations of the convention and of the importance of protecting children and making sure as many children as possible have the opportunity to be part of a permanent loving family. As we reinterpret the application of the convention, going back to the roots of its drafting and its original intent, we must reinforce the holistic reading of the convention and its intent. Each of us has a responsibility to promote the interests of children and to make sure that the overlooked provisions of The Hague Convention are no longer ignored.

¹³ Hanlon, R. (2018). Reflection: Ten Years After the U.S. Joins the Hague Convention, Adoption Advocate 118, <https://www.adoptioncouncil.org/publications/2018/04/adoption-advocate-no-118>

ABOUT THE AUTHOR

Chad Turner is a lawyer currently working in-house for a public health nonprofit, but has extensive experience in intercountry adoption law and policy. He helped co-author "Paper Chains," a report on U.S. Government actions and their impact on Nepal's abandoned children. He spent time with Carolina Adoption Services and Both Ends Believing (at the time Both Ends Burning) before interning at the Hague Conference on Private International Law. Although not working full-time in the adoption space, he has maintained an interest in and connection with the adoption community. Chad received a J.D. and L.L.M. in International and Comparative Law from Duke University School of Law in 2015. In addition to "Paper Chains," Chad has published articles on Intercountry Adoption and Child Trafficking and the Subsidiarity Principle of the Hague Convention.



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