

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

**INTERCOUNTRY ADOPTION TECHNICAL ASSISTANCE PROGRAMME
REPORT OF MISSION TO NEPAL 23-27 NOVEMBER 2009**

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REPORT OF TECHNICAL ASSISTANCE MISSION TO NEPAL
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1. Background to the mission

The mission to Nepal took place under the Hague Conference on Private International Law Intercountry Adoption Technical Assistance Programme. It was stimulated by the Nepali Government's signing of the 1993 Hague Intercountry Adoption Convention on 28 April 2009 as this gave a clear signal to the Hague Conference, and the Permanent Bureau as its Secretariat, that Nepal intended to become a party to the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*.

An exchange of correspondence had already begun in 2008. The then Secretary of the Ministry of Women, Children and Social Welfare (Mr Punya Prasad Neupane) wrote to the Secretary General of the Hague Conference on 7 February 2008 to inform him that Nepal was beginning the process towards ratification of the 1993 Hague Convention. The Secretary General, Mr Hans van Loon, replied to the Secretary on 29 February 2008, offering the support and technical assistance of the Hague Conference organisation and the Permanent Bureau in the steps towards Nepal's ratification.

On 29 April 2009 (following the signature of the Convention by Nepal), the Deputy Secretary General, Mr William Duncan, wrote to the new Secretary of the Ministry of Women, Children and Social Welfare to confirm our offer of technical assistance to Nepal to help implement the Convention, and outlined some preliminary steps for a technical assistance programme. On 3 June 2009 the Joint Secretary of the Ministry, Mr Ratna Kaji Bajracharya, wrote to Mr Duncan to officially request our technical assistance to make an assessment of the current situation and advise what needed to be done in Nepal prior to ratification of the Convention. The Permanent Bureau confirmed its interest in providing technical assistance by letter of 31 July 2009. After a further exchange of correspondence between Mr Toya Nath Adhikari, Undersecretary in the Ministry, and Mrs Jennifer Degeling, Secretary at the Permanent Bureau responsible for intercountry adoption matters, a first visit was planned for 23 to 27 November 2009 to commence the technical assistance programme, with the proposed activities for the mission as follows:

- To have meetings with the relevant actors to discuss the current situation and needs of children deprived of parental care, and more specifically the issue of adoption.
- To participate in some training and information sessions for relevant officials and other professionals, on the implementation and operation of the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Inter-country Adoption*.
- To make a preliminary assessment of needs as outlined in the letter of 3 June and discuss a timetable for the proposed technical assistance.

2. The mission in Kathmandu

A full week of meetings, seminars, presentations, working groups and visits was proposed, which appeared to include all the major actors in the intercountry adoption field. These were, from the Government sector: the Ministry of Women, Children and Social Welfare, the Ministry of Law and Justice, the Ministry of Foreign Affairs, the Ministry of Home Affairs and the Land Registry Office (where domestic adoptions must be registered). The non-Government sector in Nepal included the NGOs Central Children Welfare Board (CCWB) and Child NGO Federation Nepal (CNFN), an umbrella organisation representing *inter alia* 36 out of 38 child care homes accredited by the Ministry of Women, Children and Social Welfare for intercountry adoption purposes.

Others groups included in the programme were Unicef from the international sector; the international NGOs Save the Children and *Terre des Hommes* Foundation; and foreign representatives from Embassies of receiving States active in Nepal (Spain and Italy, as major receiving States, were not represented as they do not have an Embassy in Nepal).

The original programme appeared to meet one of the primary aims of the mission, namely, to disseminate information about the Hague Convention to the widest possible group in order to improve understanding of the Convention itself and clarify what needs to be done in Nepal to prepare for ratification.

Unfortunately a number of the sessions on the programme were suddenly cancelled without reasonable explanation, so the information sessions about the Convention did not reach the desired audience, in particular the Government

officials responsible for the steps necessary prior to ratification. Furthermore, the sudden transfer, during the week of the Hague Conference's official visit, of the Undersecretary of the Ministry of Women, Children and Social Welfare – one of the few Government officials with a sound knowledge and understanding of the Convention – was regrettable, and could be interpreted as a lack of commitment to adoption reform on the part of the Government.

3. Requirements of the Hague Convention

For a country intending to join the 1993 Hague Intercountry Adoption Convention, it is important to have a complete understanding of the Convention's purposes, principles and safeguards. These must be incorporated into each country's implementing legislation and made effective through a strong legal and administrative framework. These matters are fully explained in the Guide to Good Practice (*The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: Guide to Good Practice, Guide No. 1 (2008)*). The Guide is an important reference tool for any country which is considering joining the Convention.

The following essential elements of the Convention are presented here in order to understand better the comments on what is lacking in the Nepali legal framework.

3.1 The purposes of the Convention

The purposes of the Convention are:

1. to establish minimum standards for the protection of children who are the subject of intercountry adoption;
2. to ensure adoptions are made in the best interests of children;
3. to develop safeguards to prevent the abduction, the sale of, or traffic in children, and to eliminate various abuses associated with intercountry adoption;
4. to secure the automatic recognition of Convention adoptions in all Contracting States;
5. to reinforce and expand the adoption principles of the Convention on the Rights of the Child in Article 21.

3.2 Basic principles of the Convention

A number of fundamental principles in the 1993 Hague Convention should guide all decision-making for intercountry adoption cases. These principles come

directly from the Convention on the Rights of the Child (CRC). The 1993 Hague Convention is the practical mechanism which helps to implement the CRC principles.

1. *Best interests of the child*: an adoption should only be made when it is in the child's best interests to do so;
2. *Subsidiarity principle*: consider national solutions first for a child without parental care;
3. *Safeguards principle*: to be effective, the safeguards in the Convention should be implemented through legislation or similar means;
4. *Co-operation principle*: co-operation between authorities (national and international) is essential to strengthen the safeguards;
5. *Competent authorities principle*: only officially designated competent authorities should be involved in the adoption procedure.

3.3 Safeguards for the adoption procedure

A number of safeguards are included in the Convention to ensure that a child who may be adopted will be properly protected at all stages of the procedure.

1. Give full effect to the best interests principle;
2. Verify a child's background to ensure he / she is genuinely adoptable;
3. Provide effective financial regulation of intercountry adoption;
4. Regulate adoption agencies by accreditation (licensing);
5. Verify the Convention procedure is followed (Art. 17);
6. Additional safeguards may be imposed by any country.

4. General observations on the intercountry adoption procedures of Nepal

The basic principles on intercountry adoption are found in Article 21 of the CRC. Nepal is already a party to this Convention and should be applying the CRC principles to all intercountry adoptions. This is not happening. The Terms and Conditions 2008 are not compliant with the CRC Article 21 or the 1993 Hague Convention.

The receiving States which are conducting intercountry adoptions from Nepal are all parties to both the CRC* and the 1993 Hague Intercountry Adoption Convention. These countries should be applying the principles of the CRC and the Hague Convention to adoptions from Nepal, in accordance with the

* Except the United States of America

Recommendations made at the 2000 and 2005 Special Commission meetings (the international meeting of Contracting States of the Hague Convention). One of the agreed Recommendations of those meetings was that Convention countries should apply the Convention principles to non-Convention countries. The Recommendation states as follows:

“Recognising that the Convention of 1993 is founded on universally accepted principles and that States Parties are ‘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’, the Special Commission recommends that States Parties, as far as practicable, apply the standards and safeguards of the Convention to the arrangements for intercountry adoption which they make in respect of non-Contracting States. States Parties should also encourage such States without delay to take all necessary steps, possibly including the enactment of legislation and the creation of a Central Authority, so as to enable them to accede to or ratify the Convention.”

Therefore, there is no reason for receiving States to apply a different or lower standard to arrangements for intercountry adoptions from Nepal. A *Note Verbale*, issued on 24 November 2009, indicates that receiving States are aware of their responsibilities and are willing to work together to address issues they have identified. The *Note Verbale* (see Annex 1 of this Report) was prepared by the Embassy of Germany on behalf of Belgium, Denmark, France, Germany, Italy, Norway, Switzerland and the United Kingdom, and was supported by Australia, Canada and the United States of America.

5. Comments on Nepal’s Terms and Conditions for intercountry adoption

The Terms and Conditions 2008 are not adequate as a legal framework to conduct intercountry adoptions. They fall short of Hague Convention standards. While it is not intended in this Report to provide a complete analysis of the Terms and Conditions (as that has not been requested by the Nepali Government), the following points will indicate the most serious omissions:

1. The principles of Article 21 of the CRC are not included or applied, in particular:
 - a) The principle of best interests of the child is completely absent; what is the basis of decision-making for the child?
 - b) There are no criteria or procedures to determine if a child is adoptable (CRC Art 21(a));
 - c) The subsidiarity principle is not clearly mentioned or followed; no procedures exist to find a permanent family in Nepal for a child in need (CRC Art 21(b));
 - d) The birth family / biological parents do not receive support or counselling about the legal effects of relinquishing their child for adoption (CRC Art 21(a)) or the legal consequences of abandonment, for example, when the child may be abandoned at or near a police station.
2. None of the important principles and safeguards found in the 1993 Hague Intercountry Adoption Convention are in the Terms and Conditions 2008 (see Sections 3.2 and 3.3 above);
3. The Terms and Conditions are primarily concerned with the administrative structure and functions of a number of committees. The committees seem to be made up primarily of Government officials and do not seem to include any professionals or specialists in child welfare, such as child psychologists, pediatricians or social workers.
4. A conflict of interest arises from the inclusion of the orphanages' representatives on the Investigation, Recommendation and Monitoring Committee. The role of this committee is to actively investigate and verify the accuracy and authenticity of the information and documents on each child's file which is prepared by the orphanage directors and staff. Representatives of orphanage directors should not be permitted to investigate themselves as this creates a clear conflict of interest. This work should be done by independent and skilled professionals who have no connections with orphanages, either directly or indirectly.

5.1 Other challenges to children's rights

1. Falsification of documents: there is evidence that this abuse is occurring regularly in order to declare a child adoptable and that this abuse has continued under the Terms and Conditions 2008;

2. False statements about the child's abandonment, origins, age and status: there is evidence that this abuse is occurring regularly in order to declare a child adoptable;
3. Lack of transparency and accountability for the money coming into Nepal (to the Government and institutions) from intercountry adoptions;
4. The absence of a policy on intercountry adoption as a child protection measure within an integrated policy of alternative care options for a child without a family;
5. A lack of alternative care solutions for children without parental care.

6. Recommendations

6.1 Develop the child protection system and understand the place of intercountry adoption

Intercountry adoption should not be considered independently of child protection or independently of Nepal's obligations towards children temporarily or permanently deprived of parental care. Nepal should take a holistic view of child protection and establish a proper system at the village and district levels. Intercountry adoption needs to be seen as a child protection measure within an integrated policy of alternative care options for a child without a family. The lack of alternative care solutions for children without parental care means that the subsidiarity principle is not being applied.

6.2 Develop and support measures for family preservation

There are no specific, long-term (nationwide) family preservation programmes to assist families in caring for their children during times of family crisis, thus preventing the separation of a child from his / her family. Existing family preservation initiatives should be reviewed, supported and expanded. The Government of Nepal should develop and implement programmes to reduce the need for short-term or long-term institutionalisation of children.

6.3 Develop and support alternative care to parental care

The work carried out by the *Terre des Hommes* Foundation in preventing and responding to child trafficking while at the same time developing alternative care to parental care should be encouraged and further developed.

6.4 Better regulation of children's homes is needed

A lack of regulation reveals weaknesses in the system of children's homes and their care arrangements. All of the adoptable children are sent to children's homes in the Kathmandu Valley where they are more accessible for foreign adoption agencies and adoptive parents. These homes have direct links with the adoption agencies and there is evidence of many abuses of the rights of children and their biological parents. Children who may really be in need of adoption (*e.g.*, older children or children with health problems) are left in provincial homes and are not being adopted. There is a lack of information and statistics about children in child-care homes, the number of adoptable children, (their age, family status, etc.) and the number of applications by foreign parents for intercountry adoptions. There is no gatekeeping mechanism to avoid the admission of children to child-care centres when they do not need to be admitted to those centres (for example, when the main objective is to provide them free education).

6.5 A new law is needed

A new law for adoption, including both national and international adoption, is needed. It should be integrated with a comprehensive law on child protection measures and national solutions for children without parental care, as mentioned in Recommendation 6.1. The current draft child rights act (Child Rights Promotion and Protection Act) does not offer sufficient guarantees.

6.6 Legal criteria for professional decision-making is essential

A new law must address the current lack of any transparent legal criteria and procedures to establish that a child is adoptable. The lack of legal criteria results in unsafe and inadequate decision-making. A thorough investigation of the child's background and origins should be part of the criteria or procedure before any decision is made. The involvement of CNFN on the Investigation, Recommendation and Monitoring Committee should not continue as it creates a conflict of interest and the credibility of the investigation may be questioned. Therefore, CNFN should not be involved in any mechanism that investigates dossiers or makes recommendations on adoptability.

Also lacking are any criteria to establish the professional competence and ethics of the adoption agencies working in Nepal. The criteria to establish the number of agencies needed are also absent, and their number may be too high compared to the current needs. At present there are adoption agencies working in Nepal which have been refused accreditation in their own country according to the Hague

Convention standards, and some agencies are even under investigation or cited for violations in their own countries. However, when the Government of Nepal signed the Hague Convention on 28 April 2009, this created an obligation not to do anything in conflict with the Convention's principles. To eliminate practices that give rise to trafficking in and the sale of children, one logical first step for the Government of Nepal would be to delist agencies which have been refused accreditation in their own country according to the Hague Convention standards.

Provisions on the confidentiality of information about children and adoptive parents should also be in a new law.

6.7 Eliminate financial gain from intercountry adoption

Financial gain, profiteering and related abuses are at the heart of most problems in intercountry adoption. At present there is no transparency or accountability as to how fees or contributions are currently used. For example, the \$10,000 annual listing fee for adoption agencies to operate in Nepal cannot be justified and encourages an excessive number of agencies in Nepal. In no other country except Ethiopia does money from listing fees go directly from adoption agencies to child centres; it encourages institutionalisation of children instead of helping to build child protection systems including alternatives to parental care. Commitment by the Government is needed to implement and enforce strict controls on the financial aspects of intercountry adoption. Controls could be implemented immediately and strengthened in new legislation. While progress was made in regulating fees, USD 5,000 per child remains a strong incentive in the Nepali context and is not based on actual, reasonable expenses incurred in care and maintenance of a child.

6.8 A strong Adoption Central Authority is needed

A strong Adoption Central Authority with trained staff and a multidisciplinary team is needed to support a professional and ethical adoption system.

The Central Authority needs stability for its trained staff, who understand the 1993 Hague Convention and Nepal's obligation to children under the Convention.

6.9 Capacity-building is needed

Capacity-building (staff, resources and training) is needed for the Government authorities which are responsible for the protection of children, as well as for staff in the homes where children are cared for. Training should include an understanding of the role and place of intercountry adoption as a child protection

measure. Training should be conducted on how to investigate the situation of a child. As required by the Convention, the authorities must investigate whether a child can be suitably cared for in Nepal (the subsidiarity principle of Article 4) before considering intercountry adoption.

Receiving States have demonstrated their willingness to provide practical assistance, in collaboration with the Permanent Bureau's technical assistance programme, to give support to Nepal to help make improvements.

6.10 Implement Recommendations of the Unicef-*Terre des Hommes* Study

The 2008 study of intercountry adoption by Unicef and the *Terre des Hommes* Foundation (*Adopting the rights of the child: a study on intercountry adoption and its influence on child protection in Nepal*) and its findings are still valid since little has changed since it was written. The Government of Nepal is urged to accept and implement the Recommendations in that study. Assistance with implementation could be sought from Unicef and *Terre des Hommes* as well as from the Permanent Bureau of the Hague Conference on Private International Law, and the International Social Service.

To undertake the necessary reform of the intercountry adoption system, a temporary suspension of adoptions will be necessary. A temporary suspension will focus the Government's efforts on expediting reform and will allow time for the implementation of a new law and procedures as well as training of the relevant personnel.

6.11 Priority for recommendations

Some of these recommendations may be implemented in the short term. Others will need to be implemented over a longer period. However, a plan and a timetable for implementation in the long term may be prepared now. The Permanent Bureau's technical assistance programme for Nepal has commenced, and it remains a matter for the Government of Nepal to decide how it wishes to proceed with the technical assistance programme. As suggested by the Unicef-*Terre des Hommes* study, it is recommended to suspend the application of the Terms and Conditions 2008 until a proper legal framework is in place.

ANNEX

Annex 1



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Note Verbale

The Embassy of the Federal Republic of Germany presents its compliments to the Ministry of Foreign Affairs, Government of Nepal, and representing the group of countries entertaining inter-country adoptions from Nepal[†] has the honour to offer congratulations on the invitation extended to the Hague Conference on Private International Law. The group explicitly appreciates the efforts undertaken by the Government of Nepal to allow for the interests of the children in the adoption process.

Notwithstanding recent progress, Nepal's partners in inter-country adoptions are concerned about the lack of alternatives for children temporarily or permanently deprived of parental care. The number of children institutionalized is increasing in certain homes and the partners are deeply concerned over the lack of systematic, nation-wide family preservation efforts. International standards require that other ways of supporting children, such as protection programs by competent authorities preventing the separation of the child from the family including possibilities of foster care, kinship and domestic adoption be considered before inter-country adoption. In this regard, a revision of the "Child Rights Promotion and Protection Act" according to international standards is highly encouraged.

[†] This Note Verbale is issued on behalf of Belgium, Denmark, Germany, Norway, Switzerland and the UK and supported by Australia, Canada and the United States of America, content agreed by Sweden. After delivery signed by France, Italy and Spain.

The embassies of the countries entertaining inter-country adoption from Nepal would be glad to receive statistics that provide the number of adoptable children, their age, sex, in which organization they stayed before the adoption and whether they were voluntarily waived children or orphans; in case they are orphans their status should be identified according to art. 4 a) to d) of the "Terms and Conditions and Process for Granting Approval for Adoption of Nepali Child by an Alien (2008)". In order to protect the interests of the child, it has to be investigated whether the situation of the child matches the presented paperwork.

Current procedures may not be in accordance with international standards insofar as representatives from the federation of non-governmental organizations for children are allowed to be a member of the Recommendation, Investigation and Monitoring Committee (art. 13). The existence of two different matching committees (art. 14) is also questionable. The group offers their support and urges the Government of Nepal to strengthen the beneficial cooperation with the Hague Conference, e.g. to ensure that inter-country adoption will be conducted in accordance with transparent and internationally-recognised standards and practices.

The Embassy of the Federal Republic of Germany avails itself of this opportunity to renew to the Ministry of Foreign Affairs, Government of Nepal, the assurances of its highest consideration.

Kathmandu, 24 November 2009
L.S.

Ministry of Foreign Affairs
Government of Nepal
Narayanhiti
Kathmandu

cc: Ministry of Women, Youth and Social
Welfare
Government of Nepal
Singha Durbar
Kathmandu