

mai / May 2007

**COMPTE-RENDU D'UNE MISSION D'INFORMATION AU GUATEMALA
RELATIVE À L'ADOPTION INTERNATIONALE**

26 FÉVRIER – 9 MARS 2007

*établi par Ignacio Goicoechea, Collaborateur juridique de liaison pour l'Amérique latine
assisté de Jennifer Degeling, Collaboratrice juridique principale*

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TABLE OF CONTENTS

	Pages
ABBREVIATIONS	6
GLOSSARY	7
INTRODUCTION	8
CHAPTER I GENERAL OVERVIEW OF THE CURRENT CHILD PROTECTION AND ADOPTION SYSTEM	9
A. Child Protection and Adoption System	9
1. <i>ILPEC Report</i>	9
2. <i>Holt Report</i>	10
3. <i>Striking figures</i>	11
4. <i>Costs and charges of adoptions in Guatemala</i>	11
B. Summary of major deficiencies identified in the operation of key actors of the child protection and adoption system (compiled according to opinions gathered during our meetings)	13
1. <i>Deficiencies with SBS</i>	13
2. <i>Deficiencies with the judicial system</i>	13
3. <i>Deficiencies with PGN</i>	13
4. <i>Deficiencies with private foster homes</i>	14
5. <i>Deficiencies with civil registries</i>	14
CHAPTER II STATUS OF THE HAGUE CONVENTION	15
A. Outline of the constitutional problem	15
B. Developments before the mission started	15
1. <i>Decisions taken by the Constitutional Court</i>	15
2. <i>Announcements by the United States of America</i>	16
C. New developments during the course of the mission	16
1. <i>Handbook of Good Practices</i>	16
2. <i>"Auto Acordado" withdrawing the reservations to the Vienna Convention</i>	16
3. <i>Meetings in Congress</i>	16
4. <i>Meeting with the President's advisor Lic. Jorge Arroyave</i>	17
D. Recent approval of the Convention by the Guatemalan Congress	17
CHAPTER III LEGISLATIVE MATTERS	18
A. Law Applicable to Child Protection and Adoption	18
1. <i>Domestic legislation applicable to adoption and analysis provided in the ILPEC Report</i>	18
2. <i>New legislation adopted by Guatemala which has not yet been duly incorporated in the adoption system</i>	20
3. <i>Penalties for irregular adoptions</i>	21
4. <i>Handbook of Good Practices ("Manual de Buenas Prácticas para la Adopción Nacional e Internacional")</i>	21
B. Draft laws and their current status	22
1. <i>Domestic adoption legislation</i>	22
2. <i>Draft law on foster homes</i>	23
3. <i>Draft law to modify the Criminal Code</i>	23
4. <i>Draft law to approve the Hague Convention</i>	23
CHAPTER IV ACTORS IN CHILD PROTECTION AND ADOPTION SYSTEM: ROLES AND PERSPECTIVES	24
A. Secretariat for Social Welfare (<i>Secretaría de Bienestar Social – SBS</i>)	24
1. <i>Family Preservation Programmes</i>	24
2. <i>Foster Homes</i>	25
3. <i>Adoption Programme</i>	25
4. <i>Good Practice Handbook</i>	26

B.	Secretariat for Social Services of the Office of the First Lady (<i>Secretaría de Obras Sociales de la Esposa del Presidente – SOSEP</i>)	26
1.	<i>Creciendo Bien</i>	26
2.	<i>Community homes (Hogares comunitarios)</i>	28
C.	Office of the Attorney General (<i>Procuraduría General de la Nación – PGN</i>)	28
D.	Judicial System	29
1.	<i>CHA Courts</i>	29
2.	<i>Family Courts</i>	31
3.	<i>Peace Courts</i>	32
4.	<i>Social Workers from CHA Courts</i>	34
E.	Office of the Human Rights Prosecutor – The Childhood Defender	35
1.	<i>General overview</i>	35
2.	<i>Irregular adoptions</i>	35
3.	<i>Foster homes</i>	36
4.	<i>Draft laws on adoption</i>	36
F.	Mesa de Adopciones	36
1.	<i>General overview</i>	36
2.	<i>Good Practice Handbook</i>	37
G.	COCODE (Community Councils) - Guineales	37
H.	Mesa de Municipalización a favor de los Derechos de la Niñez y la Juventud de Guatemala	38
I.	NGOs	38
1.	<i>Private home Rafael Ayau</i>	38
2.	<i>Aldeas Infantiles SOS</i>	39
3.	<i>Asociación para la Integración Familiar – APIF</i>	40
4.	<i>Casa Alianza</i>	40
5.	<i>Plan International</i>	41
6.	<i>Movimiento Social por los Derechos de la Niñez, Adolescencia y Juventud (“Movimiento Social”)</i>	42
J.	Unicef	43
K.	Institute of Family Law – Asociación Defensores de la Adopción (“Notaries”)	43
1.	<i>General comments</i>	43
2.	<i>Hague Convention</i>	44
3.	<i>Draft law on adoption</i>	44
L.	Birth parents / Prospective adoptive parents	44
1.	<i>Birth parents</i>	44
2.	<i>Prospective adoptive parents</i>	45
CHAPTER V KEY ISSUES FOR IMPLEMENTATION OF THE CONVENTION ...		46
A.	Key actors involved	46
1.	<i>Judicial Organ (CHA Court)</i>	46
2.	<i>Attorney General’s Office (PGN)</i>	46
3.	<i>Secretary for Social Welfare (SBS)</i>	46
B.	Implementation plan. Training and resource needs	47
C.	Next steps	47

ANNEXES (contained in separate documents) *

I General Information about the Child Protection and Adoption System

1. ILPEC Report
2. Holt Report
3. PGN –PowerPoint presentation delivered at the presentation of the Handbook of Good Practices (1 March 2007)
4. Childhood Defender – Report on adoptions (2004)
5. *Mesa de Adopciones* – Investigation about adoptions 2005
6. *Mesa de Adopciones* – Presentation
7. *Movimiento Social por la Niñez* – General overview of adoptions
8. List of private foster homes provided by the Zacapa CHA Court
9. Chart showing distribution of competences according to the Handbook of Good Practices
10. Unicef survey of adoption costs
11. Report of the visit to two CAI's
12. *Mesa de Municipalización* – Presentation

II Draft Laws

13. Draft law 3217
14. Draft proposal of law drafted by the Family Law Institute (Notaries)
15. Draft law on foster homes
16. Draft law for approval of the Convention and favourable opinion given by the Congress International Affairs Commission (8 November 2005)

III HCCH Documents

17. Report on the 2005 visit to Guatemala by the Secretary General of the Hague Conference
18. Conclusions and Recommendations made by the 2005 Special Commission
19. Permanent Bureau statement referring to the importance of confirming the 1993 Hague Intercountry Adoption Convention

IV Guatemalan Regulations Related to the Adoption System

20. PGN list of requirements for the presentation of an adoption file
21. General instructions for the criminal persecution of illicit acts committed in irregular adoptions

V Handbooks

22. Handbook of Good Practices
23. Draft Handbook for the Operation of the Adoption System (national and international)
24. SBS – Draft Handbook for Operation of the Foster Families Programme
25. SBS - Draft Handbook for the training of foster families

VI Estimation of Assistance Needs

26. SBS estimation of assistance needs
27. PGN estimation of assistance needs
28. Unicef estimation of assistance needed to implement the Handbook (SBS; PGN; the judiciary; MFA; Coordination Unit)

* The annexes being too voluminous are not included here but may be obtained from the Permanent Bureau upon request

VII Planned action / programmes to strengthen the child protection and adoption system

29. *Creciendo Bien* Programme – presentation
30. CHA Court of Appeals - measures needed to implement the Handbook
31. Unicef workshops proposal
32. SBS presentation on implementation of the Handbook
33. Chart showing competences arisen from Handbook – prepared by Unicef

VIII Approval of the Hague Convention

34. Decree 31/2007 of 22 May 2007

ABBREVIATIONS

CAI: Day-care Centres (*Centros de Atención Integral*)

Convention / Hague Convention: 1993 Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption

COPREDEH: Presidential Commission for Coordination of Human Rights Policies (*Comisión Presidencial Coordinadora de la Política del Ejecutivo en Materia de Derechos Humanos*)

CHA Court: Children and Adolescents Court (*Juzgado de Niñez y Adolescencia*)

CRC: United Nations 1989 Convention on the Rights of the Child

ILPEC: Latin American Institute for Education of Communication (*Instituto Latinoamericano de Pedagogía de la Comunicación*)

MFA: Ministry of Foreign Affairs

NGOs: Non-governmental organisations

PINA: Law on the Comprehensive Protection of Children and Adolescents (*Ley de Protección Integral de la Niñez y Adolescencia*)

PGN: Attorney General's Office (*Procuraduría General de la Nación*)

Q: Quetzales (Guatemalan currency 1 Euro: 10 Q)

SBS: Secretariat for Social Welfare (*Secretaría de Bienestar Social*)

SOSEP: Secretariat for Social Work of the Office of the First Lady (*Secretaría de Obras Sociales de la Esposa del Presidente*)

Unicef: United Nations Children's Fund

GLOSSARY

Auto Acordado: Presidential Decree.

Common terms linked with irregular adoption practices:

- **“jaladora”:** person who traces pregnant women or women with small or very young children to convince them to relinquish their children for money (could be: physician, social worker, nurse, teacher, community member, etc.)
- **“casa de engorde”:** place where pregnant women are lodged during their pregnancy. The women have all their maintenance costs covered and are paid for relinquishing their children.
- **“cuidadora”:** person who receives a child for care (usually babies and not more than two at a time). They are paid on a monthly basis for their services by the notary who is to certify the adoption. Children usually stay several months with the *cuidadora*, in some cases more than a year.
- **private foster home:** foster home run by an NGO or private person. These homes are neither registered nor supervised by any authority. Many are hidden. Some receive children from CHA Courts; others receive children directly from biological parents and / or *jaladoras*.
- **“comadrona”:** person who helps pregnant women deliver their babies out of hospital. It is said that half of the births in Guatemala are assisted by *comadronas*. *Comadronas* are also known for assisting pregnant women who wish to abort.

Handbook: Handbook of Good Practices (*“Manual de Buenas Prácticas para la Adopción Nacional e Internacional”*) made public on 1 March 2007.

Mesa de Adopciones: Inter-institutional organisation with the objective to generate solutions to the problems of the adoption system in Guatemala. Members: SOSEP; PGN; SBS; Public Ministry; the judiciary; Unicef; COPREDEH; *Movimiento Social por los Derechos de la Niñez y la Adolescencia* (Social Movement for the Rights of the Child and the Teenager); Guatemalan Medical Association; the Catholic Church; the Alliance of Guatemalan Evangelist Churches.

Violation of family rights: PINA Article 18 defines family rights. The violation of family rights includes the concept of abandonment.

INTRODUCTION

The status of the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption* (hereinafter "the Convention") and its implementation in Guatemala, has been a cause for concern to the Hague Conference and its Members for quite some time. Since the preparation of this report, the Guatemalan Congress approved the Convention on 22 May 2007 through Decree 31/2007. This act confirms that the Convention will be part of the internal legal order as of 31 December 2007.

Now that the Hague Conference on Private International Law has been notified of this confirmation the Hague Conference will be able, in consultation with the Guatemalan authorities, to begin the Intercountry Adoption Implementation Assistance Programme which has been under discussion since 2003.

In preparation for the implementation of the Assistance Programme, Ms Jennifer Degeling, Hague Conference Principal Legal Officer, developed a fact-finding mission statement and Mr Ignacio Goicoechea, Hague Conference Liaison Legal Officer for Latin America, undertook the mission between 26 February and 9 March 2007, under the auspices of the Hague Conference on Private International Law through the Hague Conference International Centre for Judicial Studies and Technical Assistance.

The fact-finding mission provided Mr Goicoechea with the opportunity to discuss central implementation issues with key government officials and relevant authorities. The mission was structured with a view to studying the current situation regarding adoptions in Guatemala as well as identifying resource and training needs.

The information included in the present report has been drawn from the opinions gathered, during our visit, from different actors of the child protection and adoption system. It does not reflect any conclusion or opinion from the Hague Conference (with the exception of those documents that have been attached to the present report and which were generated by the Hague Conference).

The Hague Conference (HCCH) would like to express its gratitude to the Guatemalan Minister of Foreign Affairs and Unicef Guatemala for their invaluable support given to this mission.

Furthermore the HCCH would like to acknowledge the support received from the many persons interviewed, who generously made time for the meetings and to share their views and experiences.

CHAPTER I GENERAL OVERVIEW OF THE CURRENT CHILD PROTECTION AND ADOPTION SYSTEM

A. Child Protection and Adoption System

1. ILPEC Report¹

ILPEC (Latin American Institute for Education and Communication) developed for Unicef in the year 2000 a very detailed investigation about the adoption system in Guatemala and the violation of the rights of children who were supposed to be protected by that system.

Some of the opinions given by actors HCCH met during the visit (reported below in Chapter IV), show that to a significant extent the ILPEC report still reflects current practices and identifies the main problems of the adoption system.

The following paragraphs are taken from the conclusions provided in the ILPEC report, and were expressly confirmed by actors interviewed during the HCCH visit:²

"From a legal standpoint, the problem with adoption procedures in Guatemala is that they are not in agreement with the Convention on the Rights of the Child (CRC). The gaps which exist are fundamentally related to the practices utilized in establishing the child's origin and in the lack of adequate, post-adoption follow-up, all of which prevents the attainment of transparency in adoption processes."

...

"...institutions are saturated with children who are not being adopted. It would be worthwhile to further investigate this circumstance since those actually being adopted are, to a large extent, being "produced" for this end, while those who are truly in need of a family are being condemned to institutionalization until they reach the age of adulthood. It is also necessary to consider that the majority of institutionalized children are awaiting a formal abandonment ruling which can take up to seven years. This fact dramatically reduces their possibilities of being integrated into a family, particularly since most prospective adopters tend to seek children with less than one year of age."

...

"Direct or private adoption processes exist through which the mother delivers her child to an attorney without the supervision of a competent legal authority to verify the reasons which have led the mother to make this decision.

Due to the fragility of the existing laws in Guatemala, adoptions constitute a "business" where the economic aspects of "supply and demand" actively intervene. In this sense, the investigation mechanisms aimed at the child's family must be modified so as to ensure that anomalies do not exist with respect to the child's real origins and that poverty does not come to constitute the justification for the delivery of children.

The economic management of adoptions has created a labor market in which mothers, intermediaries, custodians, translators, lawyers, adoption agencies and some children's homes charged with child protection seek to obtain significant financial gains. The existence of intermediaries or "jaladoras" who seek out pregnant woman and offer them money in exchange for their babies and which subsequently propose the caretakers for the children while contracting notaries and agents to sign off on the legal documentation, is a special issue of great concern."

...

"According to the way that the process is presently developed, the economic circumstances of the adopting parents are more important than their moral and psychological qualities. This situation puts national adoptions at a serious disadvantage since prospective parents do not have the sufficient resources to compete with foreign

¹ "Adoption and the Rights of the Child in Guatemala", Guatemala 2000, by ILPEC (Latin American Institute for Education and Communication) Guatemala for Unicef. Attached in Annex 1.

² CHA Court judges; the Childhood Defender; *Mesa de Adopciones*; SBS; PGN; Rafael Ayau Foster Home; *Casa Alianza*; Peace Court judges; Family Court judges; social workers; *Aldeas Infantiles SOS*; Deputies Zury Rios and Rolando Morales; Unicef.

families who pay in dollars. Faced with the impossibility of legally adopting, Guatemalan families more frequently resort to the process of adoption by supposition of birth where they gain recognition as if they were the actual parents."

...

"In extrajudicial adoption processes, the participation of the Family Courts is purely formal since no ruling from the judge is put forth. Rather, the social worker presents the socio-economic study of the biological mother upon his or her responsibility and under oath, and summarizes the documentation presented by the adoptive parents."

...

"In order to resolve the adoption problems in Guatemala, it is urgent that the State subscribe to the Hague Convention, legislate a new law which regulates the transparency of the adoption process, and implement policies which support and strengthen the family and which provide access to appropriate sexual education for the population."

2. Holt Report³

In October 2006 Holt International Children's Services diagnosed the situation in Guatemala and made a proposal to build child welfare capacity in order to prevent child abandonment and support reform of Guatemala's adoption system.

Many of the persons interviewed by HCCH confirmed different parts of the Holt diagnosis. The following paragraphs represent some of those parts which were expressly addressed during the meetings:

a. *"In recent dialogue between Holt and officials from several Guatemalan governmental institutions, there was honest acknowledgment about the need for continued improvement of the child welfare system. Specific mention was made regarding the urgent need to reform current international adoption practices while, at the same time, developing alternative and preventive programs which assist vulnerable children and families."*

All the officials from Guatemalan governmental institutions met⁴ agreed on the need for continued improvement of the child welfare system, as they knew that current child welfare programming offered by the Government lacks capacity to deliver services to the extent needed. These conclusions⁵ were also shared by different NGOs.⁵

b. Holt identified in its report the following key components to successfully address the magnitude of child welfare issues:

- i. *Provide alternatives to child abandonment*
For systemic reform to succeed, alternatives to child abandonment must be in place, demonstrated as successful, and widely available to the populations that need them most.
- ii. *Collaboration, networking and skill building*
The development of an effective child welfare system requires culturally appropriate services, creation of long-term collaborative models and leveraging of local resources.
- iii. *Sustainability and Replication*
Programme planning must be designed not only to meet the specific needs of the Guatemalan population, but also be financially sustainable.

³ "Building Child Welfare Capacity in Guatemala", Holt International Children's Services, October 2006. Copy attached in Annex 2.

⁴ PGN; SBS; CHA courts.

⁵ *Movimiento Social por la Niñez*; Plan International, *Aldeas Infantiles SOS*, *Casa Alianza* and Unicef.

iv. *Reform of the adoption system*

Reform of the adoption system, both domestic and intercountry, must be strongly advocated, and based upon the guiding principles of the Hague Convention.

The Holt approach was shared by several actors met. Furthermore, several programmes / actions were already identified that should improve child welfare capacity and would seem to go in the same direction as proposed by Holt in its report.⁶

3. *Striking figures*

- In 2005 more than 99% of the children placed in intercountry adoption from Guatemala were direct relinquishments from birth mothers (Holt Report)⁷
- In 2005, 98% of adoptions were intercountry in nature and a mere 2% were domestic adoptions by Guatemalan citizens (Holt Report)⁸
- In 2005, there were 1,700 children declared abandoned. Only 3% of them have been adopted (*Mesa de Adopciones*)
- 90% of adopted children are less than one year old (PGN)
- From 1997 to 2005 there were 20,702 approved international adoptions (PGN – Presentation of Handbook, 1 March 2007)⁹
- In 2006 there were 4,803 international adoptions (PGN – Presentation of Handbook, 1 March 2007)¹⁰
- From 1 January 2007 until 28 February 2007 PGN received 766 international adoption applications (PGN – Presentation of Handbook, 1 March 2007)¹¹
- Private foster homes: there seem to be about 500 with a population of about 10,000 children. They are not bound to any kind of registration or supervision (SBS and Childhood Defender)

4. *Costs and charges of adoptions in Guatemala*

a. ILPEC Report

The ILPEC Report provided the following information related to adoption costs:

“Adoption Costs”

Valuable information was obtained from International Social Service (SSI) Geneva, with respect to those countries who have processed direct adoptions with Guatemala.

Information from the United States of America (source: Embassy officials)

It is estimated that the average cost of an adoption is between USD 23,000 to USD 25,000, which includes the following:

- Attorney USD 15,000.
- Adoption agency USD 4,000.
- DNA, petition, visa, travel, hotel, etc. USD 4,000.

Total USD 23,000.

⁶ SOSEP – community homes and *Creciendo Bien*; SBS – CAIs, *Ciudad de los Niños* Project, family preservation programmes, Foster Families Programme (Unicef is supporting several SBS programmes); *Aldeas Infantiles SOS* –foster homes programme and strengthening families programme to prevent abandonment; APIF – new child care model (under development); *Casa Alianza* – family reintegration programme; Plan International).

⁷ See, *supra*, note 3.

⁸ *Idem*.

⁹ See presentation in Annex 3.

¹⁰ *Idem*.

¹¹ *Idem*.

Information from Australia (source: Legal Counsel, International Civil Procedures Unit, Australia, June 1999).

Hogar Vida Nueva (Children's Home) USD 11,500 (1 adoption) USD 10,500 (2 adoptions)
This price covers all costs except for additional medication, delivery of documents, visas, passports and travel costs for delivery of the child. This institution recently informed that the price per "baby" would be USD 14,000.

Hogar Rafael Ayau (Children's Home) USD 10,000.

Information from Switzerland (source: Family Association for Intercountry Adoption, FFIA, Switzerland, June 1999)

Swiss reports indicate two differentiated sets of costs respectively totalling USD 7,932 and USD 12,500 which are distributed as follows:

- (1) Administration (includes salary of representative in Guatemala, telephone, fax, the child's passport, visas, etc. USD 1,688.
Child support (care of the child, clothes, medicines, vaccinations, medical check-ups, etc.) USD 4,577.
Legal costs and lawyers fees USD 1,667.
Total: USD 7,932.
- (2) Expenses incurred by the attorney / mandate USD 6,000.
Delivery costs USD 5,000.
Child support USD 300 for 6 months USD 1,800.
Total: USD 12,800.

Information from Luxembourg: (source: Central Authority, Family Ministry, Luxembourg, June 1999)

- Mother's medical exams, HIV analysis, birth delivery, translation and processing expenses, notary expenses, attorney expenses, court expenses, child's passport USD 10,500.
- Child's expenses during 4 months (USD 450 per month), food, shelter, physician, vaccinations USD 1,800.

Total: USD 12,300.

Travel is paid by the adopting parents.

Information from Spain (source: Labour and Social Affairs Ministry, General Secretariat of Social Affairs, July 1999)

- Support for the child's welfare and support prior to adoption (including medical certificate) USD 5,000.
- Lawyer USD 1,000.
- Notary USD 1,000.
- Processing of file, passport, and document legalization USD 1,000.

Total: USD 8,000.

In Spain there is an accreditation system for adoption agencies which was recently created, known as ECAIs (Collaborating Agencies for International Adoption). In 1997 and 1998, Guatemalan adoptions were performed through the General System of Requests for International Adoptions, directed by the Minor's Services of each Autonomous Community. Presently, there is only one adoption agency in Spain, ADOPTA, which is located in Barcelona and whose representative for Guatemala is Attorney Julio Roberto Palencia.

Information from Denmark (source: Ministry of Justice, Department of Private Law, Denmark, June 1999)

The International Child Support Adoption Center of the Danish Ministry of Justice works directly with Casa Guatemala. The reported costs are USD 10,000, which cover support and maintenance of the centers in the capital city and Rio Dulce, medical costs (including medicines and examinations for minors in the adoption process), administrative processes, transfers and lawyer fees.

b. Unicef survey (2007)

During the HCCH visit most of the interviewed actors commented on the operation of *jaladoras* and *cuidadoras* and their links with notaries. Allegations were also made about hidden payments requested by different official authorities that have some kind of responsibility in the adoption process. Unicef has recently compiled a chart utilizing unofficial data which has been provided by different actors (lawyers, *cuidadoras*, biological mothers, judges, foster homes, etc.) and showing the kinds of allegations put forward in many of the meetings with HCCH.¹²

B. Summary of major deficiencies identified in the operation of key actors of the child protection and adoption system (compiled according to opinions gathered during our meetings)

1. *Deficiencies with SBS*

- a. Lack of resources and national reach.
- b. Lack of foster homes to absorb the need.
- c. Lack of programs and resources to provide alternatives to women / families in need.
- d. The direct link with the Office of the First Lady is seen as a negative point.

2. *Deficiencies with the judicial system*

a. CHA Courts

- i. Work overload, procedures surrounding violation of family rights (*i.e.*, abandonment) take too long, unable to comply with the timeframes provided by law.
- ii. Lack of supervision of private homes where children at risk are sent.
- iii. Allegations that judges send children to private homes without due registration in the judicial file.
- iv. Lack of supervision of children once sent to the private home.
- v. Lack of supervision of children during reintegration with their families of origin.
- vi. Lack of resources to implement changes that should improve the operation of the system.

b. Family Courts

- i. Intervention by social workers: the real situations of the child and the biological family are not investigated, allegations of corruption linked to production of their reports.
- ii. Judicial adoption procedures take too long.

c. Criminal Courts

- i. Baby-selling is not considered an offence: *jaladoras*, *cuidadoras*, notaries, and parents who relinquish their children for money cannot be prosecuted.
- ii. Difficulties regarding access to justice for vulnerable population.

3. *Deficiencies with PGN*

- a. Lack of investigation of the real situation of the child and biological family (subsidiarity principle is not followed).
- b. Lack of counselling for biological parents about the consequences of adoption.
- c. Lack of resources to carry out appropriate investigations on the child's origins and situation of the biological family.

¹² Please find the chart attached in Annex 10.

- d. Omission to request adoptability declaration by CHA Courts in direct relinquishments cases.
- e. Allegations of corruption made about PGN officers requesting hidden payments to process adoption files.

4. *Deficiencies with private foster homes*

- a. Lack of registration and supervision.
- b. Some foster homes are in bad condition and children that have been abused by personnel.
- c. Allegations that many of them are hidden and are funded by baby-selling networks.
- d. Allegations that foster homes prioritize international prospective adopters over national prospective adopters.

5. *Deficiencies with civil registries*

Corruption allegations made about the expenditure of birth certificates. Allegations were also made that it is rather easy to forge birth certificates or to adopt by supposition of birth.

CHAPTER II STATUS OF THE HAGUE CONVENTION

During the final stages of the preparation of this Report, it was announced on 22 May 2007 that the Guatemalan Congress approved the Convention through Decree 31/2007.¹³ The same act provides that the Convention would entry into force internally in Guatemala on 31 December 2007.

However, the following developments are reported because of their relevance to the situation.

A. Outline of the constitutional problem

In 2002, the Congress of Guatemala approved the Hague Convention through Decree 50-2002. On 26 November 2002 the Ambassador of Guatemala deposited the instrument of accession with the depositary, the Ministry of Foreign Affairs of the Netherlands.

On 13 August 2003, the Constitutional Court of Guatemala declared the Decree 50-2002 to be unconstitutional "*en forma total*". The unconstitutionality was based in the fact that, according to the Constitutional Court, Guatemala could not accede to an international treaty because the possibility of "accession" was not provided for in its Constitution. The main basis for this argument were the reservations to Arts. 11 and 12 that Guatemala had introduced to the Vienna Convention on the Law of the Treaties.

However, the Hague Convention depositary, by note of 3 September 2003, confirmed that the original instrument of accession had been "*accepted after it was found to be in due and proper form*". Furthermore, Canada, Germany, the Netherlands, Spain and the United Kingdom raised an objection to the accession of Guatemala, in accordance with Article 44 (3) of the Hague Convention, and that "*(t)herefore, in accordance with Article 46, the Convention entered into force and shall remain valid in the relations between Guatemala and the other Contracting States with effect as of 1 March 2003*".

B. Developments before the mission started

Further to the visit of the Secretary General of the Hague Conference to Guatemala in June 2005¹⁴, which was reported at the Special Commission on General Affairs and Policy of 2006, and the Conclusions and Recommendations in relation to Guatemala made by the Special Commission of 2005 to review the operation of the Hague Convention,¹⁵ the following events have taken place in Guatemala to change the situation and make it more favourable to the internal confirmation of the Convention:

1. Decisions taken by the Constitutional Court

- a. 16 August 2006: The Constitutional Court rendered an "*auto-interlocutorio*" (judgment) stating that its decision of 13 August 2003, which declared the accession to the Convention unconstitutional, is an act of domestic law which cannot be the basis for not fulfilling an international treaty. Therefore, it reaffirmed implicitly that the Convention was in force at the international level. There have been different understandings of this decision. On the one hand, some believed that the Convention is, and has always been, in force between Guatemala and those States which had not objected to Guatemala's accession, as of 1 March 2003. Others took the view that the decision clarified the situation but further steps were required to confirm the Convention is part of the internal legal order.

¹³ See copy in Annex 34.

¹⁴ See report of the visit in Annex 17. This document clearly explained that Guatemala was bound by the Convention under international law, though the Convention was not applied internally due to the famous decision taken by the Constitutional Court, on 13 August 2003, which declared Decree 50-2002 to be "unconstitutional *en forma total*", decree by which the Guatemalan Congress had given its approval to the Convention.

¹⁵ See copy in Annex 18.

- b. February 2007: The Constitutional Court responded to the consultation made by the Executive Branch establishing that the Executive was indeed entitled to withdraw the reservations made to the Vienna Convention on the Law of the Treaties.

2. *Announcements by the United States of America*

- a. In September 2006 the United States of America announced that it would ratify the Hague Convention in 2007.
- b. Once the Convention enters into force in the United States, new adoption applications to Guatemala would only be accepted according to the Convention procedure.

C. **New developments during the course of the mission**

1. *Handbook of Good Practices*

On 1 March 2007, the Government of Guatemala made public the *Handbook of Good Practices* with the objective of preparing official bodies for the implementation of the Hague Convention.

2. *"Auto Acordado" withdrawing the reservations to the Vienna Convention*

The Executive Branch issued the *"Auto Acordado"* withdrawing the reservations to the Vienna Convention (published in the Guatemalan official journal on 2 March 2007). The instrument was deposited with the depositary in New York on 15 March 2007.

3. *Meetings in Congress*

Meetings were held in Congress with: the President of the Commission of Human Rights, Deputy Edgar Rodriguez (*Unidad Nacional de la Esperanza* (UNE) party); the President of the Commission of Family and Children, Deputy Rolando Morales (independent); the President of the Commission of Foreign Relations, Deputy Zury Rios (*Frente Republicano Guatemalteco* (FRG) party) and with the assistant to the President of the Women's Commission (Deputy Nineth Montenegro (*Independientes Encuentro por Guatemala* (EG) party) and her own assistant Licda. Vilma de Castellanos.

During the meetings with congressmen, there was found to be a general perception that passing a domestic law on adoption would produce significant improvement in the adoption system and that the Convention's approval could wait for a second stage in the process.

Under these circumstances, the Permanent Bureau of the Hague Conference prepared and circulated a statement¹⁶ on the importance of confirming the 1993 Hague Intercountry Adoption Convention in Guatemala and explained that a national law on its own would not provide enough protection for children.

Congressmen were aware that legal experts were divided in their opinions that the Convention shall be approved by Congress or by the President (there was even a small minority who considered that the Convention was already in force – and had always been despite the famous judgment rendered by the Constitutional Court). Nevertheless, a large majority considered that it was more secure (from a legal and political view) and there would be fewer chances to be challenged if the Convention was approved by Congress.

Deputy Zury Rios considered that in order to overcome the present impasse, the Executive should address a note to Congress stating i) that the Vienna reservations were lifted, ii) that the Convention was in force at the international level – so re-accession

¹⁶ See copy in Annex 19.

would not be necessary, and iii) that they suggested Congress approve the Convention so as to confirm its validity at the internal level. Deputy Morales confirmed that he would support the Convention's approval in Congress and both Deputies (Rios and Morales) were confident that if they received the above-mentioned note they would have the means to obtain speedy approval of the Convention in Congress.

4. *Meeting with the President's advisor Lic. Jorge Arroyave*

After the meeting with the congressmen, a meeting was held with Lic. Jorge Arroyave. Conversation focused on the issue of the Convention's approval. Lic. Arroyave was fully aware of the need and urgency and considered that it would be more suitable from a legal and political perspective if Congress were to complete the approval. The suggestion by Ms Zury Rios to overcome the impasse was commented on, and he was sympathetic with the idea. Although prepared to recommend it, Lic. Arroyave would need a note beforehand from the MFA confirming that the instrument lifting the reservations had been deposited.¹⁷

Lic. Arroyave was aware that time was of the essence and that if such a note was not sent in April, there would not be much chance for Congress approval (Congress was to close sessions in late May and once resumed national elections were to be held, which actors felt would virtually completely occupy Congress until early 2008).

D. Recent approval of the Convention by the Guatemalan Congress

On 18 April 2007, the President's Office sent to Congress the note suggested by Deputy Zury Rios and discussed with Lic. Jorge Arroyave.

Finally, as reported, on 22 May 2007 the Guatemalan Congress approved the Convention through Decree 31/2007,¹⁸ and stipulated that it would enter into force internally in Guatemala on 31 December 2007.

¹⁷ The document lifting the reservations was deposited on 15 March 2007.

¹⁸ See copy in Annex 34.

CHAPTER III LEGISLATIVE MATTERS

A. Law Applicable to Child Protection and Adoption

Guatemala is a party to the *United Nations Convention on the Rights of the Child* (CRC) and the 1993 Hague Convention. Furthermore, it has passed specific legislation to implement CRC principles (PINA law). However, this legislation has not yet been implemented for the adoption procedure, which is still governed by the old domestic system based on the following legislation: Article 54 of the Political Constitution, the Civil Code, the Family Court Law, Commercial and Civil Proceedings Code and the Regulatory Law of Notarial Procedures in Matters of Voluntary Jurisdiction.

1. *Domestic legislation applicable to adoption and analysis provided in the ILPEC Report*

The following paragraphs are taken from the ILPEC Report, pages 10, 11 and 12:

“National Laws

Due to the highly dispersed character of the norms governing adoption in Guatemala and the lack of analysis behind the existing legislation on this issue, there are many gaps and contradictions in the system.

This shows that despite all of the trappings of legality, the process does not guarantee children the integral protection required. (Adoption Practices, ILPEC, p. 157).

The legal basis for adoption in Guatemala is contemplated in Article 54 of the Political Constitution, the Civil Code, the Family Court Law, Commercial and Civil Proceedings Code and the Regulatory Law of Notarial Procedures in Matters of Voluntary Jurisdiction.

Constitution of the Republic: Article 54.

This Article states that: “The State recognizes and protects adoption. The adopted child acquires the condition of the adopter’s child. The protection of orphans and abandoned children is declared to be of national interest.”

Civil Code

In Articles 228-251, the Civil Code summarily regulates the concept of adoption, defining it as “a judicial act of social assistance by which the adopter takes a child born to another as his or her own,” allowing the adoption of a person legally of age, so long as he gives his express consent, even when the adoption actually existed before he or she came of age. It also contemplates the effects of adoption, from the perspective of a limited, incomplete, adoption; in this way, for example, it establishes that the adopted person and his / her natural family preserve their rights to reciprocal succession and regulates the principle that the adopted party not be an heir of the adopter; it also establishes that the adopted individual not yet legally of age at the time of the adopter’s death, shall return to his / her natural parents or tutor, or to the social welfare institution from which he / she initially came.

The Civil Code also contains some procedural dispositions, such as certifying the conditions of domicile of the adopter before a Judge of the Civil Court, accompanied by the child’s birth certificate and a proposal for testimony concerning the good character and overall suitability of the adopter; consent of the child’s parents or other caretaker who is exercising tutelage, who along with the adopter should be present during the granting of a public deed which is to be registered in the Civil Registry.

The Civil Code also regulates the possible causes for termination of the adoption, through consent or revocation, as well as the principles by which this can originate. Given the dispositions described above, this code is insufficient and does not respond to the existent social reality where 98% are full, international adoptions, being processed through a Notary. Moreover, the process violates the spirit of the Convention on the Rights of the Child (CRC) and does not respond to internationally accepted principles as specified by the Hague Convention which remains unratified [sic] by Guatemala.

The articles in this Code which refer to adoption contain the following main deficiencies:

- They do not establish the principle of the “subsidiary character” of international adoptions relative to national adoptions.
- They do not establish the guiding principle of acting in the “best interest” of the child.
- They do not demand “consent” from the child who is to be adopted when he / she is of sufficient age to offer it (12 years of age is generally the established age according to various pronouncements), nor do they recognize the need for the child to be “heard” when he / she possesses sufficient capacity of judgment.
- They do not reference the “suitability” of adopters in direct relation to the child’s needs.
- They do not sufficiently regulate control over the “child’s origin,” for example, they do not contemplate an authority or state entity charged with such control prior to initiating the judicial proceedings, nor is there any control over the orphanages or child refuge centers.
- They fail to insist that all receiving countries have laws that guarantee the same rights and obligations for minors as recognized in their country of origin.
- Since adoptions are not always “full” adoptions, the links with the biological family are not always completely severed. For example, a revocation of adoption can take place, as well as certain caveats such as an absence of inheritance rights on behalf of some relatives whose kinship ties result from the adoption. The Civil Code contemplates that the biological family can preserve certain rights over a child offered up for adoption.
- The dispositions of the Civil Code do not establish the necessity for “follow-up” of a child who is adopted by a foreign family residing abroad, thereby running the risk that child adoption can be utilized by adoptive parents for exploitative purposes (prostitution, trafficking of organs, etc.)

Regulatory Law of Notary Proceedings in Matters of Voluntary Jurisdiction, 1977. (Arts 28-33)

In these scant few articles, the cited law regulates the procedures to be followed before a Notary which, as pointed out in this investigation, constitute the procedures followed in 98% of adoptions. These articles establish the following:

- Article 28 specifies that adoptions which are formalized before a Public Notary do not require prior judicial approval.

When no public control exists with respect to the origin of the children, and when no judicial control over the adoption procedure itself exists, what is left is a series of “legal” adoptions in form, but “illegal” in their content. The origin of the children is frequently unknown, uncontrolled and no real barriers exist to impede those attorneys practicing in the area of adoptions from turning the process into a bona fide trafficking of children. Given that the fees that lawyers can demand from the adopters are unlimited, as are the “methods, modes or forms” that can be used to “convince” mothers with large families and scarce economic resources to “consent” to methods of “negotiation,” this ultimately leads towards various forms of coercion.

- Articles 29 through 33 refer to the specific procedures which consist of the following:
 - Application for adoption before the Notary official, including presentation of the birth certificate and the proposal of two honourable persons who can attest to the adopter's overall suitability.
 - A favourable report from a social worker affiliated with the competent Family Court.
 - Preparation of a Notarial inventory in the event that the child owns any assets.
 - A favourable report from the Public Ministry, typically from the Attorney General's Office.
 - Joint appearance before the Notary of the adopter and the child's biological parents, or the persons or institution exercising tutelage.
 - Presentation of testimony which attests to the suitability of the adopters and inscription in the Public Register.

As can be clearly appreciated, these procedures do not offer any guarantee of protection of the child's interests. The child is not granted any participation either to give his or her consent or even to be heard.

The parental consent is never presented before a judge, such that an unscrupulous Notary can elude consent by falsifying a signature or obtaining it through illegal means (coercion, corruption, etc.). In addition, the adopter's suitability is based solely upon the testimony of two people who might have been paid and / or may not even know the adopter (no control over this matter exists). Finally, there is a complete lack of follow-up with respect to cases of international adoption.

Family Court Law and the Civil and Commercial Proceedings Code

The Family Courts Law refers to that which is set forth in Book I, Title II, Chapter VI, (arts 228-251) of the Civil Code, concerning the procedures to be followed in cases of judicial adoption. For its part, the Civil and Commercial Proceedings Code, in article 401, specifies those acts that should be processed through voluntary jurisdiction, referring to cases which "by legal disposition or at the request of the interested parties, require the judge's intervention, without any matter of contention being promoted by the involved parties." It is for this reason that the lawyers process judicial adoptions through this procedure. If any opposition should emerge during the course of the procedure, it would then revert to the status of a contentious issue."

2. *New legislation adopted by Guatemala which has not yet been duly incorporated in the adoption system*
 - a. CRC (ratified by Guatemala in 1990)
 - b. Hague Convention (entry into force: 1 March 2003)¹⁹
 - c. PINA (Decree 27/2003). This law implements the CRC and provides for the integral protection of children. Articles 22 and 23 refer to adoption.²⁰

¹⁹ Current status informed above in Chapter II.

²⁰ Art. 22. *Adoption. The State recognises the institution of adoption of children and adolescents, and should guarantee that in any adoption the best interests of the child, and any treaty, convention, covenants and other international instruments on this subject that are accepted and ratified by Guatemala, should be given special consideration.*

Art. 23. *Admissibility of adoption. Only competent authorities shall determine according to the law, applicable procedures and any pertinent and reliable information that the adoption is admissible.*

3. *Penalties for irregular adoptions*

- a. Penal Code Article 194 (modified after CRC incorporation) punishes trafficking in persons.
- b. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (in force in Guatemala since 8 June 2002)
- c. General Instructions for the criminal persecution of illicit acts committed in irregular adoptions²¹ (*"Instrucciones Generales de Política de Persecución Penal Aprobadas por el Fiscal General y Jefe del Ministerio Público"*, Lic. Juan Luis Florido Solís. General Instruction No 04-2006, dated September 27, 2006). This instruction clearly interprets that Criminal Code Article 194, CRC Article 21, and its Optional Protocol on Sale of Children Arts. 1-4, provide the legal basis to prosecute any of the actors involved in irregular adoptions (biological parents, *cuidadoras*, *jaladoras* and notaries).

Actors met during the HCCH mission agreed that the Criminal Code does not contain the sale of children as a criminal offence. Acts committed therefore by perpetrators of irregular adoptions might not be prosecuted. Some actors made reference to the Attorney General's instructions as a possible means for prosecution, but considered that such instructions have not been implemented so far.

4. *Handbook of Good Practices* (*"Manual de Buenas Prácticas para la Adopción Nacional e Internacional"*)²²

The Handbook was presented in public on 1 March 2007 during a ceremony at the President's palace. The ceremony was a very important event at which the Vice-President, the First Lady, the Minister of Foreign Affairs, the President of the Supreme Court and the Attorney General²³ presented the Handbook to the public, the press, diplomats and other national authorities (HCCH also attended this ceremony).

All the authorities that addressed the audience made reference to the Hague Convention and confirmed that their goal was to have it promptly confirmed internally. They considered the Handbook to be a first step towards the implementation of the Hague Convention.

The Handbook was approved by the following government institutions involved in the adoption process:

- Attorney General's Office (PGN)
- Secretary for Social Welfare
- Judiciary
- Minister of Foreign Affairs
- Human Rights Prosecutor's Office
- Migrations Office

The Handbook is based on the following legislation:

- National Constitution: Articles 1, 2, 3 and 51
- Judicial Organisation Act: Articles 9, 10 and 11
- PINA: Articles 18, 112, 113 and 116
- CRC: Articles 5, 9, 20 and 21
- United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally (3 December 1986): Articles 10 and 13
- United Nations Declaration on Children Rights (1959): Principle 6
- *Acuerdo Gubernativo* 18-2006: Article 5k)

²¹ See copy in Annex 21.

²² See copy as Annex 22.

²³ See presentation given by PGN at the ceremony in Annex 3.

- Procedural Code: Article 191
- Civil Code: Articles 240 and 243
- Decree 54-77: Articles 29 and 32

There are discussions about the enforceability of the Handbook as it has not been passed by law. The Government expects that each of the competent institutions would gradually put in practice the Handbook. Apparently the Executive is ready to implement some of the provisions in the short term through an *Auto Acordado* (e.g., registration of foster homes).

The Government of Guatemala seems to have assigned Q 12 million for the implementation of the Handbook (4 million to SBS, 4 million to PGN and 4 million to the judiciary).

B. Draft laws and their current status

The Government of Guatemala has identified the need for new legislation to improve the protection of children and the adoption system. Draft laws on the following subjects and referring to protection of children and adoption are currently being considered in Congress: 1. domestic adoption legislation; 2. foster homes; 3. modification of the Criminal Code, and 4. approval of the Hague Convention.

1. Domestic adoption legislation

a. Draft law 3217²⁴

This draft has been promoted by the *Mesa de Adopciones* co-ordinated by the Office of the First Lady. It has already passed the first two readings in Congress. It deals with national and international adoptions. It is the draft that seems to have received the highest number of acceptances. Deputies Morales and Rios considered that an agreement was about to be reached for its approval. Deputy Morales explained that this draft had received several modifications in order to be adjusted to the Hague Convention. Deputies Morales and Rios considered this draft a priority and were planning to pass it before the end of the current ordinary sessions (end of May).

b. Draft law to modify the Civil Code and the Procedural Code

This draft law has been promoted by a group of congressmen (among others, Deputy Edgar Rodriguez). It has passed the first two readings in Congress. According to this draft the Supreme Court would be designated as Central Authority. However, PGN informed that the same Supreme Court had opined that it was not in a position to assume such a role.

The draft does not seem to have received much acceptance. It is reported not to follow Hague Convention principles.

c. Draft law 2784

This draft law was considered helpful by Unicef and the Childhood Defender. However, it was left aside and replaced by the draft law modifying the Civil and Procedural Codes mentioned above in b.

d. New draft law presented by the Family Law Institute (Notaries)²⁵

This draft had not been presented to Congress by the time of the HCCH visit. No congressmen met made reference to this proposal.

²⁴See copy in Annex 13.

²⁵ See copy in Annex 14.

2. *Draft law on foster homes*²⁶

This draft was mentioned by various actors met during the HCCH visit as a helpful draft law. Actors confirmed the urgent need to regulate foster homes, and this draft law seemed to enjoy a high level of agreement. It had passed the second reading in Congress.

3. *Draft law to modify the Criminal Code*

Although it was not possible to gather much information about this draft law, it would appear to include express provisions to sanction irregular conduct related to the adoption process (e.g., operation of *jaladoras*, *cuidadoras* and the sale of children).

4. *Draft law to approve the Hague Convention*²⁷

Status informed above under Chapter II.

²⁶ See copy in Annex 15.

²⁷ See copy in Annex 16.

CHAPTER IV ACTORS IN CHILD PROTECTION AND ADOPTION SYSTEM: ROLES AND PERSPECTIVES

A. Secretariat for Social Welfare (*Secretaría de Bienestar Social – SBS*)

SBS is an organ that is linked to the Office of the First Lady and is in charge of family preservation programmes, the foster homes public system and the adoption system. Actors agree that it has a very small budget considering the wide and important range of tasks it should accomplish. Current budget is about Q 50 million, while the whole foster families and adoption programme has been assigned a total budget of Q 900,000 in 2007. It should be noted that the work of SBS would be exponentially increased with the envisaged implementation of the Handbook of Good Practices.

1. *Family Preservation Programmes*

a. Day-care Centres (*Centros de Atención Integral - CAIs*)

These centres take care of children during the day while parents work. Children arrive at 8.00 a.m. and leave at 5.00–6.00 p.m. They receive their meals and education (provided by licensed teachers).

There are currently 35 CAIs all over the country; 12 in Guatemala City. There are some Departments such as Petén and Sacatepéquez where there are no CAIs.

SBS does not have delegations outside Guatemala City (only CAIs). When needed, therefore, social workers must travel from Guatemala City to other Departments of the country.

We visited two CAIs during our visit, one in Guatemala City and the other in Zacapa.²⁸ Both institutions were well run. Actors agreed on the need for many more CAIs as they have proven to be very helpful for families in need.

b. Foster Families Programme

This is a new programme (initiated 6 months ago) which has been promoted, and is being developed in partnership with Unicef.

25 Guatemalan families have already been trained and are prepared to receive a child in foster care. HCCH was informed that the response from the Guatemalan population had largely exceeded expectations.

4 March 2007 was the actual starting day for the programme, as the first 4 children were taken from a public foster home and placed with foster families.

The SBS is to pay Q 500 a month to each foster family for their services. Unicef provided the training of the SBS team (some of them visited Colombia to see an operative model, there being already 22,000 foster families in Colombia).

Within SBS this new programme was enthusiastically perceived as it was also by the Judge in charge of the CHA Court N°3 (the pilot court to work with the foster families' programme).

With the Unicef assistance, SBS has already drafted a Handbook for operation of the Foster Families Programme,²⁹ as well as a Handbook for the training of foster families.³⁰

²⁸ See the report of such visits in Annex 11.

²⁹ See copy of the draft handbook in Annex 24.

³⁰ See copy of the draft handbook in Annex 25.

c. Building Child Welfare Capacity

With the Unicef assistance, SBS is currently developing a broad programme which includes:

- Family preservation services for the biological family: direct services to strengthen the biological family so as to ensure that the child can stay with his biological family,
- Extended family services: direct services to the extended family (uncles, grandparents and elder brothers),
- Family preservation services to extra-vulnerable populations such as street children, children with disabilities and children from women working in the sex trade,
- Foster families programme: for children who cannot be cared for by their biological or extended families,
- Adoption services,
- Foster homes programme: to improve the quality of services, provide standard implementation and supervision criteria, and register private foster homes.

2. *Foster Homes*

SBS has 7 foster homes in the whole country. It is recognized that SBS has had problems in maintaining these buildings in good condition and that the one specialist home for small children had to close due to insufficient resources (today SBS has no facilities to foster small children).

HCCH was informed that there approximately 400 children are currently institutionalised. A considerable proportion of these children have special needs, while some of them do not speak Spanish but one of the indigenous languages (there are 22 indigenous languages recognized in Guatemala, as well as several dialects).

SBS is currently initiating the construction of the so-called "Children's City". Q 30 million have been assigned to build it (solely public funds, no international co-operation). HCCH was informed that this is a modern project including 4 different modules, one of which would be the public foster home for small children (0-6 years) "*Casa Alegria*". Plans are to complete at least the two first modules (including "*Casa Alegria*") before the end of the current year.

Private foster homes

It is estimated that there are about 500 private foster homes, sheltering about 10,000 children. These private foster homes are nowadays not subject to any kind of supervision.

According to the Handbook of Good Practices, SBS would be in charge of the supervision of all private and public foster homes. SBS is preparing to assume this task and is in the process of developing a regulation to be applied by a supervision unit that would be put in place for this task.

Unicef has agreed to support the implementation of this supervision unit (would cover the cost of 3 officers).

3. *Adoption Programme*

SBS currently operates the national adoption system (judicial adoptions), qualifying prospective adoptive families and matching them with children.

The service is free of charge. None of the adoptions currently processed by SBS are international adoptions (all go through the private system run by notaries). HCCH was informed that the possibility of charging for the processing of foreign applications is under consideration.

SBS only places in adoption children sheltered in public foster homes. However, as nowadays there is no public foster home to shelter small children, there are currently no small children available to place in adoption.

SBS has found it very difficult to place older children and children with disabilities in adoption. Prospective adopters usually look for small children or babies.

4. *Good Practice Handbook*

SBS has started the implementation procedure and provided HCCH with a preliminary report on SBS competences and projected actions.³¹

According to the Handbook, SBS would be responsible for

- accreditation of adoption agencies
- registering and supervising foster homes (public and private)
- qualifying prospective adoptive parents
- matching children with adoptive families (would use the same procedure used until now for national adoptions).

SBS is currently developing a Handbook of proceedings / criteria for accreditation of adoption agencies and another for registering and supervising foster homes. Unicef has been supporting this effort and had assigned an expert to help in developing these Handbooks.

HCCH was informed that SBS should receive Q 4 million from the Government of Guatemala during the current year to assist with the Handbook's implementation.

HCCH was provided with an estimation of assistance needs that if accorded should allow SBS to duly perform its new functions.³²

B. Secretariat for Social Services of the Office of the First Lady (*Secretaría de Obras Sociales de la Esposa del Presidente – SOSEP*)

SOSEP is considered to be a much stronger institution than SBS and to have the national penetration that SBS lacks. SOSEP's budget is Q 110 million (double that of SBS). HCCH was informed that plans exist for the unification of SOSEP with SBS (both organs are linked to the Office of the First Lady).

SOSEP implements several projects focused on the protection of families and children. Two of them seem to have good national penetration and successful results: i) *Creciendo Bien* and ii) Community Homes.

1. *Creciendo Bien*³³

Aim

To improve the nutritional situation of children under 5 years old and women of child-bearing age in those municipalities identified as vulnerable (50% of children under 5 years old in Guatemala suffer from chronic malnutrition).

General Objective

To develop skills in women to prevent malnutrition in children under 5 years old by improving feeding practices in family and community.

³¹ See copy of their presentation in Annex 32.

³² See copy in Annex 26.

³³ See complete information about the programme in Annex 29.

Specific Objectives

- Promote conduct in favour of healthy nutrition in women and communities participating in *Creciendo Bien*.
- Promote self-sustainable practices in the community to secure proceedings that improve the nutritional situation of children under 5 years old and women of child-bearing.
- Articulate efforts of inter-institutional coordination to prevent malnutrition, nutrition supervision and good feeding practices at the family and community level.

There are currently 3,000 communities covered by this programme. The cost is Q 1,500 per month per community.

Creciendo Bien is seen to break with the ordinary welfare model and to empower people who are trained to think and develop by themselves. The programme has a very wide scope although it is focused on malnutrition (children are measured and weighed periodically).

SOSEP officers informed HCCH that there are testimonies from people involved in the programme who explain how much their lives have changed for good.

HCCH was informed that *Creciendo Bien* needs to be linked with productive models so people can apply their acquired skills and develop sustainable projects. Joint work with the Minister of Agriculture is being explored to market the products produced in the communities (tomatoes, chicken, jelly, shampoo, eggs, rabbits, etc.).

SOSEP seems to be very open to work in partnerships, already working with the Rotary Club, the American Development Agency, Fundazucar, Bayer, churches, and others.

Creciendo Bien Zacapa³⁴

Creciendo Bien is a new project in Zacapa (8 months). It has already been implemented in 4 municipalities and expansion is planned to 5 other municipalities during the current year.

Each "technician" takes care of 7 communities (total of approximately 500 women in 7 communities). There are currently 2,646 women in the programme and 2,038 children (4 municipalities). This figure is planned to be tripled by the end of May.

The women taking part in the programme are mostly single mothers and the children of many of them are in community homes.

Creciendo Bien Sololá³⁵

Creciendo Bien was initiated in Sololá in 2004 (first pilot programme in the country) and has already been implemented in 20 communities. 5,086 women are covered by *Creciendo Bien* in Sololá today. Expansion is planned to another 59 communities during the current year.

Work is based on a "technician" who is chosen from the same village and trained by SOSEP to lead small communities of about 10 people each. Each "technician" is in charge of 6 communities.

HCCH was informed that one of the first obstacles to be overcome is the authorization by husbands for their wives to participate in the programme.

³⁴ Zacapa is a city in the Eastern region of Guatemala. It has a population of about 70,000 inhabitants.

³⁵ Sololá is a Department in the Western region of Guatemala. It is supposed to be the third poorest Department in Guatemala and one with the highest malnutrition rates. 92% of the population is indigenous. There are 4 mother tongues; Spanish and 3 Mayan languages. The SOSEP delegation has 70 employees to cover 19 municipalities, which represent 350 communities and about 300,000 people.

2. *Community homes* (Hogares comunitarios)

Community homes represent are a special kind of child-care that replaces de CAIs. Children arrive at 7.00 a.m. and leave at 6.00 p.m.

They are based on the figure of a "mother childminder" (*madre cuidadora*) chosen by the community and trained by SOSEP. The *madre cuidadora* takes care of about 10-12 children (0-6 years old). She receives Q 500 a month and is provided with food and education material, as well as with a kindergarten teacher. The mother childminder follows a diet for the children that has been developed by a nutritionist.

Zacapa Community Homes

In Zacapa there are currently 54 community homes attended by 630 children.

HCCH was informed that parents of children attending community homes are composed approximately of 80% single mothers and 10% single fathers.

Community homes are supervised by social workers twice a month. Social workers train mother childminders and periodically weigh and measure each child.

Parents that assist in the community homes are provided by social workers with parental training twice a month (among other topics addressed: moral values, solidarity, women's rights, etc.).

Parents that send their children to the community homes are requested to do some kind of work. 80% of them are currently working. They receive on average Q 250-300 per month.

50% of children showed signs of malnutrition. The majority only receive the meals at the community home.

There is a need of more social workers to cover the 10 municipalities under the Zacapa jurisdiction, and it is estimated that 2 or 3 community homes should be added to each municipality in order to meet the needs.

Sololá Community Homes

There are 48 community homes caring for 575 children. Creation of another 20 community homes during the current year is planned.

C. Office of the Attorney General (*Procuraduría General de la Nación* – PGN)

PGN authorities are aware that mothers are being paid to relinquish their children and that there is organised crime behind international adoptions.

PGN has developed a long list of requirements to be considered for the presentation of an adoption file with the aim of making the procedure more secure and transparent.³⁶ However, it was recognized that such requirements deal with documentation that should be included in the adoption file, and that PGN does not currently investigate in the field the actual situation of the child and the biological family.

Deficiencies in the adoption system identified by PGN³⁷

1. Lack of registration, control and supervision of private foster homes.

³⁶ See copy in Annex 20.

³⁷ Included in the PGN presentation. Copy in Annex 3.

2. Need to provide due counselling to biological parents on adoption consequences and effects.
3. Need to investigate and determine the actual origin of the child.
4. Counselling to prospective adoptive parents.
5. Verification of compatibility between the child and prospective adoptive parents.
6. Post-adoption follow-up in the receiving State

Good Practice Handbook

PGN considers that in order to implement the Handbook and the Hague Convention a special multidisciplinary team is needed which they lack today (psychologists, social workers, and attorneys). The need for training and resources (computers, vehicles, etc.) was recognized, and HCCH was provided with an estimation of the assistance required by PGN in order to fulfill designated responsibilities.³⁸

It was noted during our discussions that the Government of Guatemala would provide Q 12 million this year to implement the Handbook (apparently PGN would receive Q 4 million).

The Attorney General considered that there was much confusion in the discussions surrounding the implementation of the Hague Convention and the impact on the Guatemalan adoption system after implementation of the Convention by the United States of America. He therefore considered that the Hague Conference on Private International Law should have an important role to play in explaining these issues.

D. Judicial System

In all the discussions with judges, the operation of *jaladoras* and *cuidadoras* was recognized. It was also recognized that in some cases mothers were being deceived by *jaladoras* to relinquish their children while in many others they were relinquishing them for money. Furthermore, many judges related real cases of baby-selling, of which they had taken note.

1. CHA Courts

There are 11 CHA Courts of First Instance in the country, and one unique Court of Appeals for the whole country.

Magistrates consider that current irregularities in international adoptions imply human rights violations (CRC violations).

a. Foster homes

CHA Courts are sending small children to private foster homes as there are no public homes available.

HCCH was informed of a list of approximately 260 private foster homes which was circulated to all CHA Courts for their referral.³⁹

Concern was expressed about the fact that the majority of private homes only receive very young children, who are those who can be most easily placed in adoption. Allegations were made that some of the private foster homes might be part of the

³⁸ See copy in Annex 27.

³⁹ See copy of the list provided by the Zacapa CHA Court attached in Annex 8.

international adoption business. Everyone agreed, however, that in general terms private foster homes were much better equipped than public homes.

Magistrates from the Court of Appeal explained that in 2004 they supervised 49 private foster homes and detected severe irregularities.⁴⁰ This experience led them to start working on a draft law to regulate foster homes.⁴¹ Supervision had to be stopped because of the heavy workload and lack of resources. However, judges expressed that they would like to continue with supervision as they consider it to be their responsibility to know where they are sending the children for whom they have a mandate to protect. Private foster homes are currently not subject to any kind of supervision or State control.

b. Weaknesses in the judicial system

- Lack of resources: Judges agreed that 11 courts were insufficient to provide service to 13 million inhabitants.
- Delays in procedures: It was recognized that due to the overload of work courts cannot comply with the terms foreseen in the law. Hearings that should take place in 10 days are taking between 2 to 5 months, while procedures to declare violation of family rights (*e.g.*, abandonment) can take one or two years.
- Problems with the implementation of PINA: Judges agree that PINA has not been duly implemented yet (*e.g.*, the Children's Commission has not yet been able to operate). There seems to be some confusion with the effects of the declaration of violation of family rights and whether such declaration implies or not the suspension of *patria potestad* (different criteria were identified between the CHA Courts in Guatemala City and the one in Zacapa). There also seems to be lack of supervision of children that have been sent to private foster homes (*e.g.*, CHA Courts do not seem to be notified about the adoption of children placed in foster homes; there are no registries), although PINA Article 124 expressly mandates the production of reports on the situation of children every two months.

c. Development plans

The CHA Court of Appeals has developed a plan to improve service which was presented to the Supreme Court in 2006. HCCH was informed that this plan has been accepted by the Supreme Court, though it has not been implemented due to lack of resources. Magistrates explained that the Court of Appeals is currently looking for means of funding in order to implement the necessary action.

The following are some of the measures that have been proposed to improve the operation of CHA Courts:

- Duplicate the number of courts by nominating another judge for each existent court.
- Oral Proceedings (HCCH was informed that the European Community and the Spanish Co-operation Agency (AECI) were assisting with this project). There is already a current pilot court in Quetzaltenango (only criminal proceedings).
- Mediation (HCCH was informed that the Dutch Embassy supported this project approximately six years ago, though it could not be duly implemented then).

⁴⁰ HCCH was informed that a case in Zacapa had recently been reported of children who have been abused by personnel of the same private foster home.

⁴¹ See copy of the project in Annex 15.

Four years ago, RACs (mediation centres) were created. These are under the supervision of the Supreme Court and are available in the different regions of the country. They have their own regulation of proceedings; they are accessed voluntarily by the parties and can also be referred to by the courts. This is a new procedure which is said to have shown positive results. However, HCCH was informed that this procedure still needs to be promoted and its use encouraged (apparently judges are still hesitant to use it, though PINA allows courts to submit cases to mediation).

- Foster Families pilot (see above under SBS)

The judges agreed that coordination between SBS, PGN and Children and Adolescents courts is vital. They are part of the same system of child protection and if any of these institutions does not work appropriately it affects the whole system.

The CHA Court of Appeals provided us with a presentation which expresses the Court's views about the measures needed to be taken in order to allow implementation of the Handbook by the judiciary.⁴²

2. Family Courts

There are seven Family Courts in Guatemala City. Each has three social workers.

National Adoptions

The judges were of the view that Guatemalan citizens do not adopt because notary proceedings are too expensive for them, and judicial adoptions take too much time. It was also agreed that private foster homes prioritized foreign adopters over national adopters. For these reasons, judges shared the perception that Guatemalan citizens choose for *de facto* adoptions by supposition of birth, which they explained was rather easy in Guatemala.

Suspension of *patria potestad*

The Family Court judges considered that after the CHA Court has declared the violation of family rights of the child (*i.e.*, abandonment), PGN, as representative for the child, should initiate before the Family Court the procedure to suspend *patria potestad* (the procedure requires searching for the parents and giving them the opportunity to be heard). Family judges informed that there has been agreement between the Family Courts and PGN to proceed in this manner.⁴³ One of the judges mentioned that since November 2006 PGN had brought 15 cases before his Court to suspend *patria potestad*. In all of these cases parents or extended family had been found and the children had been entrusted to them. According to their experience, judges agreed that when parents are located they always come and recover their children. However, judges explained that in some cases PGN finds it difficult to locate birth families.

Notarial Adoptions - intervention by the Family Courts

The judges explained that they do not have direct intervention nor responsibility in adoptions processed by notaries. They merely receive the request from the notary to designate a social worker to produce the report on the situation. The judges admitted that the social worker does not make any visit or field investigation, relying solely on the information provided by the notaries in the file they received (in some cases biological mothers are called for an interview at the social worker's office).

⁴² See copy in Annex 30.

⁴³ This procedure did not seem to be applied in the Zacapa jurisdiction.

Some of the judges explained that they are not comfortable with the intervention of Family Courts in notarial adoptions and consider that the procedure is not transparent enough. The fact that the file passes through the Family Court could be seen as a kind of State control, when in fact there is none. They are also uncomfortable with the fact that the social worker's report takes the Court's seal, as if the same Court supports the given opinion.

Furthermore, HCCH heard from different sources that some years ago social workers were found to be collaborating with notaries to produce positive reports, and for that reason all social workers from Family Courts had been transferred to the CHA Courts.

The judges considered that the Supreme Court should provide for directives to be followed by social workers in adoption reports. They also agreed with the proposal of the CHA Court of Appeals to have a centralised unit of social workers so as to provide better administration of this service.

3. *Peace Courts*

There is one Peace Court in each municipality (a total of 332 in the whole country). Peace Courts have first instance competence in almost any kind of matter.

a. Aldea Guineales Peace Court

i. General overview

Aldea Guineales has about 12,000 inhabitants. It is in the Boca Costa region, about three hours drive from Guatemala City and situated in the mountains. Most of the population is indigenous, speaking mostly Quiché (40,000-50,000 people within the jurisdiction of the Court). Many of them live in tiny villages with very difficult access. In some cases people have to walk for hours to get to the Court. This municipality belongs to the Department of Sololá which is one of the poorest Departments in the country.

The judge and most of the court staff speak Quiché (a total staff of 5 people). There are no interdisciplinary staff in the Court (no psychologist or social worker). There is no Internet connection in the whole village.

People are very poor and there are malnutrition problems. On average, families have around 8 children. Families do not accept birth control (for cultural reasons – a woman who controls birth is seen as deceptive). HCCH was informed that a health service centre had been attacked and then closed because a nurse was providing birth control training for women.

People in the community apply Mayan law and Mayan punishments (mostly "soft torture" in public, but people may also be exiled or even lynched in extreme circumstances).

HCCH was informed that there were no NGOs working on children protection in that area. Only SOSEP was working in the community, while PGN had its delegation in Sololá (delegations are seated in the capitals of each Department) and hardly ever travelled to Aldea Guineales.

The judge mentioned that he received judicial training about 7 times a year (he travels to other bigger cities to receive it).

ii. Overview of irregular adoptions

Abandonment of children is considered not to be part of the local culture. The concept is disliked and unaccepted. In 2007 there were only two cases of abandonment where the same parents (who already had twelve children) asked the judge to send two of their children to a foster home because they could not take care of all of them. Within the community it is common that the extended family takes care of children that cannot be cared for by their own parents.

HCCH was informed that in this region people talk directly about the "sale of babies" instead of referring to adoption procedures. The judge reported to have heard it from couples who recognized having sold their babies). There is no criminal offence for selling a baby and courts cannot therefore do much about it.

In 2006 there were about 20 reports of mothers selling babies before the Peace Court. Such situations appear to be easily noticed as people know each other in the community and people are seen buying expensive items after selling their babies. It is considered that selling babies should be explained as a way of making easy money, and not because families are unable to feed their children. HCCH was informed that in one case the biological parents had explained that they had to sell their baby because they had an important debt to pay.

In one of the proceedings investigating baby-selling a domicile was searched. Although no babies were found, there were huge amounts of dietary salt solution found, of the kind used to feed babies.

There was a significant case last October in Guineales where the community had found that a young pregnant woman had been taken to a *casa de engorde* by a *jaladora*. This *casa de engorde* was in another village (Nagualá), about one hour's walk from Guineales. The mother of the pregnant woman was forced to bring her daughter back. Once in Guineales she was punished under Mayan law and she confessed about the *casa de engorde*. Many people from the community went to the *casa* and set fire to it. It was secured by armed guards but there was a fight during which four men were killed (the story was reported in the national news). The owner of the *casa de engorde* escaped. HCCH was told that no more reports of baby-selling had been received in the Court since October 2006.

HCCH was informed that lately the community has been organized in security committees to protect themselves from baby-selling and "*maras*".⁴⁴

b. Santo Tomás la Unión Peace Court

i. General overview

Santo Tomás la Unión is about 10 kms from Aldea Guineales but belongs to another Department (Suchitepéquez). There are about 15,000 inhabitants in the village. The Court does not have any technical assistance personnel (*e.g.*, no psychologist or social worker). Child protection cases are referred to the CHA Court in Sololá, though as social workers from the Court or PGN usually cannot travel that far, the Peace Court Judge often ends up taking care of the situation as best he can.

Sexual education is considered a serious issue (children receive none and girls begin to fall pregnant from the age of 12) and is very difficult to implement due to strong opposition from the community).

Problems of access to justice were also noted. Some people have to walk many hours to reach the Court in Santo Tomás, while if the case is transferred to the Department's

⁴⁴ "*Maras*" are juvenile criminal organisations (this is a very serious problem in Guatemala and other Central American countries).

capital in Sololá, this often means closing the case as people are unable to travel that far (HCCH was informed that in many cases people do not have the money or the time to travel to the capital).

Language was identified as another barrier for the indigenous community. The Court does not have a translator and the judge does not speak Quiché. It was also noted that indigenous people mistrust civil justice and prefer to apply Mayan law (in the last three years, two persons were lynched in Santo Tomás).

ii. Overview of irregular adoptions

HCCH was informed that people are not accustomed to abandoning their children. During 2006 there were about 15 abandonment cases and all of these children were finally cared for by the extended family. No children were placed in institutions during 2006.

Baby-selling is perceived as frequent in the Boca Costa region (name given to that region of the country). It is said that there are many hidden foster homes. Last year the Court investigated a report on baby-selling and one of the biggest houses in a small village was searched. The house was empty, but 20 cradles were found and a huge amount of dietary salt solution of the kind used to feed babies.

The Court received only three formal reports of baby-selling during 2006, although many comments were heard about these kinds of cases.

4. *Social Workers from CHA Courts*

Each Children and Adolescents Court has 1 social worker, with the exception of CHA Courts Nos 1 and 2 (Guatemala City) which have 4 social workers each. HCCH was told that a social worker earns about Q 4,250 per month.

HCCH was informed that social workers are nowadays investigating abandonment cases. However, once the Handbook is implemented their work would be limited to the supervision of the protective measures taken by courts (the investigation is to be performed by PGN).

It was noted that social workers are not provided with special training by the judicial system, nor do they have any vehicle available for field investigations (have to take the bus or walk). Social workers work Monday-Friday 8.00 a.m. - 3.30 p.m. No investigations take place during the evenings, nights and weekends.

Most of the cases social workers investigate involve abandonment or abuse.

Positive experiences were related by social workers in placing abandoned children with the extended family, which seemed to be the outcome in a considerable proportion of cases (HCCH was informed that it was very rare to find an abandonment case in which nobody showed up to take care of the child).

Allegations that private foster homes prefer foreign adopters to national adopters were shared by social workers (this was the explanation given by social workers for the low rates of national adoptions). Social workers also considered that private foster homes have better facilities than the public foster homes.

It should be noted that both Family Judges and CHA Judges agreed on the need to organise the social worker system as a centralised service in one sole unit, in order to improve the distribution of work. Consideration was also given to the need to pay overtime or extra hours so as to allow investigations to be carried out during evenings and weekends where necessary.

E. Office of the Human Rights Prosecutor – The Childhood Defender

1. General overview

The Human Rights Prosecutor considered that the Convention is in force internally and should be applied (HCCH was informed that the Human Rights Prosecutor had presented a petition before the Constitutional Court requesting application of the Convention).

The need was stressed for a request for assistance to be made to the international community in order to help resolve the situation regarding irregular adoptions, as it has proven to be impossible to resolve this issue internally so far.

2. Irregular adoptions

The Childhood Defender considered that the most serious problem to be resolved is that of mothers who are indeed receiving money for relinquishing their children (mothers were known who had given up more than 3 of their children for adoption in this way). The Childhood Defender was of the view that substantial networks are behind the business of baby-selling.

The office of the Childhood Defender had received reports against hospitals from which children have allegedly been stolen. The office was aware of the existence of "*casas de engorde*" and has also detected an increase in the theft of babies, which is supposed in many cases to be linked to the irregular adoption networks.

The Childhood Defender explained that her office frequently received reports of baby-selling, and she related the latest two cases reported:

- a. In the first case, a mother who regretted relinquishing her baby had reported that she had received Q 5,000 to do so. She had bought a mobile phone as she had been requested to remain in contact with the *jaladora*. She had explained that she had given Q 1,000 to her mother and had bought some clothes with the rest of the money.
- b. In the second case, the *cuidadora* had reported that the lives of herself and her family were threatened by the notary who had hired her. She reported that she worked as *cuidadora* taking care of children that were going to be adopted. She received monthly payments for such services. She reported that the notary had stopped paying her in 2006, and after 6 months she had decided to hand over the child in her care to the authorities (the child was then 3 years old and she had received her at the age of 6 months). She said she knew the mother of the baby. She said that the notary had threatened her life because she had given the baby to the authorities and this was why she was requesting protection from the Human Rights Prosecutor. The child was put under the care of PGN and was sent to a foster home for protection.

In 2004 the Childhood Defender presented a report in Congress describing the situation regarding adoptions in Guatemala. She considered that this report is still applicable to the current situation.⁴⁵

Since PINA came into effect, 12,000 children were adopted by the current irregular procedure authorised by PGN. The Childhood Defender therefore considered that PGN has failed to stop direct relinquishments despite having the means to do so (PINA provides that adoptability should be declared by a court, and PINA prevails over provisions of the Civil Code).

⁴⁵ See copy attached in Annex 4.

3. *Foster homes*

The Childhood Defender has registered about 300 private foster homes (it is recognized that many of them are hidden so they cannot be detected). It is estimated that there are approximately 500 private foster homes where around 10,000 children are currently being sheltered.

PINA has given competence to the Human Rights Prosecutor to supervise public and private foster homes. However, that office is seriously restricted in fulfilling this task due to the lack of resources. Only 3 officers are available for this task; they have no vehicles and can only reach places close to Guatemala City.

4. *Draft laws on adoption*

The Childhood Defender was of the view that Draft law 2784 was the best drafted so far. She considered it to be the result of careful work in consultation with different bodies, which satisfied the integral protection approach.

One of the main problem areas the Childhood Defender found in connection with Draft law 3217 was the organisation of the Central Authority, which she felt should be an independent and powerful body in order to be able to meet its responsibilities.

F. **Mesa de Adopciones**

Mesa de Adopciones is an inter-institutional organisation coordinated by the Office of the First Lady with the objective to generate solutions to the problems of the adoption system in Guatemala. Its members are: SOSEP; PGN; SBS; Public Ministry; the judiciary; Unicef; COPREDEH; *Movimiento Social por los Derechos de la Niñez y la Adolescencia*; Guatemala n Medical Association; the Catholic Church; and the Alliance of Guatemalan Evangelist Churches.

Mesa de Adopciones generated the Handbook of Good Practices and has been working on modifications to Draft law 3217. Major projects planned for 2007 are: i) implementation of the Handbook; ii) resolution of the situation regarding the Hague Convention; and iii) approval of adoption law.⁴⁶

1. *General overview*

In 2005 1,700 children were declared abandoned. Only 3% of them have been adopted. 97% of adoptions were direct relinquishments. *Mesa de Adopciones* considers that something should have been done to try to keep those children within their families. HCCH was provided with a presentation showing the result of investigations made by *Mesa de Adopciones* into adoptions in 2005.⁴⁷

Mesa de Adopciones was of the view that it would be wrong to justify direct relinquishment of children as being due to economic constraints, as it was common knowledge that mothers were receiving money for relinquishing their babies.

Mesa de Adopciones considered that the Convention is in force in Guatemala since 2003 and should have been applied despite the judgment of the Constitutional Court. PINA provides that adoptability should be decided by a CHA Court (Arts 75 and 104 a). However, *Mesa de Adopciones* was now of the opinion that the Convention should be re-approved in order to ease its implementation. HCCH was informed that this Draft law had already been presented to Congress and had received a favourable opinion.⁴⁸

⁴⁶ For detailed information about work by *Mesa de Adopciones* in 2006 and strategies for 2007, please see the presentation in Annex 6.

⁴⁷ See copy in Annex 5.

⁴⁸ See copy in Annex 16.

Draft law 3217 has been agreed by 14 entities and 17 modifications were introduced so as to align it with the Convention. The adoption law is supposed to be second on the list of priorities for the current Congress, as it has been agreed by the Vice-President of Guatemala and the President of Congress early this year.

2. *Good Practice Handbook*

The Handbook's objective is to prepare the implementation of the Convention. Implementation is supposed to be progressive and work is currently underway on a plan for the implementation of the Handbook and on a training plan for the persons who are to implement the Hague Convention.

HCCH was informed that the Government is prepared to provide supplementary funding to each of the institutions that have to implement the Handbook (mainly for the training of operators).

It is foreseen that some of the measures contemplated in the Handbook would be implemented through *Acuerdos Gubernativos* (e.g., registration of foster homes).

HCCH was informed that official plans were being considered to transform the SBS into a separate Ministry (*Mesa de Adopciones* agreed that the current budget of Q 48 million was very insufficient).

Mesa de Adopciones had prepared and was planning to organise a seminar in 2007 under the title "Multidisciplinary Approach to Adoption".

G. **COCODE⁴⁹ (Community Councils) - Guineales**

During the visit to Aldea Guineales, HCCH had the opportunity to meet with the *COCODE* (Community Council) and to hear its views on the adoption situation.

The Community Council had approximately 11 members. HCCH was assisted by the SOSEP director and one SOSEP technician who helped with the translation to the Quiché language.

The discussions were focused on Council members' perceptions of baby-selling. They explained that they held a strong position against such practice. Furthermore, they related again in detail the case that had been previously related by the Guineales Peace Court Judge, in which people from their community had set fire to a "*casa de engorde*" in a neighbouring village (the versions related coincided).

HCCH was informed that due to the baby-selling cases the community has been organised and now supervises pregnant women in the community to ensure that nothing suspicious happens to mothers or babies.

HCCH was told that the community wanted justice; they wanted those responsible for baby-selling in jail; they did not trust civil justice, and they were disappointed because the Peace Court Judge had located the *jaladora* but she had been released within a few hours. The view was that the Judge had been fooled by the *jaladora* who had declared to have "simply lent" Q 2,000 to the pregnant woman.

⁴⁹ COCODES are Community Councils for Development. They are made up of an assembly and a co-ordination organ. They are organised in neighbourhoods (urban areas) or villages (non-urban areas).

Community Council members expressed their distrust in civil justice and claimed to be allowed to apply Mayan law (these discussions were highly emotive and all present strongly protested their rights to apply Mayan law).

H. Mesa de Municipalización a favor de los Derechos de la Niñez y la Juventud de Guatemala

The *Mesa de Municipalización a favor de Los Derechos de La Niñez y La Juventud* is a forum where agencies - national and international – may come together to share information and coordinate activities (participants among others are: Unicef, PLAN, Save the Children and Childhope).

The main goal is to promote action, projects, programmes, and municipal public policies in favour of childhood and adolescence in Guatemala.⁵⁰

I. NGOs

1. Private home Rafael Ayau

The Order of Sisters that runs this foster home belongs to a “Patriarcado de Antioquia” which took over the foster home ten years ago at the request of the Government. There is no financial support received from the State. All food is donated by Guatemalan citizens and support is also received from christian orthodox parishes abroad.

90 children were under care at the time of the HCCH visit (160 is the full capacity). In principle the children are aged between 0-7 years but in practice, if children are not adopted, they can remain at the home until they are older.

HCCH was informed that the home also worked with a project called “Pro-life” through which the home fosters children from mothers / families in crisis for a period of approximately 6 months. In the majority of the cases the family returns to collect their children. In the event that a child is abandoned in the foster home, this is reported to the CHA Court.

HCCH was told that this foster home handles adoptions with the United States of America through one single person. Approximately 5 adoptions take place per year (all international). All the children that had been placed in adoption from this foster home had been previously declared abandoned (violated family rights) by the CHA Court.

HCCH was informed that the home charged adoptive parents USD 14,000 to cover all costs. The home worked with a private attorney whose fees were USD 1,000. The lump sum also included other costs such as translations, certifications and USD 10 a day charged for the maintenance of the child.

The same morning HCCH met with the Director of the foster home, who informed that she had had to go to the Court in relation to the situation of two children who had been sent to the foster home by the Court in a case where the biological mother had regretted selling her two babies and had reported the *jaladora* to the authorities. The mother had reported to have been offered Q 20,000 to relinquish her children (she was on her own as her husband had left her and had migrated to the United States). The *jaladora* had apparently been taken to the Court but was released later on as there was no criminal sanction for her conduct.

⁵⁰ See a presentation of *Mesa de Municipalización* in Annex 12.

The Director informed HCCH that the home regarded the adoption system as corrupt and that different official authorities were requesting hidden payments to process adoption cases.

HCCH was also told that national adoptions took too long in court and that it was common knowledge that Guatemalan citizens opted for *de facto* adoptions through supposition of birth.

In relation to the matching process, the Director considered that this should be carried out by the foster homes as they knew best the children they were fostering.

2. *Aldeas Infantiles SOS*

Aldeas Infantiles is present in 133 countries. Their regional office is located in Uruguay. The Guatemalan office employs 175 people.

The organisation works in two main fields:

a. Family foster care (58 years of experience)

A foster family model is used based on an "SOS mother" and with an attempt to resemble real families. The organisation always tries to work with biological families to reintegrate the child where possible and also to work with the extended families. *Aldeas Infantiles* is also open to national adoption and currently has 500 children in this system, with plans for its expansion.

The system is viewed as a long-term alternative (different from the foster families' project currently under development at the SBS, which is temporary in its essence).

b. Strengthening families to prevent abandonment (started in 2004)

As this is a new development, the staff explained that they did not have much written material available. It was initiated in South America, mainly in Bolivia, where already very positive results had been obtained (this system is being replicated in other countries).

The model is based on community centres (child care, with some similarity to the CAIs of SBS). Focus is essentially on empowering women, the integral development of children and development of the whole family.

Currently 12 community centres are attended by 800 children. The goal is to reach 3,000 children. The centres are placed in Mayan villages (*e.g.*, Mizco, Sololá, and San Juan). The organisation operates together and at the same level as the community; the community chooses the community mothers to lead the SOS homes. The organisation is convinced that models cannot be imposed on the community and is very much aware that such models must be developed together with the community.

Work is carried out in partnership with the Government and other NGOs (attempts are being made to break with the traditional welfare system approach). Municipalities are providing facilities to organise the community centres. *Aldeas Infantiles* is very keen to explore means of co-operation with other international organisations.

Staff considered that national adoption is a very cumbersome process and that private homes indeed prioritize foreign adopters.

Aldeas Infantiles is a member of the Children's Commission and confirmed that the Commission had not yet found the means to operate.

3. *Asociación para la Integración Familiar – APIF*

APIF has been working with children in need for 22 years. The association is in the middle of a transition that will completely change its form. Until now it has always been a foster home that received children at risk sent to it by the courts.

The association comprises only one foster home, which now cares for 20 children. It is not receiving any more children as it is to be closed and changed to a day-care home.

The experience of APIF indicated that in the majority of cases children returned to their biological families. However, it had been detected that about 75% of children sent back to their families were found later on in the streets. The association considered that no serious work is carried out to support the biological family and supervise children during the reintegration process.

The overall conclusion of APIF is that parents should be educated in order to prevent abandonment. In this regard the association considered that daily care centres are badly needed in Guatemala. It was felt there should be institutions that take care of children while their parents work, but also that concentrate on training and supporting those parents to enable them to assume the important role they have to play.

The association knew of parents who went to work and left their children in the care of people who were not qualified, while others simply locked them in their own houses.

Street children are seen as a growing problem. APIF is now seeing the third generation of street children. These children start joining “*maras*” at the early age of 6 or 7. The association feels that the Government is trying to remedy this problem, but has not made enough effort at the preventive level.

4. *Casa Alianza*

a. General comments

Casa Alianza runs different programmes to support children at risk and young pregnant women. One of the programmes is focused on family reintegration (“*reinserción familiar*”).⁵¹ The organisation often receives children to foster sent by PGN.

Casa Alianza considered that the State is not capable of covering the needs of children at risk and should rely on respectable NGOs to meet those needs already known that cannot be covered public resources (reference was made to the model followed in Costa Rica).

The organisation considered that DNA testing should be mandatory in all cases and by way of a transparent procedure.

Civil registration was also considered to be another serious problem. Officers responsible for such registration are easily corrupted and it is quite simple to obtain irregular birth certificates.

Casa Alianza believes that money has commercialised adoption. The passage of time has made society start seeing the operation of *jaladoras* and *cuidadoras*, even the relinquishing of babies for money, as normal.

Casa Alianza is a member of *Movimiento Social por la Niñez*.

⁵¹ For a detailed description of *Casa Alianza's* work in Guatemala, please visit “www.casa-alianza.org” under “Guatemala”.

b. Irregular adoptions

Casa Alianza has identified several sources of irregular adoptions. The organisation knows these involve organised crime and has reported several cases to the authorities.

About 80 children have been recovered who were going to be or have been sold. *Casa Alianza* found it easier to trace children when the biological mother becomes involved in the procedure to recover the child.

It is very difficult to trace the authors of irregular adoptions, and one crucial thing to their advantage is the lack of reporting. Vulnerable people are not used to reporting to the authorities (they do not trust the justice system and it is also extremely difficult for them to accede to it). Access to justice is a serious problem that should be duly considered.

Casa Alianza experience shows that 98% of adoptions take place in Guatemala City, while about 60% of children come from different regions of the country; mainly the poorest ones, such as Sololá, Petén and San Marcos.

Poverty, lack of education and illiteracy makes it easier for *jaladoras* to deceive biological mothers. *Casa Alianza* considered that in a very large proportion of cases, mothers are simply deceived by *jaladoras*. In this regard HCCH was told of one of the methods identified as having been used in several cases: the *jaladora* identifies mothers with babies in hospitals and offers them help. She tells them that she can take the child to a private hospital (for better care, and to avoid losing time in public hospitals, etc.) and has the mothers fill in blank forms with the excuse that she may need them if she has to take any serious measure to protect the child's health (surgery, etc.). After a few hours, the *jaladora* returns the child to its mother and they make a new appointment within a few days. The second meeting in many cases takes place in a McDonald's restaurant (several cases were identified in *Zona 9* – a neighbourhood of Guatemala City). The mother is told that the health analysis has shown that the child is ill and needs to stay in the private hospital. The child is then retained by the *jaladora* and the mother is given money to return home. When she comes back to claim her child, she is told in some cases that the child died or was given up for adoption. Many such mothers do not report the incident at all. A minority does so before the CHA Court or PGN.

5. *Plan International*

Plan is present in 45 countries (12 of these Latin American countries). It was founded in 1978. Plan receives funding from 17 countries (among others: Canada, Korea, Switzerland and Ireland).

Plan is focused on protecting childhood (CRC implementation) by developing communities with a very wide approach, which includes education, health, water, etc. Plan tries to provide the means for communities to sustain their programmes / efforts.

Plan used to have the traditional welfare approach of providing people what they need without expecting any commitment in return. Plan has changed this and has turned to a participative approach, whereby the Government also has to meet its commitments. Plan can assist Governments, communities and other organisations to develop useful programmes, but always as joint efforts where parties share actions and responsibilities.

HCCH was informed of some of Guatemala's striking figures:

- 400,000 births are registered per year. Officially 10% of births are unregistered.
- 50% of children are born out of hospital with the assistance of "*comadronas*".
- One million children work.

- One million people were displaced because of the last war, while 50,000 migrated to Mexico.
- There are approximately 1 million Guatemalan citizens living abroad (30% of them are thought to be unregistered).

Plan operates in 600 communities in Guatemala, reaching 48,500 children (0-18 years).

The organisation's work is currently focused on:

- maltreatment and abuse
- project to reform Criminal Code (advocacy, raise awareness (through media, churches), etc.)
- implementation of law (*Ley de Consejos de Desarrollo 2002*). Civil society participation at 5 different levels: Community, Municipality, Department, Region and Nation
- protection
- sensitisation (training, workshops, etc.)
- prevention (Project "educating with care" (*crianza con cariño*))

HCCH was informed that Plan would be interested to hear about any training plans that the Hague Conference may have for Guatemala, as the possibility of co-operation might be considered.

Plan is a member of *Movimiento Social por la Niñez* and participates in the *Mesa de municipalización*.

6. *Movimiento Social por los Derechos de la Niñez, Adolescencia y Juventud* ("Movimiento Social")

The *Movimiento Social* gathers together several NGOs that work in the field of protection of children. One of its main objectives is monitoring (in Guatemala) the implementation of international conventions that deal with children rights (*e.g.*, CRC, Hague Conventions, OAS Conventions, etc.).

Movimiento Social has been following the Hague Convention's process since the entry into force of this instrument in Guatemala. It considered that the approval of the Convention is a matter of urgency, and that either the President or Congress should ensure this happens as soon as possible. However, *Movimiento Social* admitted having serious doubts that Congress would do so before the end of the ordinary sessions, as not much time remained and Congress had a very complicated agenda.

Former Magistrate to the Constitutional Court, and current legal advisor to *Movimiento Social* Rodolfo Rohmoser (who had expressed his disagreement at the famous judgment that nullified Guatemala's accession to the Convention), considered that the new Constitutional Court (changed composition) has altered the criteria and would not support any further challenges to the Hague Convention.

Regarding the Convention's implementation, *Movimiento Social* agreed that the State is not in a position to fulfil its responsibilities (*e.g.*, lack of public foster homes, work overload in CHA Courts). HCCH was informed that it might be considered in a coming session whether there was a need for a contingency plan in order to provide special assistance for the implementation stage. There was already awareness that training assistance would be needed to favour implementation.

Movimiento Social reaffirmed that pressure from the international community and the Hague Conference would be vital to enforce the Convention's implementation. HCCH was provided with several documents related to the adoption situation in Guatemala, among which a document which expressed the general view of *Movimiento Social* of the situation.⁵²

⁵² See copy in Annex 7.

J. Unicef

Unicef has been advocating for the implementation of the Hague Convention since its entry into force in Guatemala (*e.g.*, has organised several important events to raise awareness of the Convention, including vital support to the visit of the Secretary General in 2005).

Likewise, Unicef has been actively supporting the Government of Guatemala in its efforts to improve the protection of children and the adoption system (*e.g.*, Unicef is working closely with SBS to support this institution in its efforts to implement the Convention's principles).

Unicef recognizes that there is much discussion about the Hague Convention, though there is lack of information about the Convention's actual operation (*e.g.*, what would be the functions that should be performed by a Central Authority and to what extent can some of those functions be delegated?). This situation raises concern about the outcome of discussions on a new adoption law which should be coherent with the Hague Convention.

For these reasons, Unicef considered that it would be extremely important to raise awareness of the Convention and organise training events directed at those actors who have the responsibility of regulating the adoption system and implementing the Hague Convention. In this regard HCCH was provided with a proposal of workshops on the Convention to be organised in Guatemala,⁵³ in the near future, and for which Unicef has requested the Hague Conference's support.

In relation to the implementation of the Convention and the Handbook, Unicef considered that it would be essential to build child welfare capacity in Guatemala. In this regard the proposal made by Holt International⁵⁴ was considered to fully address Guatemalan needs and Unicef therefore seemed to be prepared to support its implementation. Furthermore, Unicef provided HCCH with an estimation of the needs of several key governmental institutions in order to implement the Handbook of Good Practices.⁵⁵

K. Institute of Family Law – *Asociación Defensores de la Adopción*⁵⁶ (“Notaries”)

1. *General comments*

The notaries considered that children given up for adoption are neither stolen nor abducted; it is the difficult economic situation what makes women relinquish their children, mothers have no other alternatives to protect their children.

The notaries professed to care about the transparency of adoptions. They declared to have proposed DNA testing and assisted PGN in developing a regulation for establishment of all the documents to be presented in the adoption file. They considered that the current adoption procedure to be transparent and to protect children and biological parents.

The notaries were of the view that Guatemalan citizens do not adopt because the concept is not part of their culture. It was mentioned that a few years ago they had opened an adoption centre to provide free adoption service for Guatemalans, but nobody used it and after one year it was decided to close it down.

⁵³ See copy in Annex 31

⁵⁴ See copy in Annex 2.

⁵⁵ See copy in Annex 28.

⁵⁶ Information about *Asociación Defensores de la Adopción* can be found at the following address: < www.adaguatemala.org >.

The notaries considered that direct relinquishment should be permitted, as they felt that the biological parents are the best placed to decide with whom to leave their children.

Matching methods used were explained; some notaries seemed to take care of this by themselves, studying the characteristics of the prospective adoptive parents and matching them with children they have under their care; other notaries send the information about the children to foreign adoption agencies who take care of the matching abroad with their own prospective adoptive parents.

The notaries considered that international adoption has a negative connotation in Guatemala and to some extent this was due to Unicef campaigns and abortion promoters.

HCCH was informed that on average, notaries charge between USD 15,000 and 20,000 per adoption (they noted that American citizens could deduct about USD 10,000 from their taxes).

2. *Hague Convention*

The notaries were of the view that in order to comply with the Constitution, the Convention should be denounced by Guatemala. Even with the withdrawal of the reservations to the Vienna Convention, Guatemala cannot accede to an international treaty (there are 66 other treaties to which the same situation applies).

They explained that according to their understanding the Hague Convention discouraged international adoptions, while its implementation in Latin America had produced harmful effects. Furthermore, HCCH was provided with a copy of the response given by ISS to the Hague Questionnaire for the 2000 Special Commission, in which certain obstacles to the operation of the Hague Convention were identified.

3. *Draft law on adoption*

HCCH was provided with a Draft law on adoption⁵⁷ developed by the Institute of Family Law and to be presented in Congress. The notaries considered that this draft law may coexist with the Convention.

The ILPEC report⁵⁸ includes a special section which describes the characteristics of notaries and agents identified during the ILPEC investigation.

L. Birth parents / Prospective adoptive parents

1. *Birth parents*

HCCH was not able to meet with birth parents during the visit, though from the comments received from different sources it can be inferred that in a considerable proportion of cases biological parents receive money for relinquishing their children. Most of the persons met considered that this fact had more to do with the enormous proportion of direct relinquishments than the mere lack of resources biological parents had to raise their children.

According to those interviewed, it can also be inferred that a considerable proportion of women are deceived by *jaladoras* to relinquish their children, while there were also allegations made of baby stealing for adoption purposes.

For a detailed study on birth parents and a profile of adopted children, please refer to the ILPEC report.⁵⁹

⁵⁷ See copy in Annex 13.

⁵⁸ See copy in Annex 1.

⁵⁹ See copy in Annex 1.

2. *Prospective adoptive parents*

HCCH was not able to interview prospective adoptive parents during the visit. However, during the stay in Guatemala, HCCH saw several tens of American couples carrying Guatemalan babies. It is said that about 30% of the hotel capacity in Guatemala City is occupied by American couples that come to adopt. It is also said that some hotels have complete floors prepared for couples with babies.

Persons interviewed did not mention prospective adoptive parents as being part of the alleged illegal network that surrounds international adoptions.

For a detailed study on prospective adoptive parents, please refer to the ILPEC report.⁶⁰

⁶⁰ *Idem.*

CHAPTER V KEY ISSUES FOR IMPLEMENTATION OF THE CONVENTION

A. Key actors involved

The publication of the Handbook of Good Practices shows the way in which the Guatemalan authorities are planning to implement the Hague Convention principles and the Convention itself, once confirmed at the internal level.

Although there are still discussions in Congress and within civil society about the best way to designate the Central Authority and how it should perform its functions, it cannot be confirmed at this stage that the Handbook shall be finally fully enforced, and it may be worth considering its mechanism as a possible mean of implementing the Convention.

There follows a summary of the functions to be performed by key actors according to the Handbook:⁶¹

1. *Judicial Organ (CHA Court)*

Any allegedly abandoned child, or child relinquished by his parents, should be taken to the CHA Court, which will initiate the protective judicial procedure. This child would be preventively placed with the extended family, foster family or foster home (registered and authorised by SBS).

Once provided with the information requested from PGN, the judge will render judgment either ordering reintegration of the child in the biological family or declaring that the child's family rights have been violated (*i.e.*, abandonment) and ordering SBS to re-establish such family rights within a period of six months.

2. *Attorney General's Office (PGN)*

Once the protective judicial procedure has been initiated, PGN should investigate the situation of the child and provide due advice to the child's biological parents on the consequences of relinquishing the child for adoption.

PGN should intervene in all adoption procedures (either notarial or judicial). PGN opines whether adoption is recommended or not.

3. *Secretary for Social Welfare (SBS)*

SBS should:

- re-establish family rights of children as ordered by the Court
- operate the adoption system (national and international)
- register all adoption applications
- assess prospective adoptive parents (issue certificate of suitability)
- carry out matching of adoptable children and qualified prospective adoptive parents
- issue empathy certificates
- issue (in international adoptions) certificates of exhausted means necessary for national adoption
- register and control accredited bodies
- register and control foster homes (public and private)
- provide post-adoption supervision

Although it is not clearly explained in the Handbook, it seems that notaries or Family Courts would finally formalise the adoption (provided there is compliance with the previous steps, as described above).

⁶¹ See in Annex 33 a chart prepared by Unicef with the attribution of competences arising from the Handbook.

B. Implementation plan. Training and resource needs.

There are no timeframes set for the implementation of the Handbook (nor of the Convention). Each organ is supposed to implement according to its own possibilities.⁶²

The scenario would clearly change in the event that the Convention or an adoption law were to be passed in Congress, as such legal framework should pave the way for and request rapid implementation.

Each of the key actors involved (PGN, SBS and CHA Court) appeared to be aware of their own limitations and conscious that they would need to develop capacities lacking today in order to be able to meet their responsibilities and fulfil their roles.

The three institutions were conscious that they would need assistance with training and resources in order to perform the functions that the Handbook mandates. In this regard, PGN and SBS have already submitted a preliminary estimation of needs,⁶³ while the CHA Court of Appeals has made an assessment of action which needs to be taken in order to be able to implement the Handbook.⁶⁴

C. Next steps

Due to the recent approval of the Convention by the Guatemalan Congress, the Permanent Bureau of the Hague Conference on Private International Law will now be able, in consultation with the Guatemalan authorities, and in co-operation with certain other States, to begin the Intercountry Adoption Implementation Assistance Programme which has been under discussion since 2003. This Programme will now be coordinated through the Hague Conference International Centre for Judicial Studies and Technical Assistance.

Following the distribution of the Report, the Permanent Bureau of the HCCH will arrange a meeting of the 2003 Expert Group in order to:

- analyse the Report of the fact-finding mission and develop strategies for assistance
- review the resources needed to deliver the assistance
- consolidate a plan to deliver the Intercountry Adoption Implementation Assistance Programme.

⁶² *Mesa de Adopciones* informed that it was preparing an implementation plan for the Handbook.

⁶³ See copy in Annexes 26 and 27.

⁶⁴ See copy in Annex 30.