



*The Implementation and Operation of the  
1993 Hague Intercountry Adoption Convention*

# **GUIDE TO GOOD PRACTICE**

Guide No.1

**THE IMPLEMENTATION AND OPERATION OF  
THE 1993 HAGUE INTERCOUNTRY ADOPTION CONVENTION:**

**GUIDE TO GOOD PRACTICE**

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**THE IMPLEMENTATION AND OPERATION OF  
THE 1993 HAGUE INTERCOUNTRY ADOPTION CONVENTION:  
GUIDE TO GOOD PRACTICE**

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on Protection of Children and Co-operation in Respect of  
Intercountry Adoption***

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## GLOSSARY

**Accredited body:** an adoption agency which has been through a process of accreditation in accordance with Articles 10 and 11; which meets any additional criteria for accreditation which are imposed by the accrediting country; and which performs certain functions of the Convention in the place of, or in conjunction with, the Central Authority.

**Approved (non-accredited) person:** the person (or body) who (or which) has been appointed in accordance with Article 22(2) to perform certain Central Authority functions. The person or body is not accredited in the sense of Articles 10, 11 and 12, but must meet the minimum standards required by Article 22(2). For further explanation, see Chapter 4.4.

**Authority:** see Central Authority, competent authority, public authority.

**Best interests of the child:** the term is not defined in the Convention because the requirements necessary to meet the best interests of the child may vary in each individual case, and the factors to be considered should not, in principle, be limited. However, a number of essential factors are referred to in the Convention and must be included in any consideration of what is in the best interests of a child who is the subject of an intercountry adoption. These factors, taken from the Convention, include, but are not limited to: efforts to maintain or reintegrate the child in his/her birth family; a consideration of national solutions first (implementing the principle of subsidiarity); ensuring the child is adoptable, in particular, by establishing that necessary consents were obtained; preserving information about the child and his/her parents; evaluating thoroughly the prospective adoptive parents; matching the child with a suitable family; imposing additional safeguards where necessary to meet local conditions; providing professional services. The Explanatory Report\* notes, at paragraph 50, that a “strict interpretation of the word ‘best’ might render impossible some good adoptions and to avoid such undesirable result, it should be construed as meaning the ‘real’ or ‘true’ interests of the child.”

**Central Authority:** the office or body designated by a Contracting State in accordance with Article 6, to perform certain mandatory functions in Articles 7, 8 and 33 of the Convention. The Central Authority must also perform the mandatory functions in Articles 9, and 14–21, unless another body (a public body or accredited body) is authorised to perform those functions. For further explanation, see Chapter 4 of the Guide: Institutional Structures: Central Authorities and Accredited Bodies.

**Competent authority:** a competent authority may be any authority appointed by a Contracting State to perform a function attributed in the Convention to this type of authority. For some functions, the competent authority must be a public authority. For example, in most countries, the competent authority which makes the final adoption decree or order will be a court, and in some countries it is an administrative authority (a public body). In the case of the certification under Article 23 that an adoption was made in accordance with the Convention, the Contracting State must inform the Convention’s depositary (the Dutch Ministry of Foreign Affairs) of the name of the authority competent to make the certification under Article 23.

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\* See “Explanatory Report to the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*” drawn up by G. Parra-Aranguren, Hague Conference on Private International Law, *Proceedings of the Seventeenth Session*, Tome II, “Adoption – co-operation” pp. 539 – 651. Available also on the website of the Hague Conference at < [www.hcch.net](http://www.hcch.net) > under “Intercountry Adoption Section” and “Explanatory documents”.

**Illegal adoption:** in this Guide, the term “illegal adoption” means an adoption resulting from “abuses, such as abduction, the sale of, traffic in, and other illegal or illicit activities against children”. One of the main objects pursued by the Convention is to prevent such abuses\*. In the context of the Asian African Tsunami disaster on 26 December 2004, the Permanent Bureau issued a statement which noted that “children and their families are protected against the risks of illegal, irregular, premature or ill-prepared adoptions abroad by the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*” (see also Chapter 10.2.1).

**Independent adoption:** in this Guide, the term “independent adoption” is used to refer to those cases where the prospective adoptive parents are approved as eligible and suited to adopt by their Central Authority or accredited body. They then travel independently to a country of origin to find a child to adopt, without the assistance of a Central Authority or accredited body in the State of origin. Independent adoptions, as defined, do not constitute good practice. They do not satisfy the Convention’s requirements and should not be certified under Article 23 as a Convention adoption. A private adoption (see below) could never be certified by Article 23. In practice, sometimes no distinction is made between the terms “independent adoption” and “private adoption” and this may cause confusion.

**Matching:** the term does not appear in the text of the Convention because no French equivalent exists. In the French version of this Guide this term has been translated by *apparentement* and is defined in its glossary. A full explanation of the process of matching is given at Chapter 7.2.5

**Permanent Bureau:** the general secretariat of the Hague Conference on Private International Law, based in The Hague, Netherlands. The Permanent Bureau may be contacted by e-mail at: [secretariat@hcch.net](mailto:secretariat@hcch.net).

**Placement:** in this Guide, the term “placement” refers to the stage after the “matching” and before the “entrustment” (the physical hand over) of a particular child with a particular adoptive family. It may also refer to the stage between “entrustment” and the final adoption decision. The Central Authority of the State of origin, using all the available information including the report on the child and the report on the prospective adoptive parents, shall determine whether the “envisaged placement” is in the best interests of the child in accordance with Article 16(1) *d*). The adoptive family and the Central Authority of the Receiving State must have the opportunity to consider the report on the child before they accept the proposed placement.

**Private adoption:** in this Guide, the term “private adoption” refers to one where arrangements for adoption have been made directly between a biological parent in one Contracting State and prospective adopters in another Contracting State. Private adoptions arranged directly between birth parents and adoptive parents come within the scope of the Convention if the conditions set out in Article 2 are present (*inter alia*, the child has been, is or will be moved from the State of origin to the receiving State), but such adoptions are not compatible with the Convention. A distinction is made in this Guide between purely private adoptions and “independent adoptions” (see above). For further explanation, see Chapter 8.6.6.

**Public authority:** any authority or body which is a part of the government structure. It may be located within a Ministry or it may be an independent statutory authority. As a government entity, the public authority is funded by and is accountable to the government.

**Simple adoption:** a simple adoption is one in which the parent-child relationship which existed before the adoption is not terminated but a new legal parent-child relationship between the child and his or her adoptive parents is established, and those adoptive parents have parental responsibility for the child.

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\* See “Explanatory Report to the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*” drawn up by G. Parra-Aranguren, Hague Conference on Private International Law, *Proceedings of the Seventeenth Session*, Tome II, “Adoption – co-operation” pp. 539 – 651, para. 70. Available also on the website of the Hague Conference at < [www.hcch.net](http://www.hcch.net) > under “Intercountry Adoption Section” and “Explanatory documents”.

## INTRODUCTION

1. The *Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: A Guide to Good Practice* is a project of post-Convention support initiated by the Permanent Bureau for the purpose of assisting States (whether or not already Contracting States) with the practical implementation of the Convention, in a manner which achieves the objects of the Convention, namely, the protection of children who are adopted internationally. It is the first such Guide for the 1993 Convention, and it identifies important matters related to planning, establishing and operating the legal and administrative framework to implement the Convention. It does not always claim to be a guide for best practices because some practices are necessarily different in different Contracting States. The differences in resources and skills must be recognised, as well as the fact that each Contracting State has its own strengths and challenges. Although the situation is not the same for every State, the basic test for all practices is whether they help to achieve the overall objects of the Convention. Most of the matters identified in the Guide need to be considered prior to ratification or accession. For this purpose, the Guide is aimed at policy makers involved in short term and long term planning to implement the Convention in their country, as well as lawyers, administrators, caseworkers and other professionals needing guidance on some practical or legal aspects of implementing the Convention. Accredited bodies and approved (non-accredited) persons will also be able to use the Guide to assist them in performing their functions under the Convention.

2. The Guide may also assist in other situations, such as: setting good practice standards for Contracting States wishing to improve their existing procedures; and for authorities wishing to assess their need for additional resources or changes to legislation as compared to the recommended good practices in the Guide. The Guide could also help Central Authorities to eliminate obstacles to the operation of the Convention where divergent practices or procedures are creating difficulties. Furthermore, judges in receiving States and in States of origin who are required to make decisions on intercountry adoptions may find the Guide useful in determining whether the relevant Convention procedures have been followed in the adoption case before them.

3. Intercountry adoption does not occur in a vacuum and should be part of a national child care and protection strategy. For this reason, the Guide emphasises the need for a comprehensive assessment by a State of its adoption situation (both national and intercountry), before the Convention comes into force for that State. Where a State is intending to join the Convention, the Guide encourages the adequate preparation by that State of its legal and administrative structures (such as implementing legislation and procedures, establishment of authorities, provision of human and material resources). Experience has shown that these preparations are essential to implement the Convention effectively after ratification or accession, and to ensure its efficient operation.

4. The Guide attempts to set realistic standards for new and developing Central Authorities to achieve, bearing in mind that they may have limited resources at the outset, and even for an indefinite period. Experience has shown that careful planning and progressive implementation, which take into account the reality of the current operating system and limited economic resources, will assist Contracting States to plan for and achieve a higher standard of intercountry adoption practices.

5. Importantly, the Guide tries to emphasise the shared responsibility of receiving States and States of origin to develop and maintain ethical intercountry adoption practices. At the heart of the matter are the child's best interests, which must be the fundamental principle that supports the development of a national child care and protection system as well as an ethical, child-centred approach to intercountry adoption.

6. As for the structure of the Guide, it is divided into three parts. Part I, "The Framework of the Convention", deals with the principles and structures needed for the implementation of the Convention. Part II, "The Framework for Protection of Children (the national and

international framework)", deals with the implementation of procedural aspects of intercountry adoption, as well as legal issues and post-adoption services. Part III contains the Annexes. By reviewing first the broader framework of Convention principles and structures, followed by a review of the framework for protection of children through good practices and procedures to apply in individual cases, the Guide aims to provide the overview necessary to assist all those responsible for the policy and practice of implementing the Convention, whether at the international, national or local level.

7. The Guide draws on a number of sources to advocate good practices in intercountry adoption. The Convention itself and its Explanatory Report are the primary sources of what must be considered as mandatory good practices. In addition, the Recommendations of Special Commission meetings have been relied upon. These recommendations have been agreed to in the past by countries represented at Special Commissions. As such, they should be viewed as internationally agreed good practice guidelines for the Convention. Other good practices came from the responses to Special Commission Questionnaires as well as from information provided by Central Authorities, accredited bodies and experienced non-governmental organisations. Some practices, particularly in the chapter on legal issues, draw from advice which has been given by the Permanent Bureau in response to particular requests. Taken together, with known examples of national practices, these sources permit the Permanent Bureau to present in the Guide a range of practices and procedures to follow or to avoid – depending on whether they will help to achieve the objects of the Convention, or undermine or circumvent its safeguards. Where a footnote refers to a website as a source of information, those websites were last consulted in June 2008.

8. The 2005 Special Commission made a recommendation giving its general endorsement to the draft Guide to Good Practice with directions for the completion of the work. It was agreed that certain revisions would be made by the Permanent Bureau, with the assistance of a group of experts appointed by the Special Commission.

9. The States invited to participate in the Working Group of Experts were: Australia, Belgium, Brazil, Burkina Faso, Canada, Chile, China, Colombia, Germany, India, Lithuania, Norway, the United States of America and South Africa, as well as representatives of International Social Service and the Nordic Adoption Council. The Permanent Bureau is especially grateful for the valuable contributions of the experts from Belgium (Ms Anne Ottevaere), Canada (Ms Patricia Paul-Carlson), China (Mr Liu Kang Sheng), Germany (Ms Angelika Schlunck), Lithuania (Ms Odeta Tarvydiene), Norway (Mr Morten Stephansen), the United States of America (Mr John Ballif), International Social Service (first Ms Isabelle Lammerant and later Mr Hervé Boéchat) and the Nordic Adoption Council (Mr Sten Juul Petersen).

10. The Permanent Bureau also acknowledges the valuable assistance of the following persons: Ms Trish Maskew, who prepared an early draft of the Guide for consideration by a group of experts who met in The Hague in September 2004; Ms Jennifer Degeling, Principal Legal Officer at the Permanent Bureau who prepared the draft Guide which was considered by the 2005 Special Commission, and who co-ordinated the work of the expert group to prepare the Guide for publication; Mr Hans van Loon, Secretary General and Mr William Duncan, Deputy Secretary General, who provided input and advice throughout the development of the Guide. Mrs Laura Martínez-Mora, Adoption Programme Co-ordinator, and Mrs Sophie Molina, administrative Assistant for the Adoption Programme, in the Permanent Bureau's Intercountry Adoption Technical Assistance Programme, who assisted with the footnotes and the preparations for publication.

11. Nothing in this Guide may be construed as binding on particular States or Central Authorities or as modifying the provisions of the Convention; however, all States are encouraged to review their own practices, and where appropriate and feasible, to modify them. For both established and developing Central Authorities, the implementation of the Convention should be seen as a continuing, progressive or incremental process of improvement.

## PART I: THE FRAMEWORK OF THE CONVENTION

12. Part I of this Guide focuses on fundamental principles of the Convention for the protection of children. These principles are: the protection of the child's best interests, the safeguards for the child against abduction, sale or trafficking, the establishment of a framework of co-operation between authorities, and the establishment of a framework for authorisation of competent authorities to approve intercountry adoptions. Part I also examines the institutional structures (Central Authorities and accredited bodies) established by Contracting States and which will be responsible, directly or indirectly, for implementing the principles and performing the functions required by the Convention. Furthermore, Part I examines in some detail how regulating the costs of intercountry adoption can support the principle preventing improper financial gain – one of the important safeguards in the Convention.



## CHAPTER 1 – PRELIMINARY MATTERS

### 1.1 The need for the Convention

13. The need for a new convention on intercountry adoption became apparent in the 1980s when it was recognised that there had been a dramatic increase in international adoptions in many countries from the late 1960s. Intercountry adoption had increased to such an extent that it had become a worldwide phenomenon involving migration of children over long geographical distances and from one society and culture to another very different environment. It was also recognised that this phenomenon was creating serious and complex human and legal problems and the absence of existing domestic and international legal instruments indicated the need for a multilateral approach.<sup>1</sup>

14. In December 1987, the Permanent Bureau of the Hague Conference prepared a note on the desirability of a new convention on international co-operation in respect of intercountry adoption.<sup>2</sup> That note analysed the shortcomings of the 1965 Hague Adoption Convention<sup>3</sup> and suggested that a new convention, which addressed the needs for substantive safeguards in intercountry adoption and a system of co-operation between the countries of origin and receiving countries, might be necessary.

15. The Explanatory Report for the 1993 Convention notes that the “insufficiency of the international legal instruments to meet the present problems caused by intercountry adoptions was acknowledged in a ‘Memorandum’ prepared by the Permanent Bureau in November 1989, and the following requirements were mentioned:

- (a) *a need for the establishment of legally binding standards which should be observed in connection with intercountry adoption (in what circumstances is such adoption appropriate; what law should govern the consents and consultations other than those with respect to the adopters?);*
- (b) *a need for a system of supervision in order to ensure that these standards are observed (what can be done to prevent intercountry adoptions from occurring which are not in the interest of the child; how can children be protected from being adopted through fraud, duress or for monetary reward; should measures of control be imposed upon agencies active in the field of intercountry adoption, both in the countries where the children are born and in those to which they will travel?);*
- (c) *a need for the establishment of channels of communications between authorities in countries of origin of children and those where they live after adoption (it would be conceivable, for example, to create by multilateral treaty a system of Central Authorities which could communicate with one another concerning the protection of children involved in intercountry adoption); and there is, finally,*
- (d) *a need for co-operation between the countries of origin and of destination (an effective working relationship, based on mutual respect and on the observance of high professional and ethical standards, would help to promote confidence between such countries, it being*

<sup>1</sup> See “Explanatory Report to the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*” drawn up by G. Parra-Aranguren, Hague Conference on Private International Law, *Proceedings of the Seventeenth Session*, Tome II, “Adoption – co-operation”, pp. 539 – 651, para. 6. Available also on the website of the Hague Conference at < www.hcch.net > under “Intercountry Adoption Section” and “Explanatory documents”, (hereinafter, “Explanatory Report”); see also H. van Loon, “Report on Intercountry Adoption”, Prel. Doc. No 1 of April 1990, para. 4 in the Hague Conference on Private International Law, *Proceedings of the Seventeenth Session*, Tome II, “Adoption – co-operation”, pp. 11-119.

<sup>2</sup> See H. van Loon, “Note on the desirability of preparing a new convention on international co-operation in respect of intercountry adoption”, Prel. Doc. No 9 of December 1987 for the attention of the Special Commission of January 1988, *Proceedings of the Sixteenth Session*, Tome I, *Miscellaneous matters*, pp. 165 *et seq.*

<sup>3</sup> The *Hague Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions*.

*reminded that such forms of co-operation already exist between certain countries with results which are satisfactory to both sides).<sup>4</sup>*

## 1.2 Brief history of the Convention

16. It was decided by the Sixteenth Session of the Hague Conference on Private International Law, held in October 1988, that the work on a new convention would be included in the work of the Seventeenth Diplomatic Session. It was also decided that it was vital to seek the participation of non-Member States in the preparation of the Convention.<sup>5</sup> In preparation for the Diplomatic Session, Special Commission meetings were held in 1990, 1991 and 1992. The Seventeenth Session convened on 10 May 1993 and the draft Convention was examined in Plenary and unanimously approved on 29 May 1993.

17. Despite the wide range of views on intercountry adoption, the participating States were all joined by a “common will to achieve a result which would help the homeless children of the world to find a family, and this with full respect for their rights.”<sup>6</sup>

18. The States recognised that growing up in a family was of primary importance and was essential for the happiness and healthy development of the child. At the same time, there was acceptance that intercountry adoption should be regarded as a subsidiary means of finding a family for a child. The child should ideally be raised in his or her family of birth. If that is not possible, then a family should be sought in his or her country of origin. When that is also not possible, then intercountry adoption may provide the child with a permanent, loving home. Finally, the States realised that measures of protection were essential to ensure that intercountry adoptions are made in the best interests of the child and to eradicate abuses.<sup>7</sup>

19. The effort was then made to create an instrument that would be acceptable to the widest possible range of States, that would keep the best interests of the child paramount, and that created a framework for international co-operation. The 1993 Hague Convention achieves the objects of Article 21 (e) of the *United Nations Convention on the Rights of the Child*<sup>8</sup> to “promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.”

20. Indeed, the 1993 Convention refines, reinforces and augments the broad principles and norms laid down in the *Convention on the Rights of the Child* by adding substantive safeguards and procedures.<sup>9</sup> The 1993 Convention establishes minimum standards, but does not intend to serve as a uniform law of adoption. While making the rights of the child paramount, it also respects the rights of families of origin and adoptive families.

21. The result is a special Convention, novel in its combination of these distinctly different goals. It contains certain aspects of instruments from such diverse areas as human rights, judicial and administrative co-operation and private international law.

22. This result is outlined succinctly in the Preamble, which states:

*“The States signatory to the present Convention,*

<sup>4</sup> See Explanatory Report, *supra*, note 1, para. 7.

<sup>5</sup> *Ibid.*, para. 8.

<sup>6</sup> See H. van Loon, “International Co-operation and Protection of Children with regard to Intercountry Adoption”, *Recueil des cours de l’Académie de droit international de La Haye*, Vol. 244 (1993-VII), p. 335, para. 181.

<sup>7</sup> See Explanatory Report, *supra*, note 1, paras 37-54.

<sup>8</sup> *United Nations Convention on the Rights of the Child*, adopted by General Assembly resolution 44/25 of 20 November 1989. Available at < www.ohchr.org > (hereinafter, “UNCRC”).

<sup>9</sup> See H. van Loon, *supra*, note 6. See also W. Duncan, “The Protection of Children’s Rights in Intercountry Adoption”, in L. Heffernan (ed.), *Human Rights – A European Perspective*, The Round Hall Press / Irish Centre for European Law, 1994.

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

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

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

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

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

23. While the approval of the Convention was a momentous occasion, all participants realised that making the Convention work in actual practice would require a continued and sustained effort by individuals, organisations and governments, that continued assessment of the practical operation of the Convention would be vital,<sup>10</sup> and that countries of origin in particular would need assistance in carrying out their responsibilities.<sup>11</sup>

24. In the years since the approval of the Convention, numerous challenges have been faced by countries implementing the Convention. This has been particularly true for those States, generally countries of origin, whose participation in the Convention has led to an increased awareness of the need for implementation guidance and assistance.

25. Three Special Commission meetings to review the operation of the Convention have now been held, the first in 1994 with the purpose of examining issues relating to the implementation of the Convention<sup>12</sup> as well as its application to refugee children.<sup>13</sup> The second, in 2000, reviewed the practical operation of the Convention.<sup>14</sup> At the third Special Commission in 2005, approval was given, in principle, to the draft of this Guide to Good Practice.<sup>15</sup> The latter two meetings generated a number of important conclusions and recommendations, as well as standard forms, which are taken into account in this Guide.

<sup>10</sup> See H. van Loon, *supra*, note 6, p. 371, para. 255.

<sup>11</sup> See W. Duncan, "Regulating Intercountry Adoption – An International Perspective", Chapter 3 in A. Bainham and D. Pearl (eds.), *Frontiers of Family Law*, John Wiley and Sons, 1993.

<sup>12</sup> See "Report of the Special Commission on the Implementation of the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption* (17–21 October 1994)", drawn up by the Permanent Bureau, Hague Conference on Private International Law, *Proceedings of the Eighteenth Session*, Tome I, *Miscellaneous matters*, pp. 277 – 315. Available also on the website of the Hague Conference at < www.hcch.net > under "Intercountry Adoption Section" and "Special Commissions".

<sup>13</sup> *Ibid.*, paras 10–14. The Recommendation on refugee children is at Annex 5 of this Guide and on the Hague Conference website at < www.hcch.net > under "Intercountry Adoption Section" and "Special Commissions".

<sup>14</sup> See "Report and Conclusions of the Special Commission on the practical operation of the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* (28 November – 1 December 2000)", in *Proceedings of the Nineteenth Session*, Tome I, *Miscellaneous matters*, pp. 481 et seq. Available on the website of the Hague Conference at < www.hcch.net > under "Intercountry Adoption Section" and "Special Commissions" (hereinafter, "Report of the 2000 Special Commission").

<sup>15</sup> See "Report and Conclusions of the Special Commission on the practical operation of the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption* (17 – 23 September 2005)", drawn up by the Permanent Bureau, Hague Conference on Private International Law, August 2006, Recommendation No 1. Available on the website of the Hague Conference at < www.hcch.net > under "Intercountry Adoption Section" and "Special Commissions" (hereinafter, "Report of the 2005 Special Commission").

### **1.3 Purpose of the Convention**

26. The purpose of developing the Convention was to create a multilateral instrument which would define certain substantive principles for the protection of children, establish a legal framework of co-operation between authorities in the States of origin and in the receiving States, and to a certain extent, unify private international law rules on intercountry adoption.

### **1.4 Contemplating becoming a Party to the Convention**

27. States contemplating becoming a Party will have considered the purpose and objects of the Convention, and their ability to support such purpose and objects. Other matters for consideration by individual States include the extent to which the existing domestic legal and administrative framework will support the implementation and operation of the Convention, and a time-frame for any necessary legislative amendments. Consultations between different stakeholders, especially government and non-government agencies, will usually be necessary to obtain support and approval to ratify or accede to the Convention. Furthermore, federal States have to ensure that there is sufficient support, consent and co-operation in their various provinces, territories or states to implement the Convention consistently.

28. A detailed description of the steps to take prior to signing the Convention and before ratification of, or accession to, the Convention, is set out in Annex 1: Detailed pathway to signature and ratification / accession.

### **1.5 Assessment of the current situation**

29. States should undertake a detailed assessment of their current adoption practices and procedures, including existing programmes for children deprived of parental care, and procedures for evaluation and preparation of prospective adoptive parents, as well as funding arrangements for such programmes. The assessment should be undertaken before making decisions on how to set up a Central Authority, whether or not to use accredited bodies or approved (non-accredited) persons, and how to structure the child protection and adoption policies.

30. The assessment should include information on the adoptable children in need of intercountry adoption: their number, ages, profiles and special needs; any and all available aid programmes for family preservation and reunification, current national adoption programmes or child care services, and current adoption practices.

31. An assessment should also include an analysis of how each step of the current process is funded and which institutions, bodies or other persons now perform functions affected by the Convention.

### **1.6 An implementation plan**

32. After an assessment is done, States may be able to determine those changes or actions which need to be taken immediately to protect children, those which can be implemented upon the Convention's entry into force, and those which should be developed over a period of time.

33. These decisions will inform choices about who to designate as the Central Authority, and what resources to allocate to the Central Authority. In addition, States will need to determine which functions, if any, can be performed by public authorities, accredited bodies or approved (non-accredited) persons, and how the proposed system will be funded. Matters

concerning Central Authorities and accredited bodies are further developed in Chapter 4: Institutional Structures: Central Authorities and Accredited Bodies.

34. Once a State has undertaken an internal assessment of its current adoption and child protection system, and reviewed the requirements and principles of the Convention, a progressive implementation plan may be developed. Such a plan can be relevant for newly acceding States as well as for States already Party to the Convention which have identified the benefits of having a long-term strategy for the protection of children in need of care.

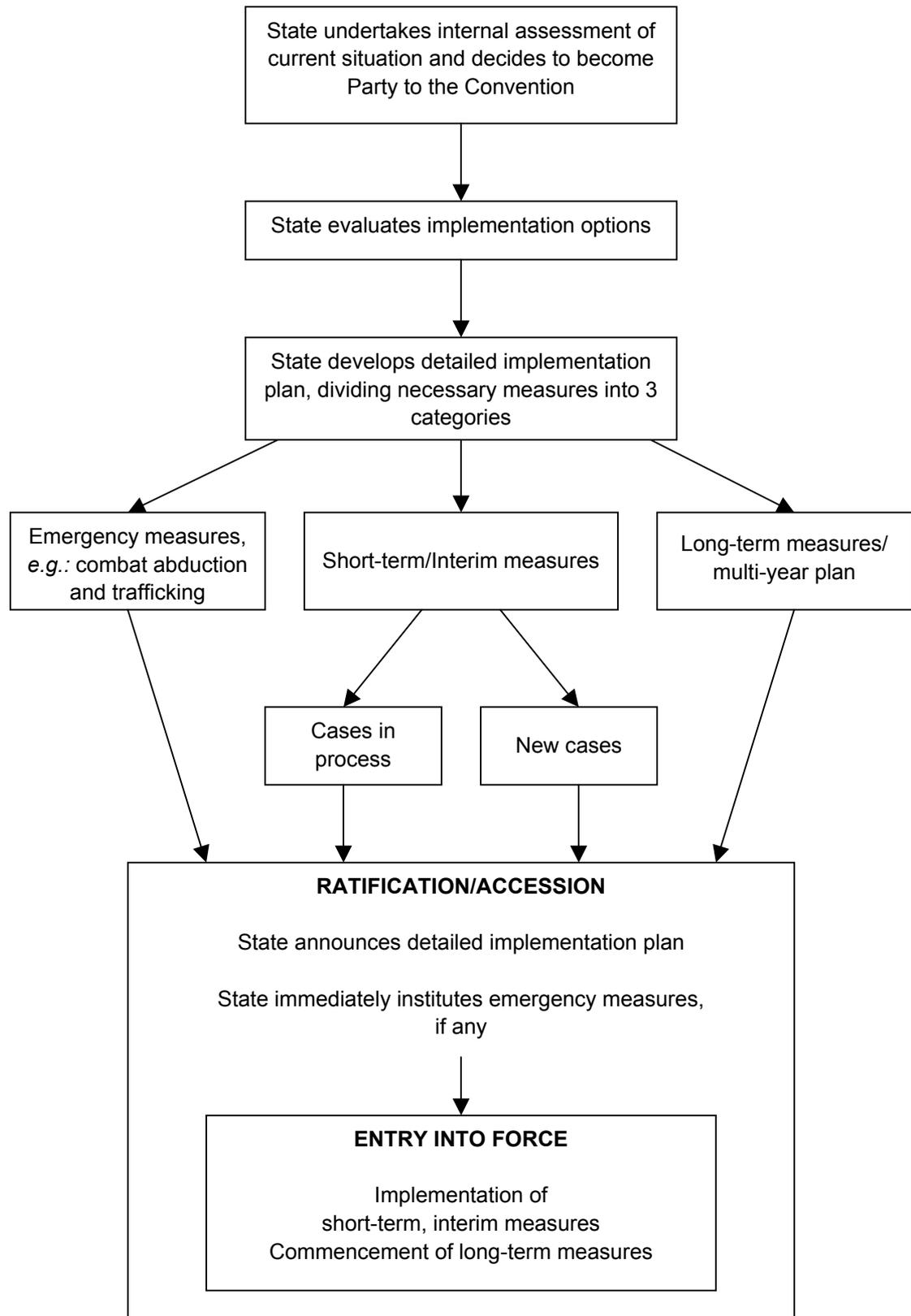
## **1.7 Developing an implementation plan**

35. The following steps may be involved in developing an implementation plan:

- Develop an assessment strategy, mechanism and tools.
- Assess the internal situation.
- Review the internal assessment results.
- Determine whether emergency measures are needed.
- Develop a long-term plan.
- Develop a short-term plan.
- Produce a written implementation plan.
- Allocate resources to put the plan into operation.
- Manage further ongoing assessment or control.

36. A more detailed description of the process for developing an implementation plan appears in Annex 2 of this Guide.

## DIAGRAM OF THE PROCESS TOWARDS IMPLEMENTATION



## **CHAPTER 2 – GENERAL PRINCIPLES OF THE CONVENTION**

### **Outline of general principles**

#### **2.1 Ensuring adoptions take place in the best interests of the child and with respect for his or her fundamental rights**

- 2.1.1 Subsidiarity
- 2.1.2 Non-discrimination
- 2.1.3 Measures supporting the best interests principle

#### **2.2 Establishing safeguards to prevent abduction, sale and trafficking in children for adoption**

- 2.2.1 Protection of families
- 2.2.2 Combating abduction, sale and trafficking in children
- 2.2.3 Ensuring that proper consents are given
- 2.2.4 Preventing improper financial gain and corruption

#### **2.3 Establishing co-operation between States**

- 2.3.1 Co-operation between Central Authorities
- 2.3.2 Co-operation regarding Convention procedures
- 2.3.3 Co-operation to prevent abuses and avoidance of the Convention

#### **2.4 Ensuring authorisation of competent authorities (UNCRC, Art. 21(a))**

- 2.4.1 Competent authorities
- 2.4.2 Central Authorities
- 2.4.3 Accredited bodies and approved (non-accredited) persons

37. This Chapter attempts to establish the broader context of general principles which should be borne in mind when developing legislation, procedures and other measures to implement the Convention. These principles could also be applied to the development of regional or bilateral instruments. The general principles are supported by the key operating principles (see Chapter 3).

38. The general principles provide the essential framework for guiding the overall implementation of the Convention and developing appropriate procedures, and they apply to all entities and individuals involved in intercountry adoptions under the Convention. These principles are given prominence in the Preamble to the Convention. Experts attending the Special Commission meetings insisted on the importance of the Preamble as guidance for interpretation when applying the Convention to particular situations.<sup>16</sup> Certain principles are also given prominence in individual articles, in particular Article 1, which sets out the objects of the Convention.

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<sup>16</sup> See also Explanatory Report, *supra*, note 1, para. 36.

39. The general principles of the Convention should be equally relevant to the principles of the national child protection system. The development of such a system, and the role of intercountry adoption within that system, including the administrative processes and practical aspects, are discussed in Part II of this Guide entitled: The Framework for Protection of Children (the national and international framework), at Chapters 6 and 7.

40. The key operating principles are dealt with in Chapter 3 of this Guide. They are principles which govern the day-to-day operation of the Convention's procedures and handling of files or other requests. These principles should also be borne in mind at the time when a Central Authority and competent authorities are being established or designated to perform the Convention functions.

## 2.1 Ensuring adoptions take place in the best interests of the child and with respect for his or her fundamental rights

41. One of the objectives of the Convention is "to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law."<sup>17</sup>

42. The Preamble to the Convention refers to the *Convention on the Rights of the Child*. The child's fundamental rights as reflected in the latter Convention include:

- the child's best interests shall be a primary consideration in all actions concerning children;<sup>18</sup>
- non-discrimination of any kind, irrespective of the child's or his parents' or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status;<sup>19</sup>
- the right of a child who is capable of forming his or her own views to express these views freely and to have these views given due weight in accordance with the age and maturity of the child.<sup>20</sup>

43. In achieving the best interests of the child in intercountry adoption, the 1993 Hague Convention recognises that:

- children should grow up in a family environment;<sup>21</sup>
- permanency is preferable to temporary measures;<sup>22</sup>
- intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin.<sup>23</sup>

44. In practice, Contracting States and Central Authorities should guard against the misuse or arbitrary interpretation of the best interests principle to override the child's fundamental rights when applying this Convention.

45. The manner in which the best interests principle and the fundamental rights of the child are supported in the Convention are discussed below.

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<sup>17</sup> Art. 1 a).

<sup>18</sup> UNCRC, *supra*, note 8, Art. 3(1).

<sup>19</sup> *Ibid.*, Art. 2(1).

<sup>20</sup> *Ibid.*, Art. 12(1).

<sup>21</sup> See Preamble to the Convention; see also Preamble to the UNCRC, *supra*, note 8.

<sup>22</sup> See Explanatory Report, *supra* note 1, para. 43; see also UNCRC, *supra*, note 8, Art. 20(3).

<sup>23</sup> See Preamble to the Convention.

### 2.1.1 Subsidiarity

46. The principle of subsidiarity is highlighted in the Preamble to the Convention and in Article 4 b). Article 4 b) provides that:

*“An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin [...] have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child’s best interests;”*

47. “Subsidiarity” means that States Party to the Convention recognise that a child should be raised by his or her birth family or extended family whenever possible. If that is not possible or practicable, other forms of permanent family care in the country of origin should be considered. Only after due consideration has been given to national solutions should intercountry adoption be considered, and then only if it is in the child’s best interests.<sup>24</sup> Intercountry adoption serves the child’s best interests if it provides a loving permanent family for the child in need of a home. Intercountry adoption is one of a range of care options which may be open to children in need of a family.<sup>25</sup>

48. The subsidiarity principle is central to the success of the Convention. It implies that efforts should be made to assist families in remaining intact or in being reunited, or to ensure that a child has the opportunity to be adopted or cared for nationally. It implies also that intercountry adoption procedures should be set within an integrated child protection and care system, which maintains these priorities. However, States should also ensure that efforts to achieve this goal do not unintentionally harm children by delaying unduly a permanent solution through intercountry adoption. States should guarantee permanency planning in the shortest possible time for each child deprived of his / her parents. Policies should work to promote family preservation and national solutions, rather than to hinder intercountry adoption.

49. This Guide encourages incorporating intercountry adoption within a comprehensive child and family welfare policy. Important steps toward this goal include coherent legislation, complementary procedures and co-ordinated competences. Such a policy would ultimately incorporate support to families in difficult situations, prevention of separation of children from their family, reintegration of children in care into their family of origin, kinship care, national adoption and more temporary measures such as foster and residential care. Matching for both national and intercountry adoption should be a professional, multi-disciplinary and qualitative decision taken in the shortest possible time on a case-by-case basis, after careful study of the situation of the child and the potential families, and with care being taken that the procedure does not unnecessarily harm the child through its methods of implementation. Such decisions would include systematic implementation of the subsidiarity principle, as appropriate.

50. The Convention refers to “possibilities” for placement of a child in the State of origin. It does not require that all possibilities be exhausted. This would be unrealistic; it would place an unnecessary burden on authorities; and it may delay indefinitely the possibility of finding a permanent home abroad for a child.

51. The principle of subsidiarity should be interpreted in the light of the principle of the best interests of the child. For example:

<sup>24</sup> See, for example, the responses of Chile, Ecuador, Estonia, India, Latvia, Lithuania, Peru and South Africa to question No 4(b) of the 2005 Questionnaire on the Practical Operation of the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption*. The Questionnaire and the responses are available on the website of the Hague Conference at: < [www.hcch.net](http://www.hcch.net) > under “Intercountry Adoption Section” and “Special Commissions” (hereinafter “2005 Questionnaire”).

<sup>25</sup> Statement of Unicef’s position on intercountry adoption at Annex 10 of this Guide and at < [www.hcch.net](http://www.hcch.net) > under “Intercountry Adoption Section” and “Related documents and links”.

- It is true that maintaining a child in his or her family of origin is important, but it is not more important than protecting a child from harm or abuse.
- Permanent care by an extended family member may be preferable, but not if the carers are wrongly motivated, unsuitable, or unable to meet the needs (including the medical needs) of the particular child.
- National adoption or other permanent family care is generally preferable, but if there is a lack of suitable national adoptive families or carers, it is, as a general rule, not preferable to keep children waiting in institutions when the possibility exists of a suitable permanent family placement abroad.<sup>26</sup>
- Finding a home for a child in the country of origin is a positive step, but a temporary home in the country of origin in most cases is not preferable to a permanent home elsewhere.
- Institutionalisation as an option for permanent care, while appropriate in special circumstances, is not as a general rule in the best interests of the child.

52. It is noted that in-family adoptions (adoptions by a relative) come within the scope of the Convention (see Chapter 8.6.4 of this Guide). The question may arise as to where the child's best interests lie when the choice is between a permanent home in the State of origin and a permanent home abroad with a family member. Assuming that the two families in question are equally suitable to adopt the child, in most cases the child's interests may be best served by growing up with the biologically-related family abroad. This example illustrates that it is not subsidiarity itself which is the overriding principle of this Convention, but the child's best interests.

53. It is sometimes said that the correct interpretation of "subsidiarity" is that intercountry adoption should be seen as "a last resort". This is not the aim of the Convention. National solutions for children such as remaining permanently in an institution, or having many temporary foster homes, cannot, in the majority of cases, be considered as preferred solutions ahead of intercountry adoption. In this context, institutionalisation is considered as "a last resort."<sup>27</sup>

### **2.1.2 Non-discrimination**

54. The principle of non-discrimination in the 1993 Hague Convention derives from Article 21(c) of the *Convention on the Rights of the Child*. Article 21(c) requires Contracting States to "ensure that the child concerned by intercountry adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption."

55. Article 2 of the same Convention is a general non-discrimination provision, and requires Contracting States to protect the rights of any child in their jurisdiction, without discrimination and irrespective of (inter alia) birth or other status. Therefore, children who are the subjects of national or intercountry adoption should enjoy the same rights and protections as any other child.<sup>28</sup>

<sup>26</sup> One State of origin indicated at the 2005 Special Commission that due to a lack of national solutions for its large number of abandoned and orphaned children, and children of destitute parents, intercountry adoption was the best solution for such children at that time.

<sup>27</sup> See Unicef statement, *supra*, note 25.

<sup>28</sup> It is recalled that States also bear responsibility for ensuring that children adopted by national adoption benefit from legal and psycho-social services and procedures equivalent to those provided for intercountry adoption. See International Social Service / International Reference Centre for the Rights of Children Deprived of their Family (hereinafter ISS/IRC), "Editorial: One Child is equal to another: The principle of non-discrimination applied to adoption", *Monthly Review No 2/2005*, February 2005.

56. Article 26(2) of the 1993 Hague Convention contains a more specific non-discrimination clause to the effect that where a full adoption is made under the Convention with the effect of terminating the existing parent-child relationship, the child's rights resulting from the adoption should be equivalent to those resulting from a similar adoption made under national law in the receiving State.

57. In the context of intercountry adoption, the principle of non-discrimination is intended to guarantee equivalent rights and protections for all adopted children. It is also intended to protect the most vulnerable and disadvantaged children and ensure that they have the same possibilities of growing up in a family environment as other children. Contracting States should consider how special assistance can be given to families willing to adopt children with special needs.

### ***2.1.3 Measures supporting the best interests principle***

58. A number of specific measures in the 1993 Convention are intended to support the implementation of the best interests principle.

#### ***2.1.3.1 Ensuring the child is adoptable – meeting the requirements of Convention Chapters II and IV***

59. One of the most important measures to protect the child's best interests in adoption and at the same time to combat abduction of, sale of and trafficking in children is to ensure that a child to be adopted is genuinely adoptable.

60. The Convention establishes a number of obligations and requirements to this effect. The obligation in Article 4 a) to ensure the child is adoptable requires different approaches in different countries. The meaning of "adoptable" or the criteria to determine "adoptability" will be established by the national law of each Contracting State.<sup>29</sup> The procedure for establishing adoptability is discussed further in Chapter 7.

#### ***2.1.3.2 Preserving information***

61. The best interests of the child who is the subject of an intercountry adoption, will be best protected if every effort is made to collect and preserve as much information as possible about the child's origins, background, family and medical history. Both the long-term and short-term interests of the child will be affected by this obligation in Articles 9 a) and 30 of the Convention (see also Chapter 6.1.2 in relation to abandoned children and the loss of their personal information).

62. The child's general history provides a link to his or her past and is important for knowledge and understanding of origins, identity and culture, and to establish or maintain personal connections if at any time he or she returns to the country of origin. The knowledge may contribute to the psychological well-being of the child in later life.

63. The child's medical history may provide important information on the child's current state of health and for diagnosing any medical problems the child could have, either during childhood or later in life. Preservation of information is discussed further in Chapter 9.1.

#### ***2.1.3.3 Matching with a suitable family***

64. Matching the needs of the child with the qualities of the adoptive parents and family is essential for the best interests of the child and should be done professionally. Prospective

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<sup>29</sup> This question is discussed further in Chapter 8, Legal issues surrounding implementation, in Chapters 8.4.2 and 8.6.

adoptive parents should be thoroughly and professionally assessed as suitable to adopt a child, particularly if the child has special needs.

65. Matching should not be done by the prospective adoptive parents, either by selecting an appealing child in person or through a photo listing. Although photo listings can be a useful method of promoting adoption generally, as well as allowing prospective adoptive parents to express interest in adopting a child, countries of origin should be careful that actual matching decisions are made by professionals and are based on the needs of the child with the qualities of the adoptive parents. Matching should not be done by computer. The procedure for matching is discussed in more detail in Chapters 6.4.6, 7.2.5, 7.2.7 and 7.4.6.

## 2.2 Establishing safeguards to prevent abduction, sale and trafficking in children for adoption

66. An important object of the Convention is:

*“To establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children.”<sup>30</sup>*

67. To this end Central Authorities are required to take “directly or through public authorities, all appropriate measures to prevent improper financial or other gain in connection with an adoption, and to deter all practices contrary to the objects of the Convention.”<sup>31</sup> Certain preventive measures are mentioned below.

68. It is important to note that Article 21(a) of the UN *Convention on the Rights of the Child* refers to basic safeguards and provides that:

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

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

69. Practical measures to prevent abuses of the Convention are discussed in Chapter 10, Preventing Abuses of the Convention.

### 2.2.1 Protection of families

70. Protection of families is one of the safeguards envisaged by the Convention to protect children from abduction, sale or trafficking for the purpose of adoption (see Chapter 2.2.2 below about combating these practices). Families and children also need protection from more subtle forms of exploitation, and protective measures are envisaged in the Convention to prevent undue pressure on, or coercion, inducement or solicitation of birth families to relinquish a child (see also the discussion on this question in Chapter 2.2.3: “Ensuring that proper consents are given”). The Convention is clear that the decision to place a child for adoption should not be “induced by payment or compensation of any kind.”<sup>32</sup> This applies equally to individual or group practices. These matters are related to the question of improper financial gain and must be dealt with through the implementing measures of each country.

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<sup>30</sup> Art. 1 b).

<sup>31</sup> Art. 8.

<sup>32</sup> Art. 4 c)(3) and Art. 4 d)(4).

71. The ratification and implementation of the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*,<sup>33</sup> could contribute to the international co-operation against improper solicitation of consent to national or intercountry adoption, in violation of applicable international instruments (Art. 3), including in particular the Hague Convention.<sup>34</sup>

## 2.2.2 Combating abduction, sale and trafficking in children

72. As noted in the Explanatory Report, “the fundamental objects of the Convention are the establishment of certain safeguards to protect the child in case of intercountry adoption, and of a system of co-operation among the Contracting States to guarantee the observation of those safeguards. Therefore, the Convention does not prevent directly, but only indirectly, ‘the abduction, the sale of, or traffic in children’, [Article 1 *b*)], because it is expected that the observance of the Convention’s rules will bring about the avoidance of such abuses”.<sup>35</sup>

73. In the preparatory work for the Convention, it was noted that “the demand for children by industrialised nations and the availability of many homeless children in developing nations, has in addition to regular and legal intercountry adoptions, led to practices of international child trafficking either for purposes of adoption abroad, or under the cloak of adoption, for other – usually illegal – purposes.”<sup>36</sup>

74. The traffic in children in this context may lead to an illegal adoption. The abduction or sale of a child for adoption could occur as a single event. The abduction or sale of children which amounts to trafficking in children for adoption is likely to be done as a systematic organised operation.<sup>37</sup> The term “trafficking” refers to the payment of money or other compensation to facilitate the illegal movement of children for the purposes of illegal adoption or other forms of exploitation.<sup>38</sup> These are all criminal acts, and each Contracting State should ensure that its criminal laws impose severe penalties for these offences.<sup>39</sup> The justice system should ensure that perpetrators are stopped and prosecutions take place. The term “illegal adoption” is included in the Glossary. During the Convention negotiations, Interpol commented that: “the establishment of strict international civil and administrative procedures would make it much more difficult for people to use intercountry adoption procedures as a means of trafficking in children, or as a cover for moving children from one country to another.” On the same occasion it was also suggested that, in particular, the system of Central Authorities would offer the possibility of reporting offenses against criminal law “to the

<sup>33</sup> Optional Protocol to the UNCRC on the sale of children, child prostitution and child pornography, adopted by General Assembly resolution A/RES/54/263 of 25 May 2000. Available at < www.ohchr.org > (hereinafter, “Optional Protocol to the UNCRC on the sale of children”).

<sup>34</sup> See ISS/IRC, News Bulletin No 49, August 2002. For an update of the status of ratification of this Protocol see < www.ohchr.org > under “Human Rights Bodies” and “Committee on the Rights of the Child”.

<sup>35</sup> Explanatory Report, *supra*, note 1, para. 52.

<sup>36</sup> See H. van Loon, *supra*, note 1, para. 78.

<sup>37</sup> See, for example, D. Smolin, “Child laundering: How the intercountry adoption system legitimizes and incentivizes the practices of buying, trafficking, kidnapping and stealing children”, *The Wayne Law Review*, Vol. 52(1), Spring 2006, pp. 113-200. See also ISS/IRC, “Editorial: Is intercountry adoption linked with trafficking for exploitation?”, *Monthly Review No 11-12/2005*, November-December 2005.

<sup>38</sup> See *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*, which supplements the *United Nations Convention against Transnational Organized Crime*, available at < www.ohchr.org >, which states at Art. 3(a): “‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”. See also Explanatory Report, *supra*, note 1, para. 54.

<sup>39</sup> For example, in Belgium, unlawful intermediaries can be punished by imprisonment up to 5 years (Penal Code, Art. 391 *quinquies*); in Chile the payment of money to facilitate adoption is punished by imprisonment up to 5 years (Law 19.620/1999 on Child Adoption, Art. 42); in Lithuania, the purchase and sale of children is punished by imprisonment up to 8 years (Criminal Code, Art. 157). See also the responses to question No 11(1) of the 2005 Questionnaire.

appropriate department so that international police or judicial co-operation may begin, if necessary.”<sup>40</sup>

75. Receiving States and States of origin should work co-operatively to prevent the abduction of children for the purpose of adoption. Any State which has reason to believe that abductions may be occurring should implement emergency measures to combat this practice. As a matter of public policy, adoptions procured through abduction of children should not be recognised.

76. It is also imperative that States notify other authorities, accredited bodies or approved (non-accredited) persons, and the general public, about the existence and application of criminal sanctions. Such factual information is a strong safeguard in preventing future instances of improper or illegal behaviour.

### **2.2.3 Ensuring that proper consents are given**

77. The requirement to obtain proper consents to the adoption is a key feature of the Convention in the fight against the abduction, sale and traffic in children. This means:

- obtaining consents from the legal custodian or guardian of the child (the person, institution or authority referred to in Art. 4 c)(1));
- ensuring that the person giving the consent understands the effect or consequences of their decision;<sup>41</sup>
- ensuring the consents were given freely, and not induced or improperly obtained by financial or other reward;<sup>42</sup>
- ensuring that a new birth mother does not give her consent until some time after the birth of her child;<sup>43</sup>
- ensuring the consent of the child is obtained, when necessary.<sup>44</sup>

78. It is acknowledged that States of origin may often lack the resources for this important responsibility of ensuring that proper consents are obtained.<sup>45</sup> As this will usually be done at the local level, it is important that States have reliable and ethical personnel to oversee the consent procedure. States should take steps to monitor the operations of foreign accredited bodies or persons to ensure that no undue pressure is exerted by them, or on their behalf by intermediaries, to obtain consents to adoptions. This is of particular importance in countries where adoption leading to the termination of the original familial ties is not culturally known. In such contexts, the implications of an intercountry adoption procedure have to be carefully studied, and, if necessary, be reflected in the legislation.

79. Receiving States must play their part. They should ensure that the bodies they accredit and the persons they approve to undertake adoptions are of the highest ethical and

<sup>40</sup> Explanatory Report, *supra*, note 1, para. 54.

<sup>41</sup> See, for example, Colombia (2006 Childhood and Adolescence Code, Art. 66), where specific emphasis is given to informing and counselling birth parents. The consent can only be given one month after the child's birth. In Kenya (2001 Children Act, Art. 163.1), birth parents have to understand that the effect of the adoption order will be permanently to deprive him or her of his or her parental rights; in Madagascar (2005 Law on Adoption, Art. 42), consent will be sought six months after a provisional care order; meanwhile the person who has to consent has to be informed and counselled as well. See also Belgium (Civil Code, Art. 348.4) and the responses of Hungary and the Netherlands to question No 4(d) of the 2005 Questionnaire: in Hungary, a mother has the right to change her consent within 6 weeks after the consent was given; in the Netherlands, biological parents have a minimum of 60 days for reconsidering their decision.

<sup>42</sup> Art. 4 c)(3); Art. 4 d)(4).

<sup>43</sup> Art. 4 c)(4).

<sup>44</sup> Art. 4 d).

<sup>45</sup> Responding to question No 4(c) of the 2005 Questionnaire, Finland claimed that not all countries of origin send a copy of the consent of the biological mother.

professional calibre. They should take steps to monitor the operations of such bodies or persons within their own State. If they receive reports from States of origin about improper behaviour of their accredited bodies or approved (non-accredited) persons, they should consider whether it is appropriate to withdraw the accreditation or the approval of that body or that person.<sup>46</sup>

80. It should not be forgotten that the child's consent to the adoption is sometimes required, depending on his or her age and maturity.<sup>47</sup> The preparation of the child for the adoption, including counselling, may be required.<sup>48</sup> Children's close ties, whether to their family or to other children or personnel in the institution, will be severed by the adoption and they may be especially vulnerable and in need of counselling prior to the adoption.

81. States are encouraged to use the "Model Form for the Statement of Consent" which was approved by the Special Commission of 1994, and was published in March 1995 in the Report of the Special Commission, Annex B.<sup>49</sup> The model form is also in Annex 7 of this Guide and on the Hague Conference website: < [www.hcch.net](http://www.hcch.net) > under Intercountry Adoption Section / The Convention / Recommended Forms.

### 2.2.3.1 *Obtaining consents without inducement*

82. States of origin are required to ensure that an adoption may only take place when the required consents to the adoption on the part of the responsible person, institution, or authority have not been obtained by improper means.<sup>50</sup>

83. Improper inducement may be present if any form of compensation or payment is used to influence or bring about the decision to relinquish a child for adoption.

84. Determining how to prevent inducements is imperative. It is good practice to have a consent procedure which involves both counselling and independent interviewing of persons whose consent is required. It should be noted that States of origin bear the direct responsibility for ensuring that the appropriate consents have been obtained, and obtained without improper behaviour. Receiving States also bear responsibility for the actions of their accredited bodies or approved (non-accredited) persons and their agents in such matters.<sup>51</sup> Receiving States will generally be satisfied with the proof that the necessary consents have been obtained, as referred to in Article 16(2).<sup>52</sup> In some cases the identity of the person giving consent may be disclosed.

### 2.2.3.2 *Preventing solicitation*

85. Of major concern is the reported practice of agents or intermediaries employed by adoption service providers, attorneys, or orphanages and who actively seek out families to relinquish a child for adoption in return for payment.<sup>53</sup> Generally, these agents or intermediaries are not official employees of the service provider, and are often residents of

<sup>46</sup> See, for example, Spain (2007 Law on Intercountry Adoption, Art. 7) and the responses of Denmark and Finland to question No 6(1)(f) of the 2005 Questionnaire. In Denmark, the Central Authority "has the authority to withdraw the accreditation in consequence of serious problems. The Danish National Board of Adoption supervises the accredited bodies in relation to their activities abroad".

<sup>47</sup> Art. 4 d). According to the responses to question No 4 d) of the 2005 Questionnaire, legislation of several responding countries recognised the right of the child to be heard.

<sup>48</sup> Art. 4 d)(1).

<sup>49</sup> See Report of the 2000 Special Commission, *supra*, note 14, Recommendation No 5.

<sup>50</sup> Art. 4 c)(3). See, for example, Ecuador (2003 Children and Adolescents' Code, Arts. 161 & 162); Guatemala (2007 Law on Adoptions, Art. 35 d); Philippines (Domestic Adoption Act of 1998 (RA 8552), Art. III, section 9 and Art. VII, section 21).

<sup>51</sup> See Explanatory Report, *supra*, note 1, para. 376.

<sup>52</sup> USA Final Rules on "Accreditation of Agencies and Approval of Persons Under the Intercountry Adoption Act of 2000" (22 CFR Part 96) and "Intercountry Adoption – Preservation of Convention Records" (22 CFR Part 98), Federal Register, Wednesday 15 February 2006, Vol. 71, N° 31, Section 96.46(c)(1).

<sup>53</sup> This was a common problem in Guatemala under the previous legal system.

the areas in which they work. These types of activities may be particularly difficult for States to address. However, some preventative measures can be taken to limit the ability of, or the benefits to, those employing such tactics.

86. Some States have chosen to include prohibitions on solicitation in their adoption laws or implementing regulations.<sup>54</sup> Some States include such prohibitions in their laws regulating national adoption.<sup>55</sup> Many States also use civil and criminal penalties to suppress these activities, authorising States to investigate and prosecute those who would traffic in children.<sup>56</sup>

87. The *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* creates an intercountry and joint responsibility of States to fight against the sale of children as a result of improperly inducing consents to their adoption.<sup>57</sup>

### 2.2.3.3 *Payment of expenses of birth family*

88. When determining appropriate safeguards, States should also consider whether or not to allow payments of any sort directly to families of origin. In some States it is the practice for families to be compensated for costs incurred during an adoption process.<sup>58</sup> Some have found, however, that allowing any reimbursement may lead to difficulties in determining whether a family has been induced to place their child for adoption.<sup>59</sup> To prevent abuses, States should ensure that family preservation and reunification services are available, and that costs associated with legal, medical, documentation, translation and travel matters are regulated to prevent improper inducements or solicitation of birth families.<sup>60</sup>

### 2.2.4 *Preventing improper financial gain and corruption*

89. The Convention specifically states that no one shall derive improper financial or other gain from an activity related to intercountry adoption<sup>61</sup> and that Central Authorities “shall take, directly or through public authorities”<sup>62</sup> all appropriate measures to prevent this practice.

90. Control over and regulation of the financial aspects of the adoption process by State authorities is a matter of central importance.<sup>63</sup> Countries of origin should ensure that their structure and procedures guard against improper practices and that they monitor the

<sup>54</sup> See also the response of Chile to question No 11(1) of the 2005 Questionnaire: Art. 42 of the Law 19.620/1999 on Child Adoption prohibits solicitations. See also the answers of Ecuador (2003 Children and Adolescents' Code, Arts 155 and 252) and South Africa among others.

<sup>55</sup> See, for example, Oregon, USA: Statute 109-311 (3): “A person may not charge, accept or pay or offer to charge, accept or pay a fee for locating a minor child for adoption or for locating another person to adopt a minor child, except that Oregon licensed adoption agencies licensed under ORS 412.001 to 412.161 and 412.991 and ORS chapter 418 may charge reasonable fees for services provided by them.” Available at < [www.leg.state.or.us/ors/109](http://www.leg.state.or.us/ors/109) >.

<sup>56</sup> See Australia (Adoption Act 1994 (Western Australia), Section 122); Canada (all territories); Chile (Law 19.620/1999 on Child Adoption Title IV, Arts 39-44); Cyprus (Adoption Law No 19(I)/95); Guatemala (2007 Law on Child Adoptions, Art. 34); Luxembourg (Penal Code, Art. 367.2). See also the responses to question No 11(1) of the 2005 Questionnaire: Estonia, “...selling or buying a child is not allowed (Penal Code)”; Switzerland, 2001 Federal Law No 211.221.31 related to the Hague Convention. To sum up, according to the responses to question No 11(1) of the 2005 Questionnaire, only Monaco, Peru, Slovak Republic did not have specific laws on this subject in 2005.

<sup>57</sup> Optional Protocol to the UNCRC on the sale of children, *supra* note 33, Art. 3(1) a) ii.

<sup>58</sup> See United States National Adoption Information Clearinghouse Report, which states that 46 States of the United States allow reimbursement of expenses.

<sup>59</sup> According to the responses to question No 10(3) of the 2005 Questionnaire, the majority of responding countries recognised the existence of these practices, and they stressed the need for transparency in order to avoid abuses.

<sup>60</sup> See, for example, United States of America (Regulations under the Immigration and Nationality Act, (8CFR) Section 204.3 (I)) which states, “[n]othing in this paragraph shall be regarded as precluding reasonable payment for necessary activities such as administrative, court, legal, translation, and/or medical services related to the adoption proceedings”.

<sup>61</sup> Art. 32(1).

<sup>62</sup> Art. 8.

<sup>63</sup> See also ISS/IRC, “Reflections on the costs of intercountry adoption”, *Monthly Review* 72-73, November – December 2004.

activities of institutions, accredited bodies and intermediaries.<sup>64</sup> Receiving States should ensure that they actively monitor their accredited bodies and approved (non-accredited) persons in this regard. The practice of some States of permitting prospective adoptive parents to go direct to orphanages to adopt independently (after being approved to adopt by the receiving country) or to adopt privately, is not recommended due to the lack of any effective controls or monitoring.<sup>65</sup>

91. It is impossible to evaluate financial considerations in isolation. Each stage of the process, from before the entry of the child into the child care and protection system to the finalisation of the adoption, may be affected by this issue. Therefore, questions and policies regarding the payments of fees and contributions, both proper and improper, should be considered throughout the development of a national child protection strategy.

92. States should take care to ensure that each step of the process is both adequately funded and appropriately structured to prevent both improper financial gain and corruption.

93. Some practical suggestions for the prevention of improper financial or other gain are also discussed in Chapter 4.2.1, concerning the role of the Central Authority, and in Chapter 10.1.1: “Strategies to prevent improper financial gain.”

## 2.3 Establishing co-operation between States

94. Co-operation between States is the third central principle of the Convention. The system of co-operation envisioned under the Convention is one in which all Contracting States work together to ensure the protection of children. In order to achieve this goal, it is important that States:

- create systems that complement and strengthen the protections implemented by other Contracting States;
- consider the impact that their regulation of adoption, or lack thereof, may have on other States;
- provide mechanisms for the collection and dissemination of information and statistics to other States Parties, and to those who utilise the adoption and child care and protection system;
- co-operate with other Parties to address temporary or permanent changes in procedures, emergency situations, and enforcement of criminal sanctions;
- provide the Permanent Bureau with updated contact information in respect of Central Authorities and accredited bodies.

95. The Convention makes clear that receiving States and States of origin must share equally the burdens and benefits of developing a stricter regime to safeguard the interests of children who are the subject of intercountry adoptions. The need is clearly evident for co-operation between States and between Central Authorities to achieve the objects of the Convention.

96. States should also work together to determine whether receiving countries can usefully provide assistance to countries of origin, and if so, what form that assistance might

<sup>64</sup> For example, the Central Authorities of Quebec (Canada) and Lithuania co-operated to establish the reasonable fees of intermediaries in Lithuania.

<sup>65</sup> See Chapters 4.2.6 and 10.1.1.6 of this Guide. Chapter 4.2.6 also deals with the question of independent adoptions.

take. However, it is important to ensure that any assistance offered does not compromise in any way the arrangements for intercountry adoptions.<sup>66</sup>

### **2.3.1 Co-operation between Central Authorities**

97. The creation of a Central Authority to facilitate the operation of the Convention is mandatory for all Contracting States.<sup>67</sup> The Central Authority should be provided with the resources and powers to enable it to fulfil its obligations under the Convention. Details on the establishment and operation of Central Authorities are found in Chapter 4, Institutional Structures: Central Authorities and Accredited Bodies.

### **2.3.2 Co-operation regarding Convention procedures**

98. A number of different government authorities and private agencies will be involved in the protection of children, whether or not as part of an intercountry adoption process. Co-operation between such authorities and agencies within a country is necessary to achieve the requirements of the Convention and facilitate the intercountry adoption process. These steps are discussed in more detail in Chapter 7, The Intercountry Adoption Process under the Convention.

99. Co-operation at the post-adoption stage should not be forgotten. Adoptive parents may need support from post-adoption services. Follow-up reports may also be required by the State of origin. These questions are dealt with in Chapter 9, Post-Adoption Matters.

### **2.3.3 Co-operation to prevent abuses and avoidance of the Convention**

100. Central Authorities have an obligation to deter all practices contrary to the objects of the Convention.<sup>68</sup> States and Central Authorities should co-operate to eliminate practices which allow adoptions to occur outside of the Convention framework in situations which avoid the usual safeguards and standards brought by the Convention. These questions are discussed in more detail in Chapter 10, Preventing Abuses of the Convention, and on the question of potential abuses in the consent procedure, see Chapter 2.2.3: Ensuring that proper consents are given.

## **2.4 Ensuring authorisation of competent authorities**

101. The requirement that only competent authorities should be appointed or designated to authorise intercountry adoptions is the fourth central principle of the Convention. Contracting States have an obligation to appoint or designate competent authorities with appropriate powers to enable them to fulfil their functions and to achieve the objects of the Convention.

102. As mentioned in Chapter 2.2, Article 21 of the *Convention on the Rights of the Child* is one of the building blocks of the 1993 Hague Convention. Article 21(a) obliges States Parties to “ensure that the adoption of a child is authorised only by competent authorities” to guarantee that all appropriate safeguards have been followed.

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<sup>66</sup> For example, Sweden provides development assistance at State level to States of origin, in particular through improving child care, maternal care and developing social services. The assistance is not linked to the intercountry adoption programme and is not funded by adoptive parents' contributions for adoptions. See also Chapter 5 of this Guide.

<sup>67</sup> Art. 6(1) states that Contracting States “shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities” (emphasis added).

<sup>68</sup> Art. 8.

### **2.4.1 Competent authorities**

103. The term “competent” in this context includes the idea that the authority must have the power or jurisdiction to make the decision in question.

104. Within each Contracting State there could be a number of different competent authorities for different Convention functions. For example, a competent authority could be a court when the function is to make a final adoption decree or order. On the other hand, the competent authority to make the Article 23 certification could be the Central Authority. For these two Convention functions, competent authorities must be public authorities. However, in relation to the procedural functions in Articles 14–21, the competent authority will sometimes be an accredited body.

105. Each Contracting State should provide a description of the manner in which the various responsibilities and tasks under the Convention are divided between Central Authorities, public authorities and accredited bodies, so that the entities responsible to act under particular articles of the Convention are clearly identified, as well as the mechanisms by which they interact with one another.<sup>69</sup>

106. The authorities competent to perform particular functions in the Convention should be indicated by Contracting States in the Organigram, which was attached to the 2005 Questionnaire and is found in Annex 6 of this Guide. The completed organigrams may be found on the Hague Conference website.

107. The role and functions of competent authorities may be further explained in the Country Profile model form, on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) >.

### **2.4.2 Central Authorities**

108. Central Authorities play a vital role in decision making during the adoption process. The critical step of deciding whether or not an adoption may proceed to finalisation (Art.17) is taken by the Central Authority. It is therefore apparent that Contracting States must ensure that their implementing measures provide for adequate and appropriate powers and resources to authorise the Central Authority to fulfil its obligations and perform its functions. The establishment and role of the Central Authority is discussed in Chapter 4, Institutional Structures: Central Authorities and Accredited Bodies.

109. As noted in the preceding section, the Central Authority functions in Articles 14–21 may be performed by an accredited body, and on certain conditions, Articles 15–21 may be performed by an approved (non-accredited) person.

### **2.4.3 Accredited bodies and approved (non-accredited) persons**

110. In considering the place of intercountry adoption in a national child protection strategy, Contracting States need to consider the role of accredited bodies and whether to allow them to operate as part of the system. An additional question is whether to authorise approved (non-accredited) persons to operate in accordance with Article 22(2). These matters are considered in Chapter 4.

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<sup>69</sup> See Report of the 2000 Special Commission, *supra*, note 14, Recommendation No 1.

## CHAPTER 3 – KEY OPERATING PRINCIPLES

111. As indicated in the introduction to Chapter 2, the key operating principles are intended to guide the day-to-day operation of Convention procedures and handling of files or other requests and should be taken into account when Contracting States are considering their implementing legislation and measures. The key operating principles are:

- Progressive implementation
- Resources and powers
- Co-operation
- Communication
- Expeditious procedures
- Transparency
- Minimum standards

112. Like the general principles, the key operating principles also apply to all authorities, bodies and persons involved with intercountry adoptions under the Convention.

113. Detailed comments on establishing and consolidating the Central Authority, and the role and functions of a Central Authority, are at Chapter 4.1 and 4.2 respectively.

### 3.1 Progressive implementation

114. All Contracting States are encouraged to view implementation of the Convention as a continuing process of development and improvement. Contracting States which have already implemented the Convention may wish to evaluate the operation of the Convention within their country or consider ways to improve the functioning of the Convention, if appropriate, through modification or amendment of existing implementation measures.

115. It is especially vital that States contemplating becoming a Party to the Convention consider the current situation and develop an implementation plan prior to ratifying or acceding to the Convention, whenever possible. Doing so may prevent the significant problems or delays that sometimes accompany implementation.

116. Any Contracting State may seek advice or assistance from other Contracting States to achieve its targets for progressive implementation.<sup>70</sup> The Permanent Bureau may also be able to provide general advice or assistance, or a more specific programme of assistance under the Intercountry Adoption Technical Assistance Programme (ICATAP).<sup>71</sup>

117. Progressive implementation does not mean that countries are not required to meet all their Convention obligations when processing adoptions. Nor does it mean that countries are not required to appoint appropriate competent authorities to perform certain essential functions. Receiving countries in particular need to be assured that countries of origin have

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<sup>70</sup> According to the responses to question No 2(d) of the 2005 Questionnaire, Ecuador, Hungary and Malta expressly sought assistance for the implementation of the Convention.

<sup>71</sup> For more information on this programme, please refer to Annex 2.8 of this Guide and on the website of the Hague Conference at < [www.hcch.net](http://www.hcch.net) > under “Intercountry Adoption Programme” and “Intercountry Adoption Technical Assistance Programme”.

done everything possible to ensure that an adoption is in compliance with the Convention. The principle of progressive implementation is an acknowledgement of the reality that some countries of origin do not have the resources to provide such things as a high standard of services, a thorough investigation of a child's background and situation, or support for family reunification.<sup>72</sup>

## 3.2 Resources and powers

118. Implementing measures and legislation should ensure that all authorities or personnel involved in the operation of the Convention are provided with sufficient powers and resources to support the effective functioning of the Convention.

119. The Central Authority should be properly established and provided with the resources and powers to enable it to fulfil its obligations under the Convention. In a number of States, the implementing measures describe in detail the powers and functions of Central Authorities which are explicit in the Convention, as well as other powers and functions which are seen as implicit or serving an auxiliary function.<sup>73</sup> States intending to ratify or accede to the Convention may benefit from consulting with other experienced Contracting States on questions of Central Authority structure, location and resources.

120. The Convention allows for the use of accredited bodies and, in a more limited manner, approved (non-accredited) persons, to fulfil many of the functions of the Central Authority. Further explanation is given at Chapters 4.3 (Accredited bodies) and 4.4 (Approved (non-accredited) persons). Careful consideration of the use of public or private entities to perform functions is essential. Many States have constructed systems that make effective use of both types of providers.

121. It is equally essential that States carefully plan for adequate financial resources to implement and operate the Convention. Such planning should include the costs of providing child care and protection services, family preservation services and adoption services.

## 3.3 Co-operation

### 3.3.1 Improving co-operation internally

122. There are numerous authorities and bodies involved in the adoption process such as the Central Authorities, public authorities, courts, accredited bodies, approved (non-accredited) persons, institutions or child care agencies and police. Each plays an important role under the Convention and effective communication and co-operation among all parties is crucial. As part of its preparations for implementation prior to ratification of or accession to the Convention, a State will need to ensure that the various authorities and bodies have sufficient training in and understanding of their respective roles under the Convention. This is of particular importance in States having a federal structure.

<sup>72</sup> Canada considers that this principle may often mean that countries of origin have not followed all Convention processes when processing adoptions. Canadian immigration laws require that provinces and territories issue a letter to federal immigration authorities stating that the adoption is in compliance with the Hague Convention. Immigration officials will not issue a visa for the child without this letter from the province or territory. Without a letter from the country of origin stating that it is in agreement that the adoption may proceed (1993 Hague Convention, Art. 17), the provinces and territories cannot issue the required letter for Canadian immigration officials, even if the adoption in all other respects is in the best interests of the child. This also means that Canadian provinces and territories are not in a position to also agree that the adoption may proceed (Art. 17).

<sup>73</sup> See, *inter alia*, the Australian law: Family Law (Hague Convention on Intercountry Adoption) Regulation, Statutory Rules 1998 No 249 as amended, Reg. 6 setting out the functions of the Commonwealth Central Authority and indicating functions of all state Central Authorities; Canada (Quebec): Act to implement the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (R.S.Q., chapter M-35.1.3) and Youth Protection Act (R.S.Q., chapter P-34.1, sections 71.4 to 72.3).

123. Article 7(1) of the Convention obliges the Central Authority to “promote co-operation amongst the competent authorities in their States to protect children and to achieve the other objects of the Convention.” In some countries the Central Authority will take the leading role in ensuring that all other authorities and bodies are kept well informed of their roles and responsibilities in relation to adoption. Regular meetings between the relevant authorities and bodies will ensure that they maintain good communication and co-operation.

### **3.3.2 Improving co-operation externally**

124. The Convention cannot function properly without the fullest co-operation among Central Authorities in the different Contracting States.<sup>74</sup> The responsibility to engage in co-operation falls directly on Central Authorities, as does the obligation to eliminate obstacles to the application of the Convention.<sup>75</sup> These obligations cannot be delegated to accredited bodies or other authorities. The Permanent Bureau can also be approached for assistance by States which are seeking to improve co-operation with other States, or seeking to remove obstacles to co-operation.

125. Central Authority co-operation is discussed further at Chapter 4.2.

### **3.3.3 Improving co-operation through meetings and exchange of information**

126. Co-operation is also improved through meetings and the exchange of information,<sup>76</sup> including the Special Commission meetings to review the operation of the Convention (convened periodically by the Secretary General of the Hague Conference),<sup>77</sup> other regional meetings of Central Authorities,<sup>78</sup> international seminars and conferences. These international meetings help to facilitate the exchange of ideas, resolve international difficulties and provide examples of good practice.<sup>79</sup> They assist in the development of mutual understanding and confidence between Central Authorities, and others, which is necessary to support the effective functioning of the Convention.

127. Central Authorities are encouraged, to the extent possible according to their resources, to provide statistical and other information concerning the operation of the Convention requested by the Permanent Bureau.

## **3.4 Communication**

128. Good communication refers to a number of different functions, including direct contact between individuals or authorities, promotion of the Convention and its objectives, provision of accurate information about designated authorities and also about adoption procedures within the Contracting States.<sup>80</sup>

<sup>74</sup> Art. 7(1).

<sup>75</sup> Art. 7(2) *b*).

<sup>76</sup> See Art. 7(2). See further, the response of Mexico to question No 5(c) of the 2005 Questionnaire: “We carry out courses, workshops, worktables on the subject of adoption, as well as the information exchange of the Central Authorities”.

<sup>77</sup> See Art. 42.

<sup>78</sup> The European Central Authorities hold an annual meeting to share information and experiences and discuss common problems, with a view to developing better practices. The Spanish Central Authority organises annual meetings with the Central Authorities of Latin America.

<sup>79</sup> For example, in Latvia, “[t]rips of exchange of experience are made to other Contracting States, which, in common with Latvia, are States of origin of the adoptable children for the purpose of the Convention”, and in Lithuania “training related to adoption usually are organized by the Adoption Service in co-operation with foreign organizations”. See the responses of Latvia and Lithuania, among others, to question No 5(c) of the 2005 Questionnaire.

<sup>80</sup> As an example of good practice, the federal Central Authority in Switzerland wrote to all Central Authorities of countries of origin asking for information about procedures, characteristics of adoptable children, etc. See the response of Switzerland to question No 5(e) of the 2005 Questionnaire.

129. Contracting States should ensure that all those affected by the Convention are made fully aware of the Convention's objectives and legal implications. Information surrounding the entry into force of the Convention should be made available to the public.

130. The contact details for all Central Authorities, and the designation of the "central" Central Authority in Federal or multi-unit States, as well as any changes in those details should be communicated without delay to the Permanent Bureau. Lists of accredited bodies and approved (non-accredited) persons should also be forwarded to the Permanent Bureau. Accurate contact details are essential for fast and efficient communication between authorities.

131. Each Contracting State should provide clear descriptions of its legal and administrative procedures, procedures for applications, eligibility guidelines, and costs and fee structures. The Country Profile model form on the Hague Conference website can be used for this purpose.<sup>81</sup> Any requirements of a Contracting State that specific forms or essential information be provided by another State should be made known to Central Authorities or other interested parties in other Contracting States. Some States use sites on the Internet for this purpose. These matters are considered in more detail in Chapter 4.2.2.

### 3.5 Expeditious procedures

132. Expeditious action is essential at all stages of the adoption process.<sup>82</sup> Expeditious procedures, those which are both fast and efficient, are essential to the successful implementation and operation of the Convention. States should use procedures which seek to fulfil the purposes of the Convention but which do not cause unnecessary delay that could affect the health and well-being of children. The benefits of becoming a party to the *Hague Convention of 5 October 1961 Abolishing the Requirements of Legalisation for Foreign Public Documents* should be considered.

133. The Convention itself does not set any specific time limits for particular actions. The phrase "act expeditiously" in Article 35 is understood to mean "to act as quickly as a proper consideration of the issues will allow."<sup>83</sup> It is important to distinguish between any necessary delay, such as the time taken to find the best family for a particular child, and an unnecessary delay, such as that created by cumbersome procedures or inadequate resources. A necessary delay may also include diligence in the adoption preparations, for both the child and the prospective adoptive parents. The appropriate speed or expedition will vary from case to case. For example, it may take longer to ascertain if an abandoned child is adoptable compared to an orphaned child (see also Chapter 7.1.2: "Avoiding undue delay").

### 3.6 Transparency

134. One of the best protections against misuse of a system and exploitation of children is transparency. Laws, regulations, policies, fees and processes should be clearly defined, and clearly communicated to all who use the system. This transparency enables users to see what protections are in place and to identify where actual or potential abuse of the system may occur.

<sup>81</sup> Available on the website of the Hague Conference at < [www.hcch.net](http://www.hcch.net) > under "Intercountry Adoption Section" and "Country Profiles". In the 2005 Special Commission, there was support for the idea that the Central Authority and / or accredited bodies indicate in their Country Profile the number of applications it could manage efficiently in a one year period, with their existing resources.

<sup>82</sup> Art. 35.

<sup>83</sup> See Art. 12(6) of the 2007 *Convention on the International Recovery of Child Support and Other Forms of Family Maintenance*.

### **3.7 Minimum standards**

135. The Hague Convention sets out the minimum standards or basic rules to be observed within the intercountry adoption process. In the Convention, the requirements for intercountry adoption in Chapter II, the standards for Central Authorities and accredited bodies in Chapter III, and the procedural requirements for intercountry adoption in Chapter IV of the Convention constitute a basic, not a comprehensive framework.

136. It is for individual States to decide what safeguards and requirements are needed for their particular circumstances over and above those set out in the Convention itself. It is also for individual States to decide how best to strengthen and give effect to some of the central principles of the Convention described in the preceding chapter.

137. In supplementing the provisions of the Convention, States should be guided by its objects, as stated in Article 1, and in particular the priority to be given to the best interests of the child.

## CHAPTER 4 – INSTITUTIONAL STRUCTURES: CENTRAL AUTHORITIES AND ACCREDITED BODIES

138. The specific institutional structures provided for in the Convention are Central Authorities and accredited bodies which are the subject of this chapter. The non-specific structures in the Convention are public authorities and competent authorities. These authorities are not discussed as it is for each Contracting State to decide which is the appropriate public or competent authority to perform certain functions, as the Convention requires.

139. Each Contracting State should provide a description of the manner in which the various responsibilities and tasks under the Convention are divided between Central Authorities, public authorities and accredited bodies, so that the entities responsible to act under particular articles of the Convention are clearly identified, as well as the mechanisms by which they interact with one another.<sup>84</sup>

140. The Permanent Bureau has developed an Organigram chart to assist States in providing this information.<sup>85</sup> Each Contracting State should indicate by using the Organigram which type of authority or body performs particular Convention functions in its jurisdiction. The completed Organigrams may be found on the Hague Conference website.<sup>86</sup> The Organigram chart and information in the Organigram should be supplemented by a more detailed description of procedures in the Country Profile.

141. Chapter 4 is not intended to be a comprehensive guide to the role and responsibilities of Central Authorities, accredited bodies and approved (non-accredited) persons. It is aimed primarily at assisting policy makers to identify the matters to address during planning and preparations to ratify or accede to the Convention, or following entry into force.

### A. CENTRAL AUTHORITY<sup>87</sup>

142. The Convention provides for a system of Central Authorities in all Contracting States and imposes certain obligations on them. Central Authority obligations include co-operation with one another through the exchange of general information concerning intercountry adoption, the elimination of any obstacles to the application of the Convention,<sup>88</sup> and a responsibility to deter all practices contrary to the objects of the Convention.

143. Central Authorities also have obligations in respect of particular adoptions. These latter duties may, in some cases, be performed by or delegated to competent authorities, public authorities, accredited bodies<sup>89</sup> and approved (non-accredited) persons.<sup>90</sup> The term

<sup>84</sup> See Report of the 2000 Special Commission, *supra*, note 14, Recommendation No 1.

<sup>85</sup> Available at Annex 6 of this Guide. The Organigram was first developed for the 2005 Special Commission as part of the Questionnaire.

<sup>86</sup> Available on the website of the Hague Conference at < www.hcch.net > under "Intercountry Adoption Section", then "Special Commissions", "Questionnaires and responses", "Responses to the 2005 Questionnaire (per State)".

<sup>87</sup> Part A of this chapter is based on the "Guide to Good Practice under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*", Part I on Central Authority Practice; and on "Establishing an Adoption Central Authority in Vietnam in accordance with the 1993 Hague Convention on Intercountry Adoption", Seminar held at the Ministry of Justice, Hanoi, 12-13 November 2003; presented by William Duncan, Deputy Secretary General, Hague Conference on Private International Law and Jennifer Degeling, Principal Legal Officer, Australian Central Authority for the 1993 Hague Convention, Attorney-General's Department.

<sup>88</sup> Art. 7(2) b).

<sup>89</sup> Arts 10, 11 and 22(1). See the responses to question No 5(a) of the 2005 Questionnaire, and among others the response of Denmark.

<sup>90</sup> Art. 22(2). See also the responses of Canada (Manitoba and Ontario) and the United States of America to question No 6(6) of the 2005 Questionnaire.

“Central Authority” in this chapter should be read, where appropriate, as including accredited bodies or approved (non-accredited) persons, as provided for in the Convention.

## **4.1 Establishing and consolidating the Central Authority**

### **4.1.1 Establishment of the Central Authority**

144. The Central Authority is a position or office created to carry out the obligations and functions set out in the Convention. The Convention does not specify how a Central Authority is to be established. Establishment may be by legislation, by administrative decree or by executive order, depending on the legal requirements of each country.

145. The Central Authority should be established and ready to send and receive files at the time the Convention enters into force for the Contracting State. Ideally it should be apparent well before ratification or accession takes place where the position or office of Central Authority will be located.

146. A Central Authority should be established well before any new legal or administrative arrangements commence. Of equal importance is ensuring that the designated Central Authority is established with adequate personnel and resources to deal with adoption files. The Central Authority should be given time, before officially commencing operation, to recruit experienced personnel, develop its procedures, train new staff and inform all relevant persons, bodies and institutions involved in the field of intercountry adoptions, about the Central Authority’s role and functions.

### **4.1.2 Powers and resources**

147. The obligations imposed on Central Authorities by the Convention can be quite onerous. The implementing legislation or administrative arrangements of a Contracting State should provide for sufficient powers to enable the Central Authority to effectively carry out its responsibilities, functions and international obligations. Such legislation may be amended from time to time to expand or enhance the powers of the Central Authority where new developments or Convention practice make it necessary or desirable to do so.

148. If the Central Authority is to exercise control of the adoption process (Arts 14–22), eliminate obstacles (Art. 7(2) *b*)) and deter all practices contrary to the objects of the Convention (Art. 8), it should have sufficient powers to achieve these aims. In some States the Central Authority may also need additional powers to deal with in-family adoptions (adoption of a child by a family member) under the Convention.

149. Of equal importance is ensuring that the designated Central Authority is established with adequate personnel and resources to be able to function effectively.<sup>91</sup> The autonomy of the Central Authority from inappropriate political or diplomatic pressure should also be preserved.

### **4.1.3 Designation**

150. The designation of a Central Authority is an essential Convention obligation under Article 6.<sup>92</sup> The successful operation of the Convention requires that Central Authorities should be clearly identified so that communications, whether directed to them or made between them, may be swift and simple.

<sup>91</sup> Central Authority functions are specified in Arts 6-9, 14-22 and 33.

<sup>92</sup> Art. 6(1).

151. Article 13 provides that the designation of the Central Authority and, where appropriate, the extent of their functions, as well as the names and addresses of the accredited bodies shall be communicated by each Contracting State to the Permanent Bureau.

152. The Central Authority should be designated, and the contact information communicated to the Permanent Bureau, at the time of ratification or accession to the Convention. Upon notification of these details, the Permanent Bureau will send a letter of welcome to new Central Authorities requesting confirmation of contact details to ensure future communications are sent to the appropriate person.

153. The designation of the Central Authorities, required by Article 13, as well as their contact details, should be communicated to the Permanent Bureau not later than the date of the entry into force of the Convention in that State.<sup>93</sup>

154. Such communication should, in accordance with Article 13 and paragraph 274 of the Explanatory Report on the Convention,<sup>94</sup> give notice of any other public authorities (including their contact details) which, under Article 8 or 9, discharge functions assigned to the Central Authorities.<sup>95</sup>

155. All the information referred to above should be kept up-to-date and the Permanent Bureau informed promptly of any changes, including in particular any withdrawals of accreditation or authorisation to act.<sup>96</sup>

#### **4.1.4 Designations for Federal States**

156. Federal States or multi-unit States are free to appoint more than one Central Authority, but where this is done, it is a Convention obligation under Article 6 to designate a “central” Central Authority to which communications may be addressed for transmission when necessary to the appropriate Central Authority.<sup>97</sup>

157. Federal States should ensure that their designation of a “central” Central Authority is absolutely clear at the time of ratification or accession. The different roles of their “central” Central Authority and their state, regional or provincial Central Authorities should also be made clear to other Contracting States and Central Authorities. For example, official communications must be sent to the “central” Central Authority, but adoption files may be sent to a provincial Central Authority or accredited body.

#### **4.1.5 Choosing the Central Authority**

158. The best location for the office of Central Authority in each country will be the office which has functions that are closely related to the subject matter of the Convention. Whatever location is chosen, experience suggests that the offices which perform the policy functions and Central Authority functions for the Convention should be closely linked.

159. Usually the Central Authority is established in a government authority such as the Ministry of Family and Social Affairs, or the Department of Health and Welfare.<sup>98</sup>

160. The best location of the position or office will also depend on a number of other

<sup>93</sup> See Report of the 2000 Special Commission, *supra*, note 14, Recommendation No 2a. Recommendation No 2 of 2000 was reaffirmed by the 2005 Special Commission, *supra*, note 15, in its Recommendation No 3.

<sup>94</sup> See Explanatory Report, *supra*, note 1.

<sup>95</sup> See Report of the 2000 Special Commission, *supra*, note 14, Recommendation No 2b. Recommendation No 2 of 2000 was reaffirmed by the 2005 Special Commission in its Recommendation No 3.

<sup>96</sup> See Report of the 2000 Special Commission, *supra*, note 14, Recommendation No 2g. Recommendation No 2 of 2000 was reaffirmed by the 2005 Special Commission in its Recommendation No 3.

<sup>97</sup> Art. 6(2).

<sup>98</sup> For details of the Central Authorities, see the website of the Hague Conference < [www.hcch.net](http://www.hcch.net) > under “Intercountry Adoption” then “Authorities”.

factors, including the extent of the powers and functions vested in it by the Contracting State. Because the role of the Central Authority is so essential to the successful operation of the Convention, it may be wise for a State to perform an evaluation of its child protection system before designating a body to act as Central Authority. During the evaluation process, States should consider where the Central Authority might best be located in order to fulfil its role most effectively.

161. The Central Authority should have strong links to the justice system and the care and protection system of the Contracting State. The need for co-operation between the Central Authority, the courts, the child protection network, child care institutions, relevant non-governmental organisations and social welfare professionals and the legal profession, make these links essential for the effective operation of the Convention.

162. As intercountry adoption is an international matter, the possibility of having direct access to diplomatic structures is also very useful for Central Authorities.

#### **4.1.6 Personnel**

163. Central Authority personnel should possess appropriate qualifications and training to understand the requirements of the Convention. Personnel should have sufficient understanding of how the Convention operates within their domestic legal and administrative framework.<sup>99</sup>

164. They should possess professional qualifications relevant to intercountry adoption, such as social work, psychology, child protection and related disciplines.

165. Competency in relevant foreign language skills improves communication with other Central Authorities and builds co-operative and productive relationships. A minimum standard for Central Authority good practice is that there should be personnel who are competent in French and / or English as the working languages of the Convention.<sup>100</sup>

166. It is important that the Central Authority achieves stability and continuity with personnel, in order to function effectively, develop expertise, maintain standards, gain additional experience in the field and foster good relations with national and international agencies and authorities.

167. The need for adequate resources and appropriately trained staff in Central Authorities was accepted, as well as the importance of ensuring a reasonable level of continuity in their operations.<sup>101</sup>

168. It is an aim of the 1993 Hague Convention to combat the abduction, the sale of, and traffic in children for the purposes of adoption by establishing safeguards in the intercountry adoption procedure.<sup>102</sup> To achieve this aim, and to suppress improper financial gain and promote the best interests of the child, it is critical that Central Authority staff possess the highest ethical standards.

#### **4.1.7 Material resources**

169. The basic level of necessary equipment for all Central Authorities includes:

- telephone;

<sup>99</sup> In Australia and New Zealand, new staff receive induction and ongoing training; in Canada, staff receive ongoing training, and participate in trips abroad, international meetings and national and international conferences. For a global overview, see the responses to question No 5(c) of the 2005 Questionnaire.

<sup>100</sup> In Lithuania, for example, all personnel must attend courses in foreign languages. See the response of Lithuania to question No 5(c) of the 2005 Questionnaire.

<sup>101</sup> See Report of the 2000 Special Commission, *supra*, note 14, Recommendation No 3.

<sup>102</sup> See Art. 1 a) and b).

- fax machine,<sup>103</sup>
- stationery;
- computer / word processor or typewriter;
- e-mail facilities;
- internet access.

170. The minimum level of essential resources for all Central Authorities includes:

- copies of the 1993 Hague Convention and any adoption related bilateral agreements;
- translation of the Convention into the national language(s);
- copy of applicable implementing legislation or procedures;
- copy of the Explanatory Report to the Convention by G. Parra-Aranguren;
- written procedures for handling Convention files;
- written procedures for receiving and sending correspondence and to avoid loss or misplacement of files;
- list of qualified translators to translate files;
- full contact details for all national authorities and agencies, and other Central Authorities;
- a system for the collection and reporting of statistics;
- copy of the Guide to Good Practice.

171. A well resourced Central Authority will have, in addition to the essential items listed above:

- a library or collection of Convention literature;
- materials for education and training programmes;
- office procedures manual for Convention files;
- electronic case management system;
- its own website with all essential and important information about its adoption laws and procedures.

172. Wherever possible, the Permanent Bureau obtains copies of Hague Conventions and related documents in various languages and puts them on the Hague Conference website. Although these may be unofficial translations, they provide a valuable resource for Contracting States and Central Authorities.

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<sup>103</sup> Good practice suggests that the number or line for the telephone should be different from the fax machine. Fax machines should be left switched on 24 hours a day to receive documents from countries in different time zones.

## 4.2 Role of a Central Authority

173. Central Authorities will often be given a central role in developing, or advising on the development of policy, procedures, standards and guidelines for the adoption process.<sup>104</sup>

174. The Central Authority will often be given an important role with regard to the accreditation, control, and review of agencies or bodies operating within their own country, or authorised to operate in a country of origin.<sup>105</sup>

175. As required by Article 13, the extent of the functions of the Central Authorities and any such public authorities should be explained.<sup>106</sup> For the benefit of other Contracting States, an explanation may also be given in the Country Profile model form and made available through the Hague Conference website.

### 4.2.1 *Suppression of improper financial gain*

176. Central Authorities are responsible for taking, directly or through public authorities, all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention.<sup>107</sup>

177. The Central Authority may in particular have a role in some or all of the following steps to prevent improper financial gain. It should:

- regulate the non-profit objectives of accredited bodies;
- ensure compliance with the general prohibition on improper financial gain;<sup>108</sup>
- verify that only the costs and expenses of the adoption, including reasonable professional fees of persons involved in the adoption, are charged or paid;<sup>109</sup>
- establish safeguards to prevent directors, administrators and employees of bodies involved in an adoption from receiving remuneration which is unreasonably high in relation to services rendered;<sup>110</sup>
- establish safeguards to prevent consents of persons, institutions or bodies from being induced by payment or compensation of any kind;<sup>111</sup>
- establish safeguards to prevent the consent of the child from being induced by payment or compensation of any kind;<sup>112</sup>

<sup>104</sup> For example, in Peru, it is a duty of the Central Authority to propose the policy and the regulations concerning intercountry adoption as the supervisor of the national and intercountry adoptions (2005 Regulations to the Law on the Adoption Administrative Procedure of Minors declared judicially abandoned, Art. 3).

<sup>105</sup> See, for example, Colombia, the Central Authority authorises the foreign adoption accredited bodies (2006 Childhood and Adolescence Code, Art. 72); Spain (2007 Law on Intercountry Adoption, Art. 7). See also the responses to question No 6(1)(f) of the 2005 Questionnaire, among others: Chile, the Central Authority is responsible for the general supervision of accredited bodies accredited to operate in Chile; Denmark, the Central Authority is responsible for the general supervision of the accredited bodies concerning their economical and organisational conditions. The Danish National Board of Adoption – which is a central autonomous board of appeal under the Danish Ministry of Justice – supervises the accredited bodies in relation to their activities abroad; Norway, the Central Authority keeps the management of the accredited bodies under constant review.

<sup>106</sup> See Report of the 2000 Special Commission, *supra*, note 14, Recommendation No 2c.

<sup>107</sup> Art. 8. See the responses of Canada (Saskatchewan) and Norway to question No 10(1) of the 2005 Questionnaire, according to which information on costs, expenses and fees is freely available and accessible to prospective adoptive parents and competent authorities. For the responsibilities of Contracting States, see Chapter 10.1.1.3.

<sup>108</sup> Art. 32(1): “no one shall derive improper financial gain from intercountry adoption”.

<sup>109</sup> Art. 32(2).

<sup>110</sup> Art. 32(3).

<sup>111</sup> Art. 4 c).

<sup>112</sup> Art. 4 d).

- require an accredited body or approved (non-accredited) person to provide a list of their fees or costs, for publication on a website or in brochures.<sup>113</sup>

178. It is advisable for receiving States to provide active support to States of origin for the effective implementation of these good practice recommendations in recognition of the principle of their joint responsibility, and in recognition also of the fact that some States of origin are not in a position, by themselves, to exercise the appropriate controls. The prevention of improper financial or other gain as a Convention principle is also discussed in Chapter 2.2.4. The practical aspects of preventing improper financial gain are discussed in Chapter 5, Regulating the Costs of Intercountry Adoption.

#### **4.2.2 Provision of information about the adoption process**

179. Article 7(2) provides that Central Authorities shall take directly all appropriate measures to provide information as to the laws of their State concerning adoption and other general information, such as statistics and standard forms, keep one another informed about the operation of the Convention and, as far as possible, eliminate any obstacles to its application.

180. It is clear that greater access to, or exchange of, information about the practice and procedure of intercountry adoption in each country will minimise the demands on the Central Authority personnel, and will improve understanding and co-operation between countries.

181. Intercountry adoption information can be provided on a website, or by other means, such as a brochure or flyer.<sup>114</sup> It would be desirable to present information intended for dissemination to foreign citizens in English and/or French, as well as in the local language.<sup>115</sup> Information provided could cover matters such as:

- the designation and contact details for the Central Authority;
- a website address to obtain more detailed information;
- for receiving countries – their policies on intercountry adoption, the selection and assessment criteria for prospective adoptive parents, and post-adoption services and support;
- for countries of origin – their policies on intercountry adoption, their real needs for intercountry adoption and where appropriate, profiles of the adoptable children in need of intercountry adoption including those with special needs, the application procedures for prospective adoptive parents, documentary requirements, any standard forms used and any language requirements;
- for countries of origin – the administrative and legal procedures which apply to adoption applications and the timing of such procedures.

182. A Contracting State may also provide information using the Country Profile model form. The model form was developed in response to Recommendation No 8 of the 2005 Special Commission as a means of collecting and presenting information in a uniform manner. Recommendation No 8 states:

*“To further the work commenced by the development of the organigram (Appendix 6 of Prel. Doc. No 2), the Special Commission invites the Permanent Bureau, to collect specific information from Contracting States, including, inter alia, procedures, website addresses and how the various*

<sup>113</sup> See Report of the 2000 Special Commission, *supra*, note 14, Recommendation No 8.

<sup>114</sup> See the website of the Hague Conference for a list of websites of Central Authorities or other official bodies.

<sup>115</sup> This is the case, for example, in Sweden: < [www.mia.eu](http://www.mia.eu) > and Italy: < [www.commissioneadozioni.it](http://www.commissioneadozioni.it) >.

*responsibilities and tasks under the Convention are divided between Central Authorities, public authorities, accredited bodies and any bodies and persons under Article 22(2). This information should be made available on the website of the Hague Conference.”*

### **4.2.3 International co-operation and co-ordination**

183. Article 7(1) provides that Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their States to protect children and to achieve the other objects of the Convention.

184. Co-operation between authorities is enhanced by:

- clearly identifying the responsible authorities and personnel in adoption matters, and publishing their contact details;
- building confidence, understanding and trust between countries and their Central Authority personnel;
- encouraging good communication, especially the ability to communicate with Central Authority personnel of countries of origin in their own language;
- attending meetings and exchanging information at conferences, Hague Special Commission meetings, and bilateral or regional meetings.

### **4.2.4 Collection and maintenance of statistics**

185. Central Authorities should collect and maintain accurate statistics relating to the Convention. The Permanent Bureau has developed recommended statistics forms for this purpose.<sup>116</sup> Statistical information can help Central Authorities understand the needs of children in their State and provide national and international data on intercountry adoptions.

186. As a minimum standard, it is important to collect statistics on:

- the total number of children entering institutions, care facilities or foster care;
- the number of national adoptions;
- the number of intercountry adoptions and the countries concerned; and
- age and gender.

187. Where resources permit, it is also desirable to collect statistics on the number of children placed permanently in foster care, institutions, or any other type of care facility. Additional statistics regarding the number of children in care who were reintegrated into their family and the number of children and families receiving services from the State to maintain family unity will provide a comprehensive picture of the state of national child care and protection, and may help quantify child care and protection issues for decision makers responsible for policy and budgetary matters.<sup>117</sup>

<sup>116</sup> See Report of the 2005 Special Commission, *supra*, note 15, Recommendation No 9. The statistics forms are available on the website of the Hague Conference at < [www.hcch.net](http://www.hcch.net) >, under "Intercountry Adoption Section" and "Statistics".

<sup>117</sup> Such formulations may be more relevant for countries of origin than for receiving countries such as Norway, where a lot of children are placed in foster homes for various reasons, mostly due to inadequate care, abuse, violence or behaviour problems. Very few of these children are adopted, since it is considered important that the child can maintain a relationship with their biological family whenever possible (as long as such contact is not considered harmful to the child). When such statistics are presented internationally, it is important to consider the context and the source. Otherwise, it is difficult for

188. The Convention requires States to take all appropriate measures to provide other States with general evaluation reports about experiences with intercountry adoption,<sup>118</sup> and to keep statistics.<sup>119</sup> The 2005 Special Commission encouraged sharing statistics with the Permanent Bureau and “welcomes the development of the draft forms for the gathering of general statistical information (Annex 5 of Prel. Doc. No 2) and underlines the importance for States Parties to submit general statistics to the Permanent Bureau using these forms on an annual basis.”<sup>120</sup>

189. Providing annual statistical reports to the Permanent Bureau enhances the Bureau’s ability to co-ordinate the efforts of the States Parties to advance the purposes of the Convention. Collecting and sending reliable statistics is an additional demand on the resources of Central Authorities. For this reason, Central Authorities may want to seek assistance from other Central Authorities to develop accurate statistical recording methods and processes.<sup>121</sup> The collection and analysis of statistics can play an important role in measuring the effective implementation of the Convention.

#### **4.2.5 Central Authority role in individual adoptions**

190. The role and functions of Central Authorities in relation to individual adoptions are addressed in Chapter 7. If a State of origin prefers to conduct adoptions only through the Central Authority of a receiving State, the State of origin must be satisfied that the Central Authority has the powers and resources to perform all the necessary functions for the adoption procedure.

#### **4.2.6 Central Authority role in independent adoptions**

191. Independent adoptions undermine the system of safeguards put in place by the Convention, in particular Article 29. Independent adoptions are those in which the prospective adoptive parents, after being approved by their Central Authority or accredited body, are permitted to go to the State of origin and find a child to adopt, without the assistance of the Central Authority or an accredited body or approved (non-accredited) person in the State of origin. How the prospective adoptive parents find a child, who arranges the adoption, what the costs are – this information may not be known to the authorities in either country, as there is no supervision of the procedure. They create many problems for officials in both the State of origin and the receiving country, usually when procedures have not been followed correctly. The practice of allowing independent adoptions is inconsistent with the system of safeguards established under the Convention and Central Authorities should not participate in this form of intercountry adoption<sup>122</sup> (see also Chapters 8.6.6 and 10.1.1.6).

#### **4.2.7 Other procedural functions**

192. Issues of post placement responsibilities and post-adoption services including preservation of information are discussed in Chapter 9.

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other countries to understand why so many children are in foster care, but at the same time why there are so few national adoptions.

<sup>118</sup> Art. 9 *d*).

<sup>119</sup> Art. 7(2) *a*).

<sup>120</sup> See Report of the 2005 Special Commission, *supra*, note 15, Recommendation No 9.

<sup>121</sup> See Report of the 2000 Special Commission, *supra*, note 14, Recommendation No 21.

<sup>122</sup> See I. Lammerant, M. Hofstetter, *Adoption: at what cost? For an ethical responsibility of receiving countries in international adoptions*, Terre des hommes, Lausanne, Suisse, 2007, p. 11, although in this study independent adoptions are called private adoptions.

## B. ACCREDITED BODIES AND APPROVED (NON-ACCREDITED) PERSONS

### 4.3 Accredited bodies

193. In many countries, accredited bodies will perform the functions of Central Authorities in relation to particular adoptions under this Convention. The process of accreditation of bodies is another of the Convention's safeguards to protect children during the adoption process. The Convention requires that any private body or agency wishing to operate in the field of intercountry adoption must be accountable to a supervising or accrediting authority (see Arts 6–13). Basic standards are imposed by the Convention to guide the accreditation process. It is implicit in the Convention that States will develop their own accreditation criteria, based on Convention standards and expanded as necessary to meet the requirements of the individual country.

194. The decision whether to allow accredited bodies or approved (non-accredited) persons to perform child protection or adoption functions in their State is a policy matter for each individual State. In addition, bodies accredited in one State and wishing to operate in another State must be specifically authorised to do so by the competent authority of both States (the accrediting State and the State of operation).<sup>123</sup>

195. The selection of bodies which will operate at the highest professional and ethical standards is vital for the success of the Convention. They will be expected to play an effective role in upholding the principles of the Convention and preventing illegal and improper practices in adoption. Accredited bodies are reminded that they are responsible for the treaty obligations of their State when they perform Convention functions in place of the Central Authority.

196. The authority or authorities which are competent to grant accreditation, to supervise accredited bodies or to give authorisations, should be designated pursuant to clear legal authority and should have the legal powers and the personal and material resources necessary to carry out their responsibilities effectively.<sup>124</sup>

197. The legal powers should include the power to conduct any necessary enquiries and, in the case of a supervising authority, the power to withdraw, or recommend the withdrawal of, an accreditation or authorisation in accordance with law.<sup>125</sup>

198. The 2005 Special Commission recognised the importance of these issues and the value in preparing a separate part of the Guide to Good Practice. A recommendation was made in the following terms:

*“The Special Commission recommends that the Permanent Bureau should continue to gather information from different Contracting States regarding accreditation with the view to the development of a future Part of the Guide to Good Practice dealing with accreditation. The experience of non-governmental organisations in this field should be taken into account. Such information should include financial matters and should also be considered in the development of a set of model accreditation criteria.”*<sup>126</sup>

199. An Accreditation Guide to Good Practice will be developed by the Permanent Bureau in consultation with Members of the Hague Conference and Contracting States. The following review is therefore relatively brief.

<sup>123</sup> Art. 12.

<sup>124</sup> See Report of the 2000 Special Commission, *supra*, note 14, Recommendation No 4a.

<sup>125</sup> *Ibid.*, Recommendation No 4b.

<sup>126</sup> See Report of the 2005 Special Commission, *supra*, note 15, Recommendation No 4.

### 4.3.1 *Functions of accredited bodies*

200. The Convention allows for the designation of accredited bodies and, in some cases approved (non-accredited) persons to perform some of the functions of the Central Authority.<sup>127</sup> It is important to note the distinctions between these groups. Not all functions of Central Authorities can be performed by accredited bodies. For example, functions in Articles 7, 8 and 33 cannot be delegated to accredited bodies. Note that the functions in Articles 14–21 may be carried out by Central Authorities, public authorities or accredited bodies. The bodies or persons referred to in Article 22(2) are not accredited in accordance with the Convention, and may only perform the functions of Articles 15 to 21, and these may only be performed under supervision of the competent authority of the Contracting State.

201. The designation of accredited bodies, required by Article 13, as well as their contact details, should be communicated to the Permanent Bureau at the time of their accreditation.<sup>128</sup>

202. The extent of the functions of accredited bodies should also be explained.<sup>129</sup> The division of responsibilities or functions between the Central Authority and the accredited bodies should also be clarified for other Contracting States, for example, by using the Country Profile model form on the Hague Conference website.

### 4.3.2 *Standards*

203. Bodies which meet the standards set out in Articles 6–13 of the Convention, and also meet the accreditation criteria established by competent authorities of their country, may be accredited to perform within their country certain functions of Central Authorities under the Convention.

204. The Convention sets minimum standards that must be fulfilled in relation to accredited bodies. They shall:

- demonstrate competence to carry out properly the functions entrusted to them;<sup>130</sup>
- only pursue non-profit objectives;<sup>131</sup>
- be directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of intercountry adoptions;<sup>132</sup>
- be subject to supervision by competent authorities as to their composition, operation and financial situation;<sup>133</sup> and
- their directors, administrators and employees shall not receive remuneration which is unreasonably high in relation to services rendered.<sup>134</sup>

<sup>127</sup> See Chapters III and IV of the Convention.

<sup>128</sup> See Report of the 2000 Special Commission, *supra*, note 14, Recommendation No 2d. Recommendation No 2 of 2000 was reaffirmed by the 2005 Special Commission, *supra* note 15, in its Recommendation No 3.

<sup>129</sup> See Report of the 2000 Special Commission, *supra*, note 14, Recommendation No 2f.

<sup>130</sup> Art. 10).

<sup>131</sup> Art. 11 a).

<sup>132</sup> Art. 11 b).

<sup>133</sup> Art. 11 c).

<sup>134</sup> Art. 32(3).

### 4.3.3 *Criteria for accreditation*

205. Journal articles and literature about the Convention often refer to “accreditation criteria.” That term is not used in the Convention itself. However, the Convention implies that criteria for accreditation will need to be developed by each Contracting State if bodies are to be “duly accredited” as in Article 9, or if accreditation is to be “granted” as in Article 10. It is implied that there must be conditions or criteria according to which the grant of accreditation is made. In developing their accreditation criteria, the Convention does not prevent Contracting States from imposing additional obligations or requirements on bodies seeking accreditation.

206. The criteria for accreditation should be explicit and should be the outcome of a general policy on intercountry adoption.<sup>135</sup>

### 4.3.4 *Supervision and review of accredited bodies*<sup>136</sup>

207. States which use accredited bodies are encouraged to carefully consider how they will:

- enact and enforce regulations concerning accreditation, approval or supervision that are precise, transparent and enforceable;<sup>137</sup>
- effectively communicate those regulations to other States and to the public to encourage transparency and accountability;
- retain control or supervision of the parts of the process that are most prone to exploitation.

208. Accredited bodies should be required to report annually to the competent authority concerning in particular the activities for which they were accredited.<sup>138</sup> A State of origin which has authorised a foreign accredited body to operate in its territory may also be interested to receive the annual report of the accredited body.

209. The review or re-accreditation of accredited bodies should be carried out periodically by the competent authority.<sup>139</sup> Accredited bodies which do not perform their functions to the appropriate standard may have their accreditation withdrawn, or not renewed.

### 4.3.5 *Authorisation of accredited bodies to operate in States of origin*

210. In order to perform adoption-related functions in a country of origin, the accredited body of a receiving State must be specifically authorised by the competent authorities of both the receiving country and the country of origin to operate in the latter country (Art.12). The country of origin may impose its own conditions or criteria for such authorisation. For

<sup>135</sup> See Report of the 2000 Special Commission, *supra*, note 14, Recommendation No 4c.

<sup>136</sup> See also “A Discussion Paper on Accreditation Issues”, August 2005, Prel. Doc. No 3 for the 2005 Special Commission, drawn up by Jennifer Degeling, Principal Legal Officer, with the assistance of Carlotta Alloero, Intern. Available on the website of the Hague Conference at < www.hcch.net > under “Intercountry Adoption Section” and “Special Commissions” (hereinafter, “A Discussion Paper on Accreditation Issues”).

<sup>137</sup> For example, the United States of America has enacted regulations governing accreditation of agencies and approval of persons, which are codified in 22 Code of Federal Regulations (CFR) Part 96. These regulations explicitly identify the requirements for accreditation and approval in Convention cases, the process by which accreditation / approval takes place, the application and evaluation of applications for accreditation / approval, the standards for accreditation and approval, the decision making process for accreditation / approval, renewal of accreditation / approval, oversight of accredited agencies and approved persons, the role of complaints in the oversight process, adverse actions that may be taken against accredited agencies and approved persons who fail to meet substantial compliance with the accreditation standards, and reporting requirements.

<sup>138</sup> See Report of the 2000 Special Commission, *supra*, note 14, Recommendation No 4d.

<sup>139</sup> *Ibid.*, Recommendation No 4e.

example, the body may have to be properly accredited in the country of origin.<sup>140</sup> Other conditions may require the accredited body to collaborate in the work of the Central Authority or competent authorities in the country of origin, e.g., preparing the child for adoption, checking the suitability of prospective adopters, assistance with matching, preparation of the prospective adopters for national adoptions, or training other staff in these procedures. In the receiving country the same accredited body may be required to provide in depth preparation of the prospective adopters for adoption, psycho-social follow up of the adoptive family. These requirements may also help clarify the role and the professional profile of the accredited body representative(s) in the country of origin

211. The authorisation may not be renewed if services of the accredited body are no longer needed in the country of origin. Either or both countries also have the power to withdraw the authorisation given to a foreign accredited body if that body behaves unethically, or does not otherwise comply with the conditions of authorisation. A receiving State must regulate the ethical behaviour of its own accredited bodies and approved (non-accredited) persons and, if appropriate, may cancel their authorisation or approval to operate in a particular country.<sup>141</sup>

212. Where a body accredited in one Contracting State is, in accordance with Article 12, authorised to act in another Contracting State, such authorisation should be communicated to the Permanent Bureau by the competent authorities of both States without delay.<sup>142</sup>

213. The process of accreditation of adoption agencies is one of the important safeguards in the Convention for the protection of children. The requirement for authorisation by both countries for the accredited body to operate in the country of origin is an additional safeguard. The receiving State and the State of origin should take joint responsibility for the supervision of the authorised accredited body.

214. Before any decision is taken to authorise an accredited body, the responsible authorities should determine that the accredited body will respond to a real need in the country of origin. Dialogue and international co-operation are needed to establish the profile and the number of the accredited bodies from the receiving country which are needed to manage the work of intercountry adoption in the country of origin. These questions can only be answered if the authorities in the two countries determine which children (by their profile and an estimate of their number) in the country of origin need adoptive families in the receiving country. This information may also help both States to evaluate the profile and the number of families sought.

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<sup>140</sup> Art. 12. In Canada (Quebec), the Central Authority travels to States of origin to meet Central Authorities to discuss the work of the body that wishes to be authorised or that has been already accredited. See the response of Canada (Quebec) to question No 6(1)(k) of the 2005 Questionnaire. In Lithuania, foreign accredited bodies must fulfil several conditions in order to be authorised to undertake intercountry adoptions. Moreover, the authorisation of the accredited body can be cancelled if this body fails in its duties and functions, which are established in the order of authorisation. Additionally, every three years the authorisation will be revised. See the response of Lithuania to question No 6(2)(a) and (b) of the 2005 Questionnaire.

<sup>141</sup> In Denmark, the Central Authority has the authority to withdraw the accreditation in consequence of serious problems. The Danish National Board of Adoption supervises the accredited bodies in relation to their activities abroad. See the response of Denmark to question No 6(1)(f) of the 2005 Questionnaire. Furthermore, see the responses of Finland and Norway to question No 6(1)(f) of the 2005 Questionnaire. See also Spain (2007 Law on Intercountry Adoption, Art. 7).

<sup>142</sup> See Report of the 2000 Special Commission, *supra*, note 14, Recommendation No 2e. Recommendation No 2 of 2000 was reaffirmed by the 2005 Special Commission, *supra*, note 15 in its Recommendation No 3.

#### 4.4 Approved (non-accredited) persons<sup>143</sup>

215. The term “approved (non-accredited) person” is used to describe the person (or body) who (or which) has been appointed in accordance with Article 22(2) to perform certain Central Authority functions.

216. Persons who have been approved or appointed in accordance with the standards set out in Article 22(2) of the Convention may only perform the functions in Articles 15–21. This is a more restricted list of functions than that permitted for accredited bodies. If the law of the Contracting State permits such persons to operate in the field of adoption, the person must also be supervised by the competent authorities of the approving State. Appropriate criteria for the approval process should be developed, and may be similar to accreditation criteria for adoption bodies or agencies.

217. If Contracting States decide to allow approved (non-accredited) persons to perform the functions in Convention Chapter IV,<sup>144</sup> with the exception of Article 14, there must be a declaration made by the Contracting State to the Convention depositary in accordance with Article 22. Such persons do not have to meet all the eligibility requirements of accredited bodies. For example, they may undertake adoptions for profit. They are nevertheless required to meet certain standards of integrity, professional competence, experience and ethics. Furthermore, they may only perform their functions “to the extent permitted by the law and subject to the supervision of the competent authorities” of their State. Contracting States may therefore regulate or restrict the activities of approved (non-accredited) persons to any extent necessary, as they see fit.

218. Approved (non-accredited) persons have to be under the supervision of competent authorities. It is a matter for the Contracting State to authorise an appropriate competent authority to perform this task. If approved (non-accredited) persons, operating a business for profit, are contracted by accredited bodies to perform certain functions, accredited bodies may be legally and financially responsible for any duties performed for them by approved (non-accredited) persons.<sup>145</sup>

219. Unlike accredited bodies, the Convention does not provide for approved (non-accredited) persons to be authorised to operate in another country.<sup>146</sup> Furthermore, a country of origin may declare, by filing a declaration in accordance with Article 22(4), that it will not permit adoptions of its children by countries which allow approved (non-accredited) persons to perform the functions of Central Authorities in Chapter IV of the Convention.<sup>147</sup>

220. However, it should be clarified that adoptions may still occur between a receiving country which appoints approved (non-accredited) persons and a country of origin which makes a declaration under Article 22(4). The effect of the declaration is that an approved (non-accredited) person must not be involved in any adoptions with that particular country of origin. Only accredited bodies or Central Authorities can arrange adoptions with that country of origin.

<sup>143</sup> The term “non-accredited person” was used in the Explanatory Report of Professor Parra-Aranguren to refer to the person in Art. 22(2). Some countries now employ the term “approved person” when referring to person in Art. 22(2). However, the 2005 Questionnaire responses revealed enormous confusion when the term “approved persons” was used. Consequently, the Guide to Good Practice has followed the usage of the Explanatory Report to try to improve the public’s understanding of the functions of these particular persons. The term “approved (non-accredited) person” is a compromise to retain the precision of the Explanatory Report, but recognises the usage by some countries of the term “approved person”.

<sup>144</sup> Art. 22(2).

<sup>145</sup> See Explanatory Report, *supra*, note 1, para. 376, which states that Central Authorities are responsible for actions undertaken by delegated bodies.

<sup>146</sup> See Explanatory Report, *supra*, note 1, para. 397 which raises the question whether approved (non-accredited) persons or bodies may be authorised to act in another Contracting State, and concludes that this could occur but the non-accredited person or body would be subject to the same procedure in Art. 12 as accredited bodies, namely of authorisation by both Contracting States.

<sup>147</sup> Armenia, Azerbaijan, Belarus, Brazil, Bulgaria, China, Colombia, El Salvador, Hungary, Panama, Poland, Portugal and Venezuela are the countries of origin which have made a declaration under Art. 22(4) of the Convention. Some receiving countries have also made the declaration: Andorra, Australia, Austria, Belgium, Canada (British-Columbia and Quebec), Denmark, France, Germany, Luxembourg, Norway, Spain, Sweden and Switzerland.

## 4.5 Intermediaries

221. There is no uniformity in the legislation of Contracting States on the question of whether accredited bodies are responsible for the actions of their representatives or intermediaries.<sup>148</sup> One country has made a positive decree that their accredited bodies are responsible for ensuring that their foreign intermediaries and collaborators follow the principles of the Hague Convention.<sup>149</sup>

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<sup>148</sup> It was said at the 2005 Special Commission that there should be a detailed study of this question.

<sup>149</sup> The decree of the French Community of Belgium of 31 March 2004 concerning adoption (articles 17, al. 2, 3° and 19) provides explicitly that the accredited bodies are responsible for ensuring that their foreign intermediaries and collaborators follow the principles of the Hague Convention.

## CHAPTER 5 – REGULATING THE COSTS OF INTERCOUNTRY ADOPTION

222. The Contracting State and the Central Authority have a particular responsibility to regulate the cost of intercountry adoption by taking measures to prevent improper financial gain. Some of these measures are referred to in Chapter 4.2.1. All other entities involved in intercountry adoption have a responsibility to support and comply with any such measures.

223. In this Chapter, the term “contribution” is used to refer to an amount of money that is required by a State of origin when the application for adoption is made. The contribution may be a fixed amount, paid directly to the authorities of the State of origin. In this context it is usually a compulsory contribution which is intended to support the development of child protection or adoption services. The requirement is therefore also quite transparent. Contributions which meet the requirements of transparency and accountability were, in principle, approved by the 2000 Special Commission (see Chapter 5.4).

224. The term “donation” is used to mean an amount that may be offered by or sought from parents before or after the adoption takes place. It may be offered or sought privately and the amount is not known to others. It may be required in order to “facilitate” the adoption. In this sense, donations which are not transparent and not recorded, and which are intended to facilitate an adoption are improper. Donations which do not influence the adoption outcome and which are transparent, recorded and properly accounted for, are an acceptable feature of intercountry adoption (see Chapter 5.5).

### 5.1 Payments for adoption services

225. It is reasonable to expect that payments will be necessary for both government and non-government services connected with intercountry adoptions. Both receiving States and States of origin are permitted to charge reasonable fees for services provided. The Convention is concerned with achieving transparency in costs and fees as a means of preventing improper financial gain, for example, through the accreditation, regulation and supervision of bodies or persons involved in intercountry adoption.

226. Some States may be unable to perform Central Authority duties without the payment of fees for services, particularly in the early stages of adoption reform. Concerns arise, however, when fees and payments are unregulated, particularly in relation to payments to families of origin or payments that are meant to channel children toward particular countries, orphanages, service providers or officials. When contemplating how a child enters into care, States should consider the types of abuses that could occur and how best to structure and finance a system in order to minimise those abuses. Some practical examples of this process are provided in Annex 3, Creating Effective Procedures – Practical Examples.

### 5.2 Operational funding for intercountry adoptions

227. Support for national child protection programmes in developing countries often comes from abroad, through development aid and non-governmental organisations’ activity. Programmes may also be funded by individual fees. It is clear that family preservation and national adoption programmes should be adequately funded in order for them to be effective. However, some States of origin do not have the resources to provide either a national child protection system or adequate adoption services. For this reason, development aid, preferably directed at building a national child protection system, but indirectly linked to intercountry adoption services, may be both necessary and acceptable in the early stages of

reform. The challenge for both receiving States and States of origin is to find the appropriate balance between the provision of development aid, contributions, fees, or donations which help to build and maintain an effective child protection system, and the avoidance of difficult ethical and legal problems which may arise where the source of funding is closely related to the intercountry adoption process.

228. Some States of origin ask families for contributions to cover the costs of providing child care and protection services. This is an acceptable practice, if the amount sought is a fixed amount, payable by all adoptive parents, and generally known to the public, as the contribution is sufficiently transparent to ensure that improper financial practices do not occur. It is recognised that the linking of intercountry adoption fees or contributions with funding of a child care programme may create a dependency on intercountry adoption funds. At the same time, it should be acknowledged that on a practical level, it may be very difficult for some States to avoid reliance on fees and contributions, particularly in the early stages of building up a national integrated child protection system and implementing reform, and where there are competing demands for State funds. In such cases, States are encouraged to consider the financial aspects of adoption as an integral part of their implementation plan and should consider what safeguards and other protections they can put in place to guard against improper financial gain and other funding abuses. In the short-term or interim period, States may wish to institute plans to begin a gradual withdrawal from the reliance on funds generated through intercountry adoptions.

229. There are numerous examples of situations where development aid has been offered in an ethical manner which does not compromise the intercountry adoption process. One Swedish accredited body, *Adoptionscentrum*, has developed strategies for international development co-operation including strategies to prevent the abandonment of children; to give children in institutions a family, primarily within their own, or another family within the country; to educate decision makers about the children and the care takers; to provide children who have grown up in an institution with the capability to lead an independent life as an adult; and to strengthen non-governmental organisations that promote children's right to grow up in a family. *Adoptionscentrum* co-operates primarily with non-governmental organisations and foundations which share their values and work towards the same goals. They currently support projects such as:

- training of staff at institutions and other professionals in Ecuador in order to improve the quality of care and finding alternative placements for children;
- capacity building of social workers in the Philippines in order to work more efficiently with child care;
- guidelines for institutional care in India. Other projects include training institutional staff in one state and children's rights advocacy in another; and a new method to decrease the spread of HIV in India is being undertaken;
- creating networks in Kazakhstan in order to replace institutional care with foster care;
- support to children growing up in institutions in Russia so they can lead a normal life after living in institutional care. Other projects in Russia aim to increase co-operation between authorities and non-governmental organisations in order to raise awareness about children's needs;
- support to children who leave institutional care in Serbia that will help them lead independent lives;
- establishing an information and training centre, foster homes for children affected by AIDS and training child care workers in South Africa;

- non-governmental organisations in Belarus, together with the authorities, train staff and raise public awareness in order to increase national adoptions, improve care and ease the transition for children leaving institutional care. Single mothers receive support to keep their children;
- training local leaders in the Women's Union in five provinces in Viet Nam to give them knowledge to support other underprivileged women to look after their own rights and those of their children. Training and networks will contribute in improving the situation of handicapped and orphaned children in two provinces.<sup>150</sup>

230. Other examples come from a Dutch accredited body, *Wereldkinderen*,<sup>151</sup> which supports projects in several countries, including Colombia and India. In Colombia, *Wereldkinderen* supports a day centre, *Creciendo Unidos* (Growing up United), which offers education and vocational training to young working street children in Bogotá. It operates in one of the poorest neighbourhoods around Bogotá. Large numbers of children live in slum dwellings and do not go to school. They contribute to the family income as street sellers or labourers, and are exposed to drugs, violence and criminality, or are recruited by the paramilitaries or the guerilla groups. The day centre offers:

- education and training of children who may get a certificate of vocational aptitude, or follow literacy training and have the possibility to participate in primary education through supplementary training;
- education and assistance for the children's families, in most cases the mothers;
- assistance for working children who receive meals, health care and general education.

231. In India, *Wereldkinderen* supports the NAZ Home Based Care Programme, and part of the NAZ foundation's work is to take care of children and their educators in HIV cases. It also reinforces objective factual information on sexual health and HIV. The programme assists more than 200 families affected by AIDS. NAZ offers psycho-social support, extra nutrition, public awareness programmes and capacity building. The programme was initially intended for those adults who were affected by the AIDS virus, but now the emphasis is on children. The NAZ Home Based Care Programme, initiated in 2001, assists 250 children who are, one way or another, victims of the HIV/AIDS virus. They are affected themselves or have lost their family due to the disease. The programme offers emotional and psycho-social assistance to the children. The program also ensures that all children are able to receive quality care, and that malnourished children receive regular milk, eggs or fruit. The programme offers one of the few places around Delhi where such children can go for support.

232. In Norway, the development aid body, NORAD<sup>152</sup> provides child protection aid that is unrelated to Norway's involvement in intercountry adoptions. NORAD has given support to a Philippines organisation, Norfin, to enable it to start aid programmes for poverty stricken families in remote areas in the Philippines. Norfin is also the contact organisation of the Norwegian accredited body *Adopsjonsforum*. However, Norfin has no influence on the number of children that are matched with Norwegian families. NORAD has also given funds to support an orphanage in Bombay in India. This orphanage has also been supported by the Norwegian accredited body Children of the World – Norway. Children of the World has mediated some adoptions of children from this orphanage, but no preference is given to Norwegian families, and more children have gone to other countries or to national adoptions in India.

<sup>150</sup> See < [www.adoptionscentrum.se](http://www.adoptionscentrum.se) >, under "International Aid".

<sup>151</sup> See < [www.wereldkinderen.nl](http://www.wereldkinderen.nl) >, under "Project Aid".

<sup>152</sup> See < [www.norad.no](http://www.norad.no) >.

### 5.3 Setting reasonable fees and charges

233. Article 32 allows for the payment of professional fees for services rendered for intercountry adoption. Most States (both receiving States and States of origin) make use of such fees,<sup>153</sup> although controls are warranted to ensure transparency and accountability for their expenditure. Article 32 provides that:

- “(1) No one shall derive improper financial or other gain from an activity related to an intercountry adoption;*
- (2) Only costs and expenses, including reasonable professional fees of persons involved in the adoption, may be charged or paid;*
- (3) The directors, administrators and employees of bodies involved in an adoption shall not receive remuneration which is unreasonably high in relation to services rendered.”*

234. In order to give further effect to these principles, the 2005 Special Commission reaffirmed the recommendations of the Special Commission of 2000 which recommended as follows:

*“Accreditation requirements for agencies providing intercountry adoption services should include evidence of a sound financial basis and an effective internal system of financial control, as well as external auditing. Accredited bodies should be required to maintain accounts, to be submitted to the supervising authority, including an itemised statement of the average costs and charges associated with different categories of adoptions.”<sup>154</sup>*

*Prospective adopters should be provided in advance with an itemised list of the costs and expenses likely to arise from the adoption process itself. Authorities and agencies in the receiving State and the State of origin should co-operate in ensuring that this information is made available.<sup>155</sup>*

*Information concerning the costs and expenses and fees charged for the provision of intercountry adoption services by different agencies should be made available to the public.”<sup>156</sup>*

235. When determining how to structure fee policies, States should be careful to address the practical realities. Rarely is the payment of official fees the problem. Most countries have reasonable fees for the processing of adoptions.

236. On the other hand, in some States “unofficial” adoption fees are charged – those that are demanded to move the required paperwork through the adoption process. For example, significant unexplained paperwork delays may occur without the payment of “expediting” fees. Some accredited bodies or approved (non-accredited) persons may find that their clients do not receive child assignments without paying incentives to officials or orphanage directors who make placement decisions.<sup>157</sup>

<sup>153</sup> See the responses to question No 10 (1) of the 2005 Questionnaire.

<sup>154</sup> See Report of the 2000 Special Commission, *supra*, note 14, Recommendation No 6. Recommendation No 6 of 2000 was reaffirmed by the 2005 Special Commission, *supra* note 15, in its Recommendation No 5.

<sup>155</sup> See Report of the 2000 Special Commission, *supra*, note 14, Recommendation No 7. Recommendation No 7 of 2000 was reaffirmed by the 2005 Special Commission, *supra*, note 15, in its Recommendation No 5.

<sup>156</sup> See Report of the 2000 Special Commission, *supra*, note 14, Recommendation No 8. Recommendation No 8 of 2000 was reaffirmed by the 2005 Special Commission, *supra*, note 15, in its Recommendation No 5.

<sup>157</sup> See, for example, the response of Norway to question No 10(4) of the 2005 Questionnaire: “[F]or example babies and younger children or the healthiest children are entrusted to applicants who offer higher fees. For these reasons intercountry adoptions from Romania were stopped several years ago. If such practice should be disclosed, Norway would withdraw accreditations for adoption from the country concerned or deny renewal of accreditation”. See also the response of Switzerland to the same question, which states “...it is well known that the nationals of certain countries have higher financial means and therefore get ‘facilities’” [translation by Permanent Bureau].

237. Such problems are exacerbated by the fact that some accredited bodies or approved (non-accredited) persons will offer such incentives willingly to increase their own placement rate. This may serve their clients' interests, but such practices undermine attempts to protect the interests of children to be adopted. Once a system of using such "expediting" fees develops, it is difficult to stop the abuses. In reviewing their adoption systems, States should seek to identify each point where payments of fees, both official and unofficial, can occur, and develop controls on those fees.

238. Greater transparency may be achieved if official receipts could be issued in respect of all activities requiring payments abroad, for example, to the adoptive family (e.g., gifts) or to organisations (e.g., sums spent on services in the country of origin).

#### 5.4 Contributions to support child protection services

239. The Special Commission on the practical operation of the Convention in November / December 2000 discussed at length the propriety of required contributions to family or child protection services in the country of origin. Many respondents to the Questionnaire on the practical operation of the Hague Convention<sup>158</sup> were prepared to accept systems of donations or contributions subject to a number of safeguards in relation to transparency and accountability.

240. Within the Special Commission itself there was a division of opinion. Some experts felt that the charging of a contribution which is not related to the specific adoption is contrary to Article 32, and should not in any way be condoned. Others took the view that such a charge could be regarded as a legitimate element in the cost of providing an adoption service in the country of origin and that it was important that the Special Commission should make a clear statement concerning the parameters of such contributions.

241. Those who favoured the first view argued that it was part of the "spirit" of the Convention that monies not related to actual costs of specific adoptions should be excluded from the intercountry adoption process, and that it would be unwise to condone by recommendation any breach of that principle even though the purpose of such recommendation might be to place safeguards around the practice of requiring such contributions. Those who favoured the second view argued that it was reasonable for countries of origin to require a contribution to the cost of providing a family and child protection service in that country, that this was already being done in some Contracting and non-Contracting States, and that this could be viewed as the charging of a legitimate cost for the purpose of Article 32.

242. Agreement was reached on the importance of receiving countries providing support for the development in countries of origin of family and child protection services, but in a manner which did not compromise the adoption process itself.<sup>159</sup> The Special Commission recommended that:

*"Receiving countries are encouraged to support efforts in countries of origin to improve national child protection services, including programmes for the prevention of abandonment. However, this support should not be offered or sought in a manner which compromises the integrity of the intercountry adoption process, or creates a dependency on income deriving from intercountry adoption. In addition, decisions concerning the placement of children for intercountry adoption should not be influenced by levels of*

<sup>158</sup> "Questionnaire on the practical operation of the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*", drawn up by the Permanent Bureau, Prel. Doc. No 1 of July 2000 for the attention of the Special Commission of November / December 2000. Available on the website of the Hague Conference at < www.hcch.net > under "Intercountry Adoption Section" and "Special Commissions" (hereinafter, "2000 Questionnaire").

<sup>159</sup> See Report of the 2000 Special Commission, *supra*, note 14, para. 47.

*payment or contribution. These should have no bearing on the possibility of a child being made available, nor on the age, health or any characteristic of the child to be adopted.*<sup>160</sup>

243. Thus contributions are allowed but safeguards are needed to preserve the integrity of the process. Some ideas for safeguards include:

- (a) the amount of the contribution should be a fixed amount, publicly known and notified in advance to the prospective adopters;
- (b) the intended use to which the contribution is to be put should be made clear;
- (c) contributions should always be made by a transaction which is recorded and accounted for;
- (d) detailed accounts should be maintained of income derived from contributions of this kind and of the uses to which such income is put;
- (e) contributions (rather than donations) could be given to the Central Authority or other government body instead of to individual orphanages;
- (f) the contribution should be used for the national child protection system or adoption system. It should not be used solely for institutions involved in intercountry adoption.<sup>161</sup>

## 5.5 Donations

244. Concerns were raised in the 2000 Special Commission about the practice of making donations to adoption bodies or institutions, in particular before the adoption process is completed. Specific concerns were the lack of knowledge about, and the lack of monitoring or reporting systems for, the use of donations, and the varying amounts sought or given. The Special Commission of 2000 recommended a prohibition on pre-adoption donations, namely that:

*“Donations by prospective adopters to bodies concerned in the adoption process must not be sought, offered or made.”*<sup>162</sup>

245. Central Authorities should be informed of any breaches of this recommendation and co-operate with each other to eliminate the practice.

246. In order to bring some transparency to the practice of donations made after the adoption is completed, Contracting States could impose certain safeguards, for example:

- donations should not be in cash but through a bank transfer and paid directly into a bank account;
- the Central Authorities in the State of origin and in the receiving State should be notified when a donation has been made;
- bodies receiving donations should have appropriate accounting mechanisms, and scrutiny of accounts should occur as part of the supervision of accredited bodies in accordance with Article 11.

<sup>160</sup> *Ibid.*, Recommendation No 10.

<sup>161</sup> In some countries of origin a two-tier system of orphanages has developed: those that are involved in intercountry adoptions have more money to provide services and material goods to their children, while those that are not involved in intercountry adoption have less money and therefore cannot provide the same quality of care to their children. In one other country, some orphanages are demanding more money than others and the requests for “donations” are escalating.

<sup>162</sup> See Report of the 2000 Special Commission, *supra*, note 14, Recommendation No 9.

## 5.6 Corruption

247. Official corruption may occur if a person intentionally offers, promises or gives “any undue pecuniary or other advantage, whether directly or through intermediaries, to a public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties.”<sup>163</sup>

248. To discourage improper financial gain and other improper practices in intercountry adoption, the implementing legislation of some countries imposes on public officials specific penalties for acts amounting to corruption.<sup>164</sup> To achieve the same purpose, it may also be possible for a country to extend its criminal law penalties to intercountry adoption situations.<sup>165</sup> In other countries, penalties are imposed on persons generally, and this would clearly include public officials.<sup>166</sup>

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<sup>163</sup> See Organisation for Economic and Co-operation Development (OECD), *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 21 November 1997, at Art. 1. Available at < [www.oecd.org](http://www.oecd.org) >.

<sup>164</sup> Chile (Law 19.620/1999 on Child Adoption, Art. 42); Switzerland (2001 Federal Law No 211.221.31 related to the Hague Convention, Arts 23 and 24).

<sup>165</sup> See, for example, Luxembourg (Penal Code, Art. 367-2).

<sup>166</sup> Andorra (Penal Code, Art. 105); Canada (British Columbia) (Adoption Act RSBC 1996, Chapter 5, section 84); Ecuador (2003 Children and Adolescents' Code, Arts 155 and 252); Romania (Law No 273/2004, Art. 70).

## **PART II: THE FRAMEWORK FOR PROTECTION OF CHILDREN (THE NATIONAL AND INTERNATIONAL FRAMEWORK)**

249. Part II of this Guide deals with the practical issues of implementing general principles. These issues mainly involve Convention Chapters IV and V, which deal with aspects of the intercountry adoption process, and which incorporate the steps following on from a determination by the country of origin, in giving effect to the subsidiarity principle, that a child is adoptable.

250. The context for Part II is an integrated approach to intercountry adoption, starting with the child's entry in the care and protection system, preserving or reuniting the family, providing temporary care, considering national adoption or permanent family care, and finally, the procedure for an intercountry adoption, once it has been determined that this is the best solution for a particular child.

251. The child's best interests must be the fundamental principle that supports the development of an internal child care and protection system as well as a system for intercountry adoption. The implementation of the subsidiarity principle implies that there is a functioning care and protection system in place in the country and that sufficient human and financial resources are provided to allow a consideration of national solutions for a child before deciding that an intercountry adoption is in the child's best interests.



## CHAPTER 6 – THE NATIONAL CHILD CARE CONTEXT AND NATIONAL ADOPTION

252. This Chapter deals briefly with the following phases of the child care, protection and adoption system:

1. Child's entry into care
2. Family preservation or reunification
3. Temporary child care or institutionalisation
4. National adoption

253. The four phases refer to the internal child care and protection system and encompass the services that States may offer independently of intercountry adoption. If the State makes a decision to allow outgoing intercountry adoptions, these elements also become part of the overall adoption system of that State as a country of origin. A State of origin should be able to seek advice and assistance from a receiving State to improve the national child care and protection system. Intercountry co-operation is necessary when seeking to provide alternative solutions to intercountry adoption. However, a programme of assistance should not be organised in such a way as to jeopardise the integrity of the intercountry adoption programme.<sup>167</sup>

254. The mechanisms through which a child enters the child care and protection system, and the procedures and policies that are used to guide that child's journey through the system and into a permanent family placement, may provide the foundations for good practice. Good practices employed in the early stages help to ensure implementation of the principles and requirements of the Convention. For this reason the Guide to Good Practice must examine good practices in national adoption, as the foundation for good practices in intercountry adoption.

255. As internationally accepted standards, the UN Committee on the Rights of the Child issued a decision in 2004 on "children without parental care"<sup>168</sup> where it recommended that the UN Commission on Human Rights considers establishing a working group to prepare a draft of UN Guidelines for the protection and alternative care of children without parental care. A draft of the guidelines was developed by non-governmental organisations in a working group on children without parental care, convened by International Social Service. Unicef has also been closely involved in the drafting process. After a period of consultations, the draft Guidelines will be submitted to the UN General Assembly in order to be adopted.

### 6.1 Phase one: *Child's entry into care*

#### 6.1.1 *Child's entry into care: identification of children and families in need*

256. The first paragraph of the Convention Preamble contains the principle that:

*"the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding."*<sup>169</sup>

<sup>167</sup> See Report of the 2000 Special Commission, *supra*, note 14, Recommendation No 10 and Chapter 5 of this Guide.

<sup>168</sup> Available at: < [www.ohchr.org](http://www.ohchr.org) > under "Human Right Bodies" then "Committee on the Rights of the Child" and "Decisions".

<sup>169</sup> See Explanatory Report, *supra*, note 1, para. 37.

257. This principle underlines the importance of the family in the nurturing and development of the child. This is in recognition of the right of the child to a family, where his or her personality is formed and developed.<sup>170</sup>

258. In order to ensure that children and families are provided with adequate opportunities to remain together, States should first be able to identify children and families in need of assistance. In most cases, this identification takes place when the child enters the child care and protection system, either formally or informally.

259. Most States have formal mechanisms included in their laws or implementing regulations that specify the ways a child may enter into care or protection by the State or be eligible for adoption. Such mechanisms may include court orders,<sup>171</sup> formal relinquishment, or recognition of abandonment in a hospital or orphanage. For example, in China, children may enter into care or protection by the State or be eligible for adoption if they are “orphans bereaved of parents; abandoned infants or children whose parents cannot be ascertained or found; or children whose parents are unable to rear them due to unusual difficulties.”<sup>172</sup> Formal criteria for entry into care are needed to help prevent inappropriate intervention including abduction, sale or trafficking of children.

### **6.1.2 Abandonment and abduction**

260. Abandonment refers to the act of leaving a child with the intention of forsaking one’s parental rights, with no intention of return.<sup>173</sup> Abandonment may be particularly common in countries with no formal relinquishment mechanisms, countries that lack services for families in crisis, and countries that do not have or do not enforce measures to combat child trafficking.

261. Abandoned children are more likely to spend additional time in institutions waiting for investigations to be conducted and are unlikely to be reintegrated into their families. In addition, such children are usually deprived of the right to information about their identities, families, and social and medical information.<sup>174</sup> This is a particular problem in countries which make it a criminal offence for the biological parents to either abandon a child or to initiate an adoption process for their child if they find that they cannot, for whatever reason, raise the child themselves (see also Chapter 9.1 regarding preservation of information about the child).

262. Where a large number of children classified as “abandoned” are entering the system for no obvious reason, this could be an indication of possible abuses and should be investigated. Awareness of this fact may be especially important in areas with vulnerable populations, such as those affected by internal strife, natural disaster or extreme poverty.

263. Identification of those children who may be potential abduction victims is much more difficult if a majority of the children placed for intercountry adoption are allegedly “abandoned.” In such cases, if a parent notifies the authorities that his or her child was abducted, efforts may be made through the police or other authorities to attempt to identify the child. Some States impose more stringent requirements in abandonment cases where concerns about abduction are high. For example, children may have to be listed for a specific period on a register thus giving parents time to come forward to claim the child, or to locate

<sup>170</sup> *Ibid.* See, for example, Brazil (1990 Child and Adolescent Law, Art. 19); Costa Rica (1998 Childhood and Adolescence Code, Arts 30 and 31) and India (2003 National Charter for Children, Art. 17).

<sup>171</sup> See, for example, the Child and Family Services Act of Canada (Manitoba), Art. 38(1).

<sup>172</sup> Adoption Law of 1999 of the People’s Republic of China (Art. 4).

<sup>173</sup> See Morocco (Law 15-01 relating to the care of abandoned children (*kafala*), Official Bulletin, 15 September 2002, Art. 1). Abandonment must be approved by a court, among others, in Bolivia (1999 Children and Adolescents’ Code, Arts 35, 289 and 293), the Dominican Republic (2003 Child and Adolescence Protection System and Fundamental Rights Code, Art. 132) and France (Civil Code, Art. 350).

<sup>174</sup> See UNCRC, *supra*, note 8, Arts 7 and 8.

relatives.<sup>175</sup> Registers alone may be insufficient to address this concern, particularly if there is a risk that poor families may have difficulty locating children moved to a distant location. Some States therefore require that additional safeguards be used in conjunction with registers.<sup>176</sup>

264. If States have knowledge of suspected cases of abduction, DNA testing of the child and the named birth parent may be used to establish maternity or paternity. Some States require that such tests be done in cases where suspicions are aroused, and the costs are often borne by the prospective adoptive parent through the agency or service provider.<sup>177</sup> Except in countries where there is convincing evidence of widespread and uncontrolled abduction or baby selling practices, requiring DNA testing in every case should not be necessary.<sup>178</sup>

265. As a matter of good practice, national laws and procedures must clearly state:

- who declares formally that abandonment has occurred and according to what criteria;
- what measures should be taken to locate the family of origin;
- what are the procedures for expeditiously placing abandoned children into permanent family placements.

266. The collection of statistics should also assist in assessing whether some areas of the country or some institutions have particularly high abandonment rates. Where this occurs, an investigation of the reasons may be called for.

### **6.1.3 Voluntary relinquishment**

267. Relinquishment refers to a parent's decision to forego or surrender rights and responsibilities in respect of a child, or to offer consent to the adoption of a child. Some States include provisions for consent or relinquishment in their laws and regulations<sup>179</sup> in order to avoid the negative consequences of abandonment, such as the absence of family and social information on the child.<sup>180</sup> The absence of relinquishment provisions may result in a lack of opportunities for families to be counselled before making their decision<sup>181</sup> and to ensure that their decision was not coerced.<sup>182</sup>

268. As a matter of good practice, laws and procedures should provide for and publicise:

<sup>175</sup> See, for example, in Madagascar (2005 Law on Adoption, Art. 39), a child is declared abandoned upon a decision of a Juvenile Judge. This decision may only be issued upon the presentation of a report on the inquiry and of a certificate of unsuccessful search, carried out for at least six months, from the date of initial involvement of the official of the judicial police; in Russia (Family Code, Arts 122 and 124), the government maintains a database of children without parental care; furthermore the law requires that a child be registered first on a local databank for one month, and a regional databank for a month, plus several months on the federal databank.

<sup>176</sup> Guatemala (2007 Law on Child Adoptions, Art. 36); Bulgaria (Ordinance No 3 on the Conditions and Procedure for giving Consent for the Adoption of a Person of Bulgarian Nationality by a Foreigner, 16 September 2003).

<sup>177</sup> For example, the Ecuadorian 2003 Children and Adolescents' Code (Art. 286) requests DNA tests in case of doubt of the identity of the child; Guatemala requests DNA test for all children relinquished by their parents (2007 Law on Child Adoptions, Art. 36). See also the responses to question No 7(6) of the 2005 Questionnaire: Canada required DNA testing for intercountry adoptions in Guatemala; Norway stated that they are aware that some receiving countries used such testing for adoption from Guatemala; Romania uses DNA testing to prove the paternity of children; in the United States of America DNA tests are performed in all adoption cases from Guatemala.

<sup>178</sup> According to the responses to question No 7(6) of the 2005 Questionnaire, the majority of responding countries have not yet used this kind of test.

<sup>179</sup> See responses to question No 4(c) and (d) of the 2005 Questionnaire. For example, Australia; Andorra (Adoption Law of 21 March 1996, Art. 8); Ecuador (2003 Children and Adolescents' Code, Art. 158); Lithuania (Civil Code, Art. 3.212 – 3.215 and Civil Procedure Code, Art. 448); Romania (Law 273/2004, Arts 11–17).

<sup>180</sup> Art. 16

<sup>181</sup> Art. 4 c)(1).

<sup>182</sup> Art. 4 c)(3).

- services for families in crisis, including family preservation services;
- arrangements for temporary care;
- counselling services to families of origin and, where a family cannot remain intact, counselling on the effects of giving consent to an adoption.

269. The laws and procedures must also clearly state who determines that the consent has been freely given and has not been induced by compensation.

## **6.2 Phase two: *Family preservation***

### **6.2.1 *Family preservation and reunification***

270. The Convention Preamble contains the following principle:

*“Each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin.”<sup>183</sup>*

271. Family preservation programmes are those that are designed to assist families in caring for their children during times of family crisis, thus preventing the separation of child and family. Family reunification programmes assist parents in regaining custody of children from whom they were previously separated, or reunite children with members of the extended family. By assisting families in retaining custody of their children, States reduce the need for short-term institutionalisation, foster care and adoption programmes. Most importantly, such programmes enable a child to grow up in his or her family of origin.<sup>184</sup>

272. An assessment of the current adoption system, referred to in Chapter 1, will provide a State with a picture of currently functioning family preservation programmes, if any. Even in countries that do not have a functioning child care and protection system, programmes may exist in other sectors of government operation, such as departments of health, social affairs, economic development or veterans’ affairs. If such programmes already exist elsewhere, States could integrate them into the child care programme to prevent duplication. In addition, non-governmental organisations may share a role with governments in providing child care and protection services in some countries.

273. As a matter of good practice, States should examine the most common reasons families relinquish or abandon children. To the extent possible, States should provide funding for family preservation programmes and develop programmes to meet the needs of relinquishing families.<sup>185</sup>

### **6.2.2 *Strategies to assist family preservation and unification***

274. This Guide recognises the importance of family preservation and unification in the development of a national child care and protection system. However, all the information necessary to develop such a system is beyond the scope of this Guide. An outline of some strategies is included here and further detail is provided in Annex 4.

<sup>183</sup> See Preamble to the Convention, para. 2. See also Explanatory Report, *supra*, note 1, paras 38 and 39.

<sup>184</sup> See Bulgaria (Ordinance on the Conditions and Procedures for Implementation of Measures for Prevention of Abandonment of Children and their Placement in Institutions, Decree of the Council of Ministers 181/11 August 2003); India (2003 National Charter for Children, Art. 17, Strengthening Family); Madagascar (2005 Law on Adoption, Art. 7).

<sup>185</sup> For example, Sri Lanka has many schemes and programmes to provide financial assistance to needy parents with a view to keeping children with their natural parents (response of Sri Lanka to question No 4(b) of the 2005 Questionnaire); other governments work with non-governmental organisations, such as Everychild, in order to offer family support programmes, for example, Bulgaria, Georgia, Kyrgyzstan, Moldova, Romania, Russia and Ukraine, see < [www.everychild.org.uk](http://www.everychild.org.uk) >.

### **6.2.3 Keeping families intact**

275. It has been noted that poverty or financial hardship is the leading cause of family breakdown in many States. Other factors often complicate the situation, such as domestic violence, substance abuse and societal or cultural norms.<sup>186</sup>

276. Poverty and hardship may make a family vulnerable to exploitation. If a family with several children is experiencing severe financial difficulties, they are sometimes forced to consider relinquishing a child in return for financial payment.

277. Poverty in itself is not a sufficient reason to deprive parents of their children. Article 8 of the *European Convention on Human Rights*, for example, prohibits such actions.<sup>187</sup>

### **6.2.4 Family reunification**

278. Where possible, States should make efforts to reintegrate separated children into their families.

279. If it is not possible to maintain a child in his or her family of birth, it may be possible to enable another family member to care for the child.<sup>188</sup> The search for relatives to care for a child should not unnecessarily prolong the period of institutional care for the child.

### **6.2.5 Developing family preservation programmes**

280. In determining what types of programmes will assist family preservation or reintegration, States may wish to consider examples of systems and programmes used by other States. A list and brief description of certain types of family preservation programmes, such as Domestic Violence Assistance, Substance Abuse Assistance, Small Business Loans / Business Development, is contained in Annex 4.

### **6.2.6 Provision of services**

281. Once a State has identified services that it would like to offer to families, it has to determine which entity could and should deliver those services, what mechanisms will be utilised to do so, and how services will be funded.

### **6.2.7 Utilising other resources**

282. Where there is no centrally operated program, States may have other assistance programmes for certain segments of the population, administered under various departments.<sup>189</sup>

283. Some States use private adoption service providers and orphanages to perform family preservation or reunification services. Private organisations often have more funding to implement programmes, and adequate and well-trained social service personnel to do so.

<sup>186</sup> See H. van Loon, *supra*, note 6, p. 235, para. 38.

<sup>187</sup> See also ATD Fourth World, *How poverty separates parents and children: a challenge to human rights*, 2005: "In the face of poverty, parents can show unstinting resilience and courage on behalf of their children, making enormous efforts to safeguard relationships and keep the family together. This study shows what ATD Fourth World has learnt about the fight against poverty from its grassroots action with families, and from that of other non-governmental organisations, in the Philippines, Burkina Faso, Haiti, Guatemala, the United Kingdom and the United States". See <[www.atd-uk.org/publications/Pub.htm](http://www.atd-uk.org/publications/Pub.htm)>.

<sup>188</sup> For example, Ecuador (2003 Children and Adolescents' Code, Art. 158); Lithuania (Civil Code, Art. 3.223), regional or municipal welfare agencies must first try to reunite a child with its birth family or other relatives.

<sup>189</sup> Bulgaria (Ordinance on the Conditions and Procedures for Implementation of Measures for Prevention of Abandonment of Children and their Placement in Institutions, Decree of the Council of Ministers 181/11 August 2003).

### 6.2.8 *Co-operative agreements*

284. States may also be able to refer families to programmes that they have established in co-operation with international organisations (that do not perform adoption or child care work). There are, for example, non-governmental organisations that provide small business loans to help families establish businesses that can improve their economic situation; aid agencies that provide short-term food and housing relief; and programmes that provide medical and surgical services to under-served populations.<sup>190</sup>

## 6.3 Phase three: *Temporary care and institutionalisation*

### 6.3.1 *Reasons for temporary care*

285. Children may be placed in temporary care for a number of reasons and for different periods of time. For example:

- during a family crisis, when the parents are unable to care for the child;
- to protect the child from a violent or abusive family situation;
- while the family receives counselling pending reunification;
- if the child is abandoned, and attempts are made to locate the family;
- as an interim measure while permanency planning is undertaken;
- as an interim measure before a declaration of adoptability is made;
- if the parents are deceased, or have been found unfit to care for the child.

286. The temporary care may be in an institution or in foster care. States should monitor the length of time children remain in temporary care.<sup>191</sup> In some countries, children are left in institutions by their families while they are unable to care for them. The intention may be to leave the children only temporarily, and the parents are expected to return to reclaim their child. Unfortunately this may not happen. The child is left in limbo. The institution, expecting the parents to return, takes no action to find permanent family care for the child who may then remain in the institution for years. Where children will not be reunited with their families, permanency planning should be undertaken as quickly as possible. In the majority of cases, long-term institutionalisation is not in the best interests of children.<sup>192</sup>

<sup>190</sup> See for example, the American Friends Service Committee (AFSC), which is an organisation that carries out service, development, social justice, and peace programmes throughout the world (Vietnam, Laos, Cambodia, Afghanistan, North Korea). For more information see < [www.afsc.org/about/default.htm](http://www.afsc.org/about/default.htm) >.

Moreover, Save the Children has several programmes in order to provide services to families: for instance, in Afghanistan, Save the Children work with families, communities and health care workers in homes, health posts, clinics and hospitals to promote the basic health, well-being and survival of children under age five and the health of women who are and may become mothers. Furthermore, Save the Children is increasing access to education through school rehabilitation and community mobilisation in poor, remote districts in two northern provinces of Afghanistan, by supporting associations of teachers and parents, mothers and fathers alike, by promoting education for girls as well as boys in their communities, etc. For more information see < [www.savethechildren.org](http://www.savethechildren.org) >.

<sup>191</sup> Brazil has developed a national database, the *Sistema de Informação para a Infância e a Adolescência* (SIPIA), for the formulation of public policies related to the rights of children at all governmental levels.

<sup>192</sup> See also the Council of Europe: Recommendation 5 (2005) of the Committee of Ministers to member states on the rights of children living in residential institutions (adopted by the Committee of Ministers on 16 March 2005 at the 919th meeting of Ministers' Deputies). Available at < [www.coe.int](http://www.coe.int) >.

### 6.3.2 Facilities for temporary care

287. Some States allow only public authorities to operate temporary care facilities. These are generally funded by the State itself, although contributions by other organisations may be accepted to assist in operating those facilities. In many States, arrangements with private orphanages and privately run foster care systems have developed because of the absence of government-funded alternatives.<sup>193</sup> In other States, non-governmental organisations may be granted licenses to operate adoption programmes in exchange for sponsorship of particular orphanages or programmes.

288. Whether child care and protection systems and services are implemented by government bodies or through the use of private bodies, States should be careful to ensure the integrity of the child care and protection system. In reviewing the funding and operation of child care facilities, both public and private, and foster care, it is important to establish who owns the facility, who pays basic operating costs, and whether the entities funding these services have any conflicting interests.

289. National laws and procedures should provide for adequate funding of temporary care facilities and services, at the same time ensuring that adequate protections are in place to protect against exploitation of children.

## 6.4 Phase four: National adoption or permanent care

### 6.4.1 Permanency planning

290. The Convention contains the following rule to express the subsidiarity principle:

*“An adoption within the scope of the Convention shall take place only... after possibilities for placement of the child within the State of origin have been given due consideration.”*<sup>194</sup>

291. A decision on permanency planning<sup>195</sup> should be taken when, after reasonable efforts, it has been determined that a child cannot remain with his or her family of origin, or cannot be cared for by members of the family. Efforts should then be made to place the child, preferably with an adoptive family, in his or her country of birth.<sup>196</sup>

292. States should ensure that children are moved into permanent family placements as quickly as a proper consideration of the child’s best interests will allow. The Explanatory Report notes that the third paragraph of the Preamble, in referring to permanent or suitable family care, does not

<sup>193</sup> In Georgia, children are in institutions because there are no adequate support systems to help parents cope when they are unable to feed, clothe and educate their children. Worldvision, together with EveryChild, Unicef and the Ministries of Labour, Health, Social Affairs and Education, have implemented the first “Prevention of Infant Abandonment and Deinstitutionalisation” project in Georgia (PIAD). See the WorldVision website: < [http://meero.worldvision.org/issue\\_details.php?issueID=10](http://meero.worldvision.org/issue_details.php?issueID=10) >.

<sup>194</sup> Art. 4 b).

<sup>195</sup> See, for example, ISS/IRC document “A Global Policy for the Protection of Children Deprived of Parental Care” available at < [www.iss-ssi.org](http://www.iss-ssi.org) >.

<sup>196</sup> See, for example, Bolivia (1999 Children and Adolescents’ Code, Arts 74 and 85); Ecuador (2003 Children and Adolescents’ Code, Art. 153); India (2003 National Charter for Children, Art. 17, “Strengthening Family”, and 2006 Guidelines for Adoption from India, Chapter IV, section 4.1, Step III). In the Philippines (Inter-Country Adoption Act of 1995 (RA 8043), Art. III, Section 7) the Central Authority shall ensure that all possibilities for adoption of the child under the Family Code have been exhausted and that intercountry adoption is in the best interest of the child. Towards this end, the Board shall set up the guidelines to ensure that steps will be taken to place the child in the Philippines before the child is placed for intercountry adoption. See also the response of Sri Lanka to question No 4(b) and (c) of the 2005 Questionnaire, according to which when there is an adoptable child “at first the child is referred to local adopters, who have been registered with the Provincial Commissioner. The children refused by local adopters, are thereafter, referred to the Central Authority. Then the Commissioner of Probation and Child Care Services of the Central Authority takes action to put them in a priority list for foreign adoption”.

deny or ignore other child care alternatives, but highlights the importance of permanent family care as the preferred alternative to care by the child's family of origin.<sup>197</sup>

#### **6.4.2 *Delaying permanency planning not in the child's best interests***

293. A viable national adoption system ensures that States can fulfil their responsibility for finding a permanent family for a child in need. If no national adoption system exists, States should consider how best to develop one that effectively meets the needs of children and families in their State. Developing a national adoption system where none currently exists requires time and resources, and needs to be considered as part of the implementation plan for the Convention.

294. The inability to perform national adoptions may cause some States to consider stopping intercountry adoptions until a system can be developed and implemented. However, delaying permanent family placements for children while attempting to enact long-term reform of a child care and protection system in most cases runs contrary to the "best interests" principle. When implementing changes, the use of interim measures should be considered, to allow children in need of permanent family placement to find such a placement in a child-friendly time frame, especially where arrangements for the placement have already begun. Otherwise, children who are currently in institutions and in immediate need of a family may unfortunately remain there for years unless they are placed in permanent families through intercountry adoption. The question of transition or "pipeline" cases (cases started before a moratorium on adoption occurs, or cases not completed when the Convention enters into force) is discussed in detail in Chapter 8.3.2.

295. On the other hand, States should not use interim provisions to relieve themselves indefinitely of the responsibility to implement needed changes. This is one of the primary reasons that a national child protection strategy for reform is important (see Annex 2). A country intending to join the 1993 Convention can demonstrate its intention to enact long-term reforms, perhaps thereby avoiding the lodging of objections to its accession by other States. However, the failure of a new State Party to implement its national reform strategy may prompt international pressure to conform to the principles of the Convention.

#### **6.4.3 *Designing a national adoption system***

296. It is not possible in this Guide to do more than outline some of the factors involved in establishing or developing a national adoption system. Of particular importance is to structure a system that will meet the needs of children quickly and efficiently. Factors to be considered include:

- how to promote national adoption;
- how to prepare and approve adoptive families;
- whether to provide financial support for adoptive families;
- who will provide adoption services;
- how children and families will be matched.

297. As important as it is to develop national adoption systems, there may be other forms of care that are already practiced in countries of origin and that need to be developed further. For instance, in Cambodia, relatives and community members are often happy to look after

<sup>197</sup> See Explanatory Report, *supra*, note 1, para. 43; see also UNCRC, *supra*, note 8, Art. 20(3), which refers to the desirability of "continuity" in a child's upbringing.

orphaned and abandoned children but they do not want to formally adopt them. Buddhist monks and nuns also offer homes for small groups of children. This works very well for older children who are not adoptable. As long as there is permanency for the child, these systems may work well and are recognised and accepted by adults and children alike. Where appropriate, they need to be developed and encouraged. Community-based solutions may sometimes be preferable to a national adoption.

#### **6.4.4 Promoting national adoption**

298. In States that have historically low numbers of national adoptions there may be a need to promote awareness of adoption and cultural acceptance of adoption. In some States, adoption has not traditionally been considered an option in caring for children without families. Building awareness of the need for adoptive families may require a change in public attitudes. Some countries have had success in building awareness of adoption for the benefit of children and families through public announcements, media campaigns and active involvement of many in the government sector on the local, regional and national level.<sup>198</sup>

299. In developing a national adoption system, it is important for States to know what factors, if any, are inhibiting national adoption in the State, and to consider how families can be encouraged to adopt children.

#### **6.4.5 Training and approval of adoptive families**

300. Once States have identified potential adoptive families, there should be a period of counselling and preparation before approving them as adoptive parents. Prospective adopters should be evaluated with respect to their ability to care for a child.<sup>199</sup>

301. The State must have procedures or criteria in place to assess the eligibility and suitability of national families to adopt a child. National adoptive families may be evaluated and prepared according to standards that are equivalent to those applied in intercountry adoption.<sup>200</sup> Systems employed by other States can provide helpful models in this regard.

302. It is also important to decide which body in the State is qualified and competent to prepare adoptive families for the adoption.

#### **6.4.6 Matching children and families**

303. One of the challenges in developing a functional national adoption system is determining how to match adoptable children in need of families with approved adoptive families. Families are most often approved by local authorities and efforts are made to match those families with children in local facilities.<sup>201</sup> However, if no appropriate family is found for

<sup>198</sup> See the Philippines (Domestic Adoption Act of 1998 (RA 8552), Art. 1, Section 2(c) (iv, v and vi)) and the campaigns carried out by the Central Authority of Chile (SENAME) < [www.sename.cl](http://www.sename.cl) >.

<sup>199</sup> For example, Canada (British Columbia), requirements of a homestudy (Adoption Regulation, Section 3); Denmark, examination and preparation of prospective adopters, (Adoption Act, *cf.* Consolidated Act No 928 of 14 September 2004 and the Executive Order on the approval of adopters); Italy, requirement for stability in the relationship of prospective adoptive parents before adoption (Law No 149, 28 March 2001, Art. 6).

<sup>200</sup> See UNCRC, *supra*, note 8, Art. 21(c). See the responses to question No 4(g) of the 2005 Questionnaire: Canada (British Columbia): procedures to assess the eligibility and suitability of prospective adoptive parents are established in Section 3 of Adoption Regulation of British Columbia; Denmark: "[i]n order to ensure and promote the welfare of the child to be adopted all prospective adoptive parents must be subject to an examination, and for almost all prospective adoptive parents an adoption course is mandatory before adopting a child from abroad". Further, Danish legislation established that the prospective adoptive parents must be subject to investigations, which are in three phases.

<sup>201</sup> Chilean Law 19.620/1999 on Child Adoption (Arts 20-22) states that adoption of a Chilean child by persons not resident in Chile shall only proceed when there are no Chilean married couples or foreign married couples with permanent residence in Chile who are interested in adopting the child and who satisfy the legal requirements. The Guidelines for Adoption from India – 2006 (Section 3.4) establish the need to "Encourage and promote placement of such children in adoption or guardianship with families within the country."

a child locally, States should determine how adoptive families may be sought in other parts of the country.

304. Many States use a register system to accomplish this task.<sup>202</sup> A centralised list of all adoptable children and all prospective adoptive families in the country is maintained by an appropriate authority. Then, if local authorities do not have an approved adoptive family for a child, he or she can be matched with a family from another area. Such registers may also indicate which children may be considered for intercountry adoptions if no national families are available to adopt a child.<sup>203</sup>

305. As a preliminary stage to intercountry adoption, and in order to encourage the active consideration of the subsidiarity principle, many States develop procedures to determine that appropriate efforts have been made to place children with national families. One system commonly in use is to require children to be available for national adoption for a certain amount of time or until certain procedures have been attempted.<sup>204</sup>

306. However, it may not be in a particular child's best interests to delay an intercountry adoption placement merely to satisfy an arbitrary administrative procedure. In some States of origin, where the number of adoptable children greatly exceeds the number of national adoptive families, the requirements of the subsidiarity principle will be met if the "possibilities for placement of the child within the State of origin have been given due consideration" and it is obvious that a suitable national family is not available for a child. No time limits or procedures are prescribed by the subsidiarity principle.

#### **6.4.7 Provision of services**

307. When developing a national adoption system, it is necessary to consider which adoption services are required, who will provide those services and how they will do so. The provision of adoption services requires a significant use of social service expertise, particularly in regard to the study and approval of adoptive parents and the matching of children.

308. Some States do allow private service providers to assist in this regard.<sup>205</sup> Such providers may have expertise and personnel who can assess and prepare families and oversee placements. It is important that public authorities retain supervisory responsibility to ensure that proper standards are maintained and that appropriate services are offered.

<sup>202</sup> See, for example, Brazil (1990 Child and Adolescent Law, Art. 50); Bulgaria (Ordinance No 3 on the Conditions and Procedure for giving Consent for the Adoption of a Person of Bulgarian Nationality by a Foreigner, 16 September 2003, Section III); Chile (Law 19.620/1999 on Child Adoption, Art. 5); Latvia (Regulation No 111 of the Council of Ministers, 11 March 2003, Art. 3); Lithuania (Resolution No 1422 of 10 September 2002, Procedure for Registry of Adoption in the Republic of Lithuania and Civil Code, Art. 3.219).

<sup>203</sup> In Lithuania, first consideration is given to placing an adoptable child in the Lithuanian community. The procedures specify that regional or municipal welfare agencies must first try to reunite a child with its birth family or other relatives. If this is not possible, the child may be placed with a Lithuanian family for adoption, fostering or guardianship. If a Lithuanian family cannot be found then the adoption agency looks for a suitable foreign family on its Register of prospective adoptive parents. In Mongolia (Family Code, Art. 56), there are also district registers and national registers for adoptable children.

<sup>204</sup> Bulgaria (Ordinance No 3 on the Conditions and Procedure for giving Consent for the Adoption of a Person of Bulgarian Nationality by a Foreigner, 16 September 2003, Art. 3); Chile (Law 19.620/1999 on Child Adoption, Art. 12); Philippines (Domestic Adoption Act of 1998 (RA 8552)). In Belarus, the adoption by foreigners or stateless persons other than relatives may only be considered after a period of six months from the child's registration. See response to the 2000 Questionnaire.

<sup>205</sup> See, the Philippines (Domestic Adoption Act of 1998 (RA 8552), Art. I section 3h): "Child-placing agency is a duly licensed and accredited agency by the Department to provide comprehensive child welfare services including, but not limited to, receiving applications for adoption, evaluating the prospective adoptive parents, and preparing the adoption home study."

## CHAPTER 7 – THE INTERCOUNTRY ADOPTION PROCESS UNDER THE CONVENTION

309. The Preamble of the Convention states the principle that:

*“Intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin.”*<sup>206</sup>

310. For the purpose of developing good practice, it is assumed that the subsidiarity principle examined in Chapter 2, General Principles of the Convention, and the procedures or guidelines for examining national solutions for a child, which are set out in the previous chapter, will have been followed before reaching the consideration of the intercountry process, the subject of this Chapter of the Guide. It is important to emphasise the sequential nature of events affecting the child, leading up to the intercountry adoption.

### 7.1 The intercountry adoption process

311. Once it is established that a child is adoptable, and possibilities for placement of the child within the State of origin have been given due consideration, the Central Authority or other competent authorities may determine that intercountry adoption is in the child’s best interests.<sup>207</sup>

312. The procedural requirements for each intercountry adoption under the Convention are prescribed in Articles 14 to 22 of the Convention (Chapter IV). These rules are mandatory and must be followed for every adoption, including in-family adoptions. Where the Guide refers in this section to the functions of the “Central Authority”, unless otherwise stated, it should be understood that the term includes public authorities or accredited bodies as provided for in Article 22(1) or approved (non-accredited) bodies or persons as provided for in Article 22(2). However, before they can perform Central Authority functions, the designation of bodies or persons must have been made as required by Articles 13 and 22.

313. The Explanatory Report notes that:

*“Chapter IV aims at designing a procedure that will protect the fundamental interests of all the parties involved in intercountry adoption, in particular the child, the biological parents and the prospective adoptive parents. Consequently, it establishes important safeguards for the protection of those interests, but, at the same time an effort was made to simplify the existing procedures and to maximise the chances of homeless children being integrated into adequate homes in other Contracting States [...] A consensus was reached as to the mandatory character of the rules of Chapter IV[...]. Therefore, they must be applied in all cases.”*<sup>208</sup>

314. Chapter IV begins, in Articles 14 and 15, with the procedure concerning the prospective adoptive parents (and not the child). This does not imply either a priority choice or a chronological order for the adoption procedure, to register prospective adoptive parents first, and then to search for adoptable children. On the contrary, the best interests of the child are always the priority, as this Guide tries to emphasise, from the first principles in Chapter 2 through all following chapters.

315. Unfortunately this priority is not always recognised in practice and too much emphasis may be given to the needs of adoptive parents looking for a child, rather than the

<sup>206</sup> See Preamble to the Convention, para. 3.

<sup>207</sup> Art. 4 b).

<sup>208</sup> See Explanatory Report, *supra*, note 1, paras 282 and 283.

child's need for a suitable family. Countries of origin should not be expected to register large numbers of files from prospective adoptive parents and then be under pressure from those parents to give priority to their requests.<sup>209</sup>

316. Ideally, when the child's best interests are given priority, the competent authorities in the country of origin should undertake permanency planning, including a decision on whether a child is adoptable and in need of intercountry adoption. The receiving country may then be informed of the types of children in need of families before being asked for files of suitable prospective adoptive parents for these children.<sup>210</sup> A country of origin which is able to "reverse the flow" of files in this way will achieve a child-centred intercountry adoption process<sup>211</sup> (see also Chapter 10.4 of this Guide on preventing pressure on States of origin by receiving States or accredited bodies).

### **7.1.1 Summary of the procedure in Convention Chapter IV**

317. The prospective adoptive parents must apply to the Central Authority in the State of their habitual residence.<sup>212</sup> The Central Authority, if satisfied that the parents are eligible and suited to adopt, prepares a report on the family, and transmits the report to the Central Authority of the child's country of origin.<sup>213</sup> It is implicit in the Convention that the adoptive parents' habitual residence country will have criteria in its laws and procedures to assess that the prospective adoptive parents are eligible and suitable to adopt a child. This assessment should be done by professionals with appropriate qualifications and expertise.

318. The Central Authority in the State of origin should have a register of children declared adoptable through intercountry adoption. The Central Authority undertakes the matching of the adoptable child with the adoptive parents who have the qualities and skills best suited to the needs of that child. It is implicit in the Convention that the country of origin will have criteria in its laws or procedures by which to determine if a child is "adoptable".

319. If it is satisfied that the child is adoptable, the Central Authority in the State of origin prepares a report on the child, ensures that proper consents have been obtained, matches the child with appropriate adoptive parents, and determines whether the envisaged placement is in the child's best interests.<sup>214</sup> The Central Authority then transmits the report on the child to the Central Authority of the receiving State,<sup>215</sup> which must determine that the prospective adoptive parents agree with the proposed placement or entrustment,<sup>216</sup> and may, if necessary, approve the proposed placement or entrustment.<sup>217</sup> Provided that both Central Authorities have agreed that the adoption may proceed<sup>218</sup> and the child has been authorised to enter and reside permanently in the receiving State,<sup>219</sup> the entrustment of the child to the adoptive parents, and the adoption itself, may now go ahead, depending on the law of the State of origin. If the adoption must be finalised in the State of origin, in accordance with Article 28, the legal procedures, including court procedures, for the adoption must be completed before the child is authorised to leave the State of origin.

<sup>209</sup> See the response of the ISS/IRC to Questions Nos 4(g) to (i), 6, 16, 17 and 19 of the 2005 Questionnaire.

<sup>210</sup> Porto Alegre in Brazil has achieved this ideal. See ISS/IRC, "Editorial: In the child's best interest, which is the supply and which the demand?", *Monthly Review No 65*, March 2004.

<sup>211</sup> See ISS/IRC, "Brazil: "Reversing the flow of files, a practice that respects the rights of the child and the ethics of intercountry adoption", *Monthly Review No 6/2005*, June 2005.

<sup>212</sup> Art. 14.

<sup>213</sup> Art. 15.

<sup>214</sup> Art. 16(1).

<sup>215</sup> Art. 16(2).

<sup>216</sup> Art. 17 a).

<sup>217</sup> Art. 17 b).

<sup>218</sup> Art. 17 c).

<sup>219</sup> Art. 17 d).

## 7.1.2 Avoiding undue delay

320. Unlike some other Hague Conventions,<sup>220</sup> the 1993 Convention does not impose any deadlines for the treatment of files. However, delays are common, and may arise for unavoidable reasons, such as practical difficulties in the country of origin. See for example, Chapter 7.2.1: Establishing that a Child is Adoptable (Art. 4 a)). Avoidable delays may arise through the failure of Central Authorities / accredited bodies to respond to questions or communications. The 2005 Special Commission agreed that there should not be unnecessary delays, but a certain delay was necessary in order to ensure diligence in the adoption preparations and in making a decision in the best interests of the child.

321. The Special Commission made recommendations as follows:

*“The Special Commission reminds States Parties to the Convention of their obligations under Article 35 to act expeditiously in the process of adoption, and notes in particular the need to avoid unnecessary delay in finding a permanent family for the child.”<sup>221</sup>*

*The Special Commission recommends the use of flexible and efficient systems of communication taking into account, where available, advances in technology.”<sup>222</sup>*

## 7.2 The child

322. Chapter 7.2 describes the intercountry adoption procedures in the State of origin in respect of the child.

### 7.2.1 Establishing that a child is adoptable (Art. 4 a))

323. Before an adoption may take place, it must be established by the competent authorities of the State of origin that the child is adoptable. Article 16 stipulates that the matching of child and family is to be done only if the Central Authority is satisfied that the child is adoptable.<sup>223</sup> This directly ties the intercountry adoption procedure to the sequence of procedures outlined in previous chapters regarding the entry of the child into the child protection system and the consideration or provision of family preservation and national adoption services.

324. The adoptability of a child is determined according to the law and procedures of the State of origin.<sup>224</sup> It is important that the legal criteria as well as medical, psychological and social aspects of adoptability, which may be relevant,<sup>225</sup> are addressed in implementing legislation and procedures. For example, to establish the child’s adoptability, it should be made clear which particular procedures, such as a determination of abandonment or evidence of permanency planning, need to be satisfied before a child may be declared adoptable.<sup>226</sup>

325. As a matter of good practice, the State of origin should declare in its implementing measures which authority is competent under Article 4 a) to establish that a child is

<sup>220</sup> 1980 *Convention on the Civil Aspects of International Child Abduction*, Art. 11; 2007 *Convention on the International Recovery of Child Support and Other Forms of Family Maintenance*, Art. 12.

<sup>221</sup> Recommendation No 14.

<sup>222</sup> Recommendation No 16.

<sup>223</sup> Art. 16(1).

<sup>224</sup> This question is considered in detail in Chapter 8.6.2.

<sup>225</sup> See, Explanatory Report, *supra*, note 1, para. 119. In Burkina Faso, national adoption is a priority, but in reality there are few local adoptive parents due to socio-cultural obstacles. Children are only considered adoptable if they are abandoned, orphaned or the parents sign a written consent to their adoption. See response to the 2000 Questionnaire.

<sup>226</sup> Andorra (Law of 21 March 1996, Arts 8-10); Ecuador (2003 Children and Adolescents’ Code, Art. 158); Lithuania (Civil Code, Art. 3.209). For a broader overview, see the responses to question No 4(c) of the 2005 Questionnaire.

adoptable, as well as the criteria for making that decision. The child's psycho-social adoptability is determined by the conclusion that it is impossible for the birth family to care for the child, and by the assessment that the child will benefit from a family environment. This is supplemented by his / her legal adoptability, which forms the basis for severance of the filiation links with birth parents, in the ways specified by the law of the State.<sup>227</sup>

326. In the case of abandonment, an investigation of the child's background and circumstances should be made to the extent possible, with every attempt made to locate the family and relatives of the child, and effect a reunification.<sup>228</sup> A similar process should be followed for orphaned children. Any delay in investigating the child's background and reaching a decision on permanency planning for the child should be kept to a minimum. There is always a need to find a balance between protection of the child (by preserving family ties), making a decision in the child's best interests (e.g., not leaving a child indefinitely in an institution) and shortening the administrative and procedural process to allow the child to join a permanent family as soon as possible (see also Chapter 7.1.2: Avoiding undue delay).

327. If a child is voluntarily given up for adoption, it is important to establish that this decision was reached without undue pressure or financial inducement.<sup>229</sup> In each situation, the information on the child's background and circumstances will be needed for a report on the child, in accordance with Article 16 (1) a).

328. However not every child deprived of parental care is adoptable. In considering whether there are any factors or conditions which mean that a child is not adoptable, such as those relating to health or age, it is important to bear in mind the fundamental principles of non-discrimination on the basis of factors such as status at birth, ethnicity or disability.<sup>230</sup>

329. The determination that the child is adoptable should be made before parents are matched with the child. While this may seem obvious and is often included in a State's adoption law, the system may actually function in the reverse. Some States may have systems that allow prospective adoptive parents to learn about children who are "available" for adoption prior to a child being declared adoptable and sometimes even prior to consents being signed. While such actions may be done with good intentions, or because of funding or operational constraints, the practice may give rise to abuse and is contrary to Convention procedure. Learning about children who have been determined to be adoptable is a different matter and clearly permissible under the Convention.

330. A central registry or office should maintain a list of adoptable children.<sup>231</sup> The length of time that the child is on the list or register should be monitored carefully. Priority in finding a permanent family should be given to children who have been on the list for long periods of time.

331. A question may arise concerning the role of the court in a receiving country which has

<sup>227</sup> ISS/IRC Ethical Guide: *The rights of the Child in internal and intercountry adoption – Ethics and Principles – Guidelines for Practice*, available at < [www.iss-ssi.org](http://www.iss-ssi.org) >.

<sup>228</sup> See the responses to question No 4(c) of the 2005 Questionnaire: Peru (the task to investigate the child's background and circumstances is carried out by the "*Investigación Tutelar*", which is a process finalised to verify the legal situation of abandoned children, Law on the Adoption Administrative Procedure of Minors declared judicially abandoned, Art. 3); Romania (Law 272/2004 and Law 273/2004). See also India (2006 Guidelines for Adoption from India, Chapter V, section 5.5, Step 2); and Philippines (Domestic Adoption Act of 1998 (RA 8552), Art. II, section 5).

<sup>229</sup> This is established in many legislations. See, for example, Bolivia (1999 Children and Adolescents' Code, Art. 60); Guatemala (2007 Law on Child Adoptions, Art. 35 d); India (2006 Guidelines for Adoption from India, Chapter V, section 5.7).

<sup>230</sup> See UNCRC, *supra* note 8, Art. 2(1).

<sup>231</sup> See, for example, Azerbaijan (Registration Procedures of Children Deprived of Parental Care and Adopted Children, Registration Procedure of Individuals Willing to Adopt Children and Registration Procedure of Foreigners and Stateless Persons Willing to Adopt Children Who Are Citizens of the Republic of Azerbaijan, Order of the Cabinet of Ministers No 172 of 20 September 2000); Bulgaria (Family Code, Art. 136 a) para. 2.7 and Ordinance No 3 on the Conditions and Procedure for giving Consent for the Adoption of a Person of Bulgarian Nationality by a Foreigner, 16 September 2003, Section III); Lithuania (Civil Code, Art. 3.219 "Adoption Register" and Resolution No 1422 of 10 September 2002, Procedure for Registry of Adoption in the Republic of Lithuania). See also the response of Sri Lanka to question No 4(c) of the 2005 Questionnaire.

to make the final adoption order. In the situation in question, the court applies its national law to determine that the child is adoptable before making the order. In theory the court could find that the child is not adoptable according to the national law (including its rules of private international law) and the adoption order cannot be made, even though the child was declared adoptable by the State of origin. It is to be hoped that before any adoptions take place, a receiving State will have made known any limitations in its own law so that any defect in the procedures or obstacle to the adoption would have been identified in the receiving country before the adoption reached this late stage. The Convention makes clear in Article 4 that it is the State of origin which determines the adoptability of a child who is residing in that State. This decision is made in accordance with the national law of the State of origin. But the receiving State may have different criteria for adoptability of a child, and a child who does not meet the legal criteria of adoptability in the receiving State should not be proposed or considered for adoption by that State. A solution may also be found in Article 17 c) of the Convention, according to which the adoption may not proceed if the requirements of the Convention and the laws of each country have not been met.

332. The existence, in the receiving State and the State of origin, of different criteria to determine the adoptability of a child is not inconsistent with the Convention. It is comparable to the situation concerning prospective adoptive parents, where it is accepted that different criteria may be applied by a receiving State and a State of origin in relation to the eligibility and suitability of the same prospective adoptive parents. The authorities in the receiving State should ensure that its prospective adoptive parents meet the requirements of a State of origin before sending their file to that country. The State of origin should ensure that the applicant parents meet the requirements of a State of origin before allowing an adoption to proceed. The same approach applies to questions of adoptability. A receiving State may refuse to allow an intercountry adoption concerning a child who does not meet the adoptability criteria of the receiving State.

333. The importance of the declaration of adoptability, and the difficulties which may arise, when Convention requirements are improperly or inconsistently applied, underscore the importance of training in Hague Convention processes for judges and others involved in the legal or administrative system. It has already been noted that local judges in countries of origin are often unaware of the Hague Convention and may process an intercountry adoption as a national adoption. Equally, judges in receiving countries need to receive training in intercountry adoptions and Hague Convention procedures to avoid abuses of the Convention, intentional or otherwise.

### **7.2.2 Ensuring that any necessary consents have been obtained**

334. Central Authorities and accredited bodies must be satisfied that the necessary consents have been obtained. Article 16(2) requires that proof of the consent be provided to the Central Authority of the receiving country. Article 17 c) requires that both Central Authorities be satisfied that Convention requirements have been met before giving their agreement that the adoption may proceed to finalisation. Chapter 2.2.3 of this Guide describes in detail the precautions that the Contracting States should take to ensure that the necessary consents are obtained with proper regard for the rights of all the parties concerned.

335. States are encouraged to use the recommended model form – Statement of consent to the adoption – which was approved by the Special Commission of 1994, and was published in March 1995 in the Report of the Special Commission, Annex B.<sup>232</sup> The recommended model form is also in Annex 7 of this Guide.

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<sup>232</sup> See Report of the 2000 Special Commission, *supra*, note 14, Recommendation No 5. See also *supra*, para. 81 of this Report.

### 7.2.3 Preparation of report on the child

336. States of origin should determine who will prepare the report on the child in accordance with Article 16 of the Convention. Contracting States will normally have detailed internal guidelines for this procedure.

337. The report on the child is to include “information about his or her identity, background, social environment, family history, medical history including that of the child’s family, and any special needs of the child.”<sup>233</sup> This requirement should be read in conjunction with Article 30 which provides that information on the child’s origin, particularly his or her parents’ identity and medical history, shall be preserved. In addition, the child should have access to such information, under appropriate guidance, where this is permitted by the law of the State where the information is preserved.<sup>234</sup> Obstacles to obtaining this information, particularly about abandoned children, may be severe. For this reason, investigation into the child’s history by appropriate authorities should begin at the moment he or she comes into the care and protection system.

338. As with the report on the adoptive parents referred to in Article 15, Article 16 stipulates that it is the Central Authority which should prepare the report on the child. It is only after the report is made that an appropriate decision on the matching may take place, thereby protecting the interests of all persons involved, in particular the child and the prospective adoptive parents.<sup>235</sup>

339. The preparation of the report is not conditional upon receiving an application by adoptive parents. The Explanatory Report notes that it is “a task to be performed not because there are some applicants waiting for a child, but as soon as the Central Authority of the State of origin determines the existence of children who may be better protected through intercountry adoption. A list of adoptable children shall be maintained for ready reference for matching and to ensure that placements are made as soon as possible to prevent delays which are inimical to the care and protection of children.”<sup>236</sup>

340. The potential importance of the report for the child is emphasised. Adoption is a lifelong process. When a child grows up and seeks information about his or her origins, the report will be an important resource. If items such as photographs of the biological family and their home or community are included in the report, they will be treasured by an adopted person who is searching for his or her origins. The question of information about origins for adult adoptees is discussed further in Chapter 9 of this Guide.

341. There should not be unnecessary delays in the preparation of the report on the child and the subsequent procedures. However, a certain delay is necessary to ensure diligence in the collection of important information and in the adoption preparations themselves, as well as to make a decision in the best interests of the child.

### 7.2.4 Ensuring accurate reports

342. The need for accurate reports in both the pre-adoption and post-adoption stages is emphasised. Receiving States have expressed dissatisfaction with the quality and accuracy of Article 16 reports on children.<sup>237</sup> There are benefits in trying to gather as much information on the child’s background as possible: it is in the child’s best interests to have all relevant

<sup>233</sup> Art. 16(1) a).

<sup>234</sup> See Explanatory Report, *supra*, note 1, para. 309. See Chile, the Central Authority, SENAME, has a programme for the search for origins, see < [www.sename.cl](http://www.sename.cl) >; Philippines, the Central Authority, ICAB, organises Motherland Tours for adopted children. This tour includes retrieval of the child’s files and visitation, see < [www.icab.gov.ph](http://www.icab.gov.ph) > under “Frequently asked questions”.

<sup>235</sup> See Explanatory Report, *supra*, note 1, para. 308.

<sup>236</sup> *Ibid.*, para. 311. See also *supra*, note 231.

<sup>237</sup> See the responses to question No 7(1)(a) of the 2005 Questionnaire: some responding countries (Canada (Alberta and Manitoba), Finland, Netherlands and Switzerland) complained about the lack of health and social information on the child.

information given in the social and medical reports; it improves matching for families; it allows prospective adoptive parents to make an informed decision about accepting the proposed child; it becomes a future resource for that specific child.

343. States of origin have also expressed dissatisfaction with the quality and accuracy of Article 15 reports on prospective adoptive parents and with post-adoption reports.<sup>238</sup>

344. Consequently the 2005 Special Commission made a recommendation that:

*“the Permanent Bureau, in consultation with Contracting States and non-governmental organisations, develop a model form for the consent of the child (Article 4 d)(3)) as well as model forms or protocols regarding the operation of Articles 15 and 16 of the Convention.”*<sup>239</sup>

345. States should take measures to ensure that information about the child is as accurate as possible. States may have concerns about confidentiality of information concerning the child, particularly as it relates to health and social history. However, relevant information on the child and on the prospective adoptive parents should be exchanged before prospective adoptive parents are able to make their final decision to accept the proposed match / referral.

346. The 2000 Special Commission agreed on the importance, from the point of view of the process of matching and for the information of the adoptive parents and later the child himself or herself, of obtaining a full and accurate medical report on the child.<sup>240</sup>

347. The shortcomings of some medical reports were noted. At the same time, the scope of such reports could be too wide:

*“...some understanding was needed of the resource limitations in countries of origin. Also there were problems concerning the carrying out of specific medical tests, such as for HIV or Hepatitis B, and there was a need for co-operation on these matters between authorities in the State of origin and the receiving State. The importance of maintaining confidentiality with respect to the medical report on the child, bearing in mind the right to respect for private life, was also emphasised.”*<sup>241</sup>

348. A “model form” medical report on the child was discussed in the 2000 Special Commission.<sup>242</sup> The medical report was said to be the most important element of information on the child. It should be completed by a registered medical practitioner with specialist knowledge of the diagnosis and treatment of children. It should not be regarded as a means of selecting children who might be suitable to be adopted, but as a source of information to enable the adoptive parents to meet the health needs of the child.<sup>243</sup>

349. Although there was general agreement on the need to encourage a more consistent approach towards the preparation of medical reports and to make some movement towards standardisation, the idea of a rigid model form was not approved. However, it was accepted that the form for the medical report on the child, which appears in Annex 7 of this Guide to Good Practice, constitutes a useful aid in improving the quality of, and standardising of, reports on the child drawn up in accordance with Article 16, paragraph 1, of the Convention.<sup>244</sup>

350. A standard form for a supplementary medical report on young children, concentrating on their psychological and social conditions, received support at the 2005 Special Commission. The Supplementary Medical Report Form covers the psychological and social conditions of very young children, including their language and motor skills. The form only

<sup>238</sup> See Report of the 2005 Special Commission, *supra*, note 15, para. 80.

<sup>239</sup> Recommendation No 7.

<sup>240</sup> See Report of the 2000 Special Commission, *supra*, note 14, Recommendation No 12.

<sup>241</sup> *Ibid.*, para. 58.

<sup>242</sup> See Work. Doc. No 3 of the 2000 Special Commission, submitted by the United Kingdom on behalf of the informal Working Conference of European Contracting States. A copy of the form is in Annex 7 of this Guide.

<sup>243</sup> See Report of the 2000 Special Commission, *supra*, note 14, para. 59.

<sup>244</sup> *Ibid.*, Recommendation No 13.

requires a very short description and its use should not place a heavy burden on States of origin.<sup>245</sup> The following recommendation was made:

*“The Special Commission reaffirms the usefulness of the Model Form – Medical Report on the Child and notes the usefulness, in particular in the case of very young children, of the supplement to this form as proposed in Working Document No 6, pp. 8-9.”<sup>246</sup>*

351. The question has arisen whether internal State laws which prohibit the release of information on a child prior to adoption, may be a reason for not complying with the report requirement.<sup>247</sup> However, such laws may be contrary to the Convention as no reservation to the Convention is permitted.<sup>248</sup> In addition, accepted principles of international law preclude a State from using internal laws to avoid obligations incurred under international treaties.<sup>249</sup>

352. On the other hand, it is impossible to ensure that an adoption is in the child’s best interests if relevant information about a child is withheld and consequently it cannot be determined if the prospective adoptive parents have the necessary skills and desire to parent a particular child. Failure to disclose all relevant information may result in failed adoptions or tragic consequences for the child and family. For the best interests of children, Contracting States should seek solutions to possible restrictions in their privacy laws that may prevent disclosure of vital personal information to a party to the adoption or to the other country.

353. The issues concerning children with special needs are dealt with at Chapter 7.3.

## **7.2.5 “Matching” child and family**

354. Although the term “matching” does not appear in the Convention (because no French equivalent exists),<sup>250</sup> Article 16(1) describes the factors that must be taken into account by the State of origin in order to make a determination that a particular child should be placed with a particular adoptive family. Article 16(1) d) states that the Central Authority shall determine whether the “envisaged placement” is in the best interests of the child. The decision on placement involves the identification of the prospective adoptive parents (from among those approved as eligible and suited to adopt) who can best meet the needs of the child based on the reports on the child and on the prospective adoptive parents.

355. The term “placement” or “referral” (not “adoption”) must be used at this stage because the matching process is in the preliminary stages. The Explanatory Report notes that at this stage of the process, the State of origin cannot give any assurance as to whether the prospective adoptive parents agree to the placement, because the report on the child has not yet been sent to the receiving State.<sup>251</sup>

356. The matching process has several stages. The initial “matching” of prospective adoptive parents with the child must be done in the State of origin, on the basis of the report on the child and a report on the selected prospective adoptive parents. This must be done before making a referral to the prospective adoptive parents (in the sense of Article 16(1) d)) and sending the report about the child described in Art. 16(2). The decision on the matching should be communicated first to the Central Authority / accredited body of the receiving State, before any notification to the prospective adoptive parents. At this stage in the process, in the great majority of cases the prospective adoptive parents should still be in the

<sup>245</sup> A copy of the Supplementary Medical Report Form is available at Annex 7 of this Guide and on the Hague Conference website at < www.hcch.net > under “Inter-country Adoption Section” then “The Convention” and “Recommended Model Forms”. It is also included in Annex 2 of the Report of the 2005 Special Commission, *supra*, note 15.

<sup>246</sup> Recommendation No 6.

<sup>247</sup> See the reservations made by Bolivia at the time of signature in respect of Arts 9 a) and 16. The reservations were withdrawn prior to ratification.

<sup>248</sup> Art. 40.

<sup>249</sup> See *Vienna Convention on the Law of Treaties*, Art. 27: “Internal law and observance of treaties”.

<sup>250</sup> See Explanatory Report, *supra*, note 1, para. 318.

<sup>251</sup> *Ibid.*

receiving State and they should be informed by the Central Authority / accredited body of their State (and not by the Central Authorities / accredited bodies of States of origin) about the decision on matching (see Chapter 7.2.5). The acceptance of the proposed match / referral by prospective adoptive parents signals the end of the matching process.

357. Matching should be assigned to a team and not be left to the responsibility of an individual; the team should be composed of child protection professionals trained in adoption policies and practices. They should preferably be specialists in psycho-social fields. In the case of intercountry adoption, it is desirable to invite a lawyer to join the team to check that the legal requirements are met and are compatible between the States concerned.<sup>252</sup> As stated in Chapter 2.1.3.3, matching should not be done by the prospective adoptive parents, for example, parents should not visit an institution to pick out an appealing child or choose a child from photo lists. Matching should not be done by computer alone even if an initial screening is made on criteria such as age, gender or special needs of the child. The final match should always be made by professionals.

358. Article 29 stipulates that there “shall be no contact between the prospective adoptive parents and the child’s parents or any other person who has care of the child until the requirements of Article 4 a) to c), and Article 5 a) have been met, unless the adoption takes place within a family, or unless the contact is in compliance with the conditions established by the competent authority of the State of origin.”

359. To prevent inappropriate or illegal practices before matching, Article 29 clearly prohibits any contact between the prospective adoptive parents and any person whose consent might be influenced, intentionally or otherwise, by the adoptive parents. The only exceptions to this rule are for cases of in-family adoptions, where the parties obviously know each other, or if the competent authority sets some conditions for contact and those conditions are complied with. The power to set conditions for contact should be used sparingly. Article 29 does not prohibit the exchange of information about the prospective adoptive parents and the adoptable child that is necessary for all the parties to reach the final decision on the placement of the child that is in his or her best interests.

360. A specific recommendation on this issue was made by the 2005 Special Commission as follows:

*“The Special Commission recommends that States actively discourage direct contacts between prospective adoptive parents and authorities in the State of origin until authorised to do so. Exceptionally, such contact at the appropriate time may be desirable, for example in the case of a child with special needs.”*<sup>253</sup>

361. If States of origin allow accredited bodies to receive applications from prospective adoptive parents as well as determine adoptability and decide on matching, proper controls should be in place to ensure that decisions are made according to legal requirements and in the best interests of the children concerned.

362. It cannot be emphasised too strongly that the matching decision is perhaps one of the most important decisions made within the adoption process, and that it will be performed most effectively by competent persons with appropriate expertise and experience. It is one of the important measures to support the best interests principle.

363. It is suggested that more information on the risk factors associated with failed or disrupted adoptions would assist States of origin in making the decision on matching. Such information would also assist receiving States to make more accurate evaluations of prospective adoptive parents or provide them with more effective preparation for the adoption. On the other hand, the collection and sharing of information about the factors

<sup>252</sup> ISS/IRC Ethical Guide, available at < [www.iss-ssi.org](http://www.iss-ssi.org) >, *supra*, note 227.

<sup>253</sup> Recommendation No 15.

associated with successful adoptions could also contribute to better decisions about matching.

### **7.2.6 Transmittal of report on child**

364. Once the Central Authority in the State of origin has determined that the envisaged placement is in the best interests of the child,<sup>254</sup> the report on the child, the proof of the consents, and the reasons for the determination of the placement are sent to the Central Authority in the receiving State.<sup>255</sup>

365. The practical aspects of the transmittal of reports may be usefully organised through agreements among the Central Authorities involved. For example, if the adoption is being arranged through accredited bodies, will the Central Authority require a copy of the report; will private courier services be used, rather than the regular postal services? Contracting States may want to organise such matters through informal bilateral arrangements, or use the possibility foreseen in Article 39(2) to conclude specific agreements which may include procedures related to transmission of files between the two States concerned.

### **7.2.7 Acceptance of the match (Art. 17 a) and b))**

366. When the report on the child and the proposed match is received by the Central Authority or accredited body in the receiving State, the proposed match should be discussed with the prospective adoptive parents. Their agreement, and any necessary approval of the Central Authority as required by Article 17 a) and b), should then be communicated to the Central Authority of the State of origin.

367. At this stage, preliminary procedures may be commenced concerning the child's authorisation to leave the State of origin and enter and reside permanently in the receiving State.

368. After the match has been accepted, the adoption should be allowed to proceed as quickly as possible, unless a defect in the procedure is identified and the Article 17 c) agreement cannot be given. Receiving States have been critical of situations where a moratorium is declared and adoptions have been stopped, even after the child has been referred to the prospective adoptive parents and the match has been accepted. It is contrary to a child's best interests to be deprived of a permanent family in such circumstances.

369. Article 17 a) and b) in the Convention refers to decisions by the authorities in each country which must be given before the "entrustment" of the child to the adoptive parents. In practice those decisions will usually be given after the matching decision has been discussed and accepted by the adoptive parents in the receiving country.

370. See Chapters 7.4.6 and 7.4.7 for a discussion of this step as it concerns the prospective adoptive parents.

371. Article 17 a) implies that there has been acceptance of the match by the prospective adoptive parents in the receiving country, which is approved, if necessary, by the Central Authority of the receiving State (Art. 17 b)) and notified to the Central Authority of the State of origin. The acceptance, approval and notification of the match, as well as the permission that the child may enter and reside permanently in the receiving State, means that the child will, at the appropriate time, be entrusted to the prospective adoptive parents, provided that the Central Authorities give their final agreement that the adoption may proceed, as required by Article 17 c).

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<sup>254</sup> Art. 16(1) d).

<sup>255</sup> Art. 16(2).

### **7.2.8 Agreement that the adoption may proceed (Art. 17 c)**

372. Article 17 stipulates that no child shall be entrusted to the adoptive parents until the Central Authority of the State of origin has ensured that the adoptive parents agree to the placement, and until the Central Authorities of both States agree to the adoption. In some receiving States, the Central Authority may also be required to approve the placement, and consequently, the entrustment.<sup>256</sup> Article 17 repeats the requirements of Article 5 that the parents must be eligible and suited to adopt and that the child is or will be authorised to enter and reside permanently in the receiving State.

373. Article 17 c) provides one of the most important procedural safeguards in the Convention. If it becomes apparent that the proposed adoption is not in the best interests of the child, or that there has been a significant defect in the procedure, the Central Authorities must not give their agreement under Article 17 c) that the adoption can proceed.

374. In those States where agreements under Article 17 c) may be given by bodies other than the Central Authority, the bodies that may perform this function should be specified.<sup>257</sup>

### **7.2.9 Authorisation to enter country and reside permanently**

375. The Convention requires that competent authorities of both States determine that the child is or will be authorised to leave the State of origin and enter and reside permanently in the receiving State, before the child is entrusted to the prospective adoptive parents.<sup>258</sup> This decision will usually be made by the immigration authorities in both States.

376. The requirement in Article 5 c) should be considered in conjunction with Article 18, prescribing that the Central Authorities of both States shall take all necessary steps to obtain permission for the child to leave the State of origin and to enter and reside permanently in the receiving State.<sup>259</sup> The Central Authorities themselves are therefore not obliged to obtain the permissions, but must ensure that by appropriate measures the permissions are obtained. For example, the prospective adoptive parents themselves may be directed to apply to the immigration authorities.

377. Article 5 c) establishes a substantive condition for the adoption. It is clear that there is no reason to grant the adoption of a child if the child is not allowed to enter and reside permanently in the receiving State.<sup>260</sup> The wording “is or will be authorised” is broad enough to encompass cases in which visa requirements cannot be satisfied before the entrustment occurs and cases in which no formal authorisation or visa requirement is necessary to enter or reside permanently, as may occur between two countries.<sup>261</sup> Some receiving States grant the adopted child automatic citizenship from the moment the adoption order is issued, even if the adoption takes place in the country of origin.<sup>262</sup> In some cases, the confirmation of this authorisation will be included in the report required by Article 15. In other cases, this determination cannot be made until the receiving State has had an opportunity to examine the report provided in accordance with Article 16. In their implementing measures, States should specify which are the authorities competent to make this determination under Article 5 c).

<sup>256</sup> See, for example, Germany (Adoption Convention Implementation Statute, Section 5 (1)).

<sup>257</sup> See Report of the 2000 Special Commission, *supra*, note 14, Recommendation No 16.

<sup>258</sup> Arts 5 c) and 18.

<sup>259</sup> See Explanatory Report, *supra*, note 1, para. 185.

<sup>260</sup> *Ibid.*, 186.

<sup>261</sup> *Ibid.*, para. 188.

<sup>262</sup> For example, in Norway, the grant of automatic citizenship is made known in the relevant Norwegian documents, such as in the Advance Approval where it is stated / confirmed that the applicants are suitable and eligible to adopt. Since this is clear from the beginning, it is not necessary to issue an extra document that states that the child will be allowed to enter Norway once the adoption has taken place. The child would only need an entry visa when coming from countries where the adoption process is finalised in Norway, e.g., India and South Korea.

### **7.2.10 Entrustment of child to parents (Art. 17)**

378. The physical entrustment of the child to the parents must not take place until all agreements have been given and requirements have been met in accordance with Article 17. This is an important safeguard in the Convention. The decision on entrustment is made by the authorities in the State of origin.

379. It is possible that some countries omit this step in the mistaken belief that it is identical to Article 23. It is important to understand the difference. In Article 17 both Central Authorities are required to agree that the adoption can proceed, if the specified conditions have been met. Article 23 requires the State which makes the final adoption order to issue a certification that all the Convention procedures have been followed (not only those in Art. 17) and the adoption is in compliance with the Convention.

### **7.2.11 Transfer of child to receiving State**

380. The transfer of the child to the receiving State is governed by Articles 19, 20, 21 and 28 of the Convention.<sup>263</sup>

381. Co-operation between authorities is needed to ensure that the transfer of the child to the receiving State takes place in appropriate circumstances, in accordance with Article 19. Good practice in this regard usually means that the adoptive parents will travel to the State of origin to get the child, unless exceptional circumstances prevent it.<sup>264</sup> It was said that adoptive parents should escort the child from the State of origin, as that enables them to know and understand the child's life and living conditions before the adoption and to understand something of the background of the child. Other issues to be considered at this time are the first contacts between the child and the prospective adoptive parents, in particular at entrustment, as well as the follow up of the possible probationary period.

382. All these steps must be organised in a child-friendly manner, with professional psycho-social support. Preparation and counselling for the entrustment and transfer should be provided to the prospective adoptive parents and the child, to minimise possible stress or trauma during this period.

### **7.2.12 Issuing the Article 23 certificate of conformity**

383. The Article 23 "certificate of conformity with Convention requirements" must be issued by a competent authority after the adoption is finalised. It should be issued promptly, and the adoptive parents should receive the original certificate, and a copy should be sent to the Central Authorities of both countries. The authority competent to issue the certificate must be notified to the depositary of the Convention (the Dutch Ministry of Foreign Affairs), in accordance with Article 23(2) (see also Chapters 7.4.11 and 8.8.3).

384. There has been some uncertainty, arising from variations in practice, as to the mandatory nature of the certificate under Article 23 of the Convention: in some States a certificate is given automatically or very easily while in other States adoptive parents have to apply for it. The absence of a certificate causes difficulties for recognising the adoption and for according the child the nationality of the receiving State.

385. A model form for the certificate of conformity<sup>265</sup> is a recommended form, not a mandatory form. Therefore, States may choose the manner in which they certify conformity with the Convention, provided all the relevant information is included in the certifying

<sup>263</sup> See H. van Loon, *supra*, note 6, p. 362, para. 239.

<sup>264</sup> See ISS/IRC, Information Note "Transfer of the Child from the country of origin to receiving country", June 2003, available at < [www.iss-ssi.org](http://www.iss-ssi.org) >.

<sup>265</sup> The form is in Annex 7 of this Guide to Good Practice, and is also available on the website of the Hague Conference at < [www.hcch.net](http://www.hcch.net) > under "Intercountry Adoption Section" then "The Convention" and "Recommended Model Forms".

document. However the benefits of using the form are that it covers all the relevant details, it is easily understood and it is becoming more widely used.

### 7.3 Children with special needs<sup>266</sup>

#### 7.3.1 *The special needs child*

386. Children with special needs are those who may be:

- suffering from a behaviour disorder or trauma,
- physically or mentally disabled,
- older children (usually above 7 years of age), or
- part of a sibling group.

387. Older children may also be “disturbed or traumatised, due to abuse and abandonment and neglect and perhaps long stays in institutional care.”<sup>267</sup> Special needs children should have the same opportunities for adoption as other children, based on the principle of non-discrimination, even though their adoption will require detailed reports, thorough preparation (of the adoptive parents and the child), regular counselling and active support of the adoptive parents and child.

388. At the same time, it is recognised that children with special needs are hard to place, and may wait for years for a suitable family. Some never find a family, and therefore children with special needs deserve special attention. It was suggested that on the Hague Conference website, countries could list the facilities they have for permanent placement of such children. It is important to raise awareness, to get professionals involved, promote placement of children with special needs at national and intercountry levels, and promote as far as possible adoption by nationals of the country.

389. Special needs children could also receive priority above others for adoption. Older children could be adopted through simple or open adoptions, which would give older children a family while keeping some links with their biological family. However, only adoptions which create a permanent parent-child relationship come within the scope of the Convention (Art. 2(2)).

390. As more and more countries of origin have mostly children with special needs to propose for intercountry adoption, receiving countries should undertake necessary efforts to inform their candidates about this situation. To sensitise, inform and prepare candidates to adopt these children may avoid unnecessary or unrealistic demands on countries of origin for young and healthy children.

#### 7.3.2 *The prospective adoptive parents for the special needs child*

391. Children with special needs should have adoptive parents with different skills. Not all prospective adoptive parents have the necessary skills and temperament to care for such children.<sup>268</sup> The full disclosure of the condition of the child is especially important when seeking a family for a child with special needs. More specialised, tailor-made services are

<sup>266</sup> Recommendation No 1 of the 2005 Special Commission, *supra*, note 15, recommends the inclusion in the Guide to Good Practice of “appropriate references to children with special needs”.

<sup>267</sup> See Guidelines for Special Needs Children, Central Adoption Resource Agency of India, available at < [www.adoptionindia.nic.in/definition\\_sp\\_needs.htm](http://www.adoptionindia.nic.in/definition_sp_needs.htm) >.

<sup>268</sup> On the specific psycho-social work needed and the adaptation of the procedures to these children, see also ISS/IRC, Editorial: “To promote the adoption of children with special needs”, *News Bulletin No 67*, May 2004.

needed, including methods to actively look for suitable adoptive parents. In the adoption process, there should be specific matching procedures. There should also be specific post-adoption services, and opportunities for adoptive parents to obtain support.

392. There should also be extensive counselling for the prospective adoptive parents to ensure that they are fully aware of the problems that may arise and that they receive training and assistance to cope with those problems. At the same time, the prospective adoptive parents' capacity to cope with problems can be assessed, as well as any special qualities or abilities they may have that will benefit the child.

### **7.3.3 Co-operation to assist the adoption**

393. Co-operation in the interests of special needs children is necessary. Co-operation is needed not only between the State of origin and the receiving State, but also between the professionals and others in each country who have been, or will be involved in the adoptive child's care and support.

394. One possible approach to enhancing the opportunities for special needs children to be adopted has four phases.<sup>269</sup> Firstly, States of origin could assess the number and profiles of intercountry adoptable children with special needs and share these details (but not any identifying information – to protect the privacy of the children) with receiving States. Secondly, the capacity to respond to the real needs of the intercountry adoptable children with special needs should be made a requirement for accreditation of an accredited body in a receiving State and for its authorisation by a State of origin. Thirdly, if necessary, States of origin should limit the number of receiving States and of foreign accredited bodies with whom they co-operate, in order to provide better services for children with special needs. Fourthly, as a practical measure, in order to adapt to the special needs of the children, there could be a reversal of the flow of the files, i.e., States of origin would request the receiving States to look for prospective adoptive parents capable of caring for particular children with special needs.

### **7.3.4 Some factors to be considered in the pre-adoption and post-adoption stages**

395. The following factors are important to consider in the preparation of an adoption of a child with special needs:

- a) obtaining the most accurate and comprehensive health and medical information about the child (including experiences with other foster families);
- b) a full assessment of the child's developmental needs;
- c) the decision on matching made by experienced professionals;
- d) a full assessment of the parenting capacity of the adoptive parents;
- e) the impact of the child on the adoptive family structure and relationships;
- f) any other family and environmental factors (e.g., proximity of the adoptive family to specialist facilities);
- g) availability of adequate post-adoption support in the receiving country;
- h) accreditation of bodies demonstrating particular expertise in arranging and supporting adoptions of special needs children.

396. The following recommendations were made at the 2005 Special Commission:

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<sup>269</sup> Proposal made at 2005 Special Commission by a representative of ISS/IRC.

*“The Special Commission recognises the importance of States of origin sending information to receiving States on the needs of children to better identify prospective adoptive parents.”<sup>270</sup>*

*The Special Commission recognises that as a matter of good practice, authorities in receiving States should co-operate with authorities in States of origin in order to better understand the needs of children in States of origin.”<sup>271</sup>*

## 7.4 The prospective adoptive parents

397. Chapter 7.4 describes the intercountry adoption process in the receiving State with respect to the prospective adoptive parents.

### 7.4.1 Application by and evaluation of adoptive family

398. It is a Convention requirement that:

*“An adoption within the scope of the Convention shall take place only if the competent authorities of the receiving State have determined that the prospective adoptive parents are eligible and suited to adopt.”<sup>272</sup>*

399. A receiving State must decide which authority or body should receive applications from, and perform evaluations of, the prospective adoptive parents to determine if they are “eligible and suited to adopt.” Some countries require an initial expression of interest from potential adopters as well as their attendance at one or more information sessions, before proceeding to a full evaluation. Their eligibility to adopt should be determined before proceeding to an evaluation of suitability.

400. The Convention uses both “eligible” and “suited” to clarify two distinct categories of evaluation: “eligible” referring to the fulfilment of all legal requirements, and “suited” referring to the fulfilment of necessary socio-psychological criteria.<sup>273</sup>

401. The Convention requires that competent authorities perform these functions. In most States such services are provided by qualified social service professionals, with the results of the evaluation being reviewed and approved by competent authorities to ensure they are “satisfied” of the applicants eligibility and suitability as required by Article 15. States employ various mechanisms to require, review and approve evaluations of prospective adoptive parents.<sup>274</sup>

402. Countries of origin intending to give their children for adoption into the care of the receiving State need to be assured that the individuals or couples selected by the receiving State as prospective adoptive parents have been properly and thoroughly assessed as suited to adopt.<sup>275</sup>

403. The evaluation of prospective adoptive families generally includes a process known as the “home study.” Through visits to the family’s residence, a medical and psychological evaluation, as well as pre-adoption training and preparation, the social service personnel are able to determine that the prospective parents have the temperament, skills and training

<sup>270</sup> Recommendation No 12.

<sup>271</sup> Recommendation No 13.

<sup>272</sup> Art. 5 a).

<sup>273</sup> See Explanatory Report, *supra*, note 1, para. 180.

<sup>274</sup> See, for example, Australia (Western Australia), Adoption Act 1994, Section 40, Assessment of applicants for adoptive parenthood.

<sup>275</sup> See, for example, Guatemala (2007 Law on Adoptions, Art. 23 j); Dominican Republic (Code for the Child and Adolescence Protection System and Fundamental Rights, Arts. 165 and 166); and the response of Sri Lanka to question No 4(g) of the 2005 Questionnaire “...the applicants are further investigated once they come to Sri Lanka”.

necessary to be approved as adoptive parents.<sup>276</sup> This must be done before the matching occurs.<sup>277</sup>

404. A key question is whether the evaluation of the prospective adoptive parents is to be done in respect of any child from any country, or in respect of a specific category of children, for example, a child from a particular age group, with or without special needs, from a particular country. Some prospective adoptive parents who are declared suitable may have unrealistic requests, for example, to adopt a healthy baby from a country where such children do not need a family through intercountry adoption. This situation creates frustration for the parents and increases the pressure on the countries of origin. Receiving countries have an important responsibility to make thorough evaluations of parents, and to manage their expectations, taking into account the needs of adoptable children for intercountry adoption in the various countries of origin.

#### **7.4.2 Preparation of prospective adoptive parents**

405. The Convention also requires competent authorities to ensure that prospective adoptive parents receive counselling about adoption, as may be necessary.<sup>278</sup> “Counselling” in this context refers to preparation for the adoption and may include training and education.

406. The need for proper preparation of the prospective adoptive parents in the receiving States has been emphasised by Contracting States.<sup>279</sup> It is said that this is crucial for managing the expectations of the prospective adoptive parents and for diminishing the pressures on States of origin. In some cases, prospective adoptive parents mistakenly feel they have a right or entitlement to a child. In other cases, the number or profile of adoptable children does not correspond to their expectations for an adoption.

407. Some experts believe that the evaluation of the prospective adoptive parents should include a determination of whether they have the capacity to respond to potential difficulties relating to the adoption and to adapt to changing circumstances. Prospective adoptive parents who “make an application” (Arts 14 and 15) to their Central Authority or accredited body to adopt a child, must understand that there is no guarantee of a positive response to the application. The prospective adoptive parents are really only making “an offer of a home” for a child.

408. Training and education in adoptive parenthood should be provided to prospective adoptive parents, to prepare them for the benefits and challenges of adopting a child. There will be many issues for which the prospective adoptive parents may need special assistance and preparation. For example, there are basic issues of learning to communicate with the child. More serious issues may arise if the child has been living for an extended period in an institution; if the child has suffered severe psychological trauma such as the loss of his / her family in a natural disaster; if the adoption means the child is to be separated from friends (or worse, from siblings) in the orphanage; if the child is mentally or physically disabled; if physical, mental or medical problems emerge which were not apparent at the time of the adoption; if the child has received inadequate perinatal care; if the child has suffered from insufficient stimulation and neglect, or discontinuity in care (e.g., many different caretakers, frequent transfers to children’s homes or foster families).

409. Prospective adoptive parents need to fully understand the reality of the situation or circumstances from which some adoptable children come. In spite of being in a loving environment, some children with a difficult background or traumatic past will not adjust easily

<sup>276</sup> See, for example, Belgium (Civil Code, Art. 346.2); Denmark (Adoption Act, *cf.* Consolidated Act No 928 of 14 September 2004 and the Executive Order on the approval of adopters); Spain (2007 Law on Intercountry Adoption, Art. 10).

<sup>277</sup> For a global overview on how the home study is performed, see the responses to question No 4(g) of the 2005 Questionnaire.

<sup>278</sup> Art. 5 b).

<sup>279</sup> At the 2005 Special Commission.

to their new adoptive family because they have learned from previous experience not to trust adults. Prospective adoptive parents may not understand why the child does not respond to their warmth and affection and may need support when this happens. Post-adoption support should be available in order to help the parents at difficult stages during the development of the child.

410. The content and methods of the training and education, and the appointment of a service provider, are matters for each State to decide. Some countries have compulsory preparation sessions, either in groups or individually, as the case requires.<sup>280</sup> For example, during the evaluation of the parents' suitability, it may have become apparent that additional preparation is required on particular aspects of the adoption process. Some countries provide adoption preparation only after the prospective adoptive parents have been positively assessed as eligible and suitable to adopt.

411. The lack of uniformity in reports and the lack of and thoroughness in the preparation of prospective adopters has been commented upon. For example, in one country the children available for intercountry adoption are usually over age 5 and have a variety of problems. Not all parents are suitable for adopting such children and it is important to prepare prospective parents adequately through counselling and education.

412. It will assist States of origin if they receive in the report on the parents some indication that the parents received adoption preparation.

### **7.4.3 Preparation of report on the prospective adoptive parents**

413. The Convention requires Central Authorities to prepare a report on the adoptive family that includes information about their "identity, eligibility and suitability to adopt, background, family and medical history, social environment, reasons for adoption, ability to undertake an intercountry adoption, as well as characteristics of the children for whom they would be qualified to care."<sup>281</sup> In most cases, this report is also written by the social service personnel who determine if the parents are both eligible and suited to adopt.

414. Article 22(1) allows receiving States to delegate this responsibility to either public authorities or accredited bodies. The Convention takes some precautions for cases where the report is prepared by the approved (non-accredited) bodies or persons referred to in Article 22(2). For such cases, Article 22(5) states that the report required in Article 15 shall, "in every case, be prepared under the responsibility of the Central Authority or other authorities or bodies in accordance with paragraph 1." This provision means that approved (non-accredited) bodies or persons referred to in Article 22(2) can prepare the report. They may only do so, however, under the responsibility of other authorities or bodies in accordance with Article 22(1).

415. States of origin have emphasised the importance of having accurate reports on the prospective adoptive parents. They have expressed concerns about the lack of thoroughness and accuracy and the lack of uniformity of such reports.

416. To address these concerns, it was proposed in the 2005 Special Commission that a standard form be created for the evaluation of the applicants for an intercountry adoption. A recommendation was made to this effect.

*"The Special Commission recommends that the Permanent Bureau, in consultation with Contracting States and non-governmental organisations, develop a model form for the consent of the child (Article 4 d)(3)) as well as model forms or protocols regarding the operation of Articles 15 and 16 of the Convention."<sup>282</sup>*

<sup>280</sup> See, for example, the responses of Austria, Denmark, Estonia, Poland and New Zealand to question No 4(h) of the 2005 Questionnaire.

<sup>281</sup> Art. 15(1).

<sup>282</sup> Recommendation No 7.

417. Emphasis is placed on the need for thoroughness and objectivity by authorities in the receiving country in the assessment and preparation of the prospective adopters, and in drawing up the report on the applicants in accordance with Article 15.<sup>283</sup> In their implementing measures, States need to identify the responsible competent authority, body or person, and the criteria to be used, for the following steps:

- to evaluate the parents' eligibility to adopt;
- to evaluate the parents' suitability to adopt;
- to provide counselling to prospective adoptive parents;
- to prepare the report on the prospective adoptive parents;
- to supervise the preparation of the report and ensure its accuracy;
- to make the determinations under Article 5 a) and b);
- to transmit the report to the State of origin.

#### **7.4.4 Transmission of report on adoptive parents**

418. The Central Authority of the receiving State should transmit the report on the adoptive parents to the Central Authority of the State of origin.<sup>284</sup> Receiving States may consider how they will effectively oversee the process of preparing the reports to ensure that accurate reports are transmitted to the country of origin.<sup>285</sup> As mentioned above at Chapter 7.2.6, this could be subject to informal specific arrangements among States.

#### **7.4.5 Receipt of application in the State of origin**

419. States of origin should decide what information and documents are needed from prospective adoptive parents and which authority or body will receive the applications. This information should be publicised to receiving States by any means possible.<sup>286</sup>

420. Prospective adoptive parents must apply through their own Central Authority. They cannot apply directly to the Central Authority or accredited bodies in the State of origin.<sup>287</sup>

421. As a matter of good practice, the competent authorities in the State of origin should review the report on the parents and ensure that the eligibility and suitability of the family meets the requirements of the country of origin.<sup>288</sup>

422. Some parents travel to the country of origin to choose a child and sometimes even bargain directly with the biological mothers.<sup>289</sup> This practice creates risks for the child's rights, and violates Article 29 of the Hague Convention. Contracting States should have laws or procedures in place to prevent such contact before matching and to give effect to Article 29.

<sup>283</sup> See Report of the 2000 Special Commission, *supra*, note 14, Recommendation No 14.

<sup>284</sup> Art. 15(2).

<sup>285</sup> See Italy (Law 184 of 4 May 1983 as amended by Law 476 of 31 December 1998, Title III, Art. 30) which requires a report to be transmitted first to the juvenile court, and then to the Commission for Intercountry Adoption.

<sup>286</sup> See the response of Switzerland to question No 7(1)(b) in which Switzerland "pointed out a disproportional gap between documents requested for adoptive parents and those requested for adoptable children" [translation by Permanent Bureau].

<sup>287</sup> Art. 14.

<sup>288</sup> Chile, Lithuania and Peru said that parents' reports were inadequate. See the responses of these countries to question No 7(1)(b) of the 2005 Questionnaire. For a detailed example of this, see the response of Lithuania to question No 4(g) of the 2005 Questionnaire. See also the response of Sri Lanka to the same question.

<sup>289</sup> See ISS/IRC, "Rights of children deprived of their family: Georgia", *Monthly Review No 71*, October 2004.

#### **7.4.6 Notification of the matching**

423. The notification of the matching or referral of the child to the selected prospective adoptive parents must be done through the appropriate authorities as required by Article 16(2) and as noted in this Guide at Chapter 7.2.5. At the 2005 Special Commission, Contracting States strongly disapproved of the practice whereby prospective adoptive parents are notified by a body or authority in the country of origin about the proposed match, before the Central Authority in the receiving country is informed. Contracting States also disapproved of the practice of some parents who travel to the country of origin and contact the adoption competent authorities or bodies before the matching decision. A recommendation discouraging such practice, made in the 2005 Special Commission, is also noted in Chapter 7.2.5.

#### **7.4.7 Acceptance of the match and agreement of the Central Authority (Art. 17 a) and b)**

424. When the report on the child and the proposed match with the prospective adoptive parents is sent from the State of origin, either through the Central Authority or through accredited bodies or approved (non-accredited) persons, the parents then must decide whether to accept this referral or not. The State of origin must be informed of the decision of the prospective adoptive parents (Art. 17 a)).

425. Many States specify a period of time in which prospective adoptive parents may consider a referral and also have policies in place governing the effect of refusing a referral. Balancing how much time is appropriate to allow to prospective adoptive parents to consider the referral, against the needs of the child for a permanent placement, is important and sometimes difficult. It is important to make the process transparent, with clear deadlines and procedures.

426. In some countries, prospective adoptive parents who decline to accept a referral are matched soon thereafter with another child in need of placement. In others, if prospective adoptive parents decline a referral, they must begin the application process again from the beginning. A clear policy about the impact on adoptive parents of declining referrals ensures that all parties fully appreciate the requirements of the system and their role in it.

427. The Central Authority of the receiving State may also have to give its agreement to the referral, before the child could be entrusted to the prospective adoptive parents (Art. 17 b)).

#### **7.4.8 Migration procedures for the child (Arts 5, 17 d), 18)**

428. The child should not be entrusted to the adoptive parents before the migration procedures for the child have been finalised (Art. 17 d)). The Central Authority in the country of origin must take all necessary steps to ensure that the child is permitted to leave that country (Article 18). The authorities in the receiving country must ensure that the child is or will be permitted to enter and reside permanently in their country (Art. 5 c)).

429. See also Chapter 7.2.9, concerning migration authorisations in the country of origin.

#### **7.4.9 Agreement of Central Authorities that the adoption may proceed (Art. 17 c))**

430. After the prospective adoptive parents have accepted the match or referral, and after the respective authorities have been notified of the acceptance and agree to the referral, the entrustment of the child to the adoptive parents and the finalisation of the adoption may take

place, provided that the Central Authorities of both countries agree that the adoption may proceed (Art. 17 c)). The agreement should not be given unless it is clear that, up to this point, the Convention requirements have been met in both countries concerned. The importance of this step is discussed further in Chapters 7.2.8 and 7.2.10.

431. It is generally accepted that the prospective adoptive parents should not be permitted to contact the Central Authority of the State of origin directly, or to travel there to try to make contact with the child or the child's carers without invitation, before agreements under Article 17 are given. Such practices open the possibility for pressure on States of origin. In some cases, such as special needs cases, direct contact may be appropriate and does not violate Article 29 when the competent authority in the State of origin has authorised the contact.

432. See also Chapters 7.2.8 and 7.2.10 for details on agreements and entrustment in the country of origin.

#### **7.4.10 Travel to the State of origin**

433. The Convention in Article 29 attempts to restrict the prospective adoptive parents' contact in or travel to the State of origin, before certain safeguards are in place. States of origin need to make a clear statement in the Country Profile about exactly when they want prospective adoptive parents to travel there. Some States of origin may want to interview prospective adoptive parents before making a final decision on a proposed match, e.g., if a child to be adopted has special needs, the State of origin may need assurance that the prospective adoptive parents understand the child's condition and are capable of caring for him or her. Some States require at least one parent to meet with the child after a referral has been proposed but before proceeding to the adoption stage.

434. Where possible, adoptive parents should escort the child to the receiving State following the adoption or grant of custody.

435. It may be valuable for the prospective adoptive parents to spend time in the State of origin, as their experience there may enable them to know and understand the child's life and living conditions before the adoption and to understand something of the background of the child. Indeed, some States of origin require the prospective adoptive parents to spend such time there.

#### **7.4.11 Issuing the Article 23 certificate of conformity**

436. The question of issuing the Article 23 certificate of conformity has been discussed in Chapter 7.2.12. It is also discussed in Chapter 8.8.3 concerning legal issues.

437. The certificate of conformity is issued by the country which completes the adoption. When the adoption is completed in the receiving country, a copy of the certificate should be sent to the Central Authority in the State of origin. The certificate of conformity is an important document which provides proof that the adoption is entitled to automatic recognition in all other Contracting States.

## CHAPTER 8 – LEGAL ISSUES SURROUNDING IMPLEMENTATION

438. This Chapter addresses a number of legal issues concerning the nature and interpretation of the 1993 Hague Convention and the extent of State obligations under the Convention. The questions answered are for the most part ones which have been addressed by States, Central Authorities, agencies or others to the Permanent Bureau.

### 8.1 The general nature of the Convention

439. The first set of issues concerns the general nature and structure of the Convention, its relationship with national laws on adoption and the degree to which its provisions may and should be supplemented by national law within Contracting States.

#### 8.1.1 Basic procedures and minimum standards

440. The Convention provides a clear set of basic procedures and minimum standards for intercountry adoption, governing *inter alia* the application process, the preparation of reports on the child and the adopting parents, the obtaining of necessary consents, the exchange of information between the two States concerned, the decision concerning entrustment, authorisation for the child to reside permanently in the receiving State, and the transfer of the child from the State of origin to the receiving State.

441. There are basic procedures and minimum requirements in two senses.

442. First there will be points at which the Convention procedures will need to be supplemented by more detailed provisions under national law (for example, the procedures set out in Convention Chapter IV), and there are some broadly expressed rules (for example, those relating to improper financial or other gain or the subsidiarity principle) about which careful thought is required as to how they may best be given effect in the particular legal systems.

443. The second sense in which the Convention procedures may be said to be “basic” and the Convention requirements “minimum” is that there is nothing to prevent Contracting States from introducing controls or safeguards concerning intercountry adoption which are more stringent than those set out in the Convention. This may be done to the extent that such additional rules are not inconsistent with the Convention and where they are judged to be needed in the interest of or for the protection of children. For example, the conditions established by Article 4 “represent the minimum safeguards considered necessary to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights.”<sup>290</sup> The same is true of Article 5.<sup>291</sup> Equally there is nothing to prevent a Contracting State from entering into more detailed arrangements governing co-operation with other Contracting States, for example, through bilateral or regional arrangements, where this is done to improve the application of the Convention and provided that the basic procedural requirements of the Convention are respected.<sup>292</sup>

<sup>290</sup> See Explanatory Report, *supra*, note 1, para. 109.

<sup>291</sup> *Ibid.*, para. 175.

<sup>292</sup> Art. 39(2) states that: “Any Contracting State may enter into agreements with one or more other Contracting States, with a view to improving the application of the Convention in their mutual relations. These agreements may derogate only from the provisions of Arts 14 to 16 and 18 to 21. The States which have concluded such an agreement shall transmit a copy to the depositary of the Convention.”

### **8.1.2 *The Convention is not a uniform law of adoption***

444. Apart from the matters in respect of which the Convention establishes minimum standards and safeguards, the Convention does not require national adoption laws to be uniform. The Convention is designed to operate between systems having different internal laws relating to adoption. For example, the Convention operates both with respect to full and simple adoption and allows for different methods by which adoptions are made (for example, by a decision of a judicial or administrative authority, or by a contract).<sup>293</sup> The Convention also allows for the adoption to be made either in the State of origin or the receiving State. However, there is nothing to prevent a State of origin, if it so wishes, from requiring that the adoption of a child resident within that State should take place in that State prior to the transfer or placement of the child in the receiving State.<sup>294</sup>

## **8.2 Placing limits on intercountry adoption**

445. One of the worries expressed by countries of origin when contemplating ratification or accession to the Convention is that they may be obliged to develop co-operative arrangements with all other Contracting States, or at least to deal with requests for adoption from all the receiving States that are Parties to the Convention. They will probably, prior to joining the Convention, have limited their co-operation to a small number of receiving States. There is the associated concern that the authorities of the country of origin may be deluged with requests from overseas agencies (accredited bodies) for authorisation (under Art. 12) to operate in the country of origin. Countries of origin may have only a limited number of children for whom intercountry adoption is appropriate; at the same time their resources are such that they will usually take the view that they can only properly regulate and supervise arrangements with a relatively limited number of receiving States. Moreover, they may have reasons based on the best interests of the child, to prefer making arrangements with certain countries rather than others, for example, countries with which there are close cultural links, which might include a common language.

446. At the same time, receiving States may also have concerns about being obliged to co-operate with a very wide range of countries of origin when their size and other factors have in the past led them to make arrangements with only a narrow range of such countries. Receiving countries may also be reluctant to enter into an open-ended commitment to co-operate with all countries of origin at all times, and will sometimes wish to apply restrictions in respect of countries whose procedures are seen to be defective or corrupt. Such restrictions may be necessary to protect the best interests of the child.

447. At the 2005 Special Commission there was general support for the view that placing limits on adoptions is sometimes necessary. However, such limits should not be arbitrary limits. Receiving countries and countries of origin should both be ready to provide information concerning any decisions to limit their co-operation with other Contracting States.

### **8.2.1 *Contracting States are not bound to engage in any particular level of intercountry adoption***

448. Ratification of or accession to the Convention does not imply a commitment by a Contracting State to a particular level of involvement in intercountry adoption in the sense of an obligation to supply or receive a minimum number of children through intercountry adoption. This interpretation is necessary to “protect” countries which, at particular times, do not have any children (or any particular category of children) in need of intercountry adoption. In this context, the Convention’s obligations of co-operation between Contracting States may

<sup>293</sup> In Guatemala, the adoption of the child of a spouse can still be made by a public document (2007 Law on Adoptions, Art. 39).

<sup>294</sup> Art. 28.

be met if a State of origin keeps other States informed of its level of engagement in intercountry adoption.

449. However, the Convention does require that, if intercountry adoption is considered appropriate by the relevant authorities of a Contracting State, the rules and procedures set out in the Convention must be followed.

### **8.2.2 *Is a country of origin obliged to make intercountry adoption arrangements with all receiving countries which are Parties to the Convention?***

450. The fundamental point is that a State's obligations under the Convention should be viewed in the light of the principle of the child's best interests. The Convention does not oblige a State to engage in any intercountry adoption arrangements where these are not seen to be in the best interests of the individual child. Considerations of children's best interests may lead to a preference by a country of origin for placements in particular receiving countries. Moreover, limited capacity and scarce resources in the country of origin may also be a good reason for limiting the number of countries, or accredited bodies, with which a country of origin can realistically enter into effective, well-managed and properly supervised co-operative arrangements. Indeed, attempting to deal with too many receiving countries, or too many accredited bodies, may constitute bad practice if its effect is to dilute to an unsatisfactory level the control which a country of origin must necessarily exercise over the intercountry adoption process.

451. At the same time, the more general obligation of co-operation under the Convention does require that Contracting States generally should deal with each other in an open and responsive manner. This includes countries of origin being ready to explain when and why certain policies may have to be maintained. Equally, receiving countries should be sensitive to the difficulties that countries of origin may have in developing a well-managed system of alternative child care when they are subjected to excessive pressures from receiving countries.

452. A question may arise concerning the need to make practical co-operation arrangements for the operation of the Convention between the two countries concerned, for example, to specify the responsibilities of particular organisations or bodies in each country, or the types of documents which must accompany an application to adopt. The Convention imposes no such requirement or obligation to conclude such agreements or arrangements, but for practical reasons, some countries require a formal or informal procedure to be put in place with another country before adoptions can be arranged between them.<sup>295</sup> This is usually done through bilateral discussions. Furthermore, the Convention provides only a basic framework for co-operation and additional requirements may be imposed by means of a bilateral agreement. Bilateral arrangements or agreements of this kind may be established with the minimum of formality. They may also be formal bilateral agreements in the sense of Article 39(2). In the latter case, the proper notification to the depositary under Article 39(2) is required.

### **8.2.3 *Is a receiving country obliged to make intercountry adoption arrangements with all countries of origin which are Parties to the Convention?***

453. This issue may arise where, for example, persons resident in a receiving country seek to adopt a child from a country of origin with which the receiving country has had no previous arrangements. The applicants may argue that, because the country of origin is a

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<sup>295</sup> For example, Australia, Bolivia, Latvia, Lithuania, Panama, Poland, South Africa and Spain.

Party to the Convention, there is an obligation on the authorities in the receiving country to facilitate the adoption.

454. There are good reasons to support the view that a receiving country is not obliged to send files on behalf of prospective adopters to every Convention country. There are reasons of principle, as well as practical reasons for this. A receiving country is entitled to apply additional safeguards to those contained in the Convention where these are not inconsistent with the Convention and are needed to ensure the proper protection of children in intercountry adoption. Thus, for example, it is permissible for a receiving country (also, indeed, a country of origin) to insist on the establishment of agreed bilateral arrangements or programmes, supplementary to Convention provisions, before being prepared to process particular adoption applications. The view may be taken in a particular receiving country that resources make it impossible to properly supervise and control more than a limited number of such arrangements or programmes.

455. As a matter of practice it has been the experience of certain receiving countries that the mere sending of a file or report under Article 15 to a country of origin to initiate an adoption does not work. There may be no response. It is the practice in many receiving countries to approve parents to adopt from specific countries. These will mostly be the countries with which there exist current arrangements. Also, it is not in the interests of prospective adopters to have them go through an approval process, which will be time-consuming and may involve substantial costs, if the file is to be sent to a country from which there is unlikely to be a response.

456. At the same time, it should be remembered that all Contracting States have certain general obligations of co-operation to protect children and to achieve the objects of the Convention,<sup>296</sup> as well as to exchange information concerning adoption practices and to keep each other informed about the operation of the Convention.<sup>297</sup> This suggests that both receiving countries and countries of origin should be ready to provide information to all Contracting States concerning any practices or arrangements which have the effect of limiting the scope of their co-operation with other countries. They should also be open and responsive to enquiries concerning these matters.

### ***8.2.4 May a country of origin place a moratorium on intercountry adoption?***

457. There have been examples of countries of origin placing a moratorium, for a limited or a lengthy period of time, on intercountry adoption. The Permanent Bureau has been asked to advise whether this is consistent with obligations under the Convention.

458. In keeping with the general principle that the Convention does not oblige States to engage in intercountry adoption, the placing of a moratorium on adoption is not necessarily inconsistent with Convention obligations. There may be good child protection reasons for applying a moratorium where, for example, there has been a general breakdown in the procedures and safeguards that should apply to intercountry adoption or where corruption or other abuses have become widespread. In such cases the authorities in the country of origin may properly take a policy decision that a root and branch reform is needed and that this cannot be achieved while the present structures for intercountry adoption remain in operation.

459. However, the introduction of a moratorium should be accompanied by the application of a carefully considered and sensitive transition policy towards applications for intercountry adoption, which are, at the time of the moratorium, still pending. In particular, it may be difficult to justify applying a moratorium to cases in which the conditions of Article 17,

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<sup>296</sup> Art. 7(1).

<sup>297</sup> Art. 7(2).

including agreement between the two Central Authorities that the adoption may proceed, have already been met. Delaying permanent family placements for children, especially in transition cases, is, in most cases, inconsistent with the best interests principle: see Chapter 6.4.2.

460. On the one hand, the Convention does not impose an obligation on Contracting States to engage in intercountry adoption and it is based on the subsidiarity principle according to which intercountry adoption may be considered as an option only after the possibilities for placement of the child within the country of origin have been considered. On the other hand, the Convention follows the Convention on the Rights of the Child in recognising that the child, for the full and harmonious development of his or her personality, should if possible grow up in a family environment. It recognises that intercountry adoption may offer this possibility to a child, and in particular it may offer the opportunity of family life to certain children for whom the only alternative may be institutional care in the country of origin. These are matters which should be weighed carefully in the balance when a country is considering whether to introduce a moratorium, or for how long a moratorium should continue to apply. If, in the country of origin, there remain some children for whom intercountry adoption, properly regulated under the Hague Convention, offers the only prospect of growing up in a family environment, the effect on those children of applying a rigid and possibly long-term moratorium on intercountry adoption should be given serious consideration.

461. Communication between Central Authorities is a key to reducing the impact of moratoria or restrictions on adoptions. If a Contracting State (whether a State of origin or a receiving State) decides that a moratorium on adoption is necessary, the impending situation should quickly be notified to other Contracting States and a solution found for all transition cases, before the moratorium begins. A case may be said to be a “transition” case once the matching has occurred and the prospective adoptive parents have accepted the match. Transition cases at this advanced stage should, in general, be allowed to proceed to completion, where it is in the child’s best interests.

### ***8.2.5 May a receiving country place restrictions on adoptions from particular countries of origin?***

462. It can be justifiable under the Convention, in the interests of the children concerned, for a receiving State to apply additional safeguards or restrictions either generally or in relation to specific countries. Where, in a country of origin, serious problems of abuse become apparent, there may be a case, after exhausting the possibilities of rectifying the situation through the Convention’s co-operation procedures, for applying severe restrictions (the country of origin may do likewise).

463. However, if additional safeguards or restrictions are applied, especially if they may result in an adoption procedure coming to a halt, it is important that they are applied before the decision is made to entrust a child to particular prospective adopters. Article 17 provides the procedural means by which the receiving country may apply such safeguards. Article 17 enables a receiving country to stop an adoption going ahead where there is evidence of abuse or impropriety. However, it is implicit in Article 17 that the safeguards should be applied before and not after the decision on entrustment is made.

464. The philosophy, which underlies Article 17, is that all the important requirements for adoption should be satisfied before entrustment, including for example the determination that the child is or will be authorised to enter and reside permanently in the receiving State. Once entrustment has occurred, there is a *fait accompli*, a relationship begins to develop between the child and the prospective adopters, and the application at this stage of any additional requirements or “restrictions” would usually not be in the interests of the child, and may indeed result in the development of a “limbo” situation, in which the child has established a

relationship with the prospective adopters and yet an adoption cannot proceed. There is an even stronger argument against the application of additional requirements or “restrictions” by the receiving State after the adoption has actually been made in the country or origin.

### **8.3 Questions concerning the coming into force of the Convention**

465. The procedures surrounding, and the significance of, signature, ratification, acceptance, approval of, or accession to, the Convention are explained in some detail in Annex 1: A Detailed Pathway to Signature and Ratification / Accession. That Annex also explains the provisions governing the coming into force or effect of the Convention.

#### ***8.3.1 Which States may ratify and which may accede to the Convention?***

466. The rule in Article 43 governs which States may ratify the Convention. Those States which were Members of the Hague Conference at the time of the Seventieth Session in 1993, and those States which participated in the Seventieth Session may ratify the Convention. The list of such States is on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under the menu “Intercountry Adoption Section” then “Contracting States.”

467. The rule governing which States may accede to the Convention is in Article 44, namely any State other than a ratifying State. The relevance of ratification or accession may arise in relation to making an objection under Article 44(3) (see Chapter 8.3.3).

#### ***8.3.2 The relationship between Article 46(2) and Article 44(3)***

468. There appears to be something of a contradiction between Article 46(2) which specifies a three-month period (following the deposit of the instrument of ratification, acceptance, approval or accession) for the entry into force of the Convention, and Article 44(3) which prevents the Convention coming into effect between an acceding State and any Contracting State which raises an objection within a six-month period.

469. The Permanent Bureau has taken the view that the Convention should be treated as coming into operation between the acceding State and the existing Contracting States after the initial three-month period provided for in Article 46(2). From the standpoint of legal interpretation this proposition is tenable, though admittedly the matter is not crystal clear. One could on the contrary argue that the Convention comes into effect between an acceding State and existing Contracting States after the six-month period allowed for objections. However, the reasons for preferring the former interpretation are:

- The wording in Article 44(3) does not expressly state that relations are not established until the expiry of the six months. It would have been easy to make this clear, if it had been the intention of the drafters.
- The wording of Article 41 lends some support. Specifying the specific cases to which the Convention must be applied, that Article refers to applications (under Article 14) received after the Convention “has entered into force” in the receiving State and the State of origin. The date of “entry into force” in each State is governed by Article 46(2), not Article 44(3).
- For an existing Contracting State, practical difficulties should not arise if the view is taken that the Convention enters into force at the earlier date. If an existing Contracting State is actively considering raising an objection under Article 44(3) to a newly acceding State, it may be unwise in the meantime to allow the processing of adoptions in respect of that State.

- In the vast majority of cases (*i.e.*, where a new State accedes to the Convention) no objections are raised under Article 44(3). It is not generally in the interests of children that there should be a delay in the coming into effect of the Convention between Contracting States. It should be remembered that adoptions that are made before the Convention comes into effect do not enjoy the protections afforded by the Convention, nor the advantage of automatic recognition among all Contracting States.

### **8.3.3 Who may lodge an objection under Article 44(3)?**

470. Any Contracting State may object to the accession of another Contracting State. There are two possibilities concerning when an objection may be raised. An objection may be raised by any existing Contracting State against the accession of a newly acceding State.

471. An objection may also be raised by a newly ratifying or acceding State against the earlier accession of another Contracting State. This objection must be made at the time the newly ratifying or acceding State lodges its own instrument of ratification or accession.

472. A Contracting State may not object to the ratification of the Convention by a State entitled to ratify under Article 43.

### **8.3.4 How does the Convention apply to intercountry adoptions which are already pending at the time of ratification, acceptance, approval or accession to the Convention?**

473. The problem is addressed by Article 41 of the Convention according to which:

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

474. Concern has been expressed in respect of intercountry adoption applications which are already being processed under pre-existing bilateral arrangements with States which later become Parties to the 1993 Convention. Article 41 implies that, where applications under bilateral arrangements have already been received (before the Convention has entered into force for either or both the States concerned), the Convention does not apply. This interpretation is confirmed in paragraph 583 of the Explanatory Report, where it is pointed out that Article 41 answers the question, not of the entry into force of the Convention in general, but of “its application to a particular case assuming that the Convention is already in force in the State of origin and in the receiving State.”

475. In short, applications, which are already pending under bilateral arrangements, may continue to be processed in accordance with these arrangements. The disadvantage, of course, is that such adoptions cannot be certified under Article 23 as being made in accordance with the Convention and are therefore not entitled to recognition by law in other Contracting States.

476. It is possible that the parties to bilateral arrangements would prefer to have the Hague procedures apply to adoptions which are currently being processed under existing arrangements (or at least to give the applicants this option). This might be done in appropriate cases, provided the two States concerned are in agreement. It would be necessary for the prospective adoptive parents to resubmit their application to adopt to the appropriate Central Authority, after the Convention has entered into force between the two States concerned, and in accordance with Articles 14 and 41. The Central Authorities might then “fast track” the procedure for such cases, ensuring that the Hague conditions are met

but avoiding, as much as possible, unnecessary duplication of procedures already undertaken. The advantages would include the assurance of recognition in all Contracting States. The disadvantage might be delay in cases, which are already perhaps almost complete.

477. A similar approach might be taken on behalf of prospective adoptive parents who have applied to their Central Authority to adopt from a particular State of origin before the Convention entered into force in that country. The prospective adoptive parents might resubmit their application to ensure it meets the necessary Convention requirements, but the evaluation of the prospective adoptive parents would be fast-tracked to take into account any preparatory work already undertaken. The advantages of this approach would include a reduction in the number of cases being processed as non-Convention adoptions after the Convention has entered into force for the two countries concerned.

## **8.4 Habitual residence and nationality**

### **8.4.1 *Is the nationality of the child or of the prospective adopters relevant in determining the scope of the Convention?***

478. The nationality of the child or of the adopters is irrelevant in determining the scope of application of the Convention. Article 2(1) provides:

*“The Convention shall apply where a child habitually resident in one Contracting State (“the State of origin”) has been, is being, or is to be moved to another Contracting State (“the receiving State”) either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin.”*

479. Habitual residence (of the child and of the adopter(s)) is the important connecting factor. If adopters, who are nationals of France, but habitually resident in Belgium, wish to adopt a child who is habitually resident in another Contracting State, it is the Central Authority of Belgium that will be responsible for receiving and processing the application (see Art. 14).

480. If a child is a national of Brazil, but habitually resident in Costa Rica, it is the Costa Rican authorities which, under the Convention, have the responsibility of receiving the application and applying the Convention procedures and safeguards. If that same child were to be moved for adoption to Brazil, i.e., the country of the child’s own nationality, the Convention procedures and safeguards would still have to be applied.

#### **8.4.1.1 *Habitual residence and temporary workers***

481. In some cases, the concept of “habitual residence” of the prospective adoptive parents needs to be clarified to decide whether particular cases of intercountry adoption fall under the Convention and its safeguards. In particular, there are cases of temporary workers who adopt a child under the domestic law in the country where they are working. It may be difficult in these cases for the authorities to determine, first, where is the real habitual residence of the prospective adoptive parents, and second, if this is a case of national or intercountry adoption. In another situation, parents with dual nationality travel to one of their countries of nationality and adopt children according to the procedure for national adoptions and then bring the children back with them to their State of habitual residence. Receiving States are in a difficult position as to the recognition of such adoptions: on the one hand, if recognition is refused, the children may be left in limbo, but on the other hand such practices should not be encouraged. While such cases may not be deliberate attempts to avoid the

Convention rules, the possibilities for abuse do exist. Chapters 10.2, 8.4.5 and 8.7.2 may also be relevant to these situations.

482. The time when a child will be moved from the State of origin may help to resolve the question of whether an adoption is a national adoption or an intercountry adoption. The intentions of the prospective adoptive parents need to be examined. If the prospective adoptive parents have become habitually resident in the State of origin, and they adopt under the domestic law of the State of origin but intend to return to their own country years later, that is not an adoption under the Convention.

483. Habitual residence is a question of fact. In relation to temporary workers, if they acquire habitual residence in the new country (the State of origin) and wish to adopt a child there under the internal law, that is a matter for the law of the State of origin. The law of the worker's home State may also be relevant in determining that the child may be permitted to reside there permanently, should the family return there at a later time.

484. The issues arising here may not only concern temporary workers. Any couple who are in the process of adoption (whether intercountry or national) could find that due to work or family matters, they are suddenly required to move to another country. The follow-up on the adoption in such cases is a matter for the authorities in the country of adoption to resolve, preferably with the co-operation of authorities in the country of destination.<sup>298</sup>

#### **8.4.2 *Is the nationality of the child relevant in determining whether a child is adoptable?***

485. Article 4 a) requires that, before a Convention adoption takes place, the competent authorities of the State of origin should have established that the child is adoptable. The Convention does not specify the criteria of adoptability. This is a matter for the law, including the rules of choice of law, of the State of origin. The State of origin will usually apply the rules which are relevant to national adoptions in that State. On the other hand, it may apply foreign laws if required to do so by its own choice of law rules. It is possible that in a country of origin, the law applicable to the question of the adoptability of the child is (at least in part) the law of the child's original nationality. It is only in this exceptional situation that the law of the country of which the child is a national may be relevant in determining the child's adoptability under the Convention.

#### **8.4.3 *Is the nationality of the adopter relevant in determining his or her eligibility to adopt?***

486. Article 5 a) requires that, before a Convention adoption takes place, the competent authorities of the receiving State should have determined that the prospective adoptive parents are eligible and suited to adopt. The Convention does not specify the criteria of "eligibility". This is a matter for the law, including the rules of choice of law, of the receiving State. The receiving State will usually apply the rules which are relevant to national adoptions in that State. It is possible that the receiving State may, by its own choice of law rules, be required to establish that the prospective adopters are eligible under the law of their nationality. Only in this exceptional situation would the nationality of the adopters become relevant to the question of their eligibility.

487. The practice shows, nevertheless, that citizens from countries of origin who reside in receiving countries continue to undertake relative and non-relative adoptions in their country of origin / nationality using the laws and procedures for national adoptions and without respecting the 1993 Hague Convention requirements. Consequently such adoptions may not be recognised by the receiving countries and some of these children remain separated from

<sup>298</sup> See H. van Loon, *supra*, note 6, p. 347, para. 204.

their “adoptive parents” because their entry into the receiving countries is refused.

488. One of the reasons that such difficulties occur is the lack of coherence in some countries of origin between the laws and procedures for national adoption with the requirements and procedures of the 1993 Hague Convention, and in particular, the responsibilities of the Central Authority.

489. One solution for this problem is for States to include a reference to the 1993 Hague Convention requirements and procedures, including the responsibilities of the Central Authority, in their law for national adoptions. The laws and procedures relating to national adoption could either explicitly exclude from their scope adoptions by people – even citizens of the country or relatives of the child – habitually residing in another country, or formally foresee that these procedures are subject to intercountry adoption requirements (see also Chapter 8.6.4 concerning in-family adoptions).

#### **8.4.4 How easy is it for a prospective adopter to acquire a habitual residence in a Contracting State and could this be achieved by the transfer or investment of substantial sums of money to that country?**

490. Whether the adopter has a “habitual residence” in the receiving State will be a matter for the courts / authorities in that State to determine. “Habitual residence” is generally treated as a factual concept denoting the country which has become the focus of the individual’s domestic and professional life. The acquisition of a particular residential status for tax purposes could be relevant, but not determinative of habitual residence. It should be possible for a judge or other authority to distinguish between cases where the transfer of funds to the receiving State is part of a genuine change of factual residence and one where it is simply a device to enable an adoption application to be made. Where it is the latter, and if jurisdiction were to be assumed on this fragile basis, the case would not come within the Convention, and any adoption granted would not be entitled to recognition under the Convention.

#### **8.4.5 What is the effect of a Convention adoption on a child’s nationality? In particular, in what circumstances does the adoption lead to acquisition of a new nationality for the child or the loss of an existing nationality?**

491. These matters are not governed expressly by the Hague Convention. As a matter of principle, the answers to these questions should above all avoid a situation in which the child becomes stateless. Article 7 of the *Convention on the Rights of the Child* provides:

*“1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.*

*2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.”*

492. More particularly, the *Convention on Certain Questions Relating to the Conflict of Nationality Laws*,<sup>299</sup> in Article 17, provides that loss of nationality through adoption shall be conditional upon the acquisition by the adopted person of the nationality of the adopter. The

<sup>299</sup> Signed at The Hague on 12 April 1930.

same principle is to be found in Article 11(2) of the *European Convention on the Adoption of Children*.<sup>300</sup>

493. A second important consideration is the integration of the child into the adoptive family. This is assisted by allowing the child to acquire the nationality of the adopter. Article 11(1) of the European Convention embodies this idea:

*“Where the adopted child does not have, in the case of an adoption by one person, the same nationality as the adopter, or in the case of an adoption by a married couple, their common nationality, the Contracting Party of which the adopter or adopters are nationals shall facilitate acquisition of its nationality by the child.”*

494. A third principle is that of non-discrimination. The *Convention on the Rights of the Child*, in Article 21(c), requires States Parties to ensure that the child concerned by intercountry adoption enjoys safeguards and standards equivalent to those existing in the case of national adoptions. In other words, if the effect of a national adoption is to confer on the child the nationality of the adoptive parent, the same principle should apply within the receiving State to an intercountry adoption. The Hague Convention embodies this principle, in the case of a full adoption, by providing, inter alia, that the child should enjoy in the receiving State rights equivalent to those which result from similar adoptions within that State.<sup>301</sup>

495. Bearing in mind these general principles, what is the current practice? With regard first to loss of nationality, the current position, is broadly as follows:

*“Few countries have expressly regulated the question of loss of nationality as a result of adoption by a foreigner. In the absence of an express rule, the conclusion must be that no loss of nationality occurs. Some countries have a procedure for dismissal of nationality (e.g., Greece). A number of States provide that adoption abroad automatically leads to loss of nationality (e.g., Korea).”*<sup>302</sup>

496. In fact some countries provide expressly for the retention by the child of that country's nationality. An example is Bolivia where Article 92 of the Children and Adolescents' Code provides that a minor adopted by foreigners maintains his / her nationality, without prejudice to acquiring that of the adopters. Colombia, whose Constitution allows for dual nationality, permits a child born in Colombia to maintain Colombian nationality, unless it is expressly waived.<sup>303</sup> The same is true in Costa Rica and Ecuador. In India, the same approach is adopted, but voluntary renunciation of Indian citizenship is possible under Section 8 of the Citizenship Act 1955. Under the Romanian Law of 1991 concerning Romanian citizenship,<sup>304</sup> a child who has Romanian citizenship and is adopted by foreigners loses Romanian citizenship if, at the request of the adopters, the child acquires the parents' citizenship according to the provisions of the foreign law. The child who has reached the age of 14 is asked for his consent. In the event of an adoption being declared void or is annulled, the child who has not reached the age of 18 is considered as never having lost Romanian citizenship.

497. With regard to the acquisition of citizenship through intercountry adoption, the clear trend among States which are Parties to the Hague Convention of 1993 is in favour of according automatically to the adopted child the nationality of the receiving State, provided that the adopter or one of them has the nationality of that State. The following is a summary of the discussion on this matter, which took place at the Special Commission on the practical operation of the 1993 Convention, in 2000:

<sup>300</sup> Opened for signature in Strasbourg on 24 April 1967.

<sup>301</sup> Art. 26(2) .

<sup>302</sup> See H. van Loon, *supra*, note 6, p. 298, para. 129.

<sup>303</sup> See the Political Constitution of Colombia, Title III, Inhabitants and the Territory, Chapter 1, Nationality, Art. 96.

<sup>304</sup> Law No 21 of 1 March 1991, Art. 28.

*“80 Discussion in the Special Commission revealed a clear trend in favour of according automatically to the adopted child the nationality of the receiving State. Several experts described the systems operating in their countries. In many countries the acquisition of the nationality of the receiving State depended on one of the adoptive parents also having that nationality. In one case (Norway)<sup>305</sup> the consent of a child above the age of twelve was needed. The type of adoption involved may also be relevant.*

*81 It was also pointed out that the acquisition of the nationality of the receiving State was regarded by certain States of origin (for example, Paraguay and China) as a precondition to intercountry adoption. Indeed, this could cause a problem where the adoptive parents are habitually resident in, but do not have the nationality of, the receiving State. In a case of this kind the country of origin might allow the adoption to proceed if the child obtains the nationality of the prospective adopters. It was pointed out that some systems do allow, in the case of certain categories of parents living abroad, the assumption by the adopted child of the parent’s nationality.*

*82 Discussion revealed differences as to the actual moment of the acquisition of the new nationality by the child. Either the child was deemed to have acquired the new nationality once the adoption was pronounced in the State of origin, or upon the child arriving in the receiving State.”<sup>306</sup>*

498. A fairly typical example is the United Kingdom’s Adoption (Intercountry Aspects) Act 1999 which provides for a child adopted under the Hague Convention to have British citizenship conferred on him / her, provided that all the requirements of the Convention have been met and at least one adoptive parent is a British citizen at the time the adoption order is made and both (in the case of a joint application) are habitually resident in the United Kingdom.

499. The 2005 Special Commission revisited this question. Many States of origin felt strongly that receiving States should automatically grant nationality to an adopted child to avoid situations where a child becomes stateless. It was said that the child should automatically obtain the nationality of the receiving State, and that he / she should be treated the same as a child adopted domestically. Cases were mentioned concerning children adopted abroad who did not acquire the nationality of the new habitual residence country. Later as young adults, they faced deportation because of minor offences. An adopted child should not be repatriated to the State of origin in such circumstances, even if the child is now an adult. The repatriation of a young person or young adult to a country he or she left at birth is contrary to the child’s best interests and is contrary to humanitarian principles. The person may not speak the language and have no known family or contacts there, and no other connection except that is the country of his or her birth (and unfortunately in such cases, the country of his / her only nationality).

500. Co-operation between the authorities of the child’s and the prospective adoptive parents’ respective habitual residence was needed to ensure a child did not become stateless and obtained the nationality of the adoptive parents with the minimum of delay. A recommendation was made to this effect:

*“The Special Commission recommends that the child be accorded automatically the nationality of one of the adoptive parents or of the receiving State, without the need to rely on any action of the adoptive parents. Where this is not possible, the receiving States are encouraged to provide the necessary assistance to ensure the child obtains such citizenship. The policy of Contracting States regarding the nationality of the child should be guided by the overriding importance of avoiding a*

<sup>305</sup> The Norwegian Nationality Act was amended in 2005, after which any adopted child under 18 will be granted automatic Norwegian citizenship as long as the adoption is based on an advance approval to adopt a child and the adoption process has been in accordance with Norwegian legislation. Therefore, it is no longer necessary for children between 12 and 18 years to give their consent to becoming a Norwegian citizen (as an automatic and legal effect of being adopted by a Norwegian citizen).

<sup>306</sup> See Report of the 2000 Special Commission, *supra*, note 14, paras 80-82.

*situation in which an adopted child is stateless.*<sup>307</sup>

501. One State of origin has noted that it happens frequently that the adopter does not register the adopted child for the acquisition of the nationality of the receiving State. While it is not possible for this Guide to direct receiving States how to confer citizenship on adopted children, the receiving States should employ effective measures to guarantee the automatic naturalisation of the adopted child so that he or she will not be stateless.

## **8.5 Comments on the application of the 1993 Convention in disaster situations, and to displaced children within such situations**

502. In the context of the Asian African tsunami disaster, the Permanent Bureau issued the following statement.<sup>308</sup>

*“[The Hague Conference on Private International Law (HCCH)] has developed several important tools to protect children against risks involved in their cross-border movements. International child abduction and intercountry adoption, in particular, are the objects of two specific multilateral instruments.*

### *The 1980 Convention on International Child Abduction*

*Children and their families are protected against the risks of wrongful removal across international borders by the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. In the region affected by the disaster, both Sri Lanka and Thailand are parties to this Convention, which is in force for more than 70 other countries. This Convention is based on a system of co-operation through national Central Authorities and reinforces the principle that all States should take measures to combat the illicit transfer and non-return of children abroad (Articles 11 and 35 of the UN Convention on the Rights of the Child).*

### *The 1993 Convention on Intercountry Adoption*

*Children and their families are protected against the risks of illegal, irregular, premature or ill-prepared adoptions abroad by the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption. In the affected areas, India, Sri Lanka and Thailand are parties to this Convention, to which more than 60 other States are also parties. This Convention which also operates through a system of national Central Authorities reinforces the UN Convention on the Rights of the Child. The Convention seeks to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children. In 2000 HCCH adopted a Recommendation to the effect that States parties should, as far as practicable, also apply the standards and safeguards of the Convention to the arrangements for intercountry adoption which they make in respect of States that have not yet joined the Convention.*

### *Intercountry Adoption of Displaced Children*

*HCCH, in consultation with UNHCR, in 1994 adopted a specific Recommendation<sup>309</sup> urging all States – whether or not parties to the 1993 Convention – to observe particular caution in order to prevent irregularities in respect of any cross-border adoptions of refugee children and children who are, as a result of disturbances in their countries, internationally displaced.*

<sup>307</sup> Recommendation No 17.

<sup>308</sup> The tsunami occurred on 26 December 2004. The 2005 Special Commission agreed with this response.

<sup>309</sup> See Recommendation on Refugees, *supra*, note 13.

*The Recommendation inter alia provides that States to which a child has been displaced “before any intercountry adoption procedure is initiated shall take particular care to ensure that –*

- all reasonable measures have been taken in order to trace and reunite the child with his or her parents or family members where the child is separated from them; and*
- the repatriation of the child to his or her country, for purposes of such reunion, would not be feasible or desirable, because of the fact that the child cannot receive appropriate care, or benefit from satisfactory protection, in that country”*

*In the spirit of this Recommendation, it is clear that in a disaster situation, like that brought about by the tsunami, efforts to reunify a displaced child with his or her parents or family members must take priority and that premature and unregulated attempts to organise the adoption of such a child abroad should be avoided and resisted.”<sup>310</sup>*

## **8.6 Adoptability of the child and eligibility of the prospective adopter, including “relative” adoptions**

### **8.6.1 Does the Convention require Contracting States to take a uniform approach to the question of eligibility to adopt?**

503. Article 5, which is relevant to this issue, simply states that an adoption shall take place “only if the competent authorities of the receiving State (a) have determined that the prospective adopters are eligible and suited to adopt ...”. No detailed rules concerning eligibility are set out in the Convention. This matter is left for determination in the first instance under the laws of the receiving State. The receiving State may decide to apply to intercountry adoption the same rules that apply to eligibility to adopt within its national system. It may supplement them with additional requirements thought necessary for intercountry adoption. It may even apply foreign law (e.g., the law of the adopter’s nationality) where this is thought to be appropriate (see also Chapter 8.4.3).

504. This situation arises from the fact that the Convention is not designed to introduce a comprehensive uniform international code on adoption, but rather to set out the basic requirements necessary to ensure that intercountry adoptions take place in the best interests of the child and in particular with adequate safeguards to prevent abduction, sale of and traffic in children.

505. The Convention is also one based on co-operation between the two countries involved in any individual intercountry adoption. One consequence of this is that the country of origin may refuse to agree to allow an adoption by persons who do not satisfy certain eligibility requirements of the country of origin. This is not stated explicitly in the Convention. However, Article 17 c), which requires that the Central Authorities of both States shall agree that the adoption may proceed, provides the opportunity for the State of origin to apply eligibility requirements in addition to those applicable in the receiving State. In practice many States of origin adopt a flexible approach, for the most part accepting the eligibility criteria applied by the receiving State.

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<sup>310</sup> The complete text of the press release is at Annex 9 of this Guide.

### **8.6.2 Does the Convention require Contracting States to take a uniform approach to the question of the adoptability of the child?**

506. The answer to this question is similar to the answer given above in respect of eligibility requirements for adoptive parents. Under Article 4 a), it is for the competent authorities of the State of origin to determine that the child is adoptable. The detailed rules concerning adoptability are left for determination in the first instance under the laws of the State of origin. And again the authorities of the receiving State may, through the medium of Article 17 c), insist in addition on the application of certain requirements under the law of the receiving State (see also Chapter 8.4.2).

507. In practice, the additional requirements of the receiving State should be made known to the State of origin through co-operation and exchange of information. The State of origin should not match a child with a family in that receiving State if the determination that the child is adoptable will not be accepted in the receiving State. This is a matter of communicating important information to other Contracting States. A country of origin gave the example of an adoption blocked at the Article 17 c) stage because the receiving State had requirements for adoptability that were not met in the State of origin. The adoption should not have progressed to this point (see also Chapter 7.2.1).

### **8.6.3 Are there any international regulations which would prohibit intercountry adoption of children suffering from severe disabilities, including children who have been diagnosed as HIV-positive? Does the Convention permit a receiving country to prohibit the adoption of such children?**

508. There are no international regulations, which prohibit the adoption of children with severe disabilities or who have been diagnosed as HIV-positive. On the contrary, the non-discrimination principle contained in Article 2 of the *Convention on the Rights of the Child*, would argue against any such prohibition.

509. The Hague Convention certainly does not support any such discrimination. On the other hand there is nothing expressly stated in the Convention to prevent a receiving State from applying to intercountry adoption any health controls which apply generally to immigration into that country.

510. There is a requirement in Article 16 of the Convention that the report on a child who is to be the subject of an intercountry adoption should contain information on the medical history and any special needs of the child. The object here is to ensure that the placement is an appropriate one and that the prospective adopters have all the information and preparation necessary to make a responsible decision.

### **8.6.4 Do intercountry adoptions, which are “in-family” (sometimes called “relative” adoptions) fall within the scope of the Convention?**

511. This question has been addressed to the Permanent Bureau on several occasions. In particular, the question has been raised whether the detailed report on the prospective adopters required by Article 15 is really necessary in the case of adoption by relatives. In-family adoptions do fall within the scope of the Convention and the Convention procedures and safeguards must be applied to them.

512. The general approach to “in-family” adoption taken during the negotiations on the Convention is explained by G. Parra-Aranguren in the Explanatory Report at paragraph 92:

*“Working Document No 13, presented by Germany, suggested to exclude from the scope of the Convention the cases where the prospective adoptive parents and the child (a) are directly or collaterally related up to the [fourth] degree, or (b) possess the same nationality. The exclusion of the adoptions among relatives or within a family aimed to permit the application of more flexible rules, but the application of the Convention to all kinds of adoption was sustained, because there is no guarantee that abuses of children do not occur in cases of adoptions within the same family. However, the Convention gives them a special treatment, in some respects: (a) Article 26, subparagraph c, admits the possibility of the termination of the pre-existing legal relationship between the child and his or her mother and father, but not with the other members of the family, and (b) Article 29 excepts the adoptions that take place within a family from the prohibition of contacts between the prospective adoptive parents and the child’s parents or any other person who has care of the child.”*

513. It follows from this that the requirements of Article 15 do apply to intercountry adoptions by relatives. In other words, the Central or other designated Authority of the receiving State must prepare a report, to be transmitted to the Central Authority of the State of origin of the child, containing information about the prospective adopters including their “identity, eligibility and suitability to adopt, background, family and medical history, social environment, reasons for adoption, ability to undertake an intercountry adoption, as well as the characteristics of the children for whom they would be qualified to care” (Art. 15(1)).

514. The precise methods by which “suitability” is determined are not specified in the Convention, and it may be that an expedited procedure for assessing suitability will be appropriate in certain cases of intercountry adoption by a relative. The guiding principles should be the best interests and the fundamental rights of the child referred to in Article 1 a). It should not be automatically presumed that an adoption by a relative is always better for a child than adoption by another family. The detailed report on the prospective adopters required by Article 15 is necessary in the case of adoption by relatives to determine whether a possible adoption is in the child’s best interests.

515. When an application for an adoption by a foreign relative arises, the authorities should be well-informed about how to treat such cases. Central Authorities should, in accordance with Article 7, actively inform the proper authorities within their own country about which adoptions should be dealt with as intercountry adoptions. In some countries, it is possible that the adoption legislation permits adoption in the country of origin by a citizen living abroad as if it were a national adoption. This approach is inconsistent with the Convention obligations (Art. 2).

516. A question may arise concerning the application of the principle of subsidiarity to in-family intercountry adoptions: would that not mean that one would first have to try finding an adoptive family in the State of origin? In most cases, such a family could be found and the family abroad would not be able to adopt the child. However, the overarching principle of the Convention is the best interest principle, not the subsidiarity principle. While it is important to look for a home in the country of origin, a permanent home in another country would be preferable to a temporary home in the country of origin. It is necessary to consider all the relevant factors to decide which is the better family for the child and where is the best permanent home for that child (see also Chapter 2.1.1: Subsidiarity).

517. An adoption by a family member abroad would be preferable to a national adoption if the former was in the child’s best interest. For example, if the non-relative prospective adopters in the country of origin, and the relative prospective adopters abroad, were equally well qualified to care for the child, preference might be given to the relative adopters in order to preserve the family bond. It is necessary to examine, on a case-by-case basis, if an in-family intercountry adoption is in the best interest of the child.

518. Other factors may be relevant. For example, the child may not know the relatives; the child may be the subject of guardianship orders and adoption or intercountry adoption is not

necessary; some cases could be dealt with under the 1996 Child Protection Convention<sup>311</sup> and transferred abroad. The formal adoption of an older child may not be necessary and permanent care arrangements would be satisfactory; a change of country may be more difficult for an older child to adjust to; sometimes there is pressure on families in the State of origin by the family in the receiving State to allow the intercountry adoption.

### **8.6.5 Step-child adoptions**

519. Step-child adoptions are a category of family adoptions but they are not straightforward cases. If one parent already has custody of the child, and the child is living with that parent and the new partner, it should be a national adoption in the country of residence. If one parent already has custody but the child is in another country, and the step-parent adoption is necessary to allow the child to come and reside in the second country, this falls within the scope of the Convention (Art. 2). Here again, the best interest of the child should guide the procedure, and agreement between the two States involved may avoid unnecessary delays. However, national laws on immigration may interfere in such a project (especially family reunification regulations).

### **8.6.6 Are private adoptions within the scope of the Convention and are they compatible with Convention standards and procedures?**

520. These questions have arisen concerning privately arranged adoptions *i.e.*, ones where arrangements for adoption have been made between a biological parent in one Contracting State and prospective adopters in another Contracting State. Under the national laws of certain Contracting States private adoptions of this nature are permitted, while they are prohibited in many others.

521. With regard to the question of scope, Article 2 applies to all cases where a child habitually resident in one Contracting State has been, is being, or is to be moved to another Contracting State for the purpose of adoption. Private adoptions do therefore come within the scope of the Convention and are subject to Convention requirements.

522. This means that all the requirements of Articles 4 and 5 must be met, including for example, that:

- due consideration should have been given to possibilities for placement of the child within the State of origin,
- the biological parents should have been properly counselled,
- the consent of the mother should have been given only after the birth of the child, and
- it should have been determined that the prospective adoptive parents are eligible and suited to adopt.

523. Equally the procedural requirements of Chapter IV of the Convention apply, including the reciprocal transmission of reports on the child and the adoptive parents. Article 17 is also critical. The Central Authorities of both States must be satisfied that essential procedures have been followed before giving their agreement that the adoption may proceed.

524. In conclusion, private adoptions arranged directly between birth parents and adoptive parents come within the scope of the Convention if the conditions set out in Article 2 are

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<sup>311</sup> Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in respect of Parental Responsibility and Measures for the Protection of Children.

present. This means that these adoptions should comply with the Convention standards and requirements, but this is not possible without losing their “private” nature. In other words, a purely private intercountry adoption arrangement is not compatible with the Convention.

525. A distinction is made in this Guide between purely private adoptions and independent adoptions. In this Guide, the term “independent adoption” is used to refer to those cases where the prospective adoptive parents are approved as eligible and suited to adopt by their Central Authority or accredited body. They then travel independently to a country of origin to find a child to adopt (without the assistance of a Central Authority or accredited body in the State of origin). Such adoptions are not consistent with the Convention because the safeguards of the Convention to protect the interests of the adopted child cannot be guaranteed, in particular, the safeguards in Articles 4, 16 and 17 of the Convention. The safeguards of the Convention are also intended to protect the interest of the biological family and the adoptive family (see also Chapter 10.1.1.6).

## **8.7 Failure to comply with the Convention**

### **8.7.1 What measures are possible in the event of a breach of the Convention?**

526. Article 33 of the Convention provides as follows:

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

527. Given that the Convention system is based on a model of co-operation, failure by one State to observe the Convention’s principles in the course of a particular adoption procedure may result in the other State concerned withdrawing from the arrangement. In such a case the Central Authority may refuse to allow the adoption to proceed under Article 17 c).

528. The Permanent Bureau will, with the consent of the States concerned, use its good offices to assist Central Authorities in removing obstacles to the proper functioning of the Convention. The Permanent Bureau has also, from time to time, organised meetings among groups of Central Authorities for the purpose of discussing and attempting to resolve operational problems or shared problems concerning particular Contracting States.

529. Non-recognition of the adoption would be an extreme sanction for very exceptional cases, for example, where there has been a violation of fundamental rights of the natural family. Recognition may be refused, under Article 24, only if the adoption is manifestly contrary to public policy, taking into account the best interests of the child.

530. Article 42 provides for the convening at regular intervals of meetings at The Hague to review the practical operation of the Convention. It has been the experience, also in relation to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, that such meetings (which are attended by inter alia representatives of Central Authorities) provide a very useful forum for raising and resolving practical problems.

### **8.7.2 What can be done if an adoption which falls within the scope of the Convention is erroneously processed as a national adoption in the receiving country?**

531. Cases have arisen where, perhaps because of unfamiliarity with the Convention, courts in a receiving country have made national adoption orders in circumstances where the

Convention procedures and safeguards should have been applied. The courts may have taken the view that, because the children were resident in the receiving country at the time of the application, national adoption procedures should apply. In fact, where children are brought from a country of origin to the receiving country for the purpose of adoption, the cases clearly fall within the scope of the Convention, as set out in Article 2.

532. Where a mistake of this kind occurs, the authorities in the receiving country are not in a position to certify, under Article 23, that the adoption has been made in accordance with the Convention, and as a result the adoption is not entitled to recognition in other Contracting States under the Convention. In effect the safeguards set out in the Convention have been circumvented.

533. Can the situation be rectified? It would be in the spirit of the Convention, and of the Convention on the Rights of the Child, as well as in the best interests of the child concerned, for the two countries involved to try to find a pragmatic solution. They might wish to consider “healing” the defects which occurred by trying to do what should have been done, had the provisions of the Convention been respected. If it were possible for the Authorities of the country of origin to make the determinations required by Article 4 of the Convention, and those of the receiving country to verify if the provisions of Article 5, in particular Article 5 a) and b), have been respected, and if the two authorities could agree to an exchange of the required reports under Articles 15 and 16, then the two countries might agree that the requirement of Article 17 c) has been satisfied retrospectively, so that the appropriate authorities would be in a position to make out the certificate referred to in Article 23(1) of the Convention.

## 8.8 Miscellaneous matters

### **8.8.1 *In what circumstances should a Contracting State provide access, for adopting persons or others, to information concerning the adopted child’s origins?***

534. The starting point is Article 30, which provides as follows:

*“(1) The competent authorities of a Contracting State shall ensure that information held by them concerning the child’s origin, in particular information concerning the identity of his or her parents, as well as the medical history, is preserved.*

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

535. It is for a Contracting State to decide and ideally to set out in implementing legislation, what the rules are for access to information held in that State. In this narrow sense, therefore, it is the law of each individual Contracting State which governs the issue of availability of or access by the child to information<sup>312</sup> (see also Chapter 9.1).

536. The question is sometimes raised by countries that have a policy of relatively open access to information concerning origins within their national adoption system, whether the same approach should necessarily be applied to intercountry adoption. This is a question which is not directly answered by the Convention itself.

537. However, Article 16(2) of the Convention provides evidence of one of the underlying concerns of the drafters of the Convention, where it reminds the Central Authority of the State of the child’s origin that it should take care not to reveal, in the report on the child which has to be transmitted to the receiving State, the identity of the mother or father if, in the State

<sup>312</sup> This is confirmed in the Explanatory Report, see *supra*, note 1, para. 515.

of origin these identities may not be disclosed. The concern here was to protect the principle of confidentiality (as regards identifying information) for those States of origin in which for a variety of reasons (danger to the birth mother being one) confidentiality is still regarded as essential. The argument was put, during the debates, that failure to recognise this concern might result in a reluctance, or even fear, by mothers in certain countries to consider placement for adoption as a realistic option in the case of pregnancy outside marriage.

538. It would of course be wrong for the Permanent Bureau to take a partisan approach in relation to an element of implementing legislation, which the Convention clearly leaves to the discretion of the States Parties. However, it would not be going too far to suggest that, in devising an appropriate rule on access to identifying information under Article 30, consideration should be given to the concerns which underlie Article 16(2), as explained above.

### **8.8.2 Interpretation of Article 17 c)**

539. As is stated in the Explanatory Report on the Convention at paragraph 337, the intention behind Article 17 c) is to enable either State, the State of origin or the receiving State, to stop an adoption from going ahead “if it appears to either that it presents major legal obstacles.”

540. The Convention and the Explanatory Report do not specify what those “major legal obstacles” may be. That is a matter that the Convention leaves for determination by individual States.

541. How precisely the Central Authority may operate its discretion under Article 17 c) is, therefore, a matter for the law of the State concerned. It is quite possible that, under the law of that State, there exist general requirements in relation to the exercise of a discretion of this type – for example, that it should be exercised “reasonably.” Where that is the case, it could well be argued that a “reasonable” exercise of discretion is one which takes account of the general principles underlying the Convention which are set out in the Preamble, and which focus on the interests of the child (see also Chapters 8.2.5, 8.6.1, 8.6.2, 8.7.1 and 8.8.3).

### **8.8.3 When should the certificate of compliance under Article 23 be issued?**

542. The certificate, issued in accordance with Article 23 of the Hague Convention, certifies that the adoption has been made in accordance with the Convention. This implies that all the steps necessary to complete the adoption should be taken before the certificate is issued (see also Chapters 7.2.12 and 7.4.11).

543. In the case of a country of origin, such as Thailand, where a probationary placement of six months in the receiving country may be required before final approval is given for the adoption, the Article 23 certificate should not be issued until the final approval is given and the adoption is complete and valid. In Thailand, if the probationary placement is successful, the Adoption Board gives its approval for the final adoption order under Thai law. The final adoption is made in Thailand, and the Child Adoption Centre, which is the Central Authority, issues the Article 23 certificate when the adoptive parents have registered the adoption at the Thai embassy of the receiving country and after the Child Adoption Centre receives a copy of the adoption registration paper either from the Central Authority in the receiving country, or the adoptive parent/s, or the Thai embassy. The Article 23 certificate issued by Thailand allows for automatic recognition of the adoption as a simple adoption (see also Chapter 8.8.8).

#### **8.8.4 Is it possible for the physical entrustment of the child with the adoptive parents to take place after the child has been transferred to the receiving country?**

544. The key to the issue is Article 17, which speaks of “any decision ... that a child should be entrusted.” This in effect is what in English is commonly referred to as “the placement decision.” The “entrustment” is the actual placing of the child in the care of the prospective adopters, *i.e.*, the physical delivery of the child. The term “placement” was deliberately avoided because of the ambiguity in French (see Explanatory Report at para. 328). The decision to entrust the child cannot be taken until the Article 17 conditions have been met.

545. Turning to Article 19, it is clear that the actual entrustment may take place before or after the child is transferred to the receiving country. In other words, there is enough flexibility to allow for those exceptional cases where it is not practical for the prospective adopters to travel to the country of origin, but where other arrangements can be made to effect a safe transfer. Though, of course, Article 19(2) makes it clear that the preferred alternative is for the parents to travel with the child.

546. Nevertheless, even though the physical delivery of the child to the prospective adopters may take place exceptionally after the transfer, the conditions of Article 17 must by that stage have been met – in particular the two States concerned must have agreed that the adoption may proceed. It is implicit here that the decision concerning placement will have been made prior to any transfer. This is confirmed by Article 17 *b)*, the requirements of which cannot be met unless a decision on placement has already been made.

547. To summarise, whereas the physical delivery of the child to the prospective adopters may exceptionally occur after the transfer of the child to the receiving State, Article 19 combined with Article 17 implies that the decision to place the child with the potential prospective adopters will have been made prior to the transfer. This is the general practice in Contracting States.

#### **8.8.5 What is the nature of the obligation which Central Authorities have, under Article 7(2) a), to take appropriate measures to provide “information as to the laws of their States concerning adoption?”**

548. The obligation to “provide information as to the laws of their States” is rather loosely expressed. The obligation to provide such information would certainly arise in the context of a specific adoption application where a request has been made by another Central Authority. The provision of general information concerning adoption procedures in Contracting States is to be encouraged. Some Central Authorities have set up websites containing information of this kind. But it is for individual States to decide what are the appropriate measures, and it is not necessarily the Central Authority that is bound directly to provide the required information (see para. 211 of the Explanatory Report).

549. In 2005, the Special Commission recognised that a more systematic approach to the collection, organisation and accessibility of adoption information was needed. Recommendations Nos 8 and 10 were made to this effect.<sup>313</sup>

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<sup>313</sup> See also Chapter 4.2.2 of this Guide.

### **8.8.6 Should requirements for accredited bodies be applied to Central Authorities?**

550. The question has arisen whether countries of origin can apply requirements concerning accredited bodies to Central Authorities in receiving States which perform all adoption functions. The issue was raised as a legal question, although it may be a question of co-operation.

551. The obligations arising from the adoption procedures in Chapter IV are directed at Central Authorities, and may also be performed by accredited bodies. As a general rule, Central Authorities are public bodies and accredited bodies are private bodies most of the time.<sup>314</sup> The accreditation procedure is not intended to be applied to Central Authorities. However, in countries where some or all adoptions are arranged through Central Authorities, the Central Authority must provide the same level of professional service to prospective adoptive parents as an accredited body is expected to provide. The Central Authority must also provide the same level of protection for the child as an accredited body.

552. A related issue is when States of origin only want to arrange adoptions through accredited bodies. A problem then arises for some Contracting States which do not use accredited bodies. In those countries, all the procedural functions under the Convention are performed by Central Authorities. These Contracting States have reported<sup>315</sup> that some States of origin refused to work with them as they did not have accredited bodies.

553. On the other hand, the experience of some States of origin was that certain Central Authorities did not provide adequate preparation and support of the prospective adoptive parents during the adoption process. The Contracting States without accredited bodies claimed they provided the full range of services at a high level of professionalism. This situation may have developed from a lack of understanding of the procedures of the countries concerned.

554. The Contracting States without accredited bodies should explain their procedures fully to the States of origin who were unwilling or unable to work with them. The important issue is the quality of the work done to protect children during the intercountry adoption process, and not whether it is done by Central Authorities or accredited bodies. However, it is important to emphasise that the Convention does not impose any obligation on a Contracting State to use accredited bodies.

### **8.8.7 Triangular adoptions**

555. Triangular adoptions occur when prospective adoptive parents, living in one country (country A), want to adopt in another country (country B), but with the support of services of an accredited body from a third country (country C). In principle, it should be possible to arrange such adoptions in accordance with the Hague Convention requirements. However, certain conditions should be met:

- a) the arrangement should only be permitted when country A does not have an adoption facilitator in country B and the accredited body in country C can provide this service;
- b) the Central Authority of each country A, B and C agrees to the arrangement;
- c) the accredited body of country C is either authorised to act in country B or has arrangements with accredited bodies in country B;
- d) the prospective adoptive parents are approved as eligible and suited to adopt by the authorities in country A, their country of habitual residence;
- e) the Central Authority of country A (or the prospective adoptive parents as the

<sup>314</sup> Some receiving countries, such as France, have now public entities whose functions are similar to private accredited bodies.

<sup>315</sup> At the 2005 Special Commission.

case may be) agrees to provide the necessary post-adoption reports to country B and post-adoption services to the prospective adoptive parents.

### **8.8.8 Simple and full adoptions**

556. The Convention applies to simple and full adoptions. According to the Convention, a simple adoption is one in which the parent-child relationship which existed before the adoption is not terminated but a new legal parent-child relationship between the child and his or her adoptive parents is established, where the adoptive parents acquire parental responsibility for the child (see Art. 26(1) a) and b)). A full adoption is one in which the pre-existing parent-child relationship is terminated (see Art. 26(1) a) and b)).

557. Article 2(2) of the Convention states that “The Convention covers only adoptions which create a permanent parent-child relationship.” Consequently, simple adoptions which establish a permanent parent-child relationship and the transfer of parental responsibility for the child to the adoptive parents are covered by the Convention, even if that adoption does not result in the termination of a pre-existing legal relationship between the child and his or her mother or father. However, the Convention does not cover “adoptions” which are adoptions in name only and do not lead to the establishment of a permanent parent-child relationship and the transfer of parental responsibility of the child to the adoptive parents.

558. Many legal systems do not provide for simple adoptions. In practice, therefore, under the Convention, those legal systems will be faced only with issues regarding the recognition of simple adoptions made in other Contracting States.

559. Under Article 26(1), a simple adoption certified under Article 23 by the State of origin must be recognised in all other Contracting States, as a minimum, with the effects that the simple adoption has under the laws of the State of origin. However, under Article 26(3), nothing prevents the recognising State from giving additional effects to the recognition (for instance, in terms of inheritance rights vis-à-vis the adoptive parents, or the right of citizenship).

560. In order to enable the receiving State to “upgrade” a simple adoption to a full adoption, Article 27 of the Convention provides the possibility of converting a simple adoption into a full adoption. But since the simple adoption does not lead to severing the links with the birth parents, this is only possible under the condition that those parents, if they have not already done so, give their permission to the full adoption (see Art. 27(1) b)). In the case of a conversion under Article 27, the newly created full adoption will replace the original simple adoption, and, if certified in accordance with Article 23, will be recognised in all Contracting States.

### **8.8.9 When respite care abroad leads to the adoption of a child: is the Convention applicable?<sup>316</sup>**

561. It often occurs that children from economically disadvantaged and/or disaster-struck countries are hosted temporarily by families in industrialised countries for “holidays” to improve the child’s physical and mental well-being. In some cases, those children are subsequently adopted by their host family. This new phenomenon raises important legal and ethical questions, as it creates a loophole for by-passing the Convention and potentially places children at risk of significant harm.

562. A major concern in such cases is that those children are selected and prepared to be hosted and not to be adopted. Therefore, when the host family decides to adopt the child, the following issues may arise:

<sup>316</sup> ISS/IRC, “Editorial: From respite care abroad... to adoption?”, Monthly Review No 2/2007, February 2007.

- the adoptability of the child may be difficult for the State of origin to determine especially if they remain abroad;
- the subsidiarity principle of intercountry adoptions is not respected;
- the eligibility and suitability of the prospective adoptive parents may not be determined. They were chosen in the first place for hosting a child and not for adopting him/her. In many cases there is not even a professional selection of the host families;
- the absence of professional “matching” from the start may also prove very problematic;
- the preparation of the child and the prospective adoptive parents may not be done, or may be difficult to achieve once the child is already with the family.

563. There is no doubt that the Convention applies to such adoptions between Contracting States when they come within the scope of Article 2, but the Convention procedures and principles may not be respected. The Convention was designed to protect children affected by intercountry adoption, and Contracting States should ensure that children in respite care abroad who may be adopted receive the protections to which they are entitled.

## CHAPTER 9 – POST-ADOPTION MATTERS

564. The Convention obligations imposed on Contracting States do not cease with the transfer of a child to the adoptive parents. The Convention requires States to undertake a range of other general functions that may be relevant to particular adoptions, such as the provision of counselling or post-adoption reports, or that may be relevant to a general review of the operation and implementation of the Convention, such as the collection of statistics. Some of these functions address the long-term needs of adopted persons and their families, and cross-border co-operation between States of origin and receiving States will be necessary when adult adoptees are searching for their origins.

565. Adoption is not a single event, but a life-long process. The need to know is not confined to young adult adoptees. In one receiving country, the oldest adoptee applying for his original birth certificate was 96; the oldest age of a birth mother searching for a child was 89.<sup>317</sup>

### 9.1 Preservation of information

566. Article 30 of the Convention imposes on Contracting States an obligation to preserve any information they have about the child and his or her origins. There is also an obligation to ensure the child has access to that information under certain conditions.

567. Article 30 regulates two different questions: (1) the collection and preservation of the information concerning the child's origins, and (2) the availability of or the access to such information by the child. These rules, while outside the norm of international conventions, were included because of their importance, particularly to adopted persons, and because of the possible need for co-operation among the Contracting States when the adopted person tries to obtain information.<sup>318</sup>

568. Article 30 should be read in conjunction with Article 16, because the information referred to is mainly that required for the preparation of the report on the child that the Central Authority of the State of origin is to transmit to the receiving State.<sup>319</sup> Therefore, as a practical matter, it may be beneficial for States to include the retention of records as a duty of the same office that prepares the report on the child.<sup>320</sup> States may also want to clearly determine, and include within their laws, the length of time that records should be kept.<sup>321</sup>

569. The demand by adult adoptees for information about their origins is significant. Those whose background information is incomplete or non-existent may never find the answers they seek. However, it is recognised that the identification of birth parents to the adult adoptee may be a sensitive issue. It should be dealt with by agreement between the parties. The wide range of views and cultures is recognised.

<sup>317</sup> Reported by New Zealand at the 2005 Special Commission.

<sup>318</sup> See Explanatory Report, *supra*, note 1, para. 506.

<sup>319</sup> *Ibid.*, para. 507.

<sup>320</sup> See, for example, the Philippines (Inter-Country Adoption Act of 1995 (RA 8043), Art. II, Section 4 (b)), which states that the Inter-country Adoption Board shall collect, maintain and preserve confidential information about the child and the adoptive parents; Italy, (Law 184 of 4 May 1983 as amended by Law 476 of 31 December 1998, Art. 37(2)), the Commission for Inter-country Adoption shall "keep any information they have acquired concerning the origins of the child, the identity of his / her biological parents and his / her medical history, together with that of his / her biological parents" [translation by Permanent Bureau].

<sup>321</sup> See, for example, Bulgaria (Ordinance No 3 on the Conditions and Procedure for giving Consent for the Adoption of a Person of Bulgarian Nationality by a Foreigner, 16 September 2003, Art. 35), states that all files shall be preserved for a period of ten years as from the date on which they were set up, and then shall be submitted to the Public Records Office; United States of America (Federal Register, Vol. 68, No 178, 15 September 2003, p. 54119), the Department of State and the Department of Homeland Security have to maintain Convention records for 75 years.

570. As more and more adoptees search for their biological families, and more and more biological parents seek information on the whereabouts of their adopted children it is important to have long-term policies and procedures for the preservation of information.<sup>322</sup>

571. For the conservation of and access to adoption information, it is possible that evolving technologies could be used for copying and preserving records. Consideration should be given to assisting Central Authorities to acquire the adequate technical resources for the collection and preservation of information.<sup>323</sup>

### 9.1.1 *Child's right to information*

572. It is a well-accepted view that a child should have a right to obtain information about his or her origins. The child's right to know his or her parents is provided for in Article 7(1) of the *Convention on the Rights of the Child*. However, this right must be balanced against the right of birth parents not to have their identity disclosed to the child who is relinquished for adoption. For example, in some countries an unmarried mother who had consented to the adoption might be later harmed by the disclosure of her past. Therefore, Article 30 does sanction some restrictions to the right of the child to have information, as access is only "in so far as is permitted by the law of that State."<sup>324</sup> Furthermore, States of origin are permitted to withhold identifying information from the report on the child in accordance with Article 16(2).

573. There is a distinction to be made between information about the birth parents and the disclosure of their identity. Information about the birth parents can be revealed without disclosing their identity or infringing their right to privacy. Such information, for example, about the age, health and social circumstances of the birth parents, may be essential for the adoptive family to have a better understanding of any potential future problems concerning the child's health, development and physical and psychological well-being. Information would not be made public, but only supplied to the adopted child and the adoptive parents. In many countries, the disclosure of information is based on the mutual consent of the adult adopted child and the birth parents.

### 9.1.2 *Access to records*

574. Access to records is handled in many different ways by States. Some receiving States allow unrestricted access for children who have reached the age of majority.<sup>325</sup> In some Federal States, the law relating to access to records is the law of the province, territory or state where the records are held.<sup>326</sup> Some countries of origin recognise access to information about origins as a protected constitutional right of the child.<sup>327</sup>

<sup>322</sup> At the 2005 Special Commission, EurAdopt-Nordic Adoption Council tabled their paper, "Origin and Personal History of Adoptees – Principles for Search, Knowledge and Reunion". It examines the question from two perspectives: first, distinguishing between the right to know / obtain information and the right to access / reunion; second, the importance of timing for both receiving information and for reunion (Work. Doc. No 5).

<sup>323</sup> Chile has an "origin programme" in which a receiving State can contact the Central Authority in Chile to request assistance for the adoptee to trace his / her origins in Chile. Active assistance is provided, including searching for the birth mother and, where appropriate, preparing for a meeting of the mother and child, see <www.sename.cl >.

<sup>324</sup> See Explanatory Report, *supra*, note 1, para. 512.

<sup>325</sup> See, for example, Belgium (Civil Code, Arts 45.1 & 2); Germany (Federal Civil Status Act *PSStG*, Section 61), in Germany children from 16 years can access the records; Netherlands (Act concerning the placement of foreign children with a view to adoption, Arts 17 b to 17 f); Norway (Act of February 1986, No 8 Relating to Adoption, Chapter 2, section 12); Spain (2007 Law on Intercountry Adoption, Art. 12); United Kingdom (Adoption Act 1976, as amended by the Adoption and Children Act 2002, Art. 60).

<sup>326</sup> See, for example, United States of America (Federal Register, Vol. 68, No 178, 15 September 2003, p. 54104, para. 96.42(c)), which establishes that "The agency or person preserves and discloses information in its custody about the adoptee's origin, social history, and birth parents' identity in accordance with applicable State law".

<sup>327</sup> See, for example, Brazil (Constitution 1988, Title II: Fundamental Rights and Guarantees, Chapter 1: Individual and Collective Rights and Duties, Art. 5 (X and XIV)) which grants as a fundamental right the inviolability of privacy, full access to information contained in the official record for the clarification of situations of personal interest.

575. States should ensure that laws and procedures for the preservation of and access to information about an adopted child are included in their measures to implement the Convention.

### 9.1.3 Data protection

576. While Article 30 acknowledges the right of the child to discover his or her origins under certain circumstances, it is necessary to limit the possibility of misuse of personal data which is disclosed during the adoption process. Consequently, the Convention establishes minimum safeguards by prescribing that the information on the child and the prospective adoptive parents should only be used for the purposes for which it was gathered or transmitted.<sup>328</sup> These obligations and safeguards are also given emphasis through the requirements of Article 9 a) namely that Central Authorities shall take all appropriate measures to “collect, preserve and exchange information about the situation of the child and the prospective adoptive parents, so far as is necessary to complete the adoption.”

577. Article 31 does not, however, prevent the information from being used in a general sense, without reference to specific individuals, in the compilation of statistics or as examples arising from intercountry adoptions.

578. States should ensure that their implementing measures contain safeguards to preserve the confidentiality of information about the adoptive parents and the child.<sup>329</sup>

## 9.2 Post-adoption services

579. The Convention imposes an obligation on Central Authorities to promote counselling and post-adoption services.<sup>330</sup> The nature and extent of these services is not specified, but States must take all appropriate measures to promote them. This should be interpreted as meaning that States must do everything within their powers and resources to carry out the obligation. In a practical sense, it is difficult to see how a Contracting State can promote these services without taking steps to also provide the services, or to ensure they are provided. The words of Article 9 c) were chosen carefully to ensure that the Central Authority had a responsibility to “take all appropriate measures to promote counselling and post-adoption services” but was not itself directly responsible for providing those services (some States would lack the resources and qualified staff to do so).

580. The Explanatory Report elaborates on the reasons for this provision in the Convention. The words on post-adoption services were added at the suggestion of some origin countries “because of the importance of post-adoption services to ensure the child’s adjustment into his or her new home or environment, and successful outcome of the adoption [...] the Convention should promote the social and cultural protection of the adopted children, and make, through the Central Authorities, a conscious effort to see that they were not only protected, but also integrated into their new environment.”<sup>331</sup>

581. Receiving States in particular should make a serious commitment to ensuring that post-adoption services are provided in their States. The need for better post-adoption services for families who struggle with problems too difficult for them to manage without help from professionals has been frequently raised,<sup>332</sup> in particular, when problems concern

<sup>328</sup> See Explanatory Report, *supra*, note 1, para. 521.

<sup>329</sup> See, for example, Bulgaria (Family Code Art. 67 a) (SG 63/2003)), which states that the Agency for Social Protection and the Ministry of Justice shall take the necessary organisation and technical measures to protect the personal data in the registers which they keep, in accordance with the requirements of the Law on Protection of Personal Data and the Law on Protection of Classified Information; Philippines (Inter-Country Adoption Act of 1995 (RA 8043), Art. II, Section 6j), which states that the Board shall take appropriate measures to ensure confidentiality of the records of the child, the natural parents and adoptive parents at all times.

<sup>330</sup> Art. 9 c).

<sup>331</sup> See Explanatory Report, *supra*, note 1, para. 235.

<sup>332</sup> See the Report of the 2005 Special Commission, *supra*, note 15, para. 160.

children whose lives were especially traumatic before the adoption. It has also been shown that providing a legal basis for the service, by itself, was ineffective in guaranteeing the service when insufficient importance was attached to the service and inadequate resources were allocated.<sup>333</sup>

582. It is evident that there needs to be a connection and a continuity between the pre-adoption preparation and the post-adoption support. In effect, the necessary support for the adoptive parents throughout the adoption process is justifiable when they may be considered, *de facto*, as central partners in the protection of children.

### **9.2.1 Counselling**

583. The Convention recognises the importance of counselling for children as well as birth parents and adoptive parents. In Articles 4 and 5, counselling “as necessary” is mandatory as a pre-adoption requirement. In that context counselling is discussed further, in Chapter 6.1.3 (Voluntary relinquishment), Chapter 7.4.2 (Preparation of prospective adoptive parents) and Chapter 7.2.11 (Transfer of child to receiving State) of this Guide.

584. Counselling may also be necessary as a post-adoption service, to assist a child adjust to his or her new environment. Counselling may be especially important in situations where a child is having adjustment difficulties and the parents need help in coping with the situation. The importance of professional expertise in intercountry adoption counselling is emphasised. If resources or funds are put into post-adoption services including counselling, serious problems for the child may be prevented. Future savings in the costs, time and resources of professionals are also achieved by treating problems before they become serious.<sup>334</sup>

### **9.2.2 Links with country of origin**

585. Post-adoption services should also include measures to assist adopted children preserve their cultural links with their country of origin, and assist adoptive parents to recognise the value and importance of such links for the child’s future development. These measures may include the promotion of cultural events about the country of origin and social events with other adoptive parent groups, as well as travel opportunities to the country of origin with other adoptive families. Where appropriate and permitted, there could be a sharing of information and contacts between the family of origin and the adoptive family.

586. Other services may include assistance to the older child in searching for and gaining access to information in the sending or receiving country, and advice on tracing family members in the country of origin. Chile has such a programme (see footnote 323).

### **9.2.3 Service providers**

587. States may provide post-adoption services through social service personnel,<sup>335</sup> or accredited bodies that also approve parents to adopt. Some States include this provision of

<sup>333</sup> Reported at 2005 Special Commission by ChildONEurope, an institutional network of National Observatories on Childhood appointed by the national ministries of the Intergovernmental Group *L’Europe de L’Enfance*. Furthermore, in January 2006 ChildONEurope published a report on National and Intercountry Adoption based on a collection of statistics and comparative research survey on national and international adoptions in Europe. The survey examined the legislative basis for post adoption services, which countries provide the services, and who provided them. In September 2007 they published the “Guidelines on Post-adoption Services”. Available at < [www.childoneurope.org](http://www.childoneurope.org) >, under “Activities”.

<sup>334</sup> Netherlands, Foundation Adoption Services (*Stitching Adoptievoorzieningen*), Video Interaction Guidance.

<sup>335</sup> See, for example, Italy (Law 184 of 4 May 1983 as amended by Law 476 of 31 December 1998, Art. 34 (2)) “From the time of the child’s entry to Italy and for at least one year, the social services of the local authorities and the accredited bodies shall, at the request of the interested persons, assist the foster family, the adoptive parents and the child in order to facilitate the child’s integration into the family and society” [translation by Permanent Bureau].

services as a requirement for accreditation.<sup>336</sup> Services may include counselling and support immediately after adoption, information on the adjustment and needs of adoptees over their lifetime, and information on search and reunion issues for adoptees who wish to discover their origins.<sup>337</sup>

588. It has been suggested that the minimum requirements for post-adoption services may include: the connection of knowledge and experience; research on the problems of adult adoptees; access to inexpensive qualified counselling for parents and children; education of social workers, therapists, doctors, nurses, teachers and others who are likely to deal with intercountry adoptees; assistance in the search for family; and access to files.<sup>338</sup>

589. Post-adoption services are almost always performed by receiving States, although in search and reunion cases, States of origin may also wish to establish services for adult adoptees. The State of origin may also have to provide support services to the biological parents who have relinquished their child for adoption.

### 9.3 Post-adoption reports to States of origin<sup>339</sup>

590. During the adoption process and prior to its completion, there is an obligation on the Central Authorities of both sending and receiving States to keep each other informed as to the progress of the adoption. The Central Authority of the receiving State must report on the progress of a probationary placement if the child has been transferred to the receiving State during the probationary period.<sup>340</sup>

591. After the adoption is completed, there is an obligation on the Central Authorities to provide each other with general evaluation reports about experiences with intercountry adoption. A Central Authority is also required to take all appropriate measures in so far as is permitted by the law of their State, to reply “to justified requests from other Central Authorities or public authorities for information about a particular adoption situation.”<sup>341</sup>

592. While the matter of supplying post-adoption reports on individual children at regular intervals and for a fixed period is not regulated by the Convention, in some States of origin the law requires that reports on the child be sent from the receiving country for a number of years. Many countries require adoptive parents and / or accredited bodies to file post-adoption reports for a period of one to two years.<sup>342</sup> In some countries, reports are requested up to the age of majority.<sup>343</sup> In practice, however, States may find it difficult to enforce such a requirement. Nevertheless, these legal requirements should be respected by the prospective

<sup>336</sup> See, for example, Finland (Adoption Decree 508/1997, Section 10(1)(8)) which states that the provider shall monitor, together with the provider of adoption counselling, the success of the placement. See also the response of Canada (British Columbia) to question No 6(a) and (c) of the 2005 Questionnaire.

<sup>337</sup> See, for example, S. Armstrong and T. Ormerod, *Intermediary Services in Post Adoption Reunion: A resource and training guide for counsellors assisting in family reunion*, The Benevolent Society Post Adoption Resource Centre, Sydney, 2005; A. Young, *Adoption in New South Wales*, The Benevolent Society Post Adoption Resource Centre, Section 9, Sydney see < www.bensoc.org.au >.

<sup>338</sup> International Korean Adoptee Associations (IKAA), “Suggestions for Specification of Post Adoption Services According to Art. 9 c) of the Hague Convention of 29 May 1993”, Work. Doc. No 7 for the 2005 Special Commission.

<sup>339</sup> This subject was extensively debated again at the 2005 Special Commission. See paras 149-161 of the Report of the meeting, *supra*, note 15.

<sup>340</sup> Art. 20.

<sup>341</sup> Art. 9 e).

<sup>342</sup> See, for example, Bolivia, post-adoption reports are sent every six months for a period of two years (1999 Children and Adolescents' Code, Art. 89); and the responses to question No 4(j) of the 2005 Questionnaire, among others: Cyprus, post placement reports are sent at six month intervals for two years after the adoption and are forwarded to the Central Authorities of the country of origin; Latvia, “[i]n accordance with Art. 39 of the Regulations, the orphans' court of a domicile of an adopter shall regularly ascertain care and supervision of a child in a family two years after adoption has been approved”; Lithuania, the “Adoption Service requires that 2 years after adoption post-placement reports have to be sent 2 times per year. Following 2 years – 1 time per year and later at the request of [the] Adoption Service.”

<sup>343</sup> Some countries like Ethiopia and Kazakhstan require reports until the age of majority. See also the response of Sri Lanka to question No 4(j) of the 2005 Questionnaire, according to which “it is a legal requirement that adoptive parents have to forward progress reports of the child to the Commissioner of Probation Child Care until the child reaches the age of 10 years”.

adoptive parents and the authorities in the receiving State where they have been stated as a condition of the entrustment of the child. In this respect, the provision of post-adoption reports cannot merely be regarded as a moral obligation. The inclusion of this requirement in the practical co-operation agreements or arrangements between Convention countries also highlights its importance to the States of origin.

593. At the same time, the State of origin should examine its need for such reports and the use it makes of them. At best they may provide feedback or confirmation that the decision taken for intercountry adoption was indeed in the child's best interests and the child is growing up "in a family environment and in an atmosphere of happiness, love and understanding."<sup>344</sup> At worst, these reports may be filed away and never read.

594. Similarly, mandatory, long-term post-adoption reports may not necessarily be in the best interest of the individual child. In particular, children who have attachment disorders, bonding issues, or fears about being returned to the country of origin may have psychological concerns about participating in repeated evaluations by non-family members.

595. At the 2005 Special Commission, the States of origin presented their reasons for needing post-adoption reports, including:

- improving domestic public opinion on international adoption, which is sometimes perceived as a national failure;
- better preparation of children for adoption, as well as prospective adoptive parents; and
- to determine with which States the intercountry adoptions are most successful.

596. It was noted that the reports provide a sense of reassurance to Central Authorities and communities in States of origin that intercountry adoption is an appropriate solution for some children, and the Convention process provides some safeguards. They highlighted that this information is important for Central Authorities of receiving States in explaining to prospective adoptive parents the reasons that certain States of origin need post-adoption reports.

597. Experts from receiving States, for their part, explained that certain legal reporting requirements imposed by States of origin on adoptive parents create a heavy burden on the latter as well as on the Central Authorities of the receiving States who are asked to enforce the requirements. The view of receiving States was not a desire to prohibit post-adoption reporting, but simply limiting the period of reporting time to one or two years in order to achieve a fair balance. The receiving country should discuss with adoptive parents during the preparation stage the reasons that many countries need such reports as it is important for the adoptive parents to know. Preparation of the reports provides an opportunity to discuss the progress of the adoption with the parents (and possibly the child).

598. Receiving States have indicated that the right to privacy of the parents is fundamental in their countries and Central Authorities cannot interfere in the private lives of families and do not have the power to oblige the adoptive parents to provide reports. However, this position is difficult to maintain if the post-adoption reporting requirements of the State of origin are well known in the receiving State, and the adoptive parents have agreed to provide such reports as a condition of the adoption. As the Convention is silent on this question, no clear rules can be applied, but as a matter of good practice and good co-operation, the Central Authorities, accredited bodies or competent authorities of the receiving States themselves, or the adoptive families, should submit the post-adoption reports to the countries of origin in accordance with their requirements, and within a reasonable time.

599. It is noted that the protection of the child after an adoption has taken place is not the

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<sup>344</sup> See the Preamble to the Convention, para. 1.

responsibility of the State of origin, but rather of the receiving State, which must be trusted to carry out this duty. As an issue of non-discrimination between a child adopted nationally and one adopted internationally, the amount of supervision and reporting should be comparable in both situations. Post-adoption reports must be distinguished from post-adoption monitoring, as the reports are but one of many methods of monitoring. The difference between supervisory and supportive monitoring is also noted. On the other hand, if Contracting States ensure that the proper precautions are taken in the pre-adoption phase, through better preparation and selection of suitable adoptive parents, and better information on adoptable children, the need for post-adoption reports would decrease.

600. At the 2005 Special Commission, it was concluded that there are three important issues: (1) intercountry adoption must be in the best interests of the child; (2) a balance must be struck between the control over adoptions and the respect for privacy; and (3) legislative constraints exist in receiving States and States of origin. As these legislative requirements cannot be ignored, a compromise was needed, based on mutual trust.

601. A recommendation was made on post-adoption reporting to reflect the compromise that was needed in this matter. It states as follows:

*“The Special Commission recommends to receiving States to encourage compliance with post-adoption reporting requirements of States of origin; a model form might be developed for this purpose. Similarly, the Special Commission recommends to States of origin to limit the period in which they require post-adoption reporting in recognition of the mutual confidence which provides the framework for co-operation under the Convention.”<sup>345</sup>*

#### 9.4 Breakdown or disruption of the adoption

602. It is a regrettable fact that not all placements or adoptions are successful, although the prospects of failure are reduced where there has been professional assessment of the suitability of the prospective adoptive parents, they have received thorough preparation for the adoption, the matching of the child and the family is undertaken by experienced social workers, and supportive post-adoption services have been provided.

603. The Convention provides procedures to deal with the breakdown of placements when the child has been transferred to the receiving country prior to the completion of the adoption. Co-operation is needed between the authorities of both sending and receiving countries to manage the situation. The Convention does not provide any rules in relation to the breakdown of completed adoptions.

604. Article 21 deals with breakdown of placements. In the situation covered by Article 21, the placement has broken down before the adoption has been completed in the receiving State. Article 21 applies when the child has been entrusted to the prospective adoptive parents by the State of origin and where the child has left the State of origin and has travelled to the receiving country. When it becomes apparent that the continued placement is not in the child’s best interests, the Central Authority of the receiving State must terminate the placement and put the child in temporary care. The Central Authority must then arrange another placement with a view to adoption, in consultation with the Central Authority of the State of origin. Only as a last resort will the child be returned to the State of origin.

605. Depending on the age and maturity of the child, he or she must be consulted and, where appropriate, his or her consent obtained in relation to measures to be taken following a breakdown in the placement.<sup>346</sup>

606. In fulfilling this requirement, States often grant the responsibility to supervise

<sup>345</sup> Recommendation No 18. In order to comply with this, see, for example, Spain (2007 Law on Intercountry Adoption, Art. 11).

<sup>346</sup> Art. 21(2).

placements to social service personnel or accredited bodies. States should ensure that proper mechanisms are in place for such bodies or individuals to immediately transmit notice of the breakdown to the Central Authority for communication to the country of origin.<sup>347</sup>

607. Article 21(1) *a*) allows the child to be placed in temporary care. In some States such care would be provided by a foster family or a new prospective adoptive family would be found by accredited bodies.<sup>348</sup> In other cases, the temporary care would be found by the child welfare authorities of the State.<sup>349</sup>

608. The implementing measures for the Convention should establish clear procedures for handling disrupted or failed placements. Article 21(1) *b*) requires that a new placement be “arranged without delay” and that a new adoption be done “in consultation with the Central Authority of the State of origin.” Therefore, although the primary responsibilities rest with the receiving State in these cases, States of origin must also develop a procedure to respond to such cases.

609. Returning the child to the State of origin should only be done in rare cases, and only after “all measures to find alternative care in the receiving State having been exhausted and any prolonged stay of the child in that State no longer being for his or her welfare and interests.”<sup>350</sup>

610. The Convention does not expressly provide procedures for the breakdown of completed adoptions. The child, being fully integrated into the adoptive family, will be protected in the same way as any other child in the receiving country. This means that the child will have the benefit of the measures of care and protection available to all children generally in the country where he / she now has his / her habitual residence.

611. As noted in Chapter 9.3, the protection of the child after an adoption has taken place is not the responsibility of the State of origin, but rather of the receiving State, which must be trusted to carry out this duty. It should be clearly understood that when a breakdown occurs after the completion of the adoption, the competent authorities of the receiving State are directly responsible for taking effective measures to provide a new and appropriate placement for the adopted child to ensure the best interests of the child. As a matter of good co-operation, if the Central Authority becomes aware of the breakdown of the completed adoption, it should inform the Central Authority of the State of origin. It is noted that the adoption, at the point of breakdown, will have become a matter for child protection services, and the Central Authority may no longer be involved with or informed of such developments.

612. Post-adoption services will be the subject of a future volume of the Guide to Good Practice. Comprehensive information on this subject may be found in the Guidelines on Post-Adoption Services, prepared by ChildONEurope.<sup>351</sup>

<sup>347</sup> See, for example, the response of New Zealand to question No 7(4) of the 2005 Questionnaire: “There have been two placement disruptions, one in-family adoption where the child returned to the country of origin to other family members. The second child will be re-placed within New Zealand in consultation with the country of origin”.

<sup>348</sup> See, for example, United States of America (Federal Register, Vol. 68, No 178, 15 September 2003, p. 54108, §96.50(d)).

<sup>349</sup> See, for example, the responses of Cyprus and Malta to question No 7(4) of the 2005 Questionnaire: the Social Welfare Services in Cyprus and the Maltese Social Services Sector in Malta.

<sup>350</sup> See Explanatory Report, *supra*, note 1, para. 371. According to the responses to question No 7(4) of the 2005 Questionnaire, in Chile, Estonia and New Zealand, there have been cases where children returned to their countries of origin. According to the response of Switzerland, the return of children to their countries of origin is very rare.

<sup>351</sup> See “Guidelines on Post-adoption Services”, *supra*, note 333.

## CHAPTER 10 – PREVENTING ABUSES OF THE CONVENTION

613. The general principles of the Convention relating to the protection of the child's best interests and prevention of abduction, sale and trafficking in children were discussed in Chapter 2 of this Guide. The main purpose of the Convention is to ensure that intercountry adoptions take place in the best interests of children, and specific measures to achieve this purpose are emphasised throughout this Guide. Specific measures to combat the criminal aspects of abduction, sale and trafficking in children are, however, beyond the scope of the Convention and of this Guide, and should be dealt with by national and international criminal law. The ratification and implementation of the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* is relevant in this regard.

614. This Chapter attempts to identify known areas of abuse or bad practice which could be addressed in implementing measures.

### 10.1 Preventing improper financial gain and corruption

615. Some aspects of this issue are dealt with in detail in Chapter 5: Regulating the Costs of Intercountry Adoption. The general principles are stated at Chapter 2.2.4 and the Central Authority's role in preventing improper financial gain is discussed in Chapter 4.2.1. This Chapter attempts to bring together some of the strategies to prevent improper financial gain. There is inevitably some overlap with measures proposed in Chapter 5.

#### 10.1.1 Strategies to prevent improper financial gain

616. Some strategies include:

- 10.1.1.1 Transparency in costs
- 10.1.1.2 Effective regulation and supervision of bodies and persons
- 10.1.1.3 Penalties should be legally enforceable and enforced
- 10.1.1.4 Regulation of fees
- 10.1.1.5 Post-adoption survey of adoptive parents
- 10.1.1.6 Prohibition on private and independent adoptions

##### 10.1.1.1 Transparency in costs

617. There is general support for the principle that achieving transparency in costs and fees would be a significant step towards preventing improper financial gain.<sup>352</sup> The problem is that when costs and fees are unregulated there is potential for abuse. Emphasis should be given to encouraging co-operation between States of origin and receiving States to have an exchange of information about costs and fees charged. There must also be transparency between receiving States about their own costs and not just pressure on countries of origin to be open and transparent. Countries should clearly identify who may charge fees, and for which services. This will help clarify who should be involved in the adoption process and who should not.

618. For example, one country of origin which does not impose any costs for intercountry

<sup>352</sup> For example, in the 2005 Special Commission. See Report, *supra*, note 15, paras 169-171.

adoption reported that a European accredited body charged exorbitant fees for an adoption. This country of origin was firmly committed to eliminating such excessive charging, and had revoked the accreditation of various bodies because of complaints made, and now requested that reports of costs actually charged be available to all parties.

619. It is implicit in the Convention that the fees and charges imposed by accredited bodies must be made known to the authority competent to supervise the accredited body and review its accreditation. Even if the accredited body's costs are transparent, some say that it is impossible to control other costs such as payments sought by intermediaries. However, some control over such costs could be exercised by accredited bodies and agencies by dealing only with respected and reputable intermediaries. The legislation of certain countries requires that any contracts between parties, including intermediaries, have to be deposited with the Central Authorities.

### *10.1.1.2 Effective regulation and supervision of bodies and persons*

620. The Convention provides a legal basis for the elimination of improper financial gain in the intercountry adoption process, it being well known that the financial aspects of intercountry adoption can be open to abuse.<sup>353</sup> Although many adoption bodies maintain high professional and ethical standards, others do not. In order to strengthen the regulatory framework of intercountry adoption, countries should include in their implementing legislation, provisions which will ensure that there is effective regulation and supervision of accredited bodies and approved (non-accredited) persons.

621. These matters will be expanded upon in a separate volume of the Guide to Good Practice on accreditation. The matters have already been touched upon in other parts of this Guide, in particular, in Chapter 4.3.2 (Standards), 4.3.3 (Criteria for accreditation), and 4.3.4 (Supervision and review of accredited bodies).

### *10.1.1.3 Penalties should be legally enforceable and enforced*

622. Penalties for improper financial gain must be included in the implementing legislation if they are to be effective. Contracting States should also ensure that the penalties are enforced against those individuals who seek improper financial gains from intercountry adoption.

623. Penalties may include:

- a warning, with an extended period of financial control and, in grave cases, suspension or withdrawal of accreditation;<sup>354</sup>
- imprisonment: from 8 days<sup>355</sup> to 12 years;<sup>356</sup>
- a fine ranging from some hundred / thousand Euros<sup>357</sup> to USD 250,000;<sup>358</sup>
- criminal sanctions;<sup>359</sup>

<sup>353</sup> See, for example, I. Lammerant, M. Hofstetter, *Adoption: at what cost? For an ethical responsibility of receiving countries in international adoptions*, Terre des hommes, Lausanne, Suisse, 2007, pp. 15-16 ; D. Smolin, "Child laundering: How the intercountry adoption system legitimizes and incentivizes the practices of buying, trafficking, kidnapping and stealing children", *The Wayne Law Review*, Vol. 52(1), Spring 2006, pp. 113-200.

<sup>354</sup> See Norway, response to Questionnaire 2005, question 11(1).

<sup>355</sup> Luxembourg, Penal Code, Art. 367-2.

<sup>356</sup> Latvia, Response to Questionnaire 2005, question No 11(6). Other examples are: France : 6 months to 2 years (Penal Code, Art. 227-12); USA: not more than 5 years (Intercountry Adoption Act, Section 404); Romania: from 2 to 7 years (Law No 273/2004, Art. 70).

<sup>357</sup> See response to Questionnaire 2005, question No 11(6) : Austria: 2,200 €. Other examples are: France: 7,500 to 30,000 € (Penal Code, Art. 227-12); Luxembourg : 251 to € 10,000 (Penal Code, Art. 367-2).

<sup>358</sup> USA (Intercountry Adoption Act, Section 404).

- confiscation of the proceeds obtained from punishable trafficking in children, by court order of forfeiture;<sup>360</sup>
- suspension of activities and prohibition to work on intercountry adoption in the country, either permanently or for a number of years;<sup>361</sup>
- confiscation of property;<sup>362</sup>
- deprivation of certain rights.<sup>363</sup>

#### 10.1.1.4 Regulation of fees

624. In some countries, adoption fees are set according to a legal scale, and therefore have the force of law.<sup>364</sup> A legal scale of fees provides complete transparency in costs for all parties.

#### 10.1.1.5 Post-adoption survey of adoptive parents

625. It may be possible for some Central Authorities to conduct an anonymous post-adoption survey of adoptive parents – a survey in which the adoptive parents do not disclose their identity. This survey could elicit helpful and candid information about the adoption process and the actual costs paid by those parents. Abuses in the process, unauthorised and unreasonable payments, and other unethical practices could be uncovered.

#### 10.1.1.6 Prohibition on private and independent adoptions

626. It has been stated in this Guide that purely private intercountry adoptions (adoptions arranged between the adoptive parents and the biological parents) are not consistent with the Convention (Chapter 8.6.6). Similarly, independent adoptions (where prospective adoptive parents are approved by their Central Authority or accredited body and then travel to a country of origin to find a child) which are not regulated or supervised by Central Authorities in the two countries concerned, are not consistent with the procedures of the Convention.

627. Contracting States should take steps to eliminate these forms of adoption which undermine the safeguards established by the Convention.<sup>365</sup> The concerns about such adoptions are discussed in some detail in Chapter 8.6.6 (concerning private adoptions), Chapter 7.2.5 (“Matching” child and family), Chapter 7.4.5 (Receipt of application in the State of origin) and Chapter 7.4.10 (Travel to the State of origin).

<sup>359</sup> See responses to Questionnaire 2005, question No 11(1) : USA (Intercountry Adoption Act, Section 404); Czech Republic and the Netherlands.

<sup>360</sup> See the response to question No 11(1) of the Questionnaire 2005 of Germany (Criminal Code, Section 73 *et seq.*).

<sup>361</sup> Brazil (Decree 5.491 of 18 July 2005 about National and Foreign Accredited Bodies, Art. 21).

<sup>362</sup> Latvia, Response to Questionnaire 2005, question No 11(1).

<sup>363</sup> Romania (Law No 273/2004, Art. 70).

<sup>364</sup> See, for example, Australia (New South Wales) Adoption Act 2000, Section 200, Fees and charges, where the head of the department must notify in the Government Gazette (a weekly publication of government information) the amount of fees payable; Philippines, fees are provided for by the Inter-Country Adoption Act of 1995 (RA 8043) (Art. III Section 13) and the Amended Implementing Rules and Regulations on Inter-Country Adoption (Sections 29 and 40). Furthermore, the web page of the Central Authority has a specific page on fees, available at < [www.icab.gov.ph](http://www.icab.gov.ph) >; Switzerland, the website of its Central Authority has also a specific page on fees, available at < [www.adoption.admin.ch](http://www.adoption.admin.ch) >.

<sup>365</sup> Norway and Italy have prohibited such adoptions.

## 10.2 Co-operation to prevent abuses

628. Receiving States must ensure that they only accredit bodies with the highest ethical and professional standards in adoption, and that they give proper force and effect to the Convention principles and safeguards regulating the adoption process: for example, Imposing sanctions for improper financial gain; ensuring prospective adoptive parents go through a proper process of selection, preparation and counselling. States of origin for their part should do their utmost to protect the child's interests before, during and after the intercountry adoption process. They also have the burden of combating illegal and improper practices in their country, whether or not those practices arise from the unethical practices of foreign accredited bodies or authorised persons operating in the country. Co-operation from the accrediting country is essential in this regard.

629. Some practices have been identified which seek to avoid the Convention's safeguards. These include:

- children moved to a third country, not Party to the Convention;
- children moved to the receiving country as "tourists";
- parent of origin moved to the receiving country e.g., to give birth to a child;
- in-family adoptions made for the purpose of exploiting the labour of the children;
- national adoptions by citizens of the country of origin living abroad (see also Chapter 8.4: Habitual Residence and Nationality);

630. Co-operation between States is necessary to address these practices.

631. States should also consider the scenarios in Annex 3 ("Creating Effective Procedures – Practical Examples"). Those scenarios illustrate how national child protection systems might minimise abuses. The importance of co-operation between States to prevent abuses is also emphasised.

### 10.2.1 Unethical or illegal practices

632. Unethical practices exist, and if they are ignored they can be a breeding ground for illegal practices. For example, birth mothers travel abroad to a receiving State to give birth for an arranged adoption. This situation may not be covered by the Convention and is a source of concern.

633. In practice, many States have penalties in their laws to deal with breaches of the Convention. However, illegal practices may only come to light after the child has left the country.

634. Other illegal or unethical practices include falsification of documents, soliciting children, and insufficient efforts at the local adoption level to look for a national solution before considering intercountry adoption.

## 10.3 Application of Convention principles to non-Convention countries

635. It is generally accepted that States Party to the Convention should extend the application of its principles to non-Convention adoptions. In 2000, the Special Commission meeting reached the following conclusion:

*“Recognising that the Convention of 1993 is founded on universally accepted principles and that States Parties are “convinced of the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children”, the Special Commission recommends that States Parties, as far as practicable, apply the standards and safeguards of the Convention to the arrangements for intercountry adoption which they make in respect of non-Contracting States. States Parties should also encourage such States without delay to take all necessary steps, possibly including the enactment of legislation and the creation of a Central Authority, so as to enable them to accede to or ratify the Convention.”<sup>366</sup>*

636. The Special Commission of 2005 supported the continued application of this recommendation, and it was affirmed in a new recommendation.<sup>367</sup>

637. One situation in which Convention principles are not applied adequately is when a receiving State permits its habitual residents to make direct or private adoptions from a non-Convention country while prohibiting such adoptions from Convention countries. Such adoptions do not respect the guarantees provided by Article 29 of the 1993 Hague Convention, as the adopters sometimes bargain directly with the child’s parents or carer in the country of origin. States of origin and receiving States which offer fewer guarantees to children when they are the subject of an intercountry adoption from a non-Convention country may also be acting in contradiction of the non discrimination principle in Article 26(2) of the Convention.

#### **10.4 Preventing undue pressure on States of origin**

638. Undue pressure on States of origin may occur in a number of situations. For example:

- too many files sent by a receiving country, either for the number of adoptable children or for the resources of the Central Authority to manage;
- pressure is then exerted by the receiving country to process the files or process them more quickly;
- pressure by accredited bodies for authorisation to operate in the State of origin;
- too many accredited bodies operating in the State of origin;
- pressure through representations by government officials of the receiving country, on behalf of individual applicants;
- pressure to supply children in response to excessive numbers of applications, applications from unsuitable applicants or applications for categories of children who are not available for adoption in specific countries;
- pressure to respond to large numbers of accredited bodies from one country who contact a single State of origin Central Authority for the same or similar information,<sup>368</sup>
- parents who travel to the State of origin and contact the authorities there to expedite their adoption.

<sup>366</sup> See Report of the 2000 Special Commission, *supra*, note 14, Recommendation No 11.

<sup>367</sup> Recommendation No 19.

<sup>368</sup> See “A Discussion Paper on Accreditation Issues”, *supra*, note 136.

639. These matters need to be dealt with through co-operation between the appropriate authorities in Contracting States. Central Authorities and States should also work together to prevent pressure on countries of origin by foreign accredited bodies seeking authorisation. A receiving State should not grant authorisation to an accredited body for the provision of services in a country of origin where those services are not needed, and States of origin should be consulted as to their needs so that numbers of bodies operating there may be controlled. States of origin should report incidents of pressure to the accrediting country. Authorisation to operate in the country of origin can be refused or withdrawn by both countries, or by the country of origin alone, when accredited bodies or persons act improperly or if the number of accredited bodies exceeds the requirements of the country of origin.

640. Central Authorities of receiving countries and countries of origin should work co-operatively to ensure the number of accredited bodies is linked to the number and category of children adoptable through intercountry adoption. States of origin should first identify the number of accredited bodies needed in their country in relation to the number of adoptable children, before giving authorisation. If receiving countries are informed of the numbers needed, they should then consider adjusting or limiting the number of bodies accredited for particular countries of origin.

641. Receiving States could assist in limiting unreasonable pressures on States of origin by informing prospective adopters about the realities of contemporary intercountry adoption and the difficulties that may arise. A certain number of unrealistic applications could thus be avoided.

## PART III: ANNEXES

<b>Annex 1</b>	<b>Detailed pathway to signature and ratification/accession</b>
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## **ANNEX 1**

### **DETAILED PATHWAY TO SIGNATURE AND RATIFICATION / ACCESSION**

# 1. DETAILED PATHWAY TO SIGNATURE AND RATIFICATION / ACCESSION<sup>369</sup>

## 1.1 Understanding the terminology of the 1993 Hague Convention

- It is possible for a State to become a Party to the 1993 Hague Convention without being a Member of the Hague Conference.
- By *signing* the 1993 Convention, a State expresses, in principle, its intention to become a Party to the Convention. However, signature does not oblige a State to ratify the Convention.<sup>370</sup> According to the terms of the 1993 Convention, signing and ratifying is only possible for (1) those States that were Members of the Hague Conference during the Session in which the Convention was adopted (29 May 1993); and (2) those non-Member States that participated in the Diplomatic Session.<sup>371</sup>
- *Signature followed by ratification*: After signature, ratification requires the Convention to be approved through the appropriate national procedures. It establishes on the international plane a State's consent to be legally bound by the Convention.
- *Accession*: Other States wishing to become a Party to the 1993 Convention may accede.<sup>372</sup> Accession is the process by which a State which was not a Member State of the Hague Conference at the time the Convention was adopted (on 29 May 1993), or did not participate in the Diplomatic Session, may nevertheless become a full Party to the Convention and be bound by its terms.
- If an objection to an accession is raised by any other Contracting State within a six-month period, the Convention will not operate between the acceding State and the objecting State until such time as that objection is withdrawn.<sup>373</sup>
- The entering into force of the Convention requires the deposit by a State of an instrument of ratification, acceptance, approval or accession with the depositary of the Hague Conventions, the Ministry of Foreign Affairs of the Kingdom of the Netherlands.<sup>374</sup>
- All States that have signed and ratified or that have acceded to the Convention are considered Contracting States to the Convention. Contracting States to the Convention do not receive different treatment according to the manner in which they became parties. Once the Convention is in force between two States the obligations are the same whether the States concerned ratified or acceded to the Convention.

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<sup>369</sup> This Annex is based partly on the Guide to Good Practice under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part II: Implementing Measures*.

<sup>370</sup> Art. 18 of the *Vienna Convention on the Law of Treaties* obliges States not to defeat the object and purpose of the treaty prior to its entry into force, or until that State has made clear its intention not to become a Party to the Convention.

<sup>371</sup> Art. 43(1).

<sup>372</sup> Art. 44. States that cannot sign and ratify may only accede.

<sup>373</sup> Art. 44(3).

<sup>374</sup> Art. 46; see also Art. 43(2) and Art. 44(2).

## **1.2 Steps prior to signing the Convention**

### **1.2.1 *Contemplating becoming a Party***

- Consult with the Permanent Bureau of the Hague Conference and other States Parties on the benefits of the Convention.
- Consider whether any existing domestic laws create obstacles or impediments to the implementation and operation of the Convention.
- Federal States may wish to consider how best to achieve co-ordination and consistent practices among the various provinces, territories or states.
- Consult with different stakeholders, government and non-government agencies to obtain support and approval to ratify or accede to the Convention.
- Read the Guide No 1: “Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: Guide to Good Practice”.
- Seek assistance through the Intercountry Adoption Technical Assistance Programme (ICATAP) of the Hague Conference on Private International Law (see Section 2.8 of Annex 2).

## **1.3 Steps to take before ratification of, or accession to, the Convention**

### **1.3.1 *Assessment of current situation***

States should undertake a detailed assessment of their current operation before making determinations on how to set up a Central Authority, whether or not to use accredited bodies or non-accredited persons, and how to structure the child protection and adoption policies.

The assessment should include information on any and all available aid programmes for family preservation and reunification, current national adoption programmes or child care services, and current adoption practices.

An assessment should also include an analysis of how each step of the current process is funded and where institutions, bodies or other persons now perform functions affected by the Convention.

### **1.3.2 *Development of implementation plan***

After an assessment is done, States may be able to determine which changes or actions need to be taken immediately to protect children, which can be implemented upon entry into force, and which should be developed over a period of time.

These decisions will inform choices about who to designate as the Central Authority, and what resources to allocate to the Central Authority. In addition, States will determine which functions, if any, can be performed by accredited bodies or approved (non-accredited) persons and how the proposed system will be funded.

Further information on developing an implementation plan can be found in Annex 2.

## 1.4 Entry into force

Entry into force occurs on the first day of the month following three months after the instrument of ratification or accession is deposited with the depositary which is the Ministry of Foreign Affairs of the Netherlands.<sup>375</sup>

States must notify the Permanent Bureau of the designation of the Central Authority and any bodies or persons which have been accredited or approved to perform functions under the Convention.<sup>376</sup>

States should ensure that all necessary procedures are in place and functional before the Convention enters into force. All interested parties, and the public, should be made aware of the new procedures and policies enacted under the Convention.

After the Convention enters into force, States should continue to provide appropriate training and education to those persons responsible for implementing the Convention (e.g. Central Authorities, judges, lawyers, locating agencies, social service agencies). States are also encouraged to continually monitor the application and functioning of the Convention and respond to any implementation difficulties that may arise.

## 1.5 Methods of implementation

The Convention will be brought into force within the domestic legal order of each State Party in accordance with that State's legal and constitutional requirements. Experience has shown that even in those countries where treaties are regarded as self-executing, additional implementing measures are extremely useful in translating the Convention's provisions into practice. For instance, either through implementing legislation or other measures, it may be particularly useful to designate any competent authorities, to determine if and how bodies will be accredited to perform Central Authority functions, to lay down procedures for determining that intercountry adoption is in the child's best interests, to provide protective mechanisms against the abduction, sale of, or traffic in children and to secure any appropriate consents.

In some States the Convention will enter into force in domestic law, without any intermediate step, once ratification or accession takes effect (*i.e.*, monist States). In other States the Convention will need to be incorporated in domestic law by legislation (*i.e.*, dualist States).<sup>377</sup> In the case of dualist States, different kinds of implementing legislation can be contemplated. Some constitutions contain both dualist and monist elements.<sup>378</sup>

Where the provisions of the Convention are being transformed into national law or where a legislative act is necessary to give effect to a treaty, there is a risk that the international and domestic mechanisms may not be synchronised. In the dualist system, whether based on incorporation or transformation, a divergence may occur: the treaty is ratified but the necessary legislation is not enacted; or the legislation is passed, but ratification does not occur.<sup>379</sup> As a result, care should be taken to ensure that the two processes are brought into line.

### 1.5.1 Monist approach (automatic incorporation)

Under the constitutional provisions of some monist States, once an international treaty has been concluded in accordance with the constitution, approved by competent State organs

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<sup>375</sup> Art. 46. For comments on the relationship between Art. 46(2) and Art. 44(2), see Chapter 8.3.2 of this Guide.

<sup>376</sup> Art. 13.

<sup>377</sup> See H. van Loon, "The Hague Conventions on Private International Law", in F.G. Jacobs and S. Roberts, *The Effect of Treaties in Domestic Law*, Sweet & Maxwell, London, 1987, pp. 221-43.

<sup>378</sup> See A. Aust, *Modern Treaty Law and Practice*, Cambridge University Press, 2000, p. 145.

<sup>379</sup> See H. van Loon, *supra* note 377, p.230.

and has entered into force at the international level for that State, it will, without the need for intervening legislation, become part of domestic law. Generally, when legislation is not needed, such treaties are described as “self-executing”.<sup>380</sup> In some monist States further measures (legislative, administrative or fiscal) may be needed for the treaty to have full effect in domestic law.<sup>381</sup>

In many monist States following ratification or accession, the 1993 Convention has effect in domestic law immediately on the date of entry into force at the international level.<sup>382</sup> It is applied directly by the judicial and administrative authorities and consequently can create rights and claims for private citizens.<sup>383</sup>

If this method is employed, States have a particular responsibility to ensure that those who are affected by, or who may have to apply the Convention, are made aware of the Convention’s contents, date of entry into force, reservations and designated Authorities. The failure to adopt specific legislation or rules, e.g., how to determine that a child is adoptable, has sometimes led to difficulties in effectively carrying the Convention into practice.<sup>384</sup>

### **1.5.2 Dualist approach (incorporation or transformation by legislation)**

Under the constitutional provisions of dualist States, an international treaty must be given effect by incorporating the rights and obligations set out in the treaty into domestic law through legislation. In this category, a statute may directly enact the provisions of the treaty by setting out the treaty as a schedule to the enacting legislation. A statute may also transform the treaty into domestic legislation by employing its own substantive provisions to give effect to the treaty without enacting the text of the treaty itself.<sup>385</sup>

When an international treaty is given effect by transformation through implementing legislation, the legislative provisions may be in accordance with, but not necessarily expressed in the same terms as, the Convention. The treaty provisions are thus used as a basis for drafting a new law or a set of rules to be applied within the Contracting State. Under this approach, the text of the treaty will not necessarily be found in a schedule to the act.

#### **1.5.2.1 Implications of the incorporation approach**

Where implementation by incorporating legislation is employed, setting out the text of the Convention in a schedule to an act, it will at the same time be possible to enact more specific provisions deemed necessary for the appropriate application of the treaty by domestic bodies or authorities. For example, such specific provisions may cover the designation of any competent authorities, the accreditation process for service providers, procedures for determining that a child is adoptable or that the prospective adopters are suited to adopt, and provisions for obtaining consent to adoption.

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<sup>380</sup> Aust, *supra* note 378, p.146.

<sup>381</sup> *Ibid.*

<sup>382</sup> *Ibid.* “Although there are many variations in how the monist approach is expressed in constitutions, three main features are common to most. First, although the constitution requires the treaty to have first been approved by parliament, there are exceptions for certain types of treaties or certain circumstances. Secondly, a distinction is made between treaties according to their nature or subject matter, some being regarded as being self-executing, others requiring legislation before they can have full effect in domestic law. Thirdly, a self-executing treaty may constitute supreme law and override any inconsistent domestic legislation, whether existing or future, though in some States where parliament is supreme later legislation can override a self-executing treaty.”

<sup>383</sup> See M. Savolainen, “The Hague Convention on Child Abduction of 1980 and Its Implementation in Finland”, *Nordic Journal of International Law*, Vol. 66, Kluwer, 1997, p. 122.

<sup>384</sup> See Aust, *supra* note 378, p. 157. “Under a monist system it may be many years after the treaty entered into force for a State that [...] a determination is made by a court deciding usually on application by a citizen, whether a provision is self-executing.”

<sup>385</sup> I. Brownlie, *Principles of Public International Law*, Clarendon Press, 1990, p. 48.

This method encourages an international approach; the incorporation of the actual text of the Convention as a schedule to the act enables direct reference to the articles of the Convention in their context and facilitates international consistency in interpretation of the Convention.

### ***1.5.2.2 Implications of the transformation approach***

While the use of established domestic structures and terminology may make the Convention rules more accessible to judges, lawyers and the parties, discrepancies between international and domestic law must be avoided. There are several issues requiring close attention if the Convention rules are reproduced in an internal transformation statute:

- Every effort should be made to ensure that the Convention will be capable of being interpreted within its international context.
- The carefully drafted provisions of the Convention should not be altered in such a way that the application of the domestic rule might lead to results which are incompatible with the provisions of the Convention.<sup>386</sup>
- All essential Convention provisions should be included in the domestic implementing legislation or in regulations; provisions not included will have no force in domestic law.
- Domestic provisions should be drafted in accordance with the objectives of the Convention. To this end, use of the Explanatory Report of the Convention is valuable.<sup>387</sup>

### ***1.5.3 A continuing process of implementation***

The successful operation of the 1993 Hague Convention requires that the Convention be consistently applied by all States Parties. The national and regional legal frameworks in which the Convention has to operate may require significant changes. Contracting States that have already implemented the Convention should continue to evaluate the operation of the Convention within their domestic systems. To this end, implementation should be seen as a continuing process of development and improvement and Contracting States should continue to consider ways in which to improve the functioning of the Convention, if appropriate, through modification or amendment of existing implementing measures.

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<sup>386</sup> See Savolainen, *supra* note 383, p. 123. See Art. 27 of the *Vienna Convention on the Law of Treaties*, stating that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”

<sup>387</sup> The Convention and the Explanatory Report are available in, *inter alia*, English, French and Spanish. See the website of the Hague Conference at <[www.hcch.net](http://www.hcch.net)> under “Intercountry Adoption Section” then “The Convention” and “Translations”.

## **ANNEX 2**

### **A POSSIBLE MODEL FOR AN IMPLEMENTATION PLAN**

## **2. A POSSIBLE MODEL FOR AN IMPLEMENTATION PLAN**

In the years since the acceptance of the Convention, States have experienced a wide range of implementation challenges. For example, it has been noted that some States have had difficulties implementing strong controls on the use of intermediaries or the acceptance of fees for services. Other States have experienced operational difficulties because of a lack of personnel or resources. Some States have stopped intercountry adoption entirely while endeavouring to develop a functioning child care and protection programme, only to find that such actions resulted in prolonged moratoria on services that may affect children already in care at the time of ratification or accession.

Equally troubling are concerns that implementation of the Convention in other countries has done little to protect children or improve practices or co-operation. In these countries, the concern is that the Convention has been applied in such a way to add a layer of respectability to a process that remains basically unchanged. While the basic principles of the Convention may be included in the law, in actual practice the protections of the Convention are not manifest. In some cases this may be due to lack of resources or enforcement capabilities. In other cases, it may be that long-standing practices, cultural considerations, or a history of failure to govern according to the rule of law may be involved. By many reports, the issue of corruption by both government officials and private practitioners and failure to enforce the provisions of the law remain deeply problematic in respect to the Convention.

States may, however, have the desire to implement an effective child care and protection system, but may lack the immediate resources and ability to do so. If such a situation exists, States are encouraged to develop a progressive plan which outlines detailed steps designed to achieve effective implementation over a set period of time.

Once a State has undertaken an internal assessment of its current adoption and child care system, and reviewed the requirements and principles of the Convention, a progressive implementation plan can be developed.

States in need of assistance in preparing to join the Convention, or Contracting States wishing to improve their procedures, should consider seeking assistance from the Permanent Bureau through the Intercountry Adoption Technical Assistance Programme (ICATAP) of the Hague Conference on Private International Law (see Section 2.8 of this Annex).

### **2.1 Developing an implementation plan**

The following steps are involved in developing an implementation plan:

- Develop assessment strategy, mechanism and tools
- Assess internal situation
- Review internal assessment results
- Determine whether emergency measures are needed
- Develop long-term plan
- Develop short-term plan
- Produce a written implementation plan
- Allocate resources to put the plan into operation

- Manage further ongoing assessment or control

## 2.2 Evaluation tools and strategies

States considering ratification of or accession to the Convention should undertake an assessment of relevant aspects of the current child welfare protection and adoption situation in their country. Undertaking such an assessment involves consideration of:

- who currently provides child welfare protection and adoption services in their State;
- how those services are structured;
- how current services are funded;
- whether all functions required by the Convention are currently being performed;
- whether current laws or procedures adequately protect the integrity of the system.

Evaluation of the appropriate options in restructuring the system to meet Convention standards requires detailed knowledge of four key areas:

- principles and requirements of the Convention;
- each step of a child's journey through the child care system and the needs and concerns associated with each stage;
- child protection needs;
- tools and strategies for effective implementation.

It should be emphasised that creating a system that complies fully with Convention principles may not be immediately possible. States should certainly do everything in their power to implement as many of the protections and principles as possible, as soon as it is feasible to do so.

The question of whether existing procedures for intercountry adoption should be halted pending implementation of the Convention will depend on particular countries. There is no reason why, as a general principle, this should occur except where it would clearly otherwise be impossible to meet Convention requirements. The following evaluation process may assist States in determining which changes are immediately necessary to protect children, which can be implemented in the short-term, and which changes will require long-term modification plans. The diagram following Chapter 1.7 of the Guide and at Section 2.9 of this Annex indicates the steps of the recommended process for developing an implementation plan.

## 2.3 Using the internal assessment

The results of the internal assessment of a State's adoption system are a key component of the development of an implementation plan. The assessment should determine:

- whether an essential function is currently being performed;
- if not, how it will be performed in future;

#### **Annex 2-4**

- who is performing or will perform the function;
- how the function is being or will be funded.

States are encouraged to review the results of the assessment carefully. In doing so, it may be helpful to chart the progress of a child through the child care system as it is currently operated. Doing so will enable States to see where critical steps in the process may be missing.

States may also chart what fees are currently being paid and to whom. When reviewing fee structures, States are encouraged to contact other Contracting States for information, and / or search on the Internet and in the adoption literature to determine the amount of fees being charged to adoptive parents in receiving countries, and for adoption services in countries of origin. Doing so may highlight a problem of “unofficial fees” and help clarify whether professional fees being charged are consistent with professional fees charged for similar work in comparable countries.

The assessment should establish the extent to which child care functions are being funded through intercountry adoption fees. States may find that fees paid by accredited bodies actually support facilities, family preservation or child health programmes in States of origin. Therefore, States of origin may need to consider how the sudden withdrawal of fees could affect the welfare of children.

### **2.4 Emergency measures**

Emergency measures are those needed to immediately protect vulnerable children, especially against the risk of abduction or child trafficking. If the results of the internal assessment indicate concerns in this area, it may be appropriate to institute protective measures even before the Convention enters into force.

Such measures could include DNA verification of a parent’s identity, independent investigations of abandoned children, or other protections discussed in Chapters 2 and 6 of the Guide.

If emergency measures are necessary, it would be prudent to fully inform governments of other States, accredited bodies or approved (non-accredited) persons, and adoptive parents.

### **2.5 Long-term reform**

In order to develop procedures that will be instituted upon ratification or accession to the Convention, it is first necessary to create an overall plan with a concrete long-term goal. To do so, it is vital that States first plan how their child care and adoption system will ideally operate in the future. Long-range planning is the key to successful implementation of interim measures.

To develop a long-term implementation plan, States should:

- review each stage of the process;
- determine how each stage will ultimately function;
- determine staff and resource requirements;
- review current situation;
- compare current system with proposed system;

- determine overall time needed to achieve change;
- determine concrete steps that can be taken to meet goals;
- determine timeline and process for each stage.

### ***2.5.1 Review and determination of each stage of the process***

States are encouraged to review each stage outlined in Chapters 6 and 7 and determine how they can structure a child care and protection system that will fulfil Convention requirements and provide for the best interests of children.

States may wish to develop a diagram of a child's journey through the proposed system as well. Doing so may illuminate areas where the proposed process is repetitive or unclear, or where it provides opportunity for malfeasance.

### ***2.5.2 Determine staff and resource requirements***

Once each stage of the process is planned, an overall statement of needs should be developed which outlines the cumulative staffing and financial resources that will be required to adequately operate the proposed child care and protection system.

After a draft statement of needs is prepared, States will be encouraged to review key operating principles to determine if adequate resources are allocated.

### ***2.5.3 Comparison with current operation***

Once the proposed system is planned, States need to compare the current operating system with the proposed system to determine what changes need to be instituted. In doing so, States should also review how the current allocated resources and personnel could be used in the proposed system.

### ***2.5.4 Determine total length of time to achieve systemic change***

Once States determine what changes are needed and how many additional resources will be needed to institute those changes, States should determine an overall length of time needed to achieve those goals.

For some States, an extended amount of time may be necessary to actually design and implement programmes to provide family preservation services, national adoption options or other services. For other States, the main issue of implementation may be a lack of financial resources to implement a system that is not dependent upon intercountry adoption fees.

### ***2.5.5 Determine concrete, progressive steps to reach goal***

After the overall time frame is determined, States should plan a systematic implementation of such reforms. It may be helpful for States to outline the steps necessary to reform each stage of the process, and then to chart those changes on an overall grid designed to strategically implement gradual reform of the entire system.

These steps constitute the details of interim arrangements designed to achieve progressive reform. Such details will be informative to other States, accredited bodies and approved (non-accredited) persons, and birth and adoptive families.

### **2.5.6 Determine timeline and process of interim arrangements**

Once each step of the reform process is outlined, States should determine the order in which changes will be implemented and the projected timeline for doing so. The result of this process will be the overall implementation plan, delineated in progressive steps to achieve an ultimate goal.

When reviewing the order and timeline of necessary changes, States should pay particular attention to what steps can be instituted immediately, and which are the most necessary to ensure the protection of children and families.

Once the immediate changes are identified, States will need to consider the procedural changes that will be needed in the short term to meet those goals.

## **2.6 Short-term / interim arrangements**

When planning for immediate or short-term arrangements, States must also consider the attendant procedural changes that will accompany each stage of the long-term reform process.

### **2.6.1 Immediate changes**

States are strongly encouraged to consider dividing procedural changes into two categories: those for adoption cases already in process at the time of entry into force (or other changes) and those for new cases beginning after entry into force.

In most cases, States do not apply new procedures to those cases already in process. States must, however, clearly indicate which cases will be considered “in process” when the Convention enters into force. States are encouraged to:

- announce a specific date on which cases must be filed to be considered “in process”;
- determine clearly what is meant by “in process”, perhaps by determining what documents must have been filed, or which actions must have occurred;
- communicate those decisions officially to other States and to concerned parties.

Procedural changes which will commence upon entry into force should also be clearly announced to all concerned. States are urged to clearly specify:

- what the new procedures are;
- how accredited bodies, approved (non-accredited) persons and families will fulfil these procedures;
- fees for the new procedures, if any;
- who can be contacted for assistance with new procedures.

### **2.6.2 Future interim arrangements**

Other interim arrangements that will be instituted in the period of time between entry into force and the accomplishment of the proposed long-term system should also be handled in the same manner. States should develop clear procedures to effect each change, and clearly

communicate those procedures to other States and interested parties well in advance of the changes.

## **2.7 Writing the formal implementation plan**

Once the implementation plan is determined, States are encouraged to write an official document outlining the proposed plan. This document should contain details of the proposed system, the steps necessary to achieve that goal, and the necessary resources that will make such a goal possible.

Doing so serves several purposes. It clearly shows other Contracting States that a comprehensive plan has been developed. This may be especially helpful if other States have concerns that may lead to their objecting to an accession. In addition, outlining the necessary resources may allow other States the opportunity to provide financial or technical assistance in meeting those goals.

## **2.8 The Intercountry Adoption Technical Assistance Programme (ICATAP)**

In order for the 1993 Hague Convention to operate successfully, it is essential that the initial steps necessary for its effective implementation within each Contracting State be carefully planned. The Convention places heavy burdens of responsibility on States of origin, and implementation and technical assistance may be particularly vital in countries that have few resources available for this purpose.

The Intercountry Adoption Technical Assistance Programme (ICATAP), first proposed in the 2002–2003 Supplementary Budget of the Hague Conference, was designed to provide assistance directly to the governments of certain States which are planning ratification of, or accession to, the Convention, or which have ratified or acceded but are experiencing difficulties with implementation of the Convention.

The Intercountry Adoption Technical Assistance Programme is operated directly by the Permanent Bureau, utilising staff and resources dedicated to this project, as well as international consultants and experts.

There has been large interest in the programme, and the legal tools, frameworks and information developed during the pilot phase.

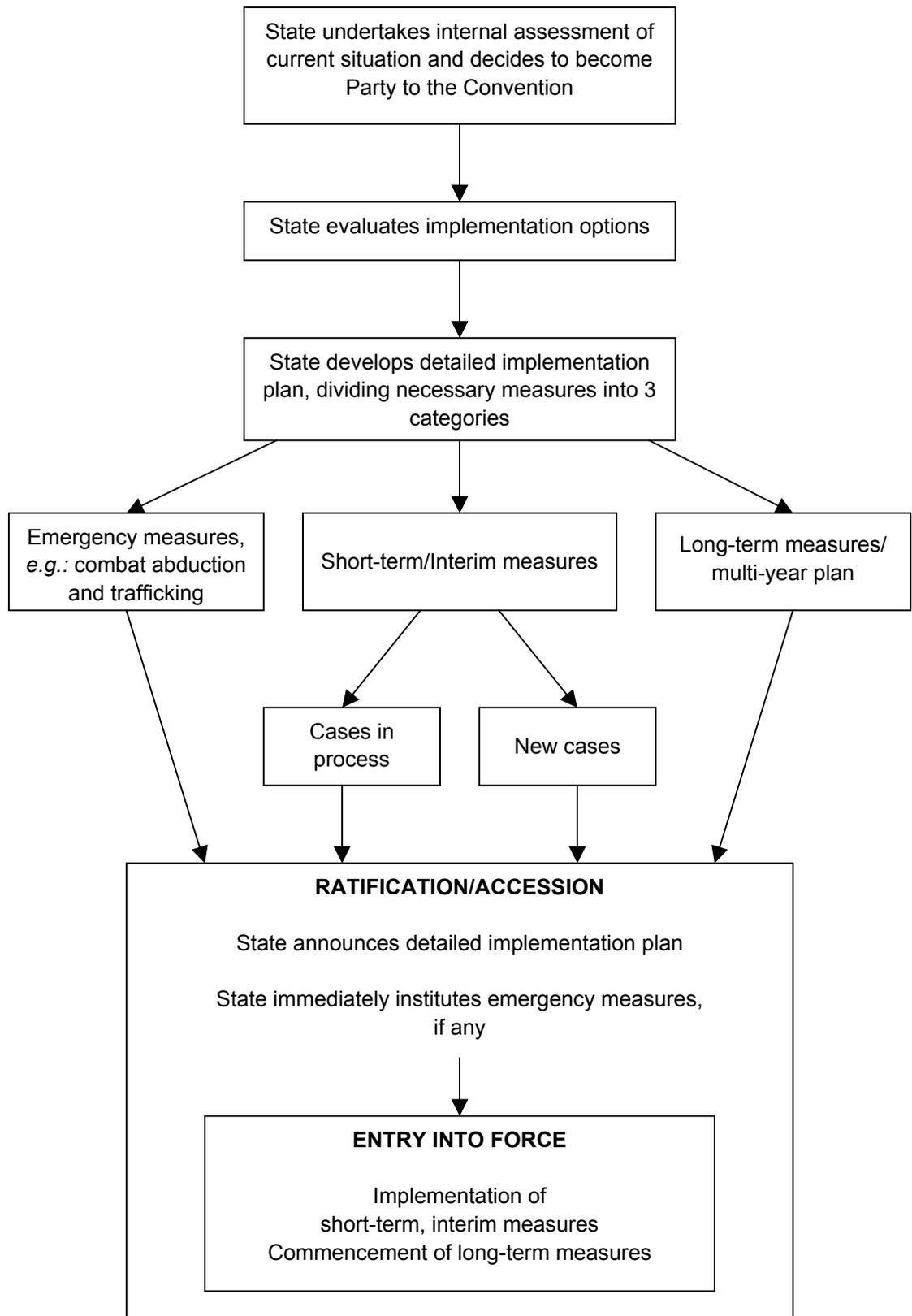
In order to continue the programme, ensure continuity, and allow for developments, additional funding is needed for the Programme Co-ordinator and the administrative assistant, and programme running costs. If the ICATAP is to expand to address the needs of more States, additional costs per country will also be needed as well as additional staff.

In ensuring that national implementing measures effectively implement and comply with the procedures and standards set by the Hague Convention, the ICATAP team developed a number of resources to assist national authorities with the implementation process. These tools may be adapted and applied to different national situations. The “Hague” approach takes full account of the need to integrate the intercountry adoption process within the broader child care and protection system.<sup>388</sup>

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<sup>388</sup> For more information on this programme, please refer to the website of the Hague Conference < [www.hcch.net](http://www.hcch.net) > under “Intercountry Adoption Programme” and “Intercountry Adoption Technical Assistance Programme”.

## 2.9 Diagram of the pathway to signature and ratification / accession



**ANNEX 3**

**CREATING EFFECTIVE PROCEDURES**

**PRACTICAL EXAMPLES**

### **3. CREATING EFFECTIVE PROCEDURES – PRACTICAL EXAMPLES**

The review of the stages of the child care, protection and adoption system in Chapters 6 and 7 of the Guide defined the numerous functions that must be completed before and during the adoption process.

A key to effective implementation is the use of well-constructed procedures. In most States, administrative bodies develop procedures after the enactment of the law. Experience has shown that it is often these administrative procedures that determine whether an adoption system will operate effectively. States have to carefully consider every procedural decision with a view to determining how it will affect the functioning of every other aspect of the system.

To assist States in undertaking this task, the following examples have been developed to illustrate the impact that individual procedures can have on the entire adoption system. The hypothetical situations outlined in each scenario are drawn from real examples in countries around the world. The problems and options discussed in this Chapter are not meant to be inclusive of every decision that will be made in the construction of an implementation plan. It is hoped however that these examples will provide States with the tools necessary to conduct further analysis of their adoption system.

#### **3.1 Country: Alpha**

##### **3.1.1 *The situation***

The country of Alpha is recovering from a serious famine that affected its residents for almost four years. As a result of the famine, thousands of families are unable to adequately care for their many children. Many parents died, leaving their families without support. Children were relinquished in large numbers to institutions. Alpha currently has over 50,000 children in orphanages. The majority of children are over the age of 2, however several hundred infants have been relinquished in the last year.

Until the famine, intercountry adoptions from Alpha were rare. The high number of children needing services attracted the attention of many international organisations. Some of these moved into specific locations and began offering humanitarian assistance to local residents with permission from local authorities. After determining that some children had no homes to return to, a small number of intercountry adoptions were allowed, mostly for older children with medical needs. In the wake of this development, dozens of other organisations requested permission to work in Alpha placing children for adoption. Some organisations offered to build new facilities to house children. Large numbers of applications for adoption are now being received.

Alpha, wanting to ensure that children are being placed abroad properly, acceded to the Convention after reviewing the requirements. Noting that most of the functions of the Central Authority could be delegated, and having few resources with which to implement the Convention, the following decisions were made:

The Ministry of Foreign Affairs was designated as the Central Authority. Its direct duties are:

- communicating with other Central Authorities regarding its new laws;
- establishing policies and accreditation standards;
- issuance of the certificate of conformity.

The Central Authority assigned the majority of the tasks under the Convention to competent authorities in each region, noting that these authorities were already overseeing institutions in their areas. The local authorities were authorised to a) accredit bodies performing adoption services, b) declare children adoptable, c) provide or supervise family preservation and adoption services, and d) authorise the operation of local orphanages.

The local authorities approved applications for bodies seeking accreditation after requesting a dossier of information to establish that they met the Convention requirements in Article 11. The bodies were also required to submit plans for family preservation services and the recruitment of national adoptive families. Having few qualified social service personnel in the local authorities, the tasks of receiving applications, matching children and families, and all required paperwork gathering were also delegated to accredited bodies.

The Central Authority could provide no funding to local authorities. Local authorities were allowed to set fees. Mindful, however, of the prohibition against improper financial gain, local authorities were advised to set fees for services at the lowest possible rate. Accreditation applications were to be submitted with 250 Euros. Required activities such as declaring children adoptable, approving passport applications and certifying documents were charged at the same rate as local services, ranging from 20–50 Euros each. Pleased by the new institutions being built around the country, the Central Authority agreed that it was appropriate for accredited bodies to charge fees that would cover the operating costs of the orphanages.

The local courts were required to confirm consent to adoption by the family of origin during a required court appearance and approve any match between child and adoptive family, foreign or domestic. Adoption fees were set at 100 Euros per adoption, payable to the local court. After the adoption was approved in the local court, the adoptive family reported to the office of the Central Authority, where a certificate of conformity was issued and a fee of 100 Euros was assessed to pay for the operation of the Central Authority.

Operations began smoothly, particularly in Region 1. Located close to the capital city, this Region received the most accreditation applications. However, wanting to limit the number of accredited bodies, the Region decided to choose three, including two that had already been operating aid programmes for many years. Both of these programmes were well established, providing families with financial assistance to feed their children, educational grants to help children attend school, and small business loans to single mothers who were supporting families. These programmes were run out of established regional orphanages with local staff. The other was a new agency, but planned programmes included the building of new orphanages with schools, playground facilities, and medical services.

Many families could not be reunited, and few local families considered adopting more children into their already large families. Over 300 children were placed for intercountry adoption from Region 1, mostly infants and young toddlers. As word spread about adoptions from Alpha, applications continued to pour in from around the world. However, the number of children entering the orphanages slowed as the economic conditions improved, and soon the orphanages had more applications for young infants and children than they had children available.

At first, the system functioned well. A year after implementation the Central Authority became concerned about two regions of the country, where a high number of children were being placed for intercountry adoption. A review of the situation revealed that virtually no national adoptions had taken place. Even more disconcerting was the revelation that the number of children entering institutions in these regions had not declined. Allegations of child trafficking and corruption had been raised.

An ensuing investigation revealed that the intended protections had not been realised and that significant problems had arisen.

The investigation found:

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- accredited bodies were using agents to solicit children directly from families of origin;
- families were being paid money in return for consent to adoption;
- little, if any, family preservation activity was being conducted even though documents reported it had been done;
- local accredited bodies had contracts with a network of accredited bodies in other countries to find children for families;
- accredited bodies sent photos and reports of “available children” before families were identified, encouraging a sharp rise in the number of applications, perpetuating the trafficking activities;
- local authorities were declaring children adoptable without respect for subsidiarity principles;
- families of origin were confirming in court that they had not been paid for their child;
- the local judge, in good faith, approved adoptions and sent them to the Central Authority who also reviewed the case file and then issued the certificate of conformity.

This scenario highlights the existence of several procedural and structural problems, including:

- accredited bodies had financial incentives to traffic in children;
- lack of separation of duties;
- poverty stricken families were vulnerable to exploitation;
- close relationship between accredited bodies and local officials with no official oversight;
- accredited entities operating with lax oversight procedures in both countries;
- lack of checks and balances, lack of mandatory reporting, and widespread conflict of interest.

### **3.1.2 The problems**

For various reasons, including a lack of financial resources, States may allow accredited bodies, non-accredited persons, or others, to perform functions related to family preservation, national adoptions or intercountry adoption. States may have programme requirements that stipulate that agencies must engage in humanitarian efforts or family preservation efforts but may not effectively monitor the results. When this occurs, services to families can be sporadic or ineffectual. This may be particularly true when those who are providing services have other interests that may conflict with family preservation goals.

In Alpha, the accredited bodies effectively controlled all of the functions from the time the child entered the child care and protection system through to intercountry adoption. They:

- determined when a child could be kept in or reintegrated into the family;
- obtained the written consent for adoption (later verified by the judge);
- sought a national adoptive placement; and
- arranged intercountry adoption placements.

The provision of such services costs money. Because Alpha provided no State resources for these programmes, the only source of income for these entities was intercountry adoption. Without proper oversight, this type of system is open to systemic abuse at the hands of those who might not have the best interests of children as their paramount concern.

Alpha's accredited bodies created contacts with accredited bodies in receiving countries who had also been delegated child matching and approval responsibilities by their Central Authorities. Neither Alpha nor the receiving country had strict guidelines or established procedures on such things as the use of Internet photo listings, the matching of children, and declaration of adoptability.

The result of this type of system is often a convoluted network of service providers that end up competing for children on behalf of adoptive parents – and which provide accredited bodies in a country of origin with strong financial incentives to traffic in children.

Investigators found that Alpha Region 1 had three accredited bodies, and each of those bodies worked with three accredited bodies in two other countries, for a total of 18 accredited bodies performing adoption services in one region. Two of Alpha's accredited bodies did things well, but one did not, and the system quickly became ineffective.

Accredited Body 3 (AB3) determined that it would place the pictures of children, particularly healthy infant children, on the Internet for viewing by adoptive families in the receiving country. This resulted in a rapid escalation of the number of adoption applications received from that country. AB3 quickly determined that while family preservation and national adoption efforts cost money, intercountry adoption resulted in a net gain of several thousand Euros. The more quickly they could move children through the various stages of the process, the more quickly they could be placed abroad. The resulting large amounts of cash allowed them to hire local residents as “child finders” who could offer families of origin money for their children, perhaps couched as payment of “expenses” for the adoption.

Poor economic conditions and few alternatives left families vulnerable to exploitation. In exchange for what they considered considerable sums of money, often enough to support their families for 2 years or more, they were willing to sign consents and verify with the judge that they had not received compensation for their consent.

Local officials, the only line of defense between illegal practices and the Central Authority, were also vulnerable to financial influences that could be offered to forestall the asking of questions.

### **3.1.3 Possible solutions**

#### **3.1.3.1 Solicitation / Coercion**

States could make the solicitation of children for adoption illegal. Doing so may allow States to curb this practice by prosecuting offenders. Some countries have added provisions to the adoption law which allow for criminal charges to be brought against those soliciting or buying children, or have included provisions in the country's criminal code.

Controls on inducement or compensation may be exercised by having the parent apply or consent directly to Central or Public Authorities. Doing so gives authorities direct contact with

families of origin, providing an opportunity to inquire about the reasons for consenting to an adoption and inducements.

States should not simply rely on such questions to conclude that no compensation has been made. Few birth parents admit to being paid any money during the course of an adoption, even though public statements about the practice of paying money to families are common. States may wish to include provisions in their law or procedures to allow for independent investigation of consent practices.

Article 29 of the Convention stipulates that there shall be no contact between the prospective adoptive parents and the child's parents or any other person who has care of the child until the requirements of Article 4 a) through 4 c) and Article 5 a) have been met unless the contact is in compliance with the conditions established by the competent authority of the State of origin. Therefore, States should ensure that adoptive parents are not matched with children prior to the declaration of adoptability and should include provisions in their law or implementing regulations to this effect.

### *3.1.3.2 Separation of duties / Conflicts of interest*

States may also wish to ensure that an independent entity controls the process of determining a child's adoptability. Some States may accomplish this by having a centralised office, rather than institutions or facilities, and refer families to available services, while retaining control of determining when families cannot be reunited or preserved and when a child is declared adoptable. Even with this provision, additional checks on the functioning should be maintained at other levels as well, to lessen the chances for official corruption. This could be accomplished by required periodic reports and reviews from other official offices.

If private adoption service providers are used to perform family preservation or national adoption functions, there is a strong need for clear, transparent requirements and parameters as well as policies for addressing conflicts of interest. In some countries, local authorities or courts may randomly assign children to orphanages, removing the incentive for solicitation of children from families of origin. Separation of duties may also be necessary to ensure that the entity which performs family preservation or national adoption efforts is not the same entity that benefits from intercountry adoption.

### *3.1.3.3 Adoptability*

States should have clear guidelines for determining adoptability, as well as an understanding of the Convention procedures prior to the matching of children and families.

### *3.1.3.4 Photo listings*

Internet "photo listings" have become popular tools in the recruitment of adoptive families. Displaying photos may be helpful in the placement of older and special needs children. Care should be taken, however, to regulate this practice to ensure that photos of healthy infant children are not used to attract adoptive families to a particular accredited body or facility.

In recent years, photo listings have been used to "bait" adoptive families into a particular programme. When the family travels to adopt the child they were assigned, they find that the child is not available and are presented with an alternative child. In some countries, it is believed that this tactic is used to recruit families before children are even identified. Then, when applications are received, children are "found" to match the criteria of the parents.

Regulations on these types of activities are most effective when both the country of origin and the receiving country regulate the practice. At the least, receiving countries should have

clear regulations which require their accredited bodies authorised to operate in a State of origin to follow the laws and procedures of that country. Receiving countries should also be aware of the ways in which their fee practices and oversight structure may affect the country of origin.

### *3.1.3.5 Preventing undue pressure on States of origin*

Receiving countries also bear a responsibility to prevent bad practices and implement the measures proposed in Chapter 10, especially those in Chapter 10.4 "Preventing undue pressures on States of origin". This comment should apply to all the country scenarios mentioned in this Annex.

## **3.2 Country: Delta**

### **3.2.1 The situation**

Delta, having witnessed the problems in Alpha and other countries, established the following processing procedures:

- Regional Offices to accept applications for assistance from families in need, declare a child adoptable, determine if placement for national adoption was available and declare a child available for intercountry adoption;
- abandoned children were subject to investigation to determine circumstances;
- Regional Offices assigned the children to orphanages randomly;
- family preservation efforts were available through, and paid for by, the Regional Offices from State funds;
- accredited bodies were asked to support directly the functioning of specific orphanages;
- once a child was matched with an adopting family abroad, the adoption was approved by Delta's Central Authority, which reviewed the documentation provided by the region and issued the certificate of conformity.

The establishment of the Regional Offices enabled the regions to refer families to resources available to them to assist in keeping their families intact. If a child was found abandoned, either at a hospital, police station or at an institution, the office would initiate a search for the child's family to see if preservation programmes could be utilised. If the family was found and could not be assisted in remaining intact, the office would be able to obtain the consents to the adoption.

The State made funds available for family preservation efforts, which provided added protections against the unnecessary relinquishment of children. In addition, the fact that children needing temporary care were assigned to an orphanage or other facility by the Regional office was intended to eliminate the risk that individual orphanages would solicit children for adoption.

Accredited bodies were specifically asked to provide support to individual orphanages and perform family preservation services in exchange for the privilege to conduct adoptions. They typically agreed, provided that they were allowed to form exclusive arrangements with the orphanages, barring other organisations from also providing services. Accredited bodies were only allowed to distribute information about available children to their overseas partners

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after a child was declared adoptable.

If a region declared the child adoptable, it would review applications for adoption from local adopting families to see if the child could be adopted locally. If not, the child would become available for intercountry adoption.

Even with the addition of safeguards, Delta began experiencing problems in its adoption system. Following allegations of impropriety, a review of its operation revealed the following problems:

- investigations into abandonments were often perfunctory;
- officials were accepting “expediting fees” to process paperwork for particular children and / or orphanages;
- lawyers were paying families to abandon children anonymously;
- children were being abducted for adoption.

Virtually all the problems in Delta were traced to one source: the Regional Offices responsible for performing the duties of family preservation and adoptability were seriously underfunded and understaffed.

### **3.2.2 The problems**

The Regional Offices were burdened by a lack of resources and a lack of staff. Due to such constraints, investigations to locate birth families of abandoned children were often perfunctory. The lack of resources in the Regional Offices also often led to long delays in having children declared adoptable, in providing documentary evidence of family preservation efforts, and in efforts to find national adoptive families.

As the Regional Office was solely responsible for these functions, they were susceptible to pressure from accredited bodies who had large numbers of children in their care. In general, the pressure resulted in the lack of adequate investigation, perfunctory family preservation efforts, limited national adoption efforts and an emphasis on simply providing the paperwork trail needed to document that these steps had occurred, rather than on the quality of each step.

In frustration that these steps were taking so long, some accredited bodies offered the Regional Offices “expediting fees” to move paperwork along faster. Rather than establishing a formal, transparent system for such fees, they were paid “under the table” and the amounts remained obscure. In addition, paperwork for those who refused to pay such fees stopped progressing at all - creating a system where such fees were actually required rather than possible. In time, such fees were also used to persuade officials to refer certain children to specific orphanages.

This atmosphere, unchecked, led to other difficulties. Realising that investigations were perfunctory, especially if the time frame to acquire paperwork showing it had been completed was significantly shortened through “expediting fees”, certain accredited bodies began again to use local agents to find children from families who were willing to abandon anonymously the child in exchange for payment.

In some cases, it was discovered that an abduction ring had been formed around the country to bring children to specific regions for “abandonment”. Families of origin who were seeking missing children had few resources and no central office which investigated alleged abductions, and were thus often unable to locate the child before adoption paperwork was processed.

### **3.2.3 Possible solutions**

#### **3.2.3.1 Adequate resources**

The solution that would eliminate the problems experienced by Delta is adequate funding of the Regional Offices, coupled with strong oversight from the Central Authority. A well-funded office would not be as susceptible to monetary pressures from accredited bodies. However, even if the office were well-funded, placing so much responsibility on one office often leads to considerable pressure from local entities. Therefore, States may wish to consider separating the duties between several offices, or requiring independent monitoring of the system by outside entities.

#### **3.2.3.2 Fee policies**

The problem of “expediting fees” is a common one around the world. At times, the system develops because of the pressure from entities to process paperwork faster. In some cases this system may merely be a reflection of the normal way of doing business in a particular country. It should be noted, however, that even if this practice is accepted in other industries, its use in relation to adoption can result in the failure of the State to meet its Convention obligations regarding subsidiarity and the best interests of the child.

Expediting fees for the actual processing of official paperwork may occur in a manner which is both legal and acceptable to most countries. For example, some countries allow higher fees to be paid to “fast-track” applications for a passport or other official document. However, those fees are transparent, and they are paid to the office itself and not to individual persons. In addition, the rate for such services is clearly posted and official receipts are offered. If employees are required to work additional hours to process expedited requests, they are paid established extra wages. The establishment of such a transparent system may help to eliminate abuses in this regard, particularly when a transparent system is coupled with civil or criminal penalties for misconduct on behalf of officials or those attempting to improperly influence official decisions.

#### **3.2.3.3 Abduction**

As noted in Chapter 6.1 of this Guide, a large number of abandonments can signal the possibility of abductions that are occurring for the purposes of adoption. Safeguards against these practices generally include adequate investigations of abandoned children. States may also want to consider whether the collection and analysis of statistical information from each province can be used as a safeguard against this and other activities. A review of such information by the Central Authority may show a pattern of abandonments in one particular area, or to one particular orphanage. Further, States may wish to ensure that local or regional authorities have a systematic way to investigate reports of abduction.

## **3.3 Country: Omega**

### **3.3.1 The situation**

In country Omega, the Central Authority determined that it would avoid the problems experienced by other countries by entrusting the sole responsibility for the referral of children for adoption abroad to the Central Authority itself. This decision was taken to curtail the “incentives” that accredited bodies could have for influencing the system, and to protect local and regional authorities from pressure to perform illegal acts.

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The operation of child care and protection institutions and family preservation and national adoption programmes was left to individual regions of the country. Regions were expected to operate such programmes from funds the State provided as an annual allocation for regional services. They were, however, allowed to accept donations from adoptive families to supplement the annual allotment. It was expected that doing so would allow the regions to offer more services to children in care.

The determination of a child's adoptability also remained at the local level, as local authorities were felt to be in the best position to determine when a local family could be assisted, and when such assistance was likely to be ineffectual. Omega believed its system would empower local and regional authorities to provide services to their residents.

If families could not be preserved, the local authorities would register the child on a national registry for adoption, taking care to first determine if a local family could provide an adoptive home. Only after the child was declined by three national families would the child be approved for intercountry adoption.

Once an intercountry adoption match was made by the Central Authority, the file would proceed to a judge who would review the file, approve the adoption, and finalise the process.

For the most part this system worked as planned. Accredited bodies and approved (non-accredited) persons, both local and foreign, had little direct cash incentive to introduce children into the system because the Central Authority determined when children were placed abroad. However, these provisions helped keep the number of available children low, and helped the country to place with foreign families most of the younger children who were available for adoption. Because of this, the local and regional authorities knew that children who were declared adoptable would likely be placed abroad, particularly if they were healthy.

Over time, three concerns were raised by other States and NGOs about Omega's system:

- donations paid by adoptive families did not seem to be used for children's programmes;
- children were not being offered to local adopting families;
- long delays in the court process meant children aged considerably during the wait.

### **3.3.2 The problems**

A review of the system revealed that the main weakness was that keeping children in families or in national adoptive homes required payments of subsidies. Therefore, the only option that did not cost the local region anything was intercountry adoption. Therefore, regions which placed more children abroad obtained more money for regional projects. Regions were also not required to demonstrate that such programmes actually benefited the children, nor were there requirements to keep adoption fees in a separate fund only to be used for children's projects. Therefore, it was found that some regions were failing to provide adequate services to families, and using the increased income from intercountry adoption to fund other types of programmes for the region.

The type of national registry used by Omega was also vulnerable because efforts were not made to ensure that the three families who had to "reject" the child were actually seriously considering adoption. No provisions were made for reporting on the national adoption efforts to the Central Authority.

The judicial review proved to be a significant issue, even though there was no discernable reason for judicial approval to be an extensive process. No investigations were actually

required in most cases. In some regions, it was reported that judges waited to approve adoptions until additional offers of payments were forthcoming. Other regions concluded that judges simply did not consider the approval of adoptions a priority. This, coupled with a lack of administrative requirements that specified a time frame for adjudication of the case, meant that cases languished for months.

### **3.3.3 Possible solutions**

#### **3.3.3.1 Adequate administrative controls**

In order for the subsidiarity principle to be effectively implemented, States should ensure that local, provincial or regional authorities do not suffer adverse financial effects for their efforts to place children with national adoptive families. Depending on levels of funding, there may be incentives for regions to move children into intercountry adoption faster. Small numbers of children in a system may result in accredited bodies and approved (non-accredited) persons attempting to influence decisions about a child's placement, particularly if there are no controls on the number of applications accepted in a country. Experience has shown that when demand exceeds supply, the likelihood of illegal activity increases.

While there may be reasons to separate financial decisions, i.e., fees, from placement decisions, States should ensure that adequate review mechanisms exist that will protect the integrity of the system. Periodic review of services rendered, money paid to regions and how those funds were used, and statistics on the numbers of children receiving each service in a region may be helpful in this regard.

#### **3.3.3.2 Child registries**

Omega utilised a registry system that requires that a certain number of national families be offered, and subsequently reject, the child for adoption, before the child can be offered for intercountry adoption. This type of system has developed as an alternative to a time-limited system (i.e., children would remain on a registry for 60 or 90 days) when a State may not actually make genuine national adoption efforts during that time frame.

On the other hand, it has been found that Omega's system can be manipulated by having local citizens who are not interested in adopting sign rejection statements on a child in order to free the child for intercountry adoption. Social service personnel also raise the significant concern that the practice of having families officially reject a child may cause the child psychological harm.

National registries are important tools in the centralisation of an adoption system. However, protections are necessary to ensure that they are not simply used as a symbol of subsidiarity without actual efforts to place children nationally. States may wish to require that actual efforts be substantiated before removing a child from a registry, or that controls are used to ensure that families rejecting a child are actually families approved to adopt nationally.

#### **3.3.3.3 "Child friendly" deadlines**

Many States experience significant delays with administrative and judicial processes. States may find it helpful to add specific time frames to their law, regulations or procedures. Such deadlines require that an official or judge act on an application within a certain amount of time, or report why action is not possible. Civil or administrative penalties for not doing so may be necessary to achieve the desired result. States should be aware of the need to provide adequate staffing and resources to meet such deadlines.

### **3.4 Country: Phi**

Throughout a long and troubled history of intercountry adoption, country Phi has changed its policies and procedures many times. After many reforms, the resultant system provides a comprehensive framework of policies designed to protect the best interests of children:

- the Central Authority randomly refers children to adoptive families;
- all adoption fees are paid to the Central Authority;
- the Central Authority provides annual funding for family and child programmes to every region of the country;
- regions are rewarded for national adoption efforts;
- employees of local, regional and national child care and protection offices are paid sufficient wages;
- both children and national adoptive families are registered in a central database;
- subsidies are provided to families for national adoption;
- Phi accepts adoption applications only for children already identified as being available for adoption;
- administrative controls provide oversight of each stage of the process.

### **3.5 Country: Theta**

Theta's child care and adoption programme provides a poignant example of the final challenge facing States that implement the Convention. Theta took steps to institute policies which sought to protect children and provide oversight:

- the use of paid intermediaries in the adoption procedure was disallowed;
- children were declared adoptable by a Central Office after efforts had been made to investigate the origin of the child;
- children were registered for 90 days to provide time for national adoption;
- national adoptive families were not charged fees;
- adoptive families were approved by an office separate from the one declaring children adoptable;
- reasonable fees were paid directly to Ministries.

In spite of these guidelines, Theta experienced enormous problems of child trafficking, abduction, improper financial gain, corruption and a lack of services to children and families. All problems could be traced to a single cause: while the system had been adequately constructed in theory, it did not actually exist in practice.

In reality, Theta's system was not funded, not monitored, and rarely used. The protections were a façade for a basic lack of infrastructure that made adequate child protection

impossible:

- intermediaries did function, with silent official co-operation;
- intermediaries determined adoptability;
- intermediaries matched children and families and presented completed paperwork for “rubber stamping”;
- intermediaries collected fees that were used to pay officials for necessary approvals;
- children were routinely solicited from families, who were paid to relinquish children.

In short, Theta’s policies existed only in their regulations. States wishing to protect children and families adequately and to meet Convention obligations effectively must be vigilant in instituting and enforcing the policies and procedures created.



**ANNEX 4**

**STRATEGIES TO ASSIST FAMILY PRESERVATION**

## 4. STRATEGIES TO ASSIST FAMILY PRESERVATION

The Guide recognises the importance of this question in the development of a national child care and protection system. However all the information necessary to develop such a system is beyond the scope of the Guide, and only a basic outline can be given here.

### 4.1 Keeping families intact

It should be a goal of all States to prevent children from needlessly entering the child care and protection system. In order to develop a strategy to prevent families from needing intervention services, States should consider the causes of family breakdown. It has been noted that poverty or financial hardship is the leading cause of family breakdown in many States. Other factors often complicate the situation, such as domestic violence, substance abuse and societal or cultural norms.<sup>389</sup>

Special attention should be paid to the presence of families or communities that may be particularly vulnerable to the risk of family disintegration or exploitation.<sup>390</sup> Ethnic minorities or indigenous communities may be more likely to experience financial hardship or discrimination. At times, they may enjoy fewer protections under the law or be particularly prone to maltreatment from local authorities. As a result, they may be vulnerable to abduction, solicitation, trafficking in children, or official corruption.

Poverty and hardship may make a family vulnerable to exploitation. If a family with several children is experiencing severe financial difficulties, the parents may consider relinquishing a child in return for financial payment.

For these reasons, family preservation efforts should focus on practical support programmes for families in crisis. Laws that provide rights to parents may not, by themselves, be sufficient. Experience has shown that the provision of material or financial assistance to families in need often produces the best results.

### 4.2 Family re-unification

Where possible, States should make efforts to reintegrate separated children into their families. Through the use of practical assistance programmes similar to those used to keep families together, families may regain stability and choose to retrieve their child from temporary care.<sup>391</sup>

If it is not possible to maintain a child in his or her family of birth, it may be possible to enable another family member to parent the child. This may be the most appropriate and preferable solution for many situations, especially those in which parents may have died or been disabled. Efforts to place children with the extended family should be performed carefully and with the best interests of each individual child as a paramount consideration.

The search for relatives to care for a child should not unnecessarily prolong institutional care for children. Child-friendly time frames are essential.

In developing its implementing measures, a Contracting State should consider what steps it will take to locate relatives and how much time will be allowed for this process. It is also necessary to consider whether the parents' views will be taken into account, including any objection to the extended family raising the child for reasons such as domestic violence or substance abuse.

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<sup>389</sup> See H. van Loon, *supra* note 377, p. 235.

<sup>390</sup> See, India; Gita Ramaswamy & Bhangya Bhukya, *The Lambadas: A Community Besieged*, Unicef, pp. 4-5 (2001).

<sup>391</sup> See, Haji Sayyid Bukenya, "Policy Workshop on Children and Promoting Strategies for Community Care of Vulnerable Children, The Uganda Experience", 2001, available from International Social Service, Geneva.

Contracting States should also ensure that persons involved in counselling parents about their placement preferences have the highest ethical standards and do not receive financial incentives to encourage placement with non-family members.

### 4.3 Developing family preservation programmes

The list below contains brief descriptions of the types of family preservation programmes utilised by some countries. This list is not exhaustive, and is meant only to encourage discussion about the types of programmes that could be offered. Details about the successful implementation of such programmes can be obtained from social service organisations.<sup>392</sup>

**Aid to low income families:** Income level and poverty guidelines are often used in determining eligibility for domestic assistance. States then pay a small subsidy amount to families with incomes below a certain level to assist in caring for their children.

**Counselling:** Counselling may be available to provide support or advice to a family needing to decide on a course of action. For example, a family may need assistance to decide if changes could be made in the current family situation which would enable them to keep their child or if options for family placement exist.

**Domestic Violence Assistance:** Programs addressing violence or physical abuse by a spouse, domestic partner or family member may take many forms including emergency shelter, counselling, and public information campaigns to raise awareness.

**Substance Abuse Assistance:** Programs to address overindulgence in and dependence on an addictive substance, especially alcohol or a narcotic drug, may take the form of addiction treatment, rehabilitation, prevention and mental health programmes.

**Crisis Pregnancy Services:** Outreach services may provide specific pregnancy, childbirth and postpartum educational support, free pregnancy testing, maternity and baby clothes, referrals, peer counselling, post-abortion help, as well as information about birth control, pregnancy symptoms, foetus development, and pregnancy options.

**Temporary Housing Assistance:** Financial assistance to secure temporary accommodation may be offered; State-sponsored public housing or emergency shelter may be available.

**Educational Funding:** Financial aid programmes, grants or loans may be available to assist with educational expenses.

**Temporary Food Provisions:** Temporary food assistance programmes provide food for low-income households through periodic emergency food distributions. Such programmes are intended to serve as a last resort for households in need of short-term, immediate food assistance.

**Medical / Rehabilitation Services:** Medical or social rehabilitative services may be provided to children and adults with disabilities or who are recovering from an illness.

**Small Business Loans / Business Development:** A business loan programme may be developed to provide indigent households with loans to begin small businesses that support families for years to come.

### 4.4 Provision of services

Once a State has identified services that it would like to offer to families, it has to determine which entity could and should deliver those services, what mechanisms will be utilised to do so, and how services will be funded.

It may be possible for a single governmental entity to provide family preservation and

<sup>392</sup> For example, the International Social Service, Geneva, Switzerland; see <[www.iss-ssi.org](http://www.iss-ssi.org)> (last consulted June 2008).

reunification services to families and to oversee a child's entry into care if necessary. Many States have child protection or child care services that are funded through government grants. In turn, the child protection department provides all the services needed by families in crisis, often preventing a child's entry into care.

To operate effectively, such programmes need ideally to be fully staffed and funded. Creating such a system is difficult at best, and requires sustained funding and governmental support. Many States find the creation of such a system beyond the immediate possibilities for their country. States may need to seek ways to institute immediately low-cost protective mechanisms and make use of interim measures while working on long-term reform.

#### **4.5 Utilising other resources**

Where there is no centrally operated programme, States may have other assistance programmes for certain segments of the population. Such programmes may be administered under departments of health, social care, economic development, or veterans affairs. Families in need can be referred to other programmes to obtain assistance. Such programmes may have to be expanded or modified but it may be possible to make them appropriate to families who would otherwise place their children in institutions.

#### **4.6 Co-operative agreements**

States may also be able to refer families to programmes that they have established in co-operation with international organisations (that do not perform adoption or child care work) to provide services. This may be particularly helpful if used for a brief and limited amount of time, and if the programmes utilised are of substantial size and can be accessed by many families. There are, for example, NGOs that provide small business loans to help families establish businesses that can improve their economic situation, aid agencies that provide short-term food and housing relief, and programmes that provide medical and surgical services to underserved populations.

In order to do so as part of a formal implementation plan, States may consider drafting formal agreements with NGOs for such services. While not ideal, such an arrangement could assist a State in establishing short-term family preservation programmes. These types of funding measures cannot be considered long-term solutions. Relying on outside funding is risky, and doing so provides little security and assurances to other States. However, they could be used as interim measures if the arrangements were a formalised part of a larger implementation plan.

#### **4.7 Utilising accredited bodies**

Some States use private adoption service providers and orphanages to perform family preservation or reunification services. There are some advantages to these programmes. Private organisations often have more funding to implement programmes, and adequate and well-trained social service personnel to do so.

These programmes tend to be most successful when they are carefully monitored by authorities to ensure that adequate efforts are being made to preserve families and proper safeguards are in place. There is potential for a conflict of interest between preserving families and providing intercountry adoption services. Some States may separate the decision about what services to offer, or by whom those services may be offered, from the actual delivery of services. It has been noted that the States that are most successful in operating family preservation programmes may utilise a small number of agencies that are carefully monitored and controlled. It may be difficult for States adequately to monitor an unlimited number of service providers.

## **ANNEX 5**

### **HAGUE RECOMMENDATION ON REFUGEE CHILDREN**

## 5. HAGUE RECOMMENDATION ON REFUGEE CHILDREN (ADOPTED ON 21 OCTOBER 1994)

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

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

Adopts the following Recommendation –

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### RECOMMENDATION

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

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

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

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

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

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

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

- a) before any intercountry adoption procedure is initiated,
  - all reasonable measures have been taken in order to trace and reunite the child with his or her parents or family members where the child is separated from them; and
  - the repatriation of the child to his or her country, for purposes of such reunion, would not be feasible or desirable, because of the fact that the child cannot receive appropriate care, or benefit from satisfactory protection, in that country;
- b) an intercountry adoption only takes place if
  - the consents referred to in Article 4 c) of the Convention have been obtained; and
  - the information about his or her identity, adoptability, background, social environment, family history, medical history including that of the child's family, the child's upbringing, his or her ethnic, religious and cultural origins, and any special needs of the child, has been collected in so far as is possible under the circumstances.

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

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

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

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



**ANNEX 6**  
**ORGANIGRAM**

## INTRODUCTION AND EXPLANATION

In response to the Recommendation of the Special Commission of 2000<sup>393</sup> the Permanent Bureau has prepared a model form designed to provide information on which entity in each State performs each function outlined in the Convention.<sup>394</sup> The form is applicable to both States of Origin and Receiving States, and also includes space for the reporting and updating of names and contact information for the Central Authorities, public authorities, courts, accredited bodies and approved (non-accredited) persons in each State.

The Organigram serves several functions. It may be used as:

- A checklist of all the adoption-related functions and responsibilities of both the receiving State and the State of origin;
- A guide as to the categories of authorities or bodies which are permitted by the Convention to perform those functions;
- A summary of a country profile, for the information of other States.

As a checklist of matters to be covered by the implementing legislation and procedures of States considering ratification of or accession to the Convention, the Organigram should be read in conjunction with the 1994 Checklist (see Annex 8). The completed organigram will be of most use to other States when read in conjunction with a completed Country Profile. The interaction of the competent authorities and bodies in each State could be described by States in a separate document.

The completed Organigrams are available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under “Intercountry Adoption Section” then “Country Profiles” and “Organigram”.

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<sup>393</sup> See para. 25 of the Guide and the Report of this Special Commission, *supra*, note 14.

<sup>394</sup> See Report of the Special Commission of 2000, *supra*, note 14, page 41, paras 1 and 2.

## ORGANISATION AND RESPONSIBILITY UNDER THE 1993 HAGUE INTERCOUNTRY ADOPTION CONVENTION

**Country:** \_\_\_\_\_

Please check the box(es) that indicate(s) which body performs the stated function. States which are solely States of origin should complete only section A; States which are solely receiving States should complete only section B; States which act as both States of origin and receiving States should complete sections A and B. All States are requested to ensure that the Permanent Bureau has the information requested in Section C and to provide updated information where changes are needed.

(CAN) Central Authority National

(CAR) Central Authority Regional

(PA) Public Authority

(CT) Court or Tribunal

(ABN) Accredited Body National

(ABF) Accredited Body Foreign

(APN) Approved (Non-accredited) Person National

(APF) Approved (Non-accredited) Person Foreign

(IAE) Independent Accrediting Entity appointed by Central Authority

**Section A: States of origin**

Article	Action	Responsible Party
4 a)	Establishes that the child is adoptable	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT
4 b)	Determines that possibilities for placement of the child within the State of origin have been considered	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT
4 b)	Determines that intercountry adoption is in the child's best interests	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT
4 c); 16(1) c)	Ensures that all involved parties have been counselled; consent has been obtained; consent was freely given; and was only given after birth of child	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT
4 d)	Ensures that child has been counselled and consulted when appropriate	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT
8	Takes all appropriate steps to prevent improper financial gain	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT
9 a); 30	Preserves adoption records and information; Ensures availability of information to child when appropriate	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT <input type="checkbox"/> ABN <input type="checkbox"/> ABF
9 b)	Facilitates, follows and expedites proceedings with a view to obtaining the adoption	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT <input type="checkbox"/> ABN <input type="checkbox"/> ABF
9 c)	Promotes the development of adoption counselling and post adoption services	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT <input type="checkbox"/> ABN <input type="checkbox"/> ABF
9 d)	Provides Central Authorities with general evaluation reports about experiences with intercountry adoption	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT <input type="checkbox"/> ABN <input type="checkbox"/> ABF
9 e)	Replies, in so far as it is permitted by the law of their State, to justified requests from other Central Authorities or public authorities for information about a particular adoption situation	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT <input type="checkbox"/> ABN <input type="checkbox"/> ABF
10; 11	Accredits bodies and ensures that accredited bodies meet the requirements of the Convention and the State	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT <input type="checkbox"/> IAE
12	Authorises foreign accredited bodies to act in the State	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT
16(1) a)	Prepares report on the child	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT <input type="checkbox"/> ABN <input type="checkbox"/> ABF <input type="checkbox"/> APN <input type="checkbox"/> APF

16(1) a); 22(5)	Supervises preparation of report by approved (non-accredited) persons	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT <input type="checkbox"/> ABN <input type="checkbox"/> ABF
16(1) b)-d)	Determines, after giving due consideration to the child's circumstances and ensuring that consents have been properly obtained, that the envisaged placement is in the best interests of the child	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT <input type="checkbox"/> ABN <input type="checkbox"/> ABF <input type="checkbox"/> APN <input type="checkbox"/> APF
16(2)	Transmits reports and documentation to receiving State	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT <input type="checkbox"/> ABN <input type="checkbox"/> ABF <input type="checkbox"/> APN <input type="checkbox"/> APF
17 a)	Ensures that the prospective adoptive parent(s) agree to the placement	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT <input type="checkbox"/> ABN <input type="checkbox"/> ABF <input type="checkbox"/> APN <input type="checkbox"/> APF
17 c)	Agrees that the adoption may proceed	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT <input type="checkbox"/> ABN <input type="checkbox"/> ABF <input type="checkbox"/> APN <input type="checkbox"/> APF
18	Takes all necessary steps to obtain permission for the child to leave the State of origin	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT <input type="checkbox"/> ABN <input type="checkbox"/> ABF <input type="checkbox"/> APN <input type="checkbox"/> APF
19(2)	Ensures that the transfer of the child takes place in secure and appropriate circumstances	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT <input type="checkbox"/> ABN <input type="checkbox"/> ABF <input type="checkbox"/> APN <input type="checkbox"/> APF
19(3)	Returns reports if transfer of the child does not take place	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT <input type="checkbox"/> ABN <input type="checkbox"/> ABF <input type="checkbox"/> APN <input type="checkbox"/> APF
20	Provides information on the progress of the adoption to the Central Authority of the receiving State	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT <input type="checkbox"/> ABN <input type="checkbox"/> ABF <input type="checkbox"/> APN <input type="checkbox"/> APF
21	Consults with Central Authority or other body in receiving State in the event the placement fails and a new placement is necessary	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT <input type="checkbox"/> ABN <input type="checkbox"/> ABF <input type="checkbox"/> APN <input type="checkbox"/> APF
23	Certifies that the adoption has been made in accordance with the Convention (if the adoption is completed in State of origin)	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT

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24	Retains authority to refuse adoption if manifestly contrary to the public policy of the State	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT
29	Ensures that no contact takes place between the prospective adoptive parent(s) and the child's parents or any other person who has care of the child until the requirements of Articles 4 a) and 5 a) have been met in accordance with the law of the State	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT
32	Ensures that no one derives improper financial gain, and that service providers do not receive remuneration which is unreasonably high in relation to services rendered	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT

## Section B: Receiving Countries

Article	Action	Responsible Party
5 a)	Determines the eligibility and suitability of adopters	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT
5 b)	Ensures that prospective adoptive parents have been counselled	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT
5 c)	Determines that the child is or will be authorised to enter or reside permanently in that State	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT
8	Takes all appropriate steps to prevent improper financial gain	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT
9 a); 30	Preserves adoption records and information; Ensures availability of information to child when appropriate	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT <input type="checkbox"/> ABN <input type="checkbox"/> ABF
9 b)	Facilitates, follows and expedites proceedings with a view to obtaining the adoption	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT <input type="checkbox"/> ABN <input type="checkbox"/> ABF
9 d)	Provides Central Authorities with general evaluation reports about experiences with intercountry adoption	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT <input type="checkbox"/> ABN <input type="checkbox"/> ABF
9 e)	Replies, in so far as it is permitted by the law of their State, to justified requests from other Central Authorities or public authorities for information about a particular adoption situation	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT <input type="checkbox"/> ABN <input type="checkbox"/> ABF
10; 11	Accredits bodies and ensures that accredited bodies meet the requirements of the Convention and the State	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT <input type="checkbox"/> IAE
12	Authorises foreign accredited bodies to act in the State	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT
14	Accepts adoption applications from prospective adoptive parents	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT <input type="checkbox"/> ABN <input type="checkbox"/> ABF
15	Prepares report on prospective adoptive parents and transmits to the State of origin	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT <input type="checkbox"/> ABN <input type="checkbox"/> ABF <input type="checkbox"/> APN <input type="checkbox"/> APF
15(1); 22(5)	Supervises preparation of reports by approved (non-accredited) persons	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT <input type="checkbox"/> ABN <input type="checkbox"/> ABF

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15(2)	Transmits report to State of origin	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT <input type="checkbox"/> ABN <input type="checkbox"/> ABF <input type="checkbox"/> APN <input type="checkbox"/> APF
16(2)	Receives report on child, proof of consents and reasons for recommended placement of child with prospective adoptive parents	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT <input type="checkbox"/> ABN <input type="checkbox"/> ABF <input type="checkbox"/> APN <input type="checkbox"/> APF
17 a) b)	Approves decision made by State of origin regarding match of child and parents where required by law or appropriate; notifies State of origin of agreement of prospective adoptive parents to placement of child	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT <input type="checkbox"/> ABN <input type="checkbox"/> ABF <input type="checkbox"/> APN <input type="checkbox"/> APF
17 c)	Agrees that the adoption may proceed	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT <input type="checkbox"/> ABN <input type="checkbox"/> ABF <input type="checkbox"/> APN <input type="checkbox"/> APF
18	Takes all necessary steps to obtain permission for the child to enter and reside permanently in the receiving State	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT <input type="checkbox"/> ABN <input type="checkbox"/> ABF <input type="checkbox"/> APN <input type="checkbox"/> APF
19(2)	Ensures that the transfer of the child takes place in secure and appropriate circumstances	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT <input type="checkbox"/> ABN <input type="checkbox"/> ABF <input type="checkbox"/> APN <input type="checkbox"/> APF
19(3)	Returns reports if transfer of the child does not take place	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT <input type="checkbox"/> ABN <input type="checkbox"/> ABF <input type="checkbox"/> APN <input type="checkbox"/> APF
20	Provides information on the progress of the adoption to the Central Authority of State of origin	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT <input type="checkbox"/> ABN <input type="checkbox"/> ABF <input type="checkbox"/> APN <input type="checkbox"/> APF
21	Protects child, finds alternate care, consults with Central Authority or other body in State of origin in the event the placement fails and a new placement is necessary	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT <input type="checkbox"/> ABN <input type="checkbox"/> ABF <input type="checkbox"/> APN <input type="checkbox"/> APF
23	Certifies that the adoption has been made in accordance with the Convention (if the adoption is completed in the receiving State)	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT
24	Retains authority to refuse adoption if manifestly contrary to the public policy of the State	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT

29	Ensures that no contact takes place between the prospective adoptive parent(s) and the child's parents or any other person who has care of the child until the requirements of Articles 4 a) and 5 a) have been met in accordance with the law of the State	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT
32	Ensures that no one derives improper financial gain, and that service providers do not receive remuneration which is unreasonably high in relation to services rendered	<input type="checkbox"/> CAN <input type="checkbox"/> CAR <input type="checkbox"/> PA <input type="checkbox"/> CT

## **Section C: Identification of responsible parties**

Please provide the names and contact information for all applicable entities noted below.

Central Authority

Regional Central Authorities

Public Authorities / Courts and Tribunals

Accredited Bodies

Approved (Non-accredited) Persons

Please provide name and contact information of person / department completing this form.

**ANNEX 7**

**RECOMMENDED AND MODEL FORMS**

## **RECOMMENDED MODEL FORM STATEMENT OF CONSENT TO THE ADOPTION**

*Hague Convention of 29 May 1993  
on Protection of Children and Co-operation in Respect of Inter-country Adoption*

### **I     STATEMENT OF CONSENT**

Read the following statements carefully before completing them. Sign below only when you fully understand each statement. You have the right to receive any counselling or information which you may want to have about the effects of your consent. You have the right, if you so desire, to receive a copy of this document.

You should not have received any payment or compensation of any kind made or offered for the purpose of obtaining your consent to the adoption of the child.

I, the undersigned:

Family name: .....

First name(s): .....

Date of birth: day .... month .... year ...

Habitual residence: .....

mother [ ] father [ ] legal representative [ ] of the child:

Family name: .....

First name(s): .....

Sex: male [ ] female [ ]

Date of birth: day .... month .... year ....

Place of birth: .....

Habitual residence: .....

declare as follows:

1 – I freely consent, without threat or coercion, to the adoption of this child.

2 – I understand that my child may be adopted by spouses or a person residing abroad.

3 – I understand that the adoption of this child will create a permanent parent-child relationship with the adoptive parent(s).

4 – I give my consent for the purpose of an adoption that terminates the pre-existing legal parent-child relationship between the child and his or her mother and father.

5 – I have been informed that I may withdraw my consent until ..... and that after that date my consent will be irrevocable.

I declare that I have fully understood the above statements.

Done at ..... on .....

Signature or Mark:

II     DECLARATION OF WITNESS(ES) (where required by law or by the circumstances, e.g. in the case of illiterate or handicapped persons)

.....  
.....  
.....  
.....  
.....

III CERTIFICATION OF THE AUTHORITY AUTHORIZED TO ATTEST THE CONSENT

Name: .....

Title: .....

I hereby certify that the person (and the witness(es)) named or identified above appeared before me this date and signed this document in my presence.

Done at ..... on .....

Signature / Seal:

# RECOMMENDED MODEL FORM CERTIFICATE OF CONFORMITY OF INTERCOUNTRY ADOPTION

*Article 23 of the Hague Convention of 29 May 1993  
on Protection of Children and Co-operation in Respect of Intercountry Adoption*

**1** The undersigned authority:

(Name and address of the competent authority of the State of adoption)

.....  
.....  
.....

**2** Hereby certifies that the child:

Family name: .....

First name(s): .....

Sex: Male [ ] Female [ ]

Date of birth: day ..... month ..... year .....

Place of birth: .....

Habitual residence: .....

**3** Was adopted according to the decision of the following authority:

.....

Date of the decision: .....

Date at which the decision became final: .....

(If the adoption was made otherwise than by a decision of an authority, please specify the equivalent details)

**4** By the following person(s):

a) Family name of the adoptive father: .....

First name(s): .....

Date of birth: day ..... month ..... year .....

Place of birth: .....

Habitual residence at the time of the adoption: .....

b) Family name of the adoptive mother: .....

First name(s): .....

Date of birth: day ..... month ..... year .....

Place of birth: .....

Habitual residence at the time of the adoption: .....

**5** The undersigned authority certifies that the adoption was made in accordance with the Convention and that the agreements under Article 17, sub-paragraph c, were given by:

a) Name and address of the Central Authority<sup>(1)</sup> of the State of origin:

.....  
.....  
.....

Date of the agreement: .....

b) Name and address of the Central Authority<sup>(1)</sup> of the receiving State:

.....  
.....  
.....

Date of the agreement: .....

**6**  The adoption had the effect of terminating the pre-existing legal parent-child relationship.

The adoption did not have the effect of terminating the pre-existing legal parent-child relationship.

Done at ....., on .....

Signature / Seal

<sup>(1)</sup> Or the public authority, body or person designated in accordance with Article 22(1) or 22(2) of the Convention.

## MODEL FORM MEDICAL REPORT ON THE CHILD

*For Contracting States within the scope of the Hague Convention on intercountry adoption*

**A duly licensed physician should complete this report.**

Please answer all questions.

If the information in question is not available please state "unknown".

Name of the child:
Date and year of birth:
Sex:
Place of birth:
Nationality:
Name of the mother:
Date and year of her birth:
Name of the father:
Date and year of his birth:
Name of the present institution:      placed since:
Weight at birth:    kg. At admission:    kg.
Length at birth:    cm. At admission:    cm.
Was the pregnancy and delivery normal? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Do not know
Where has the child been staying? <input type="checkbox"/> with his/her mother      from      to <input type="checkbox"/> with relatives              from      to <input type="checkbox"/> in private care              from      to <input type="checkbox"/> in institution or hospital    from      to
(please state below the name of the institution or institutions concerned)



Annex 7-8

	Stand with support?  Walk without support?
Language <input type="checkbox"/> unknown	When did the child start to prattle? Say single words? Say sentences?
Contact <input type="checkbox"/> unknown	When did the child start to smile?  How does it react towards strangers?  How does it communicate with adults and other children?
Emotional <input type="checkbox"/> unknown	How does the child show emotions (anger, uneasiness, disappointment, joy)?
<b>Medical examination of the child</b>	
Date of the medical examination:	
<b>1. The child</b>	<b>Weight:</b> <b>kg</b> <b>date:</b>  <b>Height:</b> <b>cm</b> <b>date:</b>  Head circumference <b>cm</b> <b>date:</b>
Colour of hair:	Colour of eyes:                      Colour of skin:
Through my complete clinical examination of the child I have observed the following evidence of disease, impairment or abnormalities of: Date of the examination:	
Head (form of skull, hydrocephalus, craniotabes)	

Mouth and pharynx (harelip or cleft palate, teeth)
Eyes (vision, strabismus, infections)
Ears (infections, discharge, reduced hearing, deformity)
Organs of the chest (heart, lungs)
Lymphatic glands (adenitis)
Abdomen (hernia, liver, spleen)
Genitals (hypospadias, testis, retention)
Spinal column (kyphosis, scoliosis)
Extremities (pes equinus, valgus, varus, pes calcaneovarus, flexation of the hip, spasticity, paresis)
Skin (eczema, infections, parasites)
Other diseases?
<b>Are there any symptoms of syphilis in the child?</b> Result of syphilis reaction made (date and year): <input type="checkbox"/> <b>Positive</b> <input type="checkbox"/> <b>Negative</b> <input type="checkbox"/> <b>Not done</b>
Any symptoms of tuberculosis? Result of tuberculin test made (date and year): <input type="checkbox"/> Positive <input type="checkbox"/> Negative <input type="checkbox"/> Not done
Any symptoms of Hepatitis A? Result of tests for hepatitis A made (date and year): <input type="checkbox"/> <b>Positive</b> <input type="checkbox"/> <b>Negative</b> <input type="checkbox"/> <b>Not done</b>
Any symptoms of Hepatitis B? Result of tests for HBsAg (date and year): <input type="checkbox"/> <b>Positive</b> <input type="checkbox"/> <b>Negative</b> <input type="checkbox"/> <b>Not done</b> Result of tests for anti-HBs (date and year): <input type="checkbox"/> Positive <input type="checkbox"/> Negative <input type="checkbox"/> Not done Result of tests for HBeAg (date and year): <input type="checkbox"/> Positive <input type="checkbox"/> Negative <input type="checkbox"/> Not done Result of tests for anti-HBe (date and year): <input type="checkbox"/> Positive <input type="checkbox"/> Negative <input type="checkbox"/> Not done

**Annex 7-10**

Any symptoms of AIDS?

Result of tests for HIV made (date and year):

Positive     Negative     Not done

Symptoms of any other infectious disease?

Does the urine contain?

Sugar?

Albumen?

Phenylketone?

Stools (diarrhoea, constipation):

Examination for parasites:

Positive (species):       Negative       Not done

Is there any mental disease or retardation of the child?

Give a description of the mental development, behaviour and skills of the child. This is of particular value for advising the prospective parents.

Any additional comments?

\_\_\_\_\_  
Signature and stamp of the examining physician

\_\_\_\_\_  
Date

## SUPPLEMENT TO THE GENERAL MEDICAL REPORT ON THE CHILD

### REPORT CONCERNING THE PSYCHOLOGICAL AND SOCIAL CIRCUMSTANCES OF THE SMALL CHILD

*For Contracting States within the scope of the Hague Convention on intercountry adoption*  
Please respond to each statement.

<b>Activity with toys:</b>	
<input type="checkbox"/>	<i>The child's eyes follow rattles/toys, that are moved in front of the child</i>
<input type="checkbox"/>	<i>The child holds on to a rattle</i>
<input type="checkbox"/>	<i>The child plays with rattles: putting it in the mouth, shaking it, moving it from one hand to the other etc</i>
<input type="checkbox"/>	<i>The child puts cubes on top of each other</i>
<input type="checkbox"/>	<i>The child plays purposely with toys: pushes cars, puts dolls to bed, feeds dolls etc</i>
<input type="checkbox"/>	<i>The child plays role-play with toys with other children</i>
<input type="checkbox"/>	<i>The child draws faces, human beings or animals with distinct features</i>
<input type="checkbox"/>	<i>The child cooperates in structured games with other children (ballgames, card games etc)</i>
<input type="checkbox"/>	<i>No observation available</i>
<b>Vocalization/language development:</b>	
<input type="checkbox"/>	<i>1. The child vocalizes in contact with caregiver</i>
<input type="checkbox"/>	<i>2. The child repeats different vowel-consonant combinations (ba-ba, da-da, ma-ma etc)</i>
<input type="checkbox"/>	<i>3. The child uses single words to communicate needs</i>
<input type="checkbox"/>	<i>4. The child speaks in sentences</i>
<input type="checkbox"/>	<i>5. The child understands prepositions as: on top of, under, behind etc</i>
<input type="checkbox"/>	<i>6. The child uses prepositions as: on top of, under, behind etc</i>
<input type="checkbox"/>	<i>7. The child speaks in past tense</i>
<input type="checkbox"/>	<i>8. The child writes his own name</i>
<input type="checkbox"/>	<i>9. The child reads simple words</i>
<input type="checkbox"/>	<i>No observation available</i>

<b>Motor development:</b>	
	<i>The child turns from back to stomach from age: _____</i>
	<i>The child sits without support from age: _____</i>
	<i>The child crawls/moves forwards from age: _____</i>
	<i>The child walks with support from furniture from age: _____</i>
	<i>The child walks alone from age: _____</i>
	<i>The child walks up and down stairs with support from age: _____</i>
	<i>The child walks up and down stairs without support from age: _____</i>
	<i>The child rides a bicycle without support from age: _____</i>
<b>Contact with adults:</b>	
<input type="checkbox"/>	<i>1. The child smiles in contact with known caregiver</i>
<input type="checkbox"/>	<i>2. The child is more easily soothed when held by known caregiver</i>
<input type="checkbox"/>	<i>3. The child cries/follows known caregiver, when the caregiver leaves the room</i>
<input type="checkbox"/>	<i>4. The child actively seeks known caregiver when he/she is upset or has hurt him/herself</i>
<input type="checkbox"/>	<i>5. The child seeks physical contact with all adults, that come into the ward</i>
<input type="checkbox"/>	<i>6. The child communicates his feeling in words to caregivers</i>
<b>Contact with other children:</b>	
<input type="checkbox"/>	<i>1. The child shows interest in other children by looking or smiling at their activity</i>
<input type="checkbox"/>	<i>2. The child enjoys playing beside other children</i>
<input type="checkbox"/>	<i>3. The child engages actively in activities with other children</i>
<b>General Level of Activity:</b>	
<input type="checkbox"/>	<i>Passive</i>
<input type="checkbox"/>	<i>Active</i>
<input type="checkbox"/>	<i>Overactive</i>
<b>General mood:</b>	
<input type="checkbox"/>	<i>Sober, serious</i>
<input type="checkbox"/>	<i>Emotionally indifferent</i>
<input type="checkbox"/>	<i>Fussy, difficult to soothe</i>
<input type="checkbox"/>	<i>Happy, content</i>

Any additional comments?

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Name, occupation, signature and stamp of the examining person

---

Date



## **ANNEX 8**

### **1994 CHECKLIST OF QUESTIONS CONCERNING IMPLEMENTATION OF THE CONVENTION**

## CHECKLIST OF QUESTIONS WHICH MAY BE USEFULLY EXAMINED WITH A VIEW TO IMPLEMENTING THE HAGUE CONVENTION OF 29 MAY 1993 ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION

Drawn up by the Permanent Bureau in September 1994 for the Special Commission of 1994

The purpose of the following checklist is to highlight certain questions which may be usefully examined with a view to implementing the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*. Certain questions will concern more particularly “States of origin”, others “receiving States”. Of course, the list is not exhaustive and serves only as an illustration of questions which may arise on the occasion of the implementation of the Convention.

### CHAPTER I – SCOPE OF THE CONVENTION

#### *Article 2*

What form(s) of adoption creating “a permanent parent-child relationship” – paragraph 2 – provided for in the internal law of your country cause the “termination of a pre-existing legal relationship between the child and his or her mother and father” (*cf.* Article 26(1) *c*) and (2))?

### CHAPTER II – REQUIREMENTS FOR INTERCOUNTRY ADOPTIONS

<p><b>State of origin</b></p> <p><i>Article 4</i></p> <ul style="list-style-type: none"> <li>– Which are in your country the “competent authorities” under Article 4?</li> <li>– There may be occasion to include the following minimum requirements of Article 4 in the implementing legislation and/or to specify, as the case may be:</li> </ul> <p>paragraph <i>a</i></p> <ul style="list-style-type: none"> <li>– adoptability according to which psycho-social criteria?</li> </ul>	<p><b>Receiving State</b></p> <p><i>Article 5</i></p> <ul style="list-style-type: none"> <li>– Which are in your country the “competent authorities” under Article 5?</li> <li>– There may be occasion to include the following minimum requirements of Article 5 in the implementing legislation and/or to specify, as the case may be:</li> </ul> <p>paragraph <i>a</i></p> <ul style="list-style-type: none"> <li>– “the prospective adoptive parents are suited”: psycho-social requirements?</li> </ul>
<p><b>State of origin</b></p> <p>paragraph <i>b</i></p> <ul style="list-style-type: none"> <li>– “after giving due consideration”; see also Preamble, paragraphs 2 and 3;</li> </ul>	<p><b>Receiving State</b></p> <p>paragraph <i>b</i></p> <ul style="list-style-type: none"> <li>– establishment, if they do not already exist, or development of adoption counselling services for prospective adoptive parents (<i>cf.</i> Art. 9c)?</li> </ul>

<p>paragraph c</p> <ul style="list-style-type: none"> <li>– establishment, if they do not already exist, or development of adoption counselling services (<i>cf.</i> Article 9 c)?</li> <li>– what is “the required legal form”?</li> <li>– provide means of expressing or evidencing consent in writing (see proposed model form);</li> <li>– how to make sure that the consents “have not been induced by payment or compensation of any kind”?</li> <li>– provide, where applicable, a special provision concerning the consent of mother, “after the birth of the child”;</li> <li>– additional provisions concerning the consent by the child:</li> <li>– how to take into consideration the child’s wishes and opinions?</li> </ul>	<p>paragraph c</p> <ul style="list-style-type: none"> <li>– requirements for the authorization for the child to enter and reside permanently in the receiving State and the form of such authorization. Possible co-ordination with the immigration authorities.</li> </ul>
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### CHAPTER III – CENTRAL AUTHORITIES AND ACCREDITED BODIES

#### *Articles 6 and 7*

- Designation of the Central Authority referred to in Article 6(1).
- For federal States, States with more than one system of law or States having autonomous territorial units, designation of more than one Central Authority, if they so desire; in that case, specification of the territorial or personal extent of their functions plus designation of Central Authority to which any communication may be addressed (*cf.* Article 6(2)).
- By what means is (are) the Central Authority(ies) to discharge its (their) overall co-ordinating role (*cf.* Article 33), its (their) non-delegable duties under Article 7(1) and (2), and its (their) delegable duties under Articles 8, 9 and 15-21?

#### *Article 8*

- Which are the public authorities, if any, who will be acting in your country under Article 8?
- Specify, where applicable, “improper financial or other gain”.
- Specify, where applicable, the means of implementing Article 8.

#### *Article 9*

- Establish the means of implementing the measures listed in Article 9 (the list is not exhaustive: “in particular to –”).

#### *Article 10*

- Which are the requirements and procedures for granting and maintaining accreditation of the “accredited bodies”?

#### Annex 8-4

– “To carry out properly” according to what practical criteria? Will the requirements of Articles 11 and 32 be sufficient?

#### Article 11

– An accredited body “shall pursue only non-profit objectives”. Which are the “competent authorities” establishing “the conditions and limits” of this criterion?

– “Persons qualified by their ethical standards”: these standards may have to be specified, e.g. will it be necessary to check their past conduct; by whom and how must complaints about transgressions against standards be established, etc.?

– “By training or experience”: who will develop and provide such training; who will set standards for such training?

– “Be subject to supervision by competent authorities”:

- designate competent authorities
- provide conditions of supervision

#### Article 12

– Which are “the competent authorities” in your country?

– When will authorisation be given?

– Possible co-ordination with competent authorities of other States.

### CHAPTER IV – PROCEDURAL REQUIREMENTS IN INTERCOUNTRY ADOPTION

<b>State of origin</b>	<b>Receiving State</b>
<i>Article 15**</i> – Provide preservation of confidentiality of the report prepared in accordance with paragraph 1 and transmitted according to paragraph 2, taking into account Article 19(3) (cf. Article 31)?	<i>Article 14*</i> – How should prospective adoptive parents apply to the Central Authority? Expedious handling of applications (cf. Article 35); feedback to prospective adoptive parents.  <i>Article 15**</i> – Implementation of paragraph 1? Who provides “home study”? Who sets standards for “home study” and report? – Indicate in report public policy requirements for adoption in your country (cf. Article 24). – How to expedite transmission under paragraph 2 (cf. Article 35)? – Provide preservation of confidentiality of the report (cf. Article 31)? – Where applicable: take measures for implementation of Article 22(5).

<p><i>Article 16**</i></p> <ul style="list-style-type: none"> <li>– Implementation of paragraph 1. Standards for report?</li> <li>– Provide conditions for preservation of the report (in particular duration). Provide for access (cf. Articles 30 and 31)?</li> <li>– How to expedite transmission under paragraph 2 (cf. Article 35)?</li> <li>– When applicable, take into account Article 22(5).</li> </ul>	<p><i>Article 16**</i></p> <ul style="list-style-type: none"> <li>– Provide conditions for preservation of the report prepared in accordance with paragraph 1 and transmitted according to paragraph 2, taking into account Article 19(3). Provide for access (cf. Articles 30 and 31)?</li> </ul>
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\* According to Article 22(1), the functions of the Central Authority under this Article may be performed by public authorities or by accredited bodies.

\*\* According to Article 22(1), the functions of the Central Authority under this Article may be performed by public authorities or by accredited bodies; if a declaration under Article 22(2) is made, those functions may, subject to paragraph 4, also be performed by the bodies or persons as referred to in that paragraph.

- Where applicable, provide cases where the Central Authority could or shall request the approval of the Central Authority of the receiving State.

- When applicable, provide refusals (public policy, cf. Article 24).

- Co-ordination with emigration authorities.

<p><i>Article 18**</i></p> <p>Which are "the necessary steps" to obtain permission for the child to leave the State of origin?</p> <ul style="list-style-type: none"> <li>– When applicable, co-ordination with emigration authorities.</li> </ul>	<p><i>Article 18**</i></p> <p>Which are "the necessary steps" to obtain permission for the child to enter and reside permanently in the receiving State?</p> <ul style="list-style-type: none"> <li>– When applicable, co-ordination with immigration authorities. (cf. Article 5 c).</li> </ul>
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*Article 19\*\**

- Conditions for the preservation of the report when it is sent back: can it be utilized again (see paragraph 3)?

*Articles 20\*\* and 21\*\**

<p><b>State of origin</b></p>	<p><b>Receiving State</b></p> <ul style="list-style-type: none"> <li>– Establishment or development of post-adoption services (cf. Article 9 c).</li> <li>– Services offered and/or responsibilities assumed to help prevent disruption including re-placement of child in adoption.</li> </ul>
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\* According to Article 22(1), the functions of the Central Authority under this Article may be performed by public authorities or by accredited bodies.

\*\* According to Article 22(1), the functions of the Central Authority under this Article may be performed by public authorities or by accredited bodies; if a declaration under Article 22(2) is made, those functions may, subject to paragraph 4, also be performed by the bodies or persons as referred to in that paragraph.

**Annex 8-6**

*Article 22*

– As the case may be, make declaration of paragraph 2 with depositary and provide for regular information of Permanent Bureau of names and addresses under paragraph 3, and

- determine who “the competent authorities” are (paragraph 2);
- how to ensure the observance of the requirements of sub-paragraphs *a* and *b*: integrity; professional competence, experience and accountability; ethical standards and training or experience in intercountry adoption (*cf.* Articles 11 and 32).

– As the case may be (States of origin only), make declaration of paragraph 4.

**CHAPTER V – RECOGNITION AND EFFECTS OF THE ADOPTION**

*Article 23*

– Certificate of conformity of adoption with Convention: see proposed model form.

– What is/are the “competent authority/ies” in your country (if the adoption is made there)?

*Article 25*

As the case may be, declaration to be made.

*Article 27*

– Is there reason to regulate the conversion of a “simple adoption” into a “full adoption”?

– How to implement sub-paragraph 1 *b*?

**CHAPTER VI - GENERAL PROVISIONS**

<b>State of origin</b>	<b>Receiving State</b>
<i>Article 28</i> Does your country have a law as referred to in this Article?	
<i>Article 29</i> – Where applicable, designate “competent authority” charged with establishing conditions of contact. – Provide information on conditions of contact.	<i>Article 29</i> – Where applicable, provide information to prospective adoptive parents on contact.

*Article 30*

Paragraph 1

– Provide conditions of preservation of information (duration): see *supra* Articles 15 and 16.

– Designate “competent authorities” – provide, for example, cases where this authority would be discontinued and for transfer, in that case, of the information kept by that authority to another authority.

Paragraph 2

- Provide conditions of access.

*Article 32*

- Is there reason to specify the requirements of paragraphs 1–3 in greater detail?

*Article 39*

Paragraph 1

- Is your country a Party to any such international instrument? Declaration to be made?

*Article 45*

- Declaration to be made?



## **ANNEX 9**

# **ASIAN-AFRICAN TSUNAMI DISASTER AND THE LEGAL PROTECTION OF CHILDREN**

## PRESS RELEASE

### Asian-African Tsunami Disaster and the Legal Protection of Children

The Secretary General of the Hague Conference on Private International Law (HCCH), noting with great concern reports in the media about the irregular removal of children victims of the recent tsunami disaster that affected several Asian and some African countries, makes the following information available to governments, international organisations and the public.

HCCH has developed several important tools to protect children against risks involved in their cross-border movements. International child abduction and intercountry adoption, in particular, are the objects of two specific multilateral instruments.

#### **The 1980 Convention on International Child Abduction**

Children and their families are protected against the risks of wrongful removal across international borders by the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*. In the region affected by the disaster, both *Sri Lanka* and *Thailand* are parties to this Convention, which is in force for more than 70 other countries. This Convention is based on a system of co-operation through national Central Authorities and reinforces the principle that all States should take measures to combat the illicit transfer and non-return of children abroad (Articles 11 and 35 of the *UN Convention on the Rights of the Child*).

#### **The 1993 Convention on Intercountry Adoption**

Children and their families are protected against the risks of illegal, irregular, premature or ill-prepared adoptions abroad by the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*. In the affected areas, *India*, *Sri Lanka* and *Thailand* are parties to this Convention, to which more than 60 other States are also parties. This Convention, which also operates through a system of national Central Authorities, reinforces the *UN Convention on the Rights of the Child* (Article 21). The Convention seeks to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children. In 2000, HCCH adopted a Recommendation to the effect that States parties should, as far as practicable, also apply the standards and safeguards of the Convention to the arrangements for intercountry adoption which they make in respect of States that have not yet joined the Convention.

#### **Intercountry Adoption of Displaced Children**

HCCH, in consultation with UNHCR, in 1994 adopted a specific Recommendation urging all States – whether or not parties to the 1993 Convention – to observe particular caution in order to prevent irregularities in respect of any cross-border adoptions of refugee children and children who are, as a result of disturbances in their countries, internationally displaced.

The Recommendation *inter alia* provides that States to which a child has been displaced “before any intercountry adoption procedure is initiated shall take particular care to ensure that –

### Annex 9-3

- all reasonable measures have been taken in order to trace and reunite the child with his or her parents or family members where the child is separated from them; and
- the repatriation of the child to his or her country, for purposes of such reunion, would not be feasible or desirable, because of the fact that the child cannot receive appropriate care, or benefit from satisfactory protection, in that country.”

**In the spirit of this Recommendation, it is clear that in a disaster situation, like that brought about by the tsunami, efforts to reunify a displaced child with his or her parents or family members must take priority and that premature and unregulated attempts to organise the adoption of such a child abroad should be avoided and resisted.**

The Permanent Bureau of HCCH is prepared to give whatever assistance or advice it can to authorities in the countries affected in relation to these matters. Please contact the Deputy Secretary General, Mr William Duncan.

For more detailed information on the aforementioned instruments please see HCCH website at: < [www.hcch.net](http://www.hcch.net) >, and then choose:

– Hague Convention on International Child Abduction (Convention #28):

[http://hcch.e-vision.nl/index\\_en.php?act=conventions.text&cid=24](http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=24)

– Hague Convention on Intercountry Adoption (Convention #33):

[http://hcch.e-vision.nl/index\\_en.php?act=conventions.text&cid=69](http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=69)

– Recommendation on Displaced Children:

[http://hcch.e-vision.nl/index\\_en.php?act=publications.details&pid=934&dtid=2](http://hcch.e-vision.nl/index_en.php?act=publications.details&pid=934&dtid=2)

THE HAGUE, 10 January 2005

*The Hague Conference is an inter-governmental organization based in the Netherlands working for the harmonisation of rules of private international law. It has 64 Member States located on every continent. Furthermore, more than 120 States are Parties to one or more of the Hague Conventions.*

*In essence, the purpose of the Organisation is to build bridges between various legal systems, while respecting their diversity. In doing so it reinforces the legal security of private persons – an essential role in an age of globalisation in which rules and guidelines are needed.*



**ANNEX 10**

**UNICEF'S POSITION ON INTERCOUNTRY ADOPTION**

**STATEMENT 2007**



Unicef has received many enquiries from families hoping to adopt children from countries other than their own. Unicef believes that all decisions relating to children, including adoptions, should be made with the best interests of the child as the primary consideration. The Hague Convention on Intercountry Adoption is an important development, for both adopting families and adopted children, because it promotes ethical and transparent processes, undertaken in the best interests of the child. Unicef urges national authorities to ensure that, during the transition to full implementation of the Hague Convention, the best interests of each individual child are protected.

The Convention on the Rights of the Child, which guides Unicef's work, clearly states that every child has the right to know and be cared for by his or her own parents, whenever possible. Recognising this, and the value and importance of families in children's lives, Unicef believes that families needing support to care for their children should receive it, and that alternative means of caring for a child should only be considered when, despite this assistance, a child's family is unavailable, unable or unwilling to care for him or her.

For children who cannot be raised by their own families, an appropriate alternative family environment should be sought in preference to institutional care which should be used only as a last resort and as a temporary measure. Inter-country adoption is one of a range of care options which may be open to children, and for individual children who cannot be placed in a permanent family setting in their countries of origin, it may indeed be the best solution. In each case, the best interests of the individual child must be the guiding principle in making a decision regarding adoption.

Over the past 30 years, the number of families from wealthy countries wanting to adopt children from other countries has grown substantially. At the same time, lack of regulation and oversight, particularly in the countries of origin, coupled with the potential for financial gain, has spurred the growth of an industry around adoption, where profit, rather than the best interests of children, takes centre stage. Abuses include the sale and abduction of children, coercion of parents, and bribery.

Many countries around the world have recognised these risks, and have ratified the Hague Convention on Intercountry Adoption. Unicef strongly supports this international legislation, which is designed to put into action the principles regarding inter-country adoption which are contained in the Convention on the Rights of the Child. These include ensuring that adoption is authorised only by competent authorities, that inter-country adoption enjoys the same safeguards and standards which apply in national adoptions, and that inter-country adoption does not result in improper financial gain for those involved in it. These provisions are meant first and foremost to protect children, but also have the positive effect of providing assurance to prospective adoptive parents that their child has not been the subject of illegal and detrimental practices.

The case of children separated from their parents and communities during war or natural disasters merits special mention. It cannot be assumed that such children have neither living parents nor relatives. Even if both their parents are dead, the chances of finding living relatives, a community and home to return to after the conflict subsides exist. Thus, such children should not be considered for inter-country adoption, and family tracing should be the priority. This position is shared by Unicef, UNHCR, the International Confederation of the Red Cross, and international NGOs such as the Save the Children Alliance.

## INDEX OF CONVENTION ARTICLES

Note: references are to paragraphs of the Guide. However, references preceded by “f” indicate footnotes and references preceded by “A” refer to pages of the Annexes.

### Hague Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption:

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