

## Evaluation of the practical Operation of The Hague Convention of 29 May 1993 on Protection of Children and Co-operation in respect of inter-country Adoption

*For the attention of the Special Commission invited in September 2005 by the Permanent Bureau of The Hague Conference*

*The International Social Service (ISS) is an international federative non-governmental organization dedicated to helping individuals and families with personal or social problems resulting from migration and international movement<sup>1</sup>.*

From the beginning of the 1990s, ISS has developed an international programme, currently named *the International Reference Centre for the Rights of Children deprived of their Family (IRC)*, based in Geneva. The ISS/IRC commits itself to a global child and family welfare policy, as well as to the ratification and implementation of international conventions relating to children's rights. In this spirit, it promotes information (among others through a Monthly Review), documentation, expertise and research, training, counselling and assistance as well as exchange of experiences and collaboration between professionals of governmental bodies and NGOs from both countries of origin and receiving countries<sup>2</sup>.

The International Social Service warmly welcomes the invitation in September 2005 by The Hague Permanent Bureau to attend the Second Special Commission relating to the practical operation of The Hague Convention 1993. While the main concepts and guarantees included in The Hague Convention 1993 are more and more disseminated and made known worldwide, it is of key importance that both States of origin and receiving States meet each other in order to take note of the recent evolution of inter-country adoption and to search together to implement the Convention in a way always more compatible with the best interests of the children.

The evaluation of the International Social Service will focus on 9 main issues, all linked with the relevant articles of The Hague Convention 1993 and questions of the Questionnaire drawn up by the Permanent Bureau (Preliminary Document N° 1). According to our global experience gathered over these last few years, the following topics are considered by ISS as priority issues for the 2005 Special Commission and will be examined in separated chapters following hereafter from Chapter 1 to 9. The 9 main issues are:

1. The current evolution and trends of inter-country adoption and their consequences in view of the best interests of children.

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<sup>1</sup> For more information, see <http://www.iss-ssi.org/index.html>.

<sup>2</sup> For more information, see [http://www.iss-ssi.org/Resource\\_Centre/resource\\_centre.html](http://www.iss-ssi.org/Resource_Centre/resource_centre.html).

2. Permanency planning for each child deprived of parental care, including the subsidiarity principle of inter-country adoption.
3. Inter-country adoption of children with special needs.
4. Non-relative adoptions through adoption accredited bodies (AAB) or independent non relative adoptions?
5. Accreditation and authorization of adoption bodies.
6. The implications of article 29 of The Hague Convention 1993 on matching and on direct adoptions.
7. Relative adoptions.
8. Cases of avoidance of The Hague Convention 1993 through “domestic” adoptions.
9. Non-discrimination principle between children benefiting from Hague and non Hague Convention adoptions.

#### *Question 20*

Some other issues raised by the Questionnaire of the Permanent Bureau will be handled in Chapter 10: Miscellaneous.

The International Social Service furthermore refers explicitly to the Evaluation presented to the attention of the First Special Commission gathered in 2000<sup>3</sup>. ISS, which was represented at this occasion, considers the Conclusions and Recommendations of such Commissions as very useful tools in order to interpret collectively and implement the Convention engaging more and more respect for the best interests of children. ISS refers regularly to these Conclusions and Recommendations in its work with the adoption protagonists.

*ISS thus encourages the States to adopt strong and precise new Conclusions and Recommendations in 2005, progressing steadily forward beyond those of 2000.*

#### *Question 1.c*

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<sup>3</sup> See [www.iss-ssi.org/Resource\\_Centre/thcevaluation.PDF](http://www.iss-ssi.org/Resource_Centre/thcevaluation.PDF).

## **1. The current evolution and trends of inter-country adoption and their consequences in view of the best interests of children**

*Art. 4-5, 7, 9.c, 10-12 and 14-17 of The Hague Convention 1993  
Questions 4 (g) to (i), 6, 16, 17 and 19*

The situation and trends of inter-country adoption have evolved dramatically during the last few years.

- Nowadays, according to UNICEF, worldwide « ...the adoption applications seem to exceed the number of adoptable children as far as young healthy children are concerned. The opposite seems, nonetheless, the case for children considered hard to place (children with special needs: aged, ill or handicapped, in sibling groups), for whom there is a serious lack of prospective adoptive parents »<sup>4</sup>.

*The adequacy of this analysis to each national situation could usefully be a matter of discussion during the 2005 Special Commission.*

- In such a context, pressure from foreign prospective adoptive parents, adoption accredited bodies and authorities of receiving countries in favour of the adoption of young children without serious health problems runs the risk of encouraging abuse of inter-country adoption and thus disregarding the best interest of the child.

This risk becomes far bigger if the public opinion of the receiving countries continues to believe that there exists, in the developing and in the transition countries, a huge amount of adoptable healthy children waiting for families and if the erroneous concept of a "right to adopt" keeps spreading in receiving countries.

*During the 2005 Special Commission, receiving States and States of origin could usefully share on which measures they have taken or intend to take in order to address this key issue. The following good practices may in particular be usefully discussed.*

- 1. Assessment by the countries of origin of the number and the profile of the inter-country adoptable children after all the domestic alternative solutions are carefully examined; sharing of the results of this assessment with the receiving countries; determination of the numbers and profiles of foreign prospective adoptive parents and adoption accredited bodies needed in order to fit the needs of these children.*
- 2. Information of the public opinion and of the prospective adoptive parents in receiving countries about the reality (both in numbers and profiles) of the adoptable children worldwide.*
- 3. Education of the public opinion and of the professionals in both countries of origin and receiving countries about the ethics of inter-country adoption based e.g. on The Hague Convention 1993 and the UN Convention on the Rights of*

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<sup>4</sup> N. CANTWELL, « Intercountry Adoption – A Comment on the Number of 'adoptable' Children and the Number of Persons seeking to adopt internationally », *International Child Protection. The Judges' Newsletter*, published by The Hague Conference, t. V, Spring 2003, pp. 69-73, [http://hcch.e-vision.nl/index\\_en.php?act=publications.details&pid=2799](http://hcch.e-vision.nl/index_en.php?act=publications.details&pid=2799) and [www.iss-ssi.org/Resource\\_Centre/Tronc\\_DI/Cantwell\\_Intercountry\\_Adoption\\_English.pdf](http://www.iss-ssi.org/Resource_Centre/Tronc_DI/Cantwell_Intercountry_Adoption_English.pdf).

the Child. The ethics including elements as the best interest of the child; the subsidiarity principle; the adoptability of the child; the free and informed consent of the parents of origin; the prohibition of improper financial gain; the joint responsibility and cooperation between countries of origin and receiving countries ... and finally the inexistence of any "right to adopt". As quoted from the head of the Central Authority of a receiving country: "adoption is a right for the child and a privilege for the adoptive parents".

4. Taking into account, in the receiving countries, of the real needs of the inter-country adoptable children *in the evaluation of the realism and of the openness of the project of the prospective adoptive parents as an element of the evaluation of their suitability to inter-country adoption and in their preparation.*
5. Making the adequacy with the real needs of the inter-country adoptable children a requirement for *accreditation of the adoption bodies by receiving countries and for their authorization by countries of origin.*
6. The limitation, by the countries of origin, of the number of receiving countries and foreign adoption accredited bodies with whom they cooperate, in order to adjust (possibly by way of requirements additional to the Convention) and specialize such cooperations in line with the needs of their adoptable children.

Regarding this issue, it has to be recalled that, according to a statement by The Hague Permanent Bureau on 19 May 2005, "*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 inter-country 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 cooperative 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 inter-country adoption process.*

*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"*<sup>5</sup>.

7. A practical measure, in order to adjust to the needs of adoptable children, is the "reversing of the flow of the files": *the despatch of the files of children in need of inter-country adoption by the States of origin to the potential receiving States* and not the despatch by the receiving countries to the countries of

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<sup>5</sup> Editorial of ISS/IRC Monthly Review 5/2005,  
[www.iss-ssi.org/Resource\\_Centre/Tronc\\_DI/documents/Edito.2005.5.eng.pdf](http://www.iss-ssi.org/Resource_Centre/Tronc_DI/documents/Edito.2005.5.eng.pdf).

origin of a great number of files of prospective adopters requesting children with profiles who do not necessarily need a foreign family. ISS/IRC is actually aware of such experiences of reversing the flow of files in 4 States of origin, 3 relating to the files of adoptable children with special needs and 1 to the files of every adoptable child.

8. All these measures stress *the joint responsibility of the Central Authorities of both countries of origin and receiving countries, and thus their necessary strong cooperation*, in order to address, by priority, the needs of the children.

## **Proposal**

**That the Special Commission takes note of the current evolution and trends of inter-country adoption and recommends States to develop above mentioned measures in order to adapt practices to the real needs of the inter-country adoptable children.**

## **2. Permanency planning for each child deprived of parental care, including the subsidiarity principle of inter-country adoption**

*Preamble and art. 4, 16 and 35 of The Hague Convention 1993  
Questions 4 (a) to (c) and 7 (1) (h)*

In conformity with the principles of subsidiarity of inter-country adoption (2) and adoptability of the child, The Hague Convention 1993 supposes that the option of inter-country adoption has been selected as the protection measure most adequate for the concerned children. Such key decision supposes also that countries implement permanency planning for each child deprived of his/her family, in the framework of a global child and family welfare policy (1).

ISS, therefore, welcomes very positively the inclusion in the Draft Guide to Good Practice of the elements of permanency planning and global child and family welfare policy.

1. **Permanency planning** means the search for the most adequate permanent solution for each child deprived of his/her family or at risk to be deprived of, in the framework of a comprehensive child and family welfare policy which supposes a coherent legislation, complementary procedures and coordinated competences. This policy has to include 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, domestic adoption and, in principle as more temporary measures, foster and residential care<sup>6</sup>.

Permanency planning is based on the following principles:

- priority be given to the prevention of abandonment and of separation of the child from his/her parents and to an active support to families in difficult situations;
- if in residential or foster care, priority be given to the reintegration of the child into his/her (possibly extended) birth family;
- if this reintegration is not possible nor in the best interest of the child, priority be given to alternative family and domestic permanent solutions.

This decision process relating to each child deprived of parental care is seen as essential but, as to the best of our knowledge, few States or organisations devote their attention actively to them. Institutionalisation of their child too generally continues to be the first response given to mothers and families in difficulty. Too many children spend several months or years in an institution before their family situation - social and legal - is clarified and steps are taken to promote their reinsertion into their family or their adoption. Since time plays a key role for children, this situation is extremely harmful. Too many children have as their only future an unlimited stay in an institution with no consideration of an individualized life plan for them.

2. Practice also shows that **the subsidiarity principle of inter-country adoption** is included into a number of domestic laws and implemented concretely according to various modalities, among which are the following:

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<sup>6</sup> For more developments, see notably [http://www.iss-ssi.org/Resource\\_Centre/Tronc\\_DI/documents/CRCDiscussionDayAglobalPolicyISS05.pdf](http://www.iss-ssi.org/Resource_Centre/Tronc_DI/documents/CRCDiscussionDayAglobalPolicyISS05.pdf).

- the child has to be registered on a list of domestically adoptable children for several months - sometimes a year - before becoming inter-country adoptable. The key issues in such a practice are to know which concrete steps are taken within this period in order to match effectively the child with a national family and if the term is not sometimes too long, especially for children (for example with special needs) who have little chance to find a national family;

- the child has to be proposed to several national prospective adoptive parents and to be refused by them before becoming inter-country adoptable. This requirement, which puts a hard stigma on the child, is also incompatible with professional matching, which tends to find the most adequate family for a child and in principle does not generate such a series of failures;

- furthermore, in some countries, the national prospective adoptive parents should have to meet the child before refusing him or her, which is still more harmful for the child.

It is understood that the countries of origin try to document that they implement effectively the subsidiarity principle but it can not be done at the cost of the emotional development of the child. Matching for both domestic and inter-country adoption has to be a professional, pluridisciplinary and qualitative decision taken in the best delays on a case-by-case basis, after careful study of the child and of the potential families.

*In order to exchange views and practices, States could usefully share, during the Special Commission, on their practice relating to the implementation of the subsidiarity principle.*

## **Proposal**

**That the Special Commission recommends to States to take the necessary legislative, administrative and psychosocial measures in order to:**

**1. guarantee permanency planning in the best delays for each child deprived of his/her parents and incorporate concretely inter-country adoption within a comprehensive child and family welfare policy, which supposes a coherent legislation, complementary procedures and coordinated competences. Such policy has to include 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, domestic adoption and, in principle as more temporary measures, foster and residential care;**

**2. ensure that the subsidiarity principle is included into law and implemented in practice in order that matching for both domestic and inter-country adoption be a professional, pluridisciplinary and qualitative decision taken in the best delays on a case-by-case basis, after careful study of the child and the potential families, and that it does not unnecessarily harm the child through its modalities.**

### **3. Inter-country adoption of children with special needs**

*Art. 4-5, 9.c and 14-16 of The Hague Convention 1993  
Questions 4 (g) to (j) and 13*

#### ***Children are waiting ...***

Millions of children and young people « with special needs » reportedly live in foster or residential care around the world, both in developing countries or those in transition and in the industrialized countries. Too often, no permanency planning has been drawn up for them. Even if adoption is probably not the solution for the adequate permanent protection for each of them, a certain number are psycho-socially and legally adoptable. Many of them, however, do not find an adoptive family.

Who are these children? Older children, ill or handicapped children, children who have been in placement for a long time and are scarred by their past, children living in a sibling group that cannot be broken up. The family integration of some of them presupposes, for sure, very specific capabilities for adaptation on the part of the children as well as the adoptive parents. But some families bear witness to the success of such adoptions.

*During the 2005 Special Commission, States should usefully share about the general current situation of their children with special needs, notably those who are adoptable.*

Moreover, depending upon the definition of « special needs » that varies from country to country, some children differ little from the profile of the child the prospective adoptive parents dreamed of: children just three years old, either carrying a harmless curable disease or handicap, who have lived through a trouble-free placement, or a sibling group of two healthy young children ... To classify these children in the category of « children with special needs » no doubt sometimes unduly diminishes their chances of being adopted, when they could be integrated in a family, probably by means of professional support.

*States should also examine their legal or practical definition of “children with special needs”, in order to encourage and not to hinder specific permanency planning for them.*

#### ***Needs of children and expectations of prospective adoptive parents***

To be realistic about the state of domestic and inter-country adoption, one should underline that, at the global level, unlike the healthy young children the prospective adoptive parents are waiting for – and will have to wait, longer and longer, and more and more, to no avail – these are the children with special needs who are waiting for families, in vain, in most cases.

It is natural that prospective adopters, like all parents, want their child to avoid any major developmental problem. Some adopters, however, probably approaching the problem more from the perspective of giving a child a family rather than of « finding a child » for their family, are willing and able to face up to certain special needs of children. In any case, it is becoming more inevitable with every passing day to question the substance of the requests made by prospective adopters; to let them evolve, if they possibly can, in their portrayal of their dream child; to broaden their desire; and, on occasion, set off in search of very tangible children in need of

domestic adoption or, failing that, resorting to inter-country adoption. Nonetheless, this step is certainly not within the reach of all prospective adopters. Children with special needs probably need parents actively recruited and chosen according to adjusted criteria, and certainly parents counselled and supported in specific ways.

### ***The need for global awareness***

This task of putting the requests of prospective adoptive parents into proper perspective necessarily presupposes a full awareness of the reality of children in need of adoption. It needs to be done in every country, on the part of the press, of those in government, by professionals and the public at large. In fact, how many people are still convinced that « the Third World is swarming with healthy babies just waiting for a family »? *Specific information, training and education are thus indispensable in both countries of origin and receiving countries, as well as targeted scientific research.*

### ***Adapting professional practices***

Together with this raising of awareness, professional practices, often still insufficiently adapted to the special needs of children, should evolve towards:

1. *Priority advancement, in all countries, of the domestic adoption of children with special needs, who must be incorporated in a global child and family welfare policy and benefit from permanency planning like other children (in this regard, it is not in the best interests of children to declare them legally adoptable and then to leave them with this status, if no adoptive family can be found for them; after a period of active search for such a family, it is advisable to draw up an alternative life plan for and with them).*
2. *Opening up all receiving countries to the adoption of foreign children requiring medical or psychological care, which is not the case at present.*
3. *Information for prospective adoptive parents, before their suitability is assessed, about the reality of children in need of domestic and inter-country adoption.*
4. *Active search, by professionals, for prospective adopters likely to respond to the special needs of children.*
5. *Evaluation of the suitability of prospective adoptive parents in terms of the needs of children who are genuinely adoptable.*
6. *Matching based, case by case, on a precise assessment of the strengths and weaknesses of the child and of the potential adoptive families.*

7. *Specific counselling* of prospective adoptive parents and of the child before they first meet.
8. *Professional follow-up* to the meeting and the period before the legal adoption decision.
9. The offer of specific professional *post-adoption services*.
10. *The possibility of granting benefits* in certain circumstances for the adoption of children with special needs.
11. *The possibility of simple or open adoption* that allows certain adoptable children to maintain their links with members of their family of origin.

In every country, developing, in transition, or industrialized, the present challenge posed by adoption – both domestic and inter-country – and an important part of its future undoubtedly reside in the search for suitable families for children with special needs, as well as in suitably adapted professional practices. *Children presenting special needs require different adoptive parents and reformed professional practices.*

## **Proposal**

**That the Special Commission expresses its deep concern about the situation of so many adoptable children with special needs waiting for a family and recommends to States the development of awareness on their situation, specific permanency planning as well as the above-mentioned adapted adoption professional practices.**

#### **4. Non-relative adoptions through adoption accredited bodies (AAB) or independent non-relative adoptions?**

Art. 22.1 of The Hague Convention 2003  
Questions 6, 7 (2) to (3) and 16

Depending on their law and practice, countries (both of origin and receiving) handle all, or the vast majority of non relative adoptions, either through adoption accredited bodies (AAB<sup>7</sup>), either as independent adoptions. We mean here independent adoptions as adoptions with no intervention of AAB from receiving countries but going through Central and possibly competent authorities.

This policy choice contains *a lot of ethical and practical implications for the child, the birth parents and the prospective adoptive parents*. According to International Social Service, making it compulsory for prospective adopters to go through the AAB of receiving countries, although not imposed by The Hague Convention 1993, constitutes an important additional guarantee.

In fact, the Central and competent Authorities of the receiving countries and the countries of origin rarely have the material and human resources (trained and experienced, interdisciplinary staff on site in sufficient number) to fully discharge the functions of preparing and supporting children, parents of origin and/or future adoptive parents through the whole adoption process. *The delegation of such tasks to professional bodies enhances the quality of the inter-country adoption process and diminishes the risks of failures.*

The AAB can thus be considered as an additional guarantor, under the supervision of the receiving States and the States of origin, of the ethics, the professionalism and of the interdisciplinary nature of the inter-country adoption process. It plays the role of a close “third party”, on the spot, and contributes to providing the necessary interventions and mediations by society and the State in defence of children deprived of their family. The adoption body serves as a strong link between families, protagonists and the authorities of the receiving countries and of the countries of origin. The supplementary intervention of the AAB enables the Central Authorities to fulfil their mission and to pursue *a genuinely integrated inter-country adoption policy*, out of an ever greater concern for the service of children.

In addition, the obligation for prospective adopters to go through an AAB is *part and parcel of the combat against certain abuses, trafficking and failures that stem from recourse to independent adoption, among others violations of article 29 of The Hague Convention 1993 (see below Chapter 6)*. *The receiving State can be seen as bearing responsibility* for the behaviour of its nationals, prospective adopters, abroad. As a reminder, *the United Nations Committee on the Rights of the Child* in its Concluding Observations to a Hague receiving country in May 2004 expressed its concern “*at the high percentage of inter-country adoptions which are not made through the accredited bodies but through individual channels*”<sup>8</sup>.

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<sup>7</sup> For a list of such countries and more information, see [www.iss-ssi.org/Resource\\_Centre/Tronc\\_DI/Interdiction\\_adoptions\\_internationales\\_privéesANG.pdf](http://www.iss-ssi.org/Resource_Centre/Tronc_DI/Interdiction_adoptions_internationales_privéesANG.pdf).

<sup>8</sup> See France, Concluding Observations, n° 33: <http://www.ohchr.org/english/bodies/crc/crcs36.htm>.

*In this respect, it has to be stressed that the situation evolved dramatically since the adoption of The Hague Convention 1993. At that time indeed, one major concern was the abuses perpetrated by unmonitored intermediaries. For this reason, the Convention considered the recourse to adoption bodies as optional and detailed important accreditation guarantees (art. 10-13). It can be considered as a success of the Convention that a significant number of adoption accredited bodies from States parties have since then increased their professionalism and ethics – even if new progresses can probably still be achieved: see below Chapter 5. Nowadays however, an important concern relating to inter-country adoption focuses on abuses committed – willingly or not – by independent prospective adoptive parents. The implementation of the Convention has thus to be adapted to this new perspective, for the best protection of children, of birth parents and of the adoptive parents themselves.*

If thus a receiving State authorises independent adoption, it should, at the very least, in order to assemble a minimum of guarantees and in close collaboration with the State of origin, *make enquiries about the reliability (in terms of the rights of the child) of contacts outside the country of each prospective independent adoptive parent*, a virtually impossible task to fulfil effectively when there is a great number of applicants.

Of course, a policy of compulsory recourse to ABB supposes the existence in the receiving countries of a sufficient amount of professionally reliable bodies (see also Chapter 5). *But it can also be considered as part of a comprehensive inter-country adoption policy for a receiving country to encourage the creation, promote the professionalism and ensure the support, training and supervision of such bodies*, at least if the number of prospective adoptive parents so requires.

## **Proposal**

**That the Special Commission recommends both States of origin and receiving States to**

- envisage to make compulsory the recourse of prospective adoptive parents to AAB from receiving countries as soon as the number of inter-country adoptions so requires;
- if not, to offer to independent adoptions the same level of guarantees as to adoptions through AAB, especially relating to
  1. the professional support to the child, to the birth parents and to the prospective adoptive parents through the adoption process;
  2. the assessment of the reliability of the contacts of the prospective adoptive parents in the State of origin;
- encourage the creation, promote the professionalism and ensure the support, training and supervision of adoption accredited bodies.

## **5. Accreditation and authorization of adoption bodies**

*Art. 7.1 and 10-13 of The Hague Convention 1993  
Questions 6, 8 (2) and 19*

According to ISS, the mediation of an adoption accredited body (AAB) from a receiving State is only a safeguard if a certain number of conditions are met at two levels: the ABB itself and the joint responsibility for the protection of children, between the receiving States and the States of origin.

### **1) At the level of the AAB itself**

*The body must fulfil the following requirements:*

- uphold the ethics of the child's best interests, namely an adequate degree of analysis of the rights of the child, embodied in the messages it conveys and in its practice;
- have medico-psychosocial and legal professional competence, human and material resources sufficient to assume its responsibilities, and enjoy the benefits of an ongoing training programme;
- have a sound knowledge of the entire machinery of adoption, as well as the factors that influence the development of the child and the process of forming attachment with its ups and downs both in the child and in the parents;
- have a sound knowledge not just of the adoption procedure, but also of the profile of children in need of inter-country adoption and of the child and family policy in the country of origin with which the AAB is co-operating;
- build firm commitments to its various interlocutors (children, prospective adopters, authorities, workers in the field, etc.);
- demonstrate transparency in its links with other partners who could influence its activities (for example belonging to a national or international network where another body sets policy or is profit-oriented);
- monitor transparent financial management, as well as a close check on the ethical and reasonable nature of the different types of fees charged or paid;
- and, as a *sine qua non*, guarantee the ethical and professional competence of its representatives and/or partners in the States of origin.

*Respect of these conditions named above, presupposes, on the part of the receiving States and the States of origin concerned and in close cooperation between them:*

- regular supervision of the AAB;
- systematic review, at a fixed date, of the accreditations and authorisations granted;
- regular support, particularly financial;
- close cooperation between the Central Authorities and the ABB and incorporation of the AAB in the States' global policy, on the occasion of contacts with other States as well.

### **2) In the joint responsibility for the protection of children, between the receiving States and the States of origin**

For the mediation of the AAB in the receiving countries to serve as a safeguard, the authorities responsible for their accreditation in the receiving State and for their authorisation in the State of origin must also commit themselves jointly to promoting

the best interests of children by applying a principle of joint responsibility. Dialogue and international co-operation should, in future, be enhanced to allow the authorities in the two countries to reply jointly to the following questions:

a) *For which children in the country of origin (their profile and an estimate of their number) do prospective families in the receiving country need to be found?*

The answer to this question will make it possible to determine the profile and the number of families sought after, and on what basis to determine the profile and the number of the AAB in the receiving country needed to manage the co-operation. Thus, this is not a matter of dialogue between just two States but between several ones: the State of origin and the receiving States involved in the co-operation must co-ordinate their decisions. Through such a dialogue, their authorities should, before any decision to accreditate or authorise an AAB, check that it responds to a real need and that it is not just attaching itself in the case in point to a list of AAB of various receiving States co-operating with the State of origin that is already too long.

b) *How is the domestic and inter-country adoption system organised and how does it function in each receiving State and State of origin?*

At what stages can an AAB collaborate qualitatively in the work of the Central or competent authorities or be associated with it: preparing the child for adoption or training the staff in charge of it, checking the suitability of prospective adopters, in-depth preparation of the latter for adoption or training the staff responsible for this preparation, matching, psychosocial follow-up of the adoptive family, etc.? The answer to these questions will make it possible to identify the professional profile of the AAB and the substance of the tasks assigned to them by the receiving State and the State of origin, always keeping in focus the children's best interests. It will also contribute to determine the role and the professional profile of *the AAB's representative(s) in the country of origin.*

*If some AAB only provide specific services for a limited part of the adoption process (for example, the study or the preparation of the prospective adoptive parents), it is the joint responsibility of the States and of the ABB to assess that these services be included in a comprehensive and qualitative inter-country procedure.*

Finally the answers to such questions can also help to assess *if AAB from the country of origin* are necessary and, should it be the case, with what profile: specifically accredited children's homes? AAB for both domestic and inter-country adoptions? AAB only for inter-country adoptions?

*The experiences of States in this field could usefully be shared during the meeting of the Special Commission.*

## **Proposals**

**That the Special Commission recommends to States of origin and to receiving States to include above mentioned requirements and inter-country joint cooperation in their accreditation/authorization procedure of AAB.**

**That a chapter on Accreditation/Authorization be developed in the future Hague Guide to Good Practice, including the issues covered by this Chapter and by Chapters 1 and 4 of the present document.**



## **6. The implications of article 29 of The Hague Convention 1993 (THC-1993) on matching and on direct adoptions**

*Art. 29 and 8 of The Hague Convention 1993*  
*Question 16*

According to article 29 of The Hague Convention 1993, no contact between foreign prospective adoptive parents (PAPs) and the child's parents or any other person who has the care of the child may take place before making sure that some requirements established in the Convention have been respected. These include, in particular, the verification (1) that the child is adoptable, (2) that no domestic measure was preferable for the child and (3) that the consents required have been obtained (art. 4. a, b, c). Furthermore, (4) it is also compulsory that the eligibility and suitability of PAPs be determined before any contact (art. 5. a).

One of the main *objectives* of article 29 is the preservation of the free consent of the birth parents. It is of utmost importance that the PAPs do not have the opportunity to induce this decision, in particular by payment or compensation (art. 4. c). Another objective is to oblige PAPs to respect The Hague adoption system, first letting their eligibility and suitability assessed and afterwards processing through the Central and competent Authorities of receiving countries and countries of origin (art. 14-17), and preferably through an adoption accredited body.

### ***Direct adoptions in the light of article 29 and of children's rights***

"Direct adoptions" are the ones which are directly arranged between the child's birth parents or carers and prospective adoptive parents, without the intervention of a professional third party in the matching process. According to the Explanatory Report to THC-1993 (n° 498) "article 29 sanctions, as a rule, the prohibition of contacts in general terms, therefore including not only 'direct, unsupervised' contacts, but also 'indirect' or 'supervised' contacts" (supposedly: visits, postal mail, phone calls, faxes, emailing).

*Direct adoptions violate therefore article 29 if they are organised before the four above described requirements are assessed by a THC-1993 authority or body.*

Furthermore, even if the arrangement between the PAPs and the child's parents or carer takes place after the legal assessment of the THC-1993 requirements, direct adoptions can be considered as *non compatible with the spirit of THC-1993*, which supposes the intervention of authorities and professional bodies throughout the whole adoption process.

Moreover, direct adoption can be considered as *counter to the United Nations Convention on the Rights of the Child (CRC)* since it makes the child an object of agreement between private individuals - living furthermore frequently in unbalanced economical and psychosocial situations - whereas the CRC considers the child to be the subject of a right to professional protection measures for which the States are responsible (art. 20-21).

Direct adoption is also frequently a source of abuse, of trafficking of children and of serious violations of the rights of the child, and as such likely to come *under the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography* (see also below, Chapter 10).

Some psychologists furthermore insist on the long-term dangers for the development both of the child and of the adoption relationship, of allowing the adoptive parents to “choose” the child.

All these risks can be avoided by the intervention of an adoption accredited body (AAB) which supervises and guides the adoption process. Such a body should be composed of a multidisciplinary team (social workers, psychologists, doctors, lawyers, etc.) capable to follow the adoption process in a comprehensive manner (see also above Chapters 4 and 5).

### ***A minimum standard***

In the same way that THC-1993 taken as a whole, article 29 establishes a *minimum guarantee* that must always be respected. However, in its letter, the prohibition contained in this provision is *limited in time*, as contacts are supposedly not prohibited after all the mentioned requirements of article 4 and 5 are met.

The principle of the best interest of the child suggests however that a *broader interpretation, more in line with the spirit of article 29 and with the general structure of THC-1993, be promoted* by the relevant authorities in all countries, which is already the case in a lot of them.

### ***A coherent interpretation with the whole THC-1993***

The authorities of receiving countries and of countries of origin should guarantee that PAPs go through the Central Authorities of both concerned countries, in order that professional and interdisciplinary teams (based on psychological, medical, social and legal reports concerning the child and the PAPs) select the most adequate family for each child (matching) and then submit this selection to the PAPs for their approval. This interpretation is the one most in conformity with the structure described by articles 14 to 17 of THC-1993 and the only one which guarantees that the objectives of article 29 be really reached.

*So no contact between PAPs and the child's parents or carer should then logically take place before the matching is carried out.* Any pre-identification or selection of the child by PAPs should in principle be avoided. In order not to influence the matching process and not to harm unduly the child by a first bonding with people who could afterwards not be matched with him/her, it is also recommended that the first travel of the PAPs to the country of origin and their first contact with the child should take place only after the decision of matching and the approval of it by the PAPs is done (with all reserve of the professional verification of the child's attachment during the probationary period).

### ***Exceptions to the article 29 prohibition***

Article 29 contains two exceptions to the prohibition.

(1) Contacts are not forbidden in case of “*adoptions within a family*” (not further defined by The Hague Convention 1993 nor the Explanatory Report: see n° 502). In these situations PAPs and birth parents usually already know each other: see below Chapter 7.

(2) In addition, *the competent authority of the State of origin may also establish conditions authorising the contact.*

The interpretation of this last exception is also an issue of discussion. According to the Explanatory Report to The Hague Convention 1993 (n° 503), the idea of this exception “is to grant flexibility and permit the setting of those conditions by the State of origin, either in general terms, by the legislator, or on a case-by-case basis, i.e. by the administrative or judicial authority, taking into account the particularities of the situation”. *However, the case by case basis for possible exceptions to article 29 should be preferred.* Indeed if the exception is implemented so broadly that it becomes a general rule, article 29 risks losing its meaning.

In order to be effectively implemented and monitored, *the exceptions in individual cases should, moreover, be decided in the framework of a close cooperation between Central Authorities of countries of origin and receiving countries. This special authorization of contact should not permit a matching done by the PAPs and the child's parents or carer: even if the child is already known by the PAPs, the adequacy of the PAPs' project with the child's best interest has to be checked by a professional team, after the assessment of every requirement, among others the adoptability of the child and the subsidiarity principle.*

## **Proposal**

**That the Special Commission recommends States to**

- **guarantee that matching be a professional decision and not a direct private arrangement between the prospective adoptive parents and the child's parents or carer;**
- **implement article 29 of The Hague Convention 1993 until the matching decision;**
- **in non relative adoptions: impede in principle any pre-identification or selection of the child by PAPs as any travel of PAPs to the country of origin and any contact with the child before the professional decision of matching and its approval by the PAPs;**
- **in non relative adoptions: limit the possible exceptions to article 29 to exceptional situations examined on a case-by-case basis, in cooperation between the Central Authorities of the concerned countries with a professional assessment of the matching.**

## **7. Relative adoptions**

*Art. 2 and 29 of The Hague Convention 1993  
Questions 12 and 14*

As a reminder, relative adoptions fall fully under the scope of The Hague Convention 1993. In our comprehension, relative adoptions include stepchild adoptions and adoptions of a child related at least to one of the adopters (nephew, niece ...). Sometimes also some kind of “reunification” of the child with godparents or other close friends of the family living in another country is requested. The precise definition and legal admissibility of such adoptions are not provided neither by the Convention nor by the Explanatory Report and have thus to be determined by national law.

As relative adoptions fall under the scope of The Hague Convention 1993, the consequences to abide by are that:

- the final and joint responsibility of Central Authorities of both countries of origin and receiving countries, be fully exercised;
- the sole intervention of Central Authorities, possibly competent authorities and adoption accredited bodies, excluding other bodies or organisations, be put in place;
- the subsidiarity principle be implemented according to the specificities of the case and thus the assessment of the best interest of the individual child, taking into consideration his/her current and future links with the family/familiars in the birth country and abroad. The principles to be balanced in this assessment include priority consideration being given to the (extended) birth family, to the stay in the birth country and to a permanent solution<sup>9</sup>;
- the assessment of the legal and medico-psycho-social adoptability and the preparation of the child, be done;
- the assessment of the eligibility and suitability and the preparation of the prospective adoptive parents be done;
- the follow-up of the placement of the child into the prospective adoptive family be made.

In relative adoptions, there is no matching in the general sense of the term as applied to non relative adoptions (see also above Chapter 6). Nevertheless, the authorities have to assess, on the basis of a detailed psycho-social and legal evaluation, the compatibility with the best interest of the child of:

- the adoption option (as opposed to other legal solutions as maintaining the child in the birth family, if necessary with some professional support; kinship care; guardianship; delegation of parental responsibility; kafala, ... either in the birth country or in another country). However, the current regulations relating to entry and residence in a lot of receiving countries, frequently do not authorize to consider such alternatives on their territory. Relating to alternative measures, the entry into force of The Hague Convention 1996 in the Hague 1993 countries could help to consider the full range of solutions relating to each child;

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<sup>9</sup> For more developments, see [www.iss-ssi.org/Resource\\_Centre/New\\_Documents1/documents/Edito.2005.3.eng.pdf](http://www.iss-ssi.org/Resource_Centre/New_Documents1/documents/Edito.2005.3.eng.pdf).

- the adoption by the proposed prospective adoptive parents (as opposed to other family members either in the country of origin or in another country);
- the move of the child from his country of origin to the receiving country, without underestimating the difficulties and overestimating the benefits; the aim being the child welfare perspective rather than the migration one.

However, practice shows that inter-country relative adoptions are not systematically given the same level of professional guarantees than non relative adoptions, although they frequently concern much older children (including late teenagers) for whom uprooting and new integration can be very difficult. For sure relative adoptions require a professional work adapted to their specificities and probably ongoing support and post-adoption services.

Moreover, in some countries of origin, relative adoptions do not seem to have been integrated in The Hague Convention 1993 legislation and structure (including the responsibility of the Central Authority) and continue, consequently, to be handled as “domestic” adoptions (see below Chapter 8).

## **Proposal**

### **That the Special Commission recommends States to**

- **fully integrate relative adoptions in their implementation of The Hague Convention 1993 and give them the same level of legal and medico-psycho-social guarantees as non relative adoptions, adapted as above mentioned to the specificities of intra-familial relationships;**
- **consider actively the ratification of, or the accession to The Hague Convention 1996 and to offer relative children, if it is in their best interests, a more open range of alternative inter-country care solutions, linked with a residence permit.**

## **8. Cases of avoidances of The Hague Convention 1993 through “domestic” adoptions**

*Art. 2, 8 and 33 of The Hague Convention 1993*  
*Question 15*

One main implementation criteria of The Hague Convention 1993 is the habitual residence of the child and the prospective adoptive parents in different countries, whatever their citizenship.

The practice shows, nevertheless, that mostly citizens from some countries of origin residing in receiving countries continue to handle relative (see also Chapter 7) and non-relative adoptions of children residing in their country of origin by the implementation of laws and procedures relating to domestic adoption, without respecting The Hague Convention 1993 requirements and procedures. Consequently such adoptions may not be recognized by the receiving countries and some of these children remain separated from their “adoptive parents” because their entry into the receiving countries is refused.

One of the reasons for such difficulties to occur is the lack of coherency between the laws and procedures relation to domestic adoption in some countries of origin with The Hague Convention 1993 requirements and procedures, and in particular, the responsibility of the Central Authority.

### **Proposal**

**That the Special Commission recommends to States to include The Hague Convention 1993 requirements and procedures, including the responsibility of the Central Authority, in the general child and family welfare system and that the laws and procedures relating to domestic adoption explicitly exclude from their scope adoptions by people – even citizens of the country or relatives of the child – habitually residing in another country.**

## **9. Non-discrimination principle between children benefiting from Hague and non Hague Convention adoptions**

### *Question 16 (a)*

Even if improvements to its implementation are still recommended, The Hague Convention 1993 provides a valuable set of guarantees for children, birth parents and prospective adoptive parents. Unfortunately some of the non States parties are amongst the most vulnerable to bad practices, abuses and violations of children's rights.

Furthermore, it becomes incompatible with their international commitments towards children, and especially with *the non discrimination principle* (art. 2 of the UN Convention on the Rights of the Child), that States parties, both of origin and receiving, offer less guarantees to children when they handle inter-country adoptions with non States parties.

As an example, some receiving States parties permit their habitual residents to make direct adoptions which do not respect the guarantees provided by article 29 of The Hague Convention 1993 – thus bargaining directly with the child's parents or carer (see above Chapter 6) in non States parties, although other receiving States parties prohibit such adoptions.

It has to be recalled that the first Special Commission in 2000 recommended that States Parties « *as far as is practicable, apply the standards and safeguards of the Convention to the arrangements for intercountry adoption which they make in respect of non-Contracting States* »<sup>10</sup>.

Some States have already included into their law and procedure parallel guarantees for non Hague inter-country adoptions in the same way as for Hague ones (for example the assessment by the receiving State, if it admits independent adoptions, of the contact of the prospective adoptive parents in the State of origin: see above Chapter 4).

Relating to non-Hague adoptions, the States parties should be particularly attentive to the implementation of the subsidiarity principle, the checking of the adoptability of the child, the monitoring of possible independent adoptions, the combat against undue material gains, the co-operation between Central Authorities, the accreditation and authorization of intermediaries, the information of all parties, the checking of the suitability of the prospective adoptive parents and the ban on all contacts between the latter and the parents or carers of the child before the matching decision (see above Chapter 6).

### **Proposal**

**That the Special Commission reinforces the recommendation adopted in 2000 and recommends to every State party to revise its law and procedure in**

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<sup>10</sup> Report and Conclusions of the Special Commission, April 2001, [http://hcch.e-vision.nl/index\\_en.php?act=publications.details&pid=2273&dtid=2](http://hcch.e-vision.nl/index_en.php?act=publications.details&pid=2273&dtid=2) or [www.iss-ssi.org/Resource\\_Centre/Tronc\\_CI/reportspecom2000.PDF](http://www.iss-ssi.org/Resource_Centre/Tronc_CI/reportspecom2000.PDF), par. 56, recommendation n°11.

**order to offer as far as possible the same level of guarantees above mentioned to non Hague inter-country adoptions as well as to Hague ones. Particularly, the States parties of origin should make provision for parallel guarantees for all their children adopted at the inter-country level, whether it be in a country that is a party to the Convention or not. Similarly, the receiving States parties should make provision for parallel safeguards for all children adopted by their residents, whether or not they come from a State party to the Convention. Non-States parties would also be encouraged to ratify or accede to The Hague Convention 1993 and to develop the necessary steps for its comprehensive implementation.**

## **10. Miscellaneous**

With respect to **adoption charges and fees**, the International Social Service participated in the common research initiative launched by The Netherlands during the 2000 Special Commission, in order to obtain more concrete information relating to the current situation. ISS also welcomes the very specific and pertinent questions provided by the Questionnaire of the Permanent Bureau on this topic.

*ISS recommends States developing a more detailed and global view of the current concrete situation of fees, and sharing such information, in order to permit to interpret the Convention more coherently, to evaluate the practices, to possibly imagine new systems and to develop cooperation for the best interests of all children deprived of parental care.*

*Art. 8 and 32 of The Hague Convention 1993  
Questions 7 (1) (c), 10 and 11*

***The Optional Protocol to the UN Convention on the Rights of the Child, on the Sale of Children, Child Prostitution and Child Pornography*** requires States in particular to make punishable that an intermediary solicit « improperly » consent to domestic or inter-country adoption, in violation of applicable international instruments (art. 3)<sup>11</sup>, including thus The Hague Convention 1993.

*ISS encourages States - to ratify or accede to the Optional Protocol to the UN Convention on the Rights of the Child, on the Sale of Children, Child Prostitution and Child Pornography;*

*- to implement the Protocol in close links with The Hague Convention 1993, and exchange information on this implementation through their Central Authorities and possibly at the occasion of The Hague Special Commissions.*

*Art. 8, 32 and 33 of The Hague Convention 1993*

*Question 11*

ISS also supports very warmly the initiative of the Permanent Bureau to circulate a draft **Guide to Good Practice, Statistical forms and Organigram**. These instruments are very necessary tools in order for the States to develop a global and always more coherent and ethical practice of inter-country adoptions. The present ISS evaluation provides examples of good practices and difficulties, documented in several countries, according to the different issues discussed. ISS will officially comment on the Draft Guide when it will be circulated.

*ISS reminds that it offers implementation assistance for States who ask for it, in coordination with the Permanent Bureau of The Hague Conference and possibly with other States.*

*Art. 7.2 and 9.d of The Hague Convention 1993*

*Question 2*

ISS also recalls that it already disseminates regularly, through its Monthly Review, information of interest received from different countries, relating to **seminars, training sessions or workshops on inter-country adoption**. We furthermore organize *training* upon request for adoption authorities or bodies.

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<sup>11</sup> For more information, see [www.ohchr.org/english/law/crc-sale.htm](http://www.ohchr.org/english/law/crc-sale.htm) and [www.unicef.org/crc/crc.htm](http://www.unicef.org/crc/crc.htm).

*ISS would be most delighted to receive more of such information in order to make it available to every Central Authority and other professional bodies and persons.*

*Hague Convention 1993*

*Art. 7.2 of The*

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