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PROJET

GUIDE DE BONNES PRATIQUES EN VERTU DE LA CONVENTION DE LA HAYE DU 29 MAI 1993 SUR LA PROTECTION DES ENFANTS ET LA COOPERATION EN MATIERE D'ADOPTION INTERNATIONALE

MISE EN ŒUVRE

établi par le Bureau Permanent

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DRAFT

GUIDE TO GOOD PRACTICE UNDER THE HAGUE CONVENTION OF 29 MAY 1993 ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION

IMPLEMENTATION

drawn up by the Permanent Bureau

Document préliminaire No 2 d'août 2005 à l'intention de la Commission spéciale de septembre 2005 sur le fonctionnement pratique de la Convention de La Haye du 29 mai 1993 sur la protection des enfants et la coopération en matière d'adoption internationale

Preliminary Document No 2 of August 2005 for the attention of the Special Commission of September 2005 on the practical operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption

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Introduction

The *Guide to Good Practice under the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption: Implementation* has been developed to assist Contracting States with the practical implementation of the Convention. The Guide is designed to assist both new and established Contracting States and their Central Authorities by putting at their disposal a range of tools and suggested approaches to assist States to achieve the objects of the Convention, namely, the protection of children who are adopted internationally.

Some States may find this Guide helpful as they move toward ratification and implementation of the Convention. Others may find the Guide a useful tool in discussions within their own authorities about the need for additional resources or changes to legislation. The Guide should also help to resolve differences and help Central Authorities work together even when the adoption systems of two countries are significantly different.

Part I of this Guide "The Framework of the Convention" deals with the principles and framework for the implementation of the Convention. Part II "The Framework for Protection of Children" deals with the implementation of procedural aspects of intercountry adoption, as well as legal issues and post-adoption services.

The purpose of this Guide is to assist States in developing a legal and procedural structure that will effectively implement the objectives and principles of the Convention. To do so, this Guide uses examples of strategies and practices employed by States around the world. This Guide is intended to be used by countries, which are contemplating becoming a Contracting State and by those States, which have already signed and ratified or acceded to the Convention. 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 in individual cases, the Guide aims to assist both policy makers and case workers who are responsible for the implementation of the Convention at the international, national and local levels.

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.

It is acknowledged that intercountry adoption does not occur in a vacuum. Intercountry adoption should be part of a national child care and protection strategy. However, this Guide is a Guide to Good Practice for implementing the 1993 Hague Convention. The Guide must therefore restrict itself to this subject, and can only briefly refer to other aspects of child care and protection to the extent that they may be relevant to issues affecting implementation of the Convention.

Nothing in this Guide may be construed as binding on particular States or Central Authorities; 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

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 of the Guide then 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 perform the functions required by the Convention.

Chapter 1 – Preliminary Matters

1.1 The need for a new convention

The need for a new convention on intercountry adoption became apparent in the 1980's when it was recognised that there had been a dramatic increase in international adoptions in many countries from the late 1960's to such an extent that intercountry adoption 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.¹

In December of 1987, the Permanent Bureau of the Hague Conference prepared a note on the desirability of preparing a new convention on international co-operation in respect of intercountry adoption.² That note analysed the shortcomings of the 1965 Hague Adoption Convention³ 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.

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,*

¹ See Explanatory Report to the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption*, by G. Parra-Aranguren, Hague Conference on Private International Law, *Proceedings of the Seventeenth Session*, Tome II, 1994, at p. 538, (hereinafter, "Explanatory Report"), at paragraph 6; See also the Report on Intercountry Adoption, drawn up by J.H.A. van Loon, Prel. Doc. No 1, 1990.

² See J.H.A. 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.

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

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

1.2 Brief History of the Convention

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 Session. It was also decided that it was vital to seek the participation of non-Member States in the preparation and execution of the Convention.⁵ 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.

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."⁶

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.⁷

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*⁸ 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."

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.⁹ 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.

⁴ See Explanatory Report, *supra* note 1, at paragraph 7.

⁵ See Explanatory Report, *supra* note 1, at paragraph 8.

⁶ See J.H.A. 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).

⁷ See Explanatory Report, *supra* note 1, at paragraphs 38-47.

⁸ *United Nations Convention on the Rights of the Child*, G.A. Res. 44/25, UN GAOR, 61st Plenary Meeting, Annex. Available at < www.ohchr.org >. (Hereinafter, "UNCRC").

⁹ See J.H.A. van Loon, *supra* note 6. See also W. Duncan, "The Protection of Children's Rights in Intercountry Adoption", Chapter 8.3 in L. Heffernan (ed.), *Human Rights - A European Perspective*, The Round Hall Press / Irish Centre for European Law, 1994.

The result was 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.

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

"The States signatory to the present Convention,

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..."

While the approval of the Convention was a momentous occasion, all 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,¹⁰ and that countries of origin in particular would need assistance in carrying out their responsibilities.¹¹

In the ten 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, which are generally countries of origin, whose participation in the Convention has led to an increased awareness of the need for implementation guidance and assistance.

Already two Special Commissions have been held, the first in 1994 with the purpose of examining issues relating to the implementation of the Convention as well as its application to refugee children,¹² and the second in 2000 to review its practical operation.¹³ These two meetings generated a number of important conclusions and recommendations, as well as standard forms, which are taken into account in this Guide.

¹⁰ See J.H.A. van Loon, *supra* note 6.

¹¹ See W. Duncan, "Regulating Intercountry Adoption – An International Perspective", Part I, Chapter 3 in A. Bainham and D. Pearl (eds.), *Frontiers of Family Law* (2d. Ed), John Wiley and Sons, 1995.

¹² 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.

¹³ 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, convened by the Secretary General under Article 47 of the Convention.

1.3 Purpose of the Convention

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

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 timeframe 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.

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 ratification / accession.

1.5 Assessment of the current situation

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 non-accredited persons, and how to structure the child protection and adoption policies.

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 domestic 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 which institutions, bodies or other persons now perform functions affected by the Convention.

1.6 An implementation plan

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.

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 non-accredited persons, and how the proposed system will be funded.

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 may be developed. Such a plan can be relevant for both newly acceding States and 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.

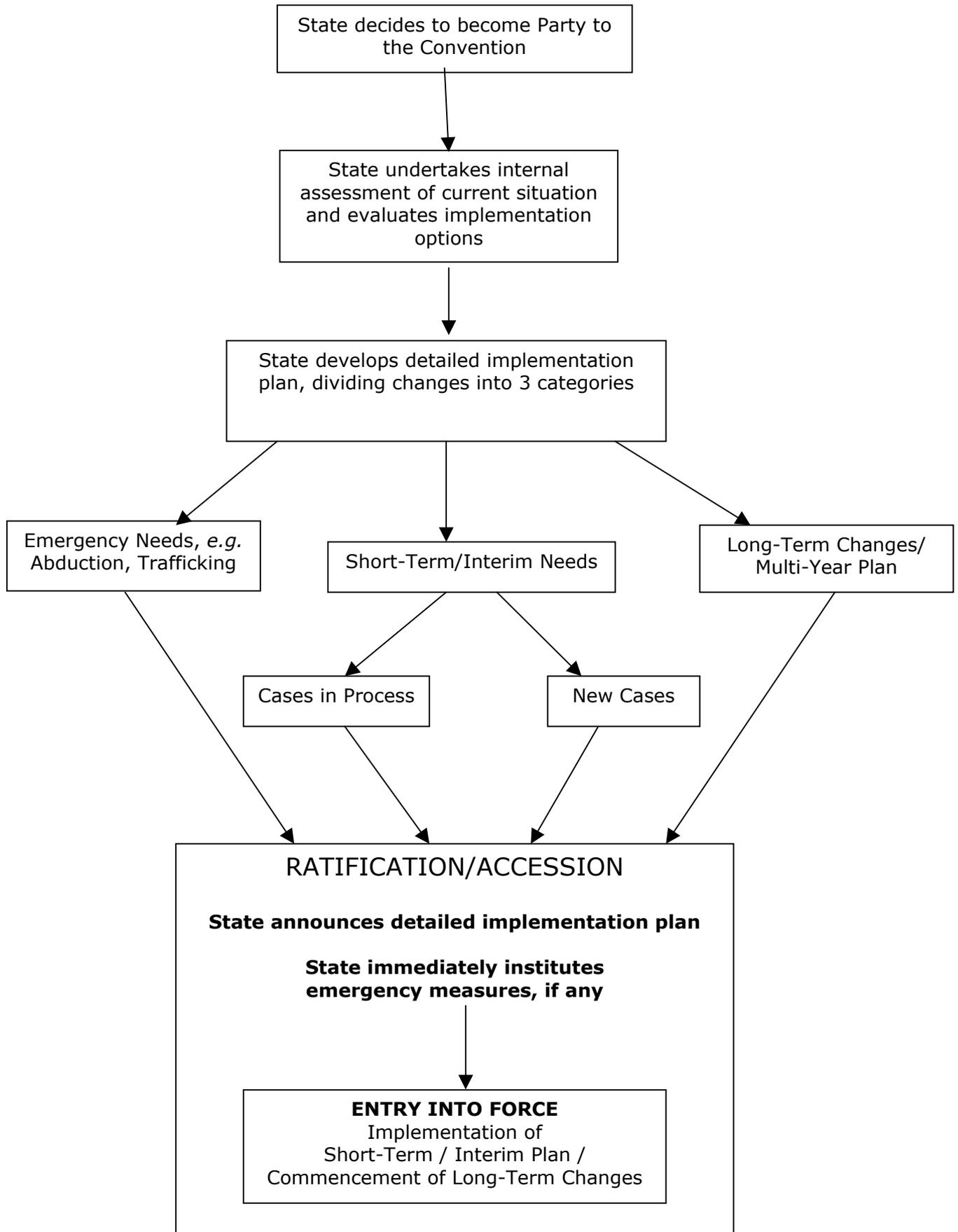
1.7 Developing an implementation plan

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
- Manage further ongoing assessment or control

A more detailed description of the process for developing an Implementation Plan appears in Annex 2 of this Guide.

Diagram of the Process to 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 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 Authorisation of competent authorities (UNCRC Art. 21(a))
 - 2.4.1 Competent authorities
 - 2.4.2 Central Authorities
 - 2.4.3 Accredited bodies and non-accredited persons

GENERAL PRINCIPLES OF THE CONVENTION

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 include both central principles of the Convention and key operating principles.

The general principles provide the essential framework for guiding the implementation of the Convention and developing appropriate procedures. 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.¹⁴ Certain principles are also given prominence in individual articles, in particular Article 1, which sets out the objects of the Convention.

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.

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, at Chapters 5 and 6.

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

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."¹⁵

The Preamble to the Convention refers to the *UN 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;¹⁶
- non-discrimination of any kind, irrespective of the child's or his parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status;¹⁷
- 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.¹⁸

¹⁴ See Explanatory Report, *supra* note 1, at paragraph 36.

¹⁵ Article 1a).

¹⁶ UNCRC, *supra* note 8, Article 3(1).

¹⁷ UNCRC, *supra* note 8, Article 2(1).

¹⁸ UNCRC, *supra* note 8, Article 12(1).

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;¹⁹
- permanency is preferable to temporary measures;²⁰
- 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 or origin.²¹

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

2.1.1 Subsidiarity

The principle of subsidiarity is highlighted in the Preamble to the Convention and in Article 4 *b*). ‘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 care in the country of origin should be considered. Only after due consideration has been given to national solutions and it is clear that the child cannot in any suitable manner be cared for in his or her country of origin, should intercountry adoption be considered, and then only if it is in the child’s best interests (Article 4 *b*)²². Intercountry adoption may serve the child’s best interests if it provides a permanent family for the child in need of a home.²³

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. Policies should work to promote family preservation and national solutions, rather than to hinder intercountry adoption.

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

- 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.

¹⁹ See Preamble to the Convention; see also Preamble to the UNCRC, *supra* note 8.

²⁰ See, Explanatory Report, *supra* note 1, at paragraph 43; see also UNCRC, *supra* note 8, Article 20(3).

²¹ See Preamble to the Convention.

²² See, for example, the responses of Estonia and Lithuania 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*. (Hereinafter, “2005 Questionnaire”).

²³ See, for example, Ecuador (*Código de la Niñez y Adolescencia* (Law No 100/2002)); Latvia (Regulation No 111 of the Council of Ministers, 11 March 2003, Article 40).

- National adoption or other permanent 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.
- 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.

2.1.2 *Non-discrimination*

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.”

Article 26(2) of the 1993 Convention contains a non-discrimination clause to the effect that where a final adoption is made under the Convention which terminates 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.

In the context of intercountry adoption, the principle of non-discrimination is intended to guarantee equivalent rights 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.

Practice has also shown that reverse discrimination may occur. It sometimes happens that the safeguards provided by domestic adoption procedures do not achieve the level of protection offered in the context of intercountry adoption. While Article 21(c) of the *Convention on the Rights of the Child* remains relevant, it is also essential to recall that States bear responsibility for ensuring that children adopted within their own country benefit from legal and psychosocial services and procedures equivalent to those provided for intercountry adoption.²⁴ Such safeguards include intervention of qualified and supervised professionals, establishing the child’s adoptability, establishing the suitability of the prospective adoptive parents, preparing the child and the parents, professional matching, post-adoption support.

2.1.3 *Measures supporting the best interests principle*

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

(a) *Ensuring the child is adoptable – meeting the requirements of Chapters II and IV*

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.

²⁴ See International Social Service / International Reference Centre for the Rights of Children Deprived of their Family, Monthly Review No 2/2005, February 2005. Editorial: “One Child is equal to another: The principle of non-discrimination applied to adoption”.

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.²⁵ The procedure for establishing adoptability is discussed further in Chapter 6.

(b) *Preserving information*

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.

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.

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 8.

(c) *Matching with a suitable family*

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

Matching should not be done by the prospective adoptive parents. 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. The procedure for matching is discussed further in Chapters 5 and 6.

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

An important object of the Convention is:

*"To establish a system of co-operation amongst Contracting States to ensure that safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children."*²⁶

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."²⁷

Practical measures to prevent abuses of the convention are discussed in Chapter 9, Preventing Abuses of the Convention.

²⁵ This question is discussed further in Chapter 7, Legal Issues surrounding Implementation, in paragraphs 7.4.2 and 7.6.

²⁶ Article 1 b).

²⁷ Article 8.

2.2.1 Protection of families

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 paragraph 2 *b*) 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 6). The Convention is clear that the decision to place a child for adoption should not be "induced by payment or compensation of any kind."²⁸ 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.

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, could contribute to the international co-operation against improper solicitation of consent to domestic or intercountry adoption, in violation of applicable international instruments (Article 3), including in particular the Hague Convention.²⁹

2.2.2 Combating abduction, sale and trafficking in children

The abduction or sale of a child could occur as a single or unrelated event. The abduction, sale and traffic in children for adoption is likely to be done as a systematic organised operation. The term 'trafficking' refers to the payment of money or other compensation to facilitate the illegal movement of children for such purposes as illegal adoption, child labour or sexual exploitation.³⁰ However they occur, these are all criminal acts. Each Contracting State should ensure that its criminal laws impose severe penalties for these offences.³¹ The justice system should ensure perpetrators are stopped and prosecutions take place.

Receiving States and States of origin should work cooperatively 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.

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

²⁸ Article 4 *d*) (4).

²⁹ See International Social Service / International Reference Centre for the Rights of Children Deprived of their Family, News Bulletin No 49 August 2002, No 54 February 2003 and No 63 January 2004.

³⁰ 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 Article 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, at paragraph 54.

³¹ For example, in Lithuania, the purchase and sale of children is punished by imprisonment for 8 years. See the response of Lithuania to question No 11(1) of the 2005 Questionnaire.

2.2.3 Preventing improper financial gain and corruption

The Convention specifically states that no one shall derive improper or other gain from an activity related to intercountry adoption³² and that Central Authorities “shall take, directly or through public authorities”³³ all appropriate measures to prevent this practice.

Control over and regulation of the financial aspects of the adoption process by State authorities is a matter of central importance.³⁴ Countries of origin should ensure that their structure and procedures guard against improper practices and receiving States should ensure that they actively monitor their accredited bodies and non-accredited persons in this regard, as well as prospective adoptive parents who are permitted to adopt independently or privately.

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.

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.

2.3 Establishing co-operation between States

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 interim arrangements, emergency situations, and enforcement of criminal sanctions;
- provide the Permanent Bureau with updated contact information in respect of Central Authorities and accredited bodies.

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.

³² Article 32(1).

³³ Article 8.

³⁴ See also International Social Service / International Reference Centre for the Rights of Children Deprived of their Family, Monthly Review Nos 72-73 November – December 2004, “Reflections on the costs of intercountry adoption”.

States should also work together to determine whether receiving countries can usefully provide assistance to sending countries, and if so, what form that assistance might take. However, it is important to ensure that any assistance offered does not compromise in any way the arrangements for intercountry adoptions.

2.3.1 *Co-operation between Central Authorities*

The creation of a Central Authority to facilitate the operation of the Convention is mandatory for all Contracting States.³⁵ 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.

2.3.2 *Co-operation regarding Convention procedures*

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 6: The Intercountry Adoption Process under the Convention.

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

Central Authorities have an obligation to deter all practices contrary to the objects of the Convention.³⁶ 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 9, preventing abuses of the Convention.

2.4 Authorisation of competent authorities

The requirement that only competent authorities should be 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.

Article 21 of the UN Convention is an important provision and is one of the building blocks of the 1993 Hague Convention. Article 21(a) 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;"

³⁵ Article 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).

³⁶ Article 8.

2.4.1 *Competent authorities*

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

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.

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.³⁷

The authorities competent to perform particular functions in the Convention should be indicated in the Organigram, which was attached to the 2005 Questionnaire. The completed organigrams may be found on the Hague Conference website.

2.4.2 *Central Authorities*

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 (Article 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.

2.4.3 *Accredited bodies and non-accredited persons*

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

³⁷ 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)”, drawn up by the Permanent Bureau, Hague Conference on Private International Law, April 2001, available at: < www.hcch.net > under Conventions, Convention 33, Practical Operation Documents. (Hereinafter, “Report of the 2000 Special Commission”) at Recommendation 1.

Chapter 3 – Key operating principles

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

3.1 Progressive implementation

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.

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.

Any Contracting States may seek advice or assistance from other Contracting States to achieve their targets for progressive implementation.³⁸ The Permanent Bureau may also be able to provide advice or assistance.

3.2 Resources and powers

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.

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.³⁹

The Convention allows for the use of accredited bodies and, in a more limited manner non-accredited persons, to fulfil many of the functions of the Central Authority. 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.

³⁸ According to the responses to question No 2(d) of the 2005 Questionnaire, Ecuador, Hungary and Estonia expressly sought assistance for the implementation of the Convention.

³⁹ See, *inter alia*, the Australian law: Family Law (Hague Convention on Intercountry Adoption) Regulation, Reg. 6 setting out the functions of the Commonwealth Central Authority and indicating functions of all state Central Authorities; Canada (Quebec) (Act ensuring implementation of the Convention on Protection of Children and Co-operation in respect of Intercountry Adoption of 22 April 2004, Articles 14 – 21).

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

There are numerous authorities and bodies involved in the adoption process such as the Central Authorities, courts, accredited bodies, 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.

Article 7(1) of the Convention obliges the Central Authority to “promote co-ordination 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 lead role in ensuring that all other authorities and bodies are well informed of their roles and responsibilities in relation to adoption.

3.3.2 Improving co-operation externally

The Convention cannot function properly without the fullest co-operation among Central Authorities in the different Contracting States.⁴⁰ 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.⁴¹ 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 to remove obstacles to co-operation.

Central authority co-operation is discussed further at Chapter 4.2 c).

3.3.3 Improving co-operation through meetings and exchange of information

Co-operation is also improved through meetings and the exchange of information,⁴² including the Special Commission meetings to review the operation of the Convention (convened periodically by the Secretary General of the Hague Conference),⁴³ other regional meetings of Central Authorities, international seminars and conferences. These international meetings help to facilitate the exchange of ideas, resolve international difficulties and provide examples of good practice⁴⁴. They aid in the development of mutual understanding and confidence between Central Authorities, and others, which is necessary to support the effective functioning of the Convention.

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

⁴⁰ Article 7(1).

⁴¹ Article 7(2) b).

⁴² See Article 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”.

⁴³ See Article 42.

⁴⁴ 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”. See the response of Latvia to question No 5(c) of the 2005 Questionnaire.

3.4 Communication

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.⁴⁵

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.

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 non-accredited persons should also be forwarded to the Permanent Bureau. Accurate contact details are essential for fast and efficient communication between authorities.

Each Contracting State should provide clear descriptions of its legal and administrative procedures, procedures for applications, eligibility guidelines, and costs and fee structures. Any standard forms and relevant information should be made available 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

Expeditious action is essential at all stages of the adoption process.⁴⁶ 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.

3.6 Transparency

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.

3.7 Minimum standards

The Hague Convention sets out the minimum standards to be observed within the intercountry adoption process. 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.

⁴⁵ As an example of good practice, the federal Central Authority in Switzerland wrote to all Central Authorities of sending countries asking for information about procedures, characteristics of adoptable children, etc. See the response of Switzerland to question No 5(e) of the 2005 Questionnaire.

⁴⁶ Article 35.

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.

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

The specific institutional structures provided for in the Convention are Central Authorities and accredited bodies. They are discussed in 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.

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.⁴⁷

The Permanent Bureau has developed an Organigram chart to assist States in providing this information. Each Contracting State should indicate in the Organigram (attached to the 2005 Questionnaire) which authority or body performs particular Convention functions in its jurisdiction. The completed Organigrams may be found on the Hague conference website.⁴⁸

A. CENTRAL AUTHORITY⁴⁹

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,⁵⁰ and a responsibility to deter all practices contrary to the objects of the Convention.

Central Authorities also have obligations in respect of particular adoptions. These latter duties may, in some cases, be delegated to competent authorities, public authorities, accredited bodies⁵¹ and non-accredited persons.⁵² The term “Central Authority” in this chapter should be read, where appropriate, as including accredited bodies or non-accredited persons, as provided for in the Convention.

⁴⁷ See Report of the 2000 Special Commission, *supra* note 37, Recommendation 1.

⁴⁸ At < www.hcch.net > under Conventions, Convention 33.

⁴⁹ 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.

⁵⁰ Article 7(2) b).

⁵¹ Articles 10, 11 and 22(1). See, for example, the response of Denmark to question No 5(a) of the 2005 Questionnaire. See also Cambodia (Draft – amendments of working group 2002-2003, Law on Intercountry Adoption, chapter V “Accreditation of Agencies”).

⁵² Article 22(2). See also the responses of Canada (Alberta and Manitoba) and the United States of America to question No 6(6) of the 2005 Questionnaire.

4.1 Establishing and consolidating the Central Authority

4.1.1 Establishment of the Central Authority

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 requirements of each legal system.

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.

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

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.

If the Central Authority is to exercise control of the adoption process, eliminate obstacles and deter all practices contrary to the objects of the Convention, it should have sufficient powers to achieve these aims. Some states may also need additional powers to deal with relative adoptions under the Convention.

Of equal importance is ensuring that the designated Central Authority is established with adequate personnel and resources to be able to function effectively.⁵³ The autonomy of the Central Authority from political or diplomatic pressure should also be preserved.

4.1.3 Designation

The designation of a Central Authority is an essential Convention obligation under Article 6.⁵⁴ The successful operation of the Convention requires that Central Authorities should be clearly identified so that communications may be swift and simple.

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.

⁵³ Central Authority functions are specified in Articles 6-9.

⁵⁴ Article 6(1).

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.

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.⁵⁵

Such communication should, in accordance with Article 13 and paragraph 274 of the Explanatory Report on the Convention by G. Parra-Aranguren (*Proceedings of the Seventeenth Session (1993)*, Tome II, *Adoption – co-operation*, page 591), give notice of any other public authorities (including their contact details) which, under Article 8 or 9 discharge functions assigned to the Central Authorities.⁵⁶

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.⁵⁷

4.1.4 Designations for Federal States

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.⁵⁸

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

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 policy functions and Central Authority functions for the Convention should be closely linked.

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.⁵⁹

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

⁵⁵ See Report of the 2000 Special Commission, *supra* at note 37, Recommendation 2a.

⁵⁶ See Report of the 2000 Special Commission, *supra* at note 37, Recommendation 2b.

⁵⁷ See Report of the 2000 Special Commission, *supra* at note 37, Recommendation 2g.

⁵⁸ Article 6(2).

⁵⁹ For details of the Central Authorities, see the website of the Hague Conference < www.hcch.net > under Conventions, Convention 33, Authorities.

evaluation process, States should consider where the Central Authority might best be located in order to fulfil its role most effectively.

The Central Authority should have strong links to the justice 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-government organisations and social care professionals and the legal profession, make these links essential for the effective operation of the Convention.

4.1.6 Personnel

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.⁶⁰

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

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.⁶¹

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.

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.⁶²

It is an aim of the 1993 Hague Convention to combat abduction, sale of, and traffic in children for the purposes of adoption. 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

The basic level of essential equipment for all Central Authorities includes:

- telephone
- fax machine⁶³

⁶⁰ In Australia and New Zealand, new staff receive induction and ongoing training; in Canada, staff receive ongoing training, trips abroad, international meetings and participation in national and international conferences. For a global overview, see the responses to question No 5(c) of the 2005 Questionnaire.

⁶¹ 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.

⁶² See Report of the 2000 Special Commission, *supra* at note 37, Recommendation 3.

⁶³ 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.

- stationery
- computer / word processor or typewriter
- email facilities
- internet access

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;
- copy of applicable implementing legislation or procedures;
- copy of the Explanatory Report to the Convention by M.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.

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 programmes;
- office procedures manual for Convention files;
- electronic case management system.

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.

4.2 Role of a Central Authority

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.⁶⁴

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 sending country.⁶⁵

The extent of the functions of the Central Authorities and any such public authorities should be explained.⁶⁶

⁶⁴ 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. For legislation in Canada (Quebec), see *supra* at note 39.

⁶⁵ In 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. In Chile, the Central Authority is responsible for the general supervision of accredited bodies accredited to operate in Chile. In Norway, the Central Authority keeps the management of the accredited bodies under constant review. See the responses to question No 6(1)(f) of the 2005 Questionnaire.

⁶⁶ See Report of the 2000 Special Commission, *supra* at note 37, Recommendation 2c.

4.2.1 *Suppression of improper financial gain*

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.⁶⁷

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;⁶⁸
- verify that only costs and expenses including reasonable professional fees of persons involved in the adoption are paid;
- 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;
- establish safeguards to prevent consents of persons, institutions or bodies from being induced by payment or compensation of any kind;
- establish safeguards to prevent the consent of the child from being induced by payment or compensation of any kind;
- require an accredited body or non-accredited person to provide a list of their fees or costs, for publication on a website or in brochures.

The prevention of improper financial or other gain is also discussed in Chapter 9.

4.2.2 *Provision of information about the adoption process*

Article 7(2) provides that Central Authorities shall take directly all appropriate measures to provide information as to the laws of their States 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.

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.

⁶⁷ Article 8. See the responses of Norway and Canada (Saskatchewan) 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.

⁶⁸ Article 32(1): "*no one shall derive improper financial gain from intercountry adoption*".

Intercountry adoption information can be provided on a website, or by other means, such as a brochure or flyer.⁶⁹ 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.⁷⁰ 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 sending countries – their policies on intercountry adoption, including their real needs for intercountry adoption with the number, ages, profiles and possibly special needs of the adoptable children in need of intercountry adoption, application procedures for prospective adoptive parents, documentary requirements, any standard forms used and any language requirements, as well as;
- the administrative and legal procedures which apply to adoption applications and the timing of such procedures.

4.2.3 International co-operation and co-ordination

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.⁷¹

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 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

Central Authorities should collect and maintain accurate statistics relating to the Convention. The Permanent Bureau has developed recommended statistics forms for this purpose.⁷² Statistical information can help Central Authorities understand the needs of children in their State and provide national and international data on intercountry adoptions.

⁶⁹ Annex 7 contains a list of websites of Central Authorities or other official bodies.

⁷⁰ This is the case, for example, in Sweden: < www.mia.adopt.se >; Italy: < www.commissioneadozioni.it >; and Germany: < www.bundeszentralregister.de/bzaa >.

⁷¹ Article 7(1).

⁷² The statistics forms are in Annex 5 of this Guide.

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

- the total number of children entering institutions, care facilities or foster care, either temporarily or permanently;
- the number of national adoptions;
- the number of intercountry adoptions and the countries concerned; and
- the number of children placed in foster care.

Where resources permit, it is also desirable to collect statistics on the demographic details of the children affected by these arrangements, such as age and gender. 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 policy and budget decision makers.

The Convention requires States to take all appropriate measures to provide other States with general evaluation reports about experiences with intercountry adoption,⁷³ keep statistics⁷⁴ and send to the Permanent Bureau.

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.⁷⁵ 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

The role and functions of Central Authorities in relation to individual adoptions are addressed in Chapter 6.

4.2.6 Other procedural functions

Issues of post placement responsibilities and post adoption services including preservation of information are discussed in Chapter 8.

B. ACCREDITED BODIES AND NON-ACCREDITED PERSONS

4.3 Accredited bodies

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 in adoption. 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 Articles 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

⁷³ Article 9 d).

⁷⁴ Article 7(2) a).

⁷⁵ See Report of the 2000 Special Commission, *supra* at note 37, Conclusions 2 and 21.

criteria, based on Convention standards and expanded as necessary to meet the requirements of the individual country.

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.

The authority or authorities 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.⁷⁶

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.⁷⁷

The importance of these issues suggests that it may be appropriate to prepare a separate part of the Guide to Good Practice dealing with:

- accredited bodies and non-accredited bodies and persons;
- accreditation standards and procedures; and
- control and review of accredited bodies and non-accredited bodies or persons.

The following review is therefore relatively brief.

4.3.1 *Functions of accredited bodies*

The Convention allows designation of accredited bodies and, in some cases non-accredited persons, to perform some of the functions of the Central Authority.⁷⁸ 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 and 8 cannot be delegated to accredited bodies. Note that Chapter IV functions may be carried out by Central Authorities, public authorities or accredited bodies. Approved bodies or persons are not accredited 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.

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.⁷⁹

The extent of the functions of accredited bodies should also be explained.⁸⁰

4.3.2 *Standards*

Bodies which meet the standards set out in Chapter III 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.

⁷⁶ See Report of the 2000 Special Commission, *supra* at note 37, Recommendation 4a.

⁷⁷ See Report of the 2000 Special Commission, *supra* at note 37, Recommendation 4b.

⁷⁸ See Chapters III and IV of the Convention.

⁷⁹ See Report of the 2000 Special Commission, *supra* at note 37, Recommendation 2d.

⁸⁰ See Report of the 2000 Special Commission, *supra* at note 37, Recommendation 2f.

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;⁸¹
- only pursue non-profit objectives;⁸²
- be directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of intercountry adoptions;⁸³
- be subject to supervision by competent authorities as to their composition, operation and financial situation;⁸⁴ and
- their directors, administrators and employees shall not receive remuneration which is unreasonably high in relation to services rendered.⁸⁵

Accredited bodies should be required to report annually to the competent authority concerning in particular the activities for which they were accredited.⁸⁶

Review or the re-accreditation of accredited bodies should be carried out periodically by the competent authority.⁸⁷

4.3.3 Criteria

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.

The criteria of accreditation should be explicit and should be the outcome of a general policy on intercountry adoption.⁸⁸

4.3.4 Authorisation of accredited bodies to operate in States of origin

In order to perform adoption-related functions in a sending country, the accredited body must be specifically authorized by the competent authorities of both the receiving country and the sending country to operate in the latter country (Article 12). The sending country may impose its own conditions or criteria for such authorisation. For example, the body may have to be properly accredited in the sending country.⁸⁹

⁸¹ Article 10.

⁸² Article 11 a).

⁸³ Article 11 b).

⁸⁴ Article 11 c).

⁸⁵ Article 32(3).

⁸⁶ See Report of the 2000 Special Commission, *supra* at note 37, Recommendation 4d.

⁸⁷ See Report of the 2000 Special Commission, *supra* at note 37, Recommendation 4e.

⁸⁸ See Report of the 2000 Special Commission, *supra* at note 37, Recommendation 4c.

⁸⁹ Article 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 authorized 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 authorized 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.

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. The authorisation may not be renewed if its services are no longer needed in the sending country. 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.⁹⁰

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.⁹¹

4.3.5 *Deciding whether to use accredited bodies*

The decision whether to allow accredited bodies or persons to perform child protection or adoption functions in their State is a 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).⁹²

States are encouraged to carefully consider all the ramifications of this decision. When determining whether or not to use accredited bodies and / or non-accredited persons, States should be careful to:

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

4.4 NON-ACCREDITED PERSONS

Persons who have been approved 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 State⁹³. Appropriate criteria for the approval process should be developed, and may be similar to accreditation criteria.

If Contracting States decide to allow non-accredited persons to perform the functions of Chapter IV⁹⁴, 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. While such persons do not have to meet all the eligibility requirements of accredited bodies, including the requirement that they pursue non-profit objectives, they are nevertheless

⁹⁰In 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)(k) of the 2005 Questionnaire. Furthermore, see the responses of Finland and Romania to question No 6(1)(f) of the 2005 Questionnaire.

⁹¹ See Report of the 2000 Special Commission, *supra* at note 37, Recommendation 2e.

⁹² Article 12.

⁹³ Andorra expressed the intention to use non-accredited persons. See the response of Andorra to question No 6(6) of the 2005 Questionnaire.

⁹⁴ Article 22(2).

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 non-accredited persons to any extent necessary, as they see fit.

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. Non-accredited persons operating a business for profit can be utilised by accredited bodies to perform certain functions. Some States may choose to make accredited bodies legally and financially responsible for duties performed for them by non-accredited persons.⁹⁵

Unlike accredited bodies, the Convention does not provide for non-accredited persons to be authorised to operate in another country.⁹⁶ Furthermore, a sending country 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 non-accredited persons to perform the functions of Central Authorities in Chapter IV.⁹⁷

⁹⁵ See Explanatory Report, *supra* note 1, at paragraph 376, which states that Central Authorities are responsible for actions undertaken by delegated bodies.

⁹⁶ See Explanatory Report, *supra* note 1, at paragraph 397 which concludes that non-accredited persons or bodies may be subject to the same procedure in Article 12 as accredited bodies.

⁹⁷ Azerbaijan, Belarus, Brazil, Bulgaria, Colombia, El Salvador, Hungary, Panama, Poland, Sri Lanka and Venezuela are the sending countries which have made a declaration under Article 22(4) of the Convention.

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

Part I of the 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, the steps following from a determination that a child is adoptable, and that the country of origin has given effect to the subsidiarity principle.

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 care, and finally, the procedure for an intercountry adoption, once it has been determined that that this is the best solution for a particular child.

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 there are sufficient human and financial resources to consider national solutions for a child before deciding that an intercountry adoption is in the child's best interests.

Chapter 5 – National child care context and national adoption

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 institutionalization
4. National (domestic) adoption

The four phases refer to the internal child care and protection system and encompass 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 sending country.

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 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.

5.1 Phase One

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

"Convention principle: 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."⁹⁸

This principle, in the first paragraph of the Preamble, underlines the role of the family in the nurturance 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.⁹⁹

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.

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,¹⁰⁰ formal relinquishment, or recognition of abandonment in a hospital or orphanage.¹⁰¹ Formal criteria for entry into care are needed to help prevent inappropriate intervention including abduction, sale or trafficking of children.

⁹⁸ See Preamble to the Convention, paragraph 1.

⁹⁹ See Explanatory Report, *supra* note 1, paragraph 37.

¹⁰⁰ See, for example, the Child and Family Services Act of Canada (Manitoba).

¹⁰¹ See, for example, China (Order of the President of the People's Republic of China, No 10 (1 April 1999), Articles 10 and 11); Cambodia (draft – amendments by working-group 2002-2003, law on the Intercountry Adoption, Article 11).

5.1.1 Abandonment

Abandonment refers to the act of leaving a child with the intention of forsaking one's parental rights, with no intention of return.¹⁰² 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.

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.¹⁰³

Where a large number of children classified as 'abandoned' are entering the system, this could be an indication that children are being abducted for the purpose of adoption or are being sold to adoption facilitators. 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.

Identification of potential abduction victims is much more difficult when a majority of the children placed for intercountry adoption are 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 be required to spend up to 90 days on a register thus giving parents time to come forward to claim the child, or to locate relatives.¹⁰⁴ 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 tandem with registers.¹⁰⁵

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.¹⁰⁶ Except in countries where there is convincing evidence of wide-spread and uncontrolled abduction or baby selling practices, requiring DNA testing in every case should not be necessary.¹⁰⁷

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;

¹⁰² See Morocco (The Law 15-01 relating to the care of abandoned children (kafala), Official Bulletin, 5 September 2002). In Bolivia, abandonment must be approved by a Bolivian court.

¹⁰³ See UNCRC, *supra* note 8, Articles 7 and 8.

¹⁰⁴ See Cambodia (Sub-Decree No 29, 14 March 2001).

¹⁰⁵ Guatemala (Adoption Law, no 2784 of 28 November 2002: Articles 21, 40(c) and (h)); Bulgaria (Ordinance no. 3 laying down the conditions and procedure for giving consent for the adoption of a person of Bulgarian nationality by a foreigner, 16 September 2003).

¹⁰⁶ Canada (Quebec) required DNA testing for intercountry adoptions in Guatemala (see response to question No 7(6) of the 2005 Questionnaire. The Ecuadorian *Código de la Niñez y Adolescencia* (Article 131, paragraph 2) requests DNA tests in order to prove the identity of the child. See the response of Ecuador to question No 7(6) of the 2005 Questionnaire. Romania used DNA testing to prove the paternity of children during the period 2001-2003 (see response to question No 7(6) of the 2005 Questionnaire); Norway stated that they are aware that some receiving countries used such testing for adoption from Guatemala (see response to question No 7(6) of the 2005 Questionnaire). In the United States of America DNA tests are performed in all adoption cases from Guatemala (see response to question No 7(6) of the 2005 Questionnaire).

¹⁰⁷ 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.

- What measures should be taken to locate the family of origin.

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 should be made, and improper or inadequate practices eliminated.

5.1.2 Voluntary relinquishment

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 consent or relinquishment mechanisms in their laws and regulations¹⁰⁸ in order to avoid the negative consequences of abandonment. The absence of relinquishment provisions may result in a lack of opportunities for families to be counselled before making their decision¹⁰⁹ and to ensure that their decision was not coerced.¹¹⁰ Family and social information on the child may also be lacking.¹¹¹

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

- 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.

The laws and procedures must also clearly state who determines that consent is freely given and not induced by compensation.

5.2 Phase two

5.2.1 Family preservation and reunification

*"Convention principle: States 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."*¹¹²

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 unite 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.¹¹³

¹⁰⁸ See the response of Australia to question No 4(c) of the 2005 Questionnaire. For more examples, see Andorra (Adoption Law of 21 March 1996, Article 8); Ecuador (*Código de la Niñez y Adolescencia*, Article 158); Lithuania (Civil Code, Articles 3.212 – 3.216 and Article 448 of the Civil Procedure Code,); Romania (Articles 11-18, Law 273/2004).

¹⁰⁹ Article 4 c)(1).

¹¹⁰ Article 4 c)(3).

¹¹¹ Article 16.

¹¹² See Preamble to the Convention, paragraph 2. See also Explanatory Report, *supra* note 1, paragraphs 38 and 39.

¹¹³ See Belgium (Law of 24 April 2003); 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 (Government Resolution No F.6-15/98-CW, dealing with the Adoption of the "National Charter for Children 2003", 9 February 2004, in the Extraordinary Gazette of India (Part 1, Section 1)).

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 organizations may share a role with governments in providing child protection and care services in some countries.

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.¹¹⁴

5.2.2 *Strategies to assist family preservation and unification*

The 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.

5.2.3 *Keeping families intact*

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.¹¹⁵

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

5.2.4 *Family re-unification*

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

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.¹¹⁶ The search for relatives to care for a child should not unnecessarily prolong institutional care for children.

¹¹⁴ 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. See the response of Sri Lanka to question No 4(b) of the 2005 Questionnaire.

¹¹⁵ See J.H.A. van Loon, *supra* note 6, at 235.

¹¹⁶ For example, Lithuania (Article 3.223 of the Civil Code); Ecuador (Article 158, *Código de la Niñez y Adolescencia*), Guatemala (Article 16, Adoption Law, No. 2784 of 28 November 2002). In Lithuania, the Adoption Accounting Order of 1995 specifies that regional or municipal welfare agencies must first try to reunite a child with its birth family or other relatives. See responses to the 2000 Questionnaire, *infra* note 256.

5.2.5 *Developing family preservation programmes*

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.

5.2.6 *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.

5.2.7 *Utilising other resources*

Where there is no centrally operated program, States may have other assistance programmes for certain segments of the population, administered under various departments.¹¹⁷

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.

5.2.8 *Co-operative agreements*

States may also be able to refer families to programmes they have established in co-operation with international organisations (that do not perform adoption or child care work) to provide services. 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.¹¹⁸

5.3 **Phase three**

5.3.1 *Temporary care and institutionalisation*

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;

¹¹⁷ 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).

¹¹⁸ Vietnam, Laos, Cambodia, Afghanistan, North Korea, see < <http://www.afsc.org/about/default.htm> > (The American Friends Service Committee (AFSC) is an organisation that carries out service, development, social justice, and peace programmes throughout the world).

Moreover, Save the Children has several programmes in order to help 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 mobilization 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.

- 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.

The temporary care may be in an institution or in foster care. States should monitor the length of time children remain in temporary care. 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.

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 functioning. In many States, arrangements with private orphanages and privately run foster care systems have developed because of the absence of government-funded alternatives.¹¹⁹ In other States non-government organisations may be granted licenses to operate adoption programmes in exchange for sponsorship of particular orphanages or programmes.

Whether implementing child care and protection systems and services 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.

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.

5.4 Phase four

5.4.1 National adoption or permanent care

*"Convention 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."*¹²⁰

A decision on permanency planning¹²¹ 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,

¹¹⁹ 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 & 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 >. See also International Reference Centre for the Rights of Children Deprived of their Family (ISS/IRC) *Georgia – Protection of the child deprived of, or at risk of being deprived of, the family of origin – COUNTRY SITUATION*, last updated March 2005.

¹²⁰ Article 4 b).

¹²¹ See, for example, the International Social Service document "A Global Policy for the Protection of Children Deprived of Parental Care" available at: < www.iss-ssi.org/Resource_Centre/Tronc_DI/documents/CRCDiscussionDayAglobalPolicyISS05.pdf >.

preferably with an adoptive family, in his or her country of birth.¹²²

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 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.¹²³

A viable national adoption system ensures that States can fulfil this responsibility. If no domestic 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.

The inability to perform national adoptions may cause some States to consider stopping intercountry adoptions until a system can be developed and implemented. Delaying permanent 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 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. Thus, the absence of a national adoption system does not preclude intercountry adoption, though it is clearly preferable for national adoption to be viable in States Party to the Convention.

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.

¹²² The Family Code of Belarus requires that a child who is without parental care be placed with other family members within one month by the Guardianship Authority. If family care is not possible, the child is registered with the National Adoption Centre for adoption by a Belarusian family. If a Belarusian family cannot be found for the child, then intercountry adoption may be considered. See responses to 2000 Questionnaire, *infra* at note 256. See also the response of Sri Lanka to question No 4(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".

For India, see Chapter 1, section 1.6, of the Revised Guidelines for Adoption of Indian Children, 29 May 1995.

¹²³ See Explanatory Report, *supra* note 1, paragraph 43; see also UNCRC, *supra* note 8, Article 20(3), which refers to the desirability of "continuity" in a child's upbringing.

5.4.1 *Designing a national adoption system*

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 with speed and efficiency. 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.

5.4.2 *Promoting national adoption*

In States that have historically low numbers of national adoptions there may be a need to promote awareness 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 enjoyed 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.¹²⁴

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.

5.4.3 *Training and approval of adoptive families*

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.¹²⁵

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.¹²⁶ Systems employed by other States can provide helpful models in this regard.

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

¹²⁴ See the Philippines (Republic Act No 8552, Article 1, Section 2(c)(v)).

¹²⁵ For example, Denmark (Consolidation Act No 928, 14 September 2004) (examination and preparation of prospective adopters), Italy (Law No 149, 28 March 2001, Article 6) (requirement for stability in the relationship of Prospective Adoptive Parents before adoption); Canada (British Columbia) (Section 3 of the Adoption Regulation) (requirements of a Homestudy).

¹²⁶ See UNCRC, *supra* note 8, Article 21(c). See the response of Denmark to question No 4(g) of the 2005 Questionnaire, where it is stated that "[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. See also the response of Canada (British Columbia) to question No 4(g) of the 2005 Questionnaire: procedures to assess the eligibility and suitability of prospective adoptive parents are established in Section 6 of Adoption Regulation of British Columbia.

5.4.4 Matching children and families

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.¹²⁷ However, if no appropriate family is found for a child locally, States should determine how to make those children available to adoptive families in other parts of the country.

Many States use a register system to accomplish this task.¹²⁸ 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.¹²⁹

As a preliminary stage to intercountry adoption, and in order to encourage the active implementation 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.¹³⁰

5.4.5 Provision of services

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.

¹²⁷ Chilean Act number 19.620 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. See India (1995 Adoption Guidelines, Chapter 1, Section 1.6): "Intercountry adoption, i.e., adoption of Indian children by adoptive parents residing abroad, should be resorted to only if efforts to place the child with adoptive parents residing in India prove unsuccessful ..."

¹²⁸ Bulgaria (Ordinance No 3 of 16 September 2003 on the conditions and procedure for giving consent for the adoption of a person of Bulgarian nationality by a foreigner, Article 18), Ecuador (*Código de la Niñez y Adolescencia* (Law No 100/2002), Article 172), Latvia (Regulation No 111 of the Council of Ministers, 11 March 2003, Article 3), Lithuania (10 September 2002 Resolution No 1422, Procedure for Registry of Adoption in the Republic of Lithuania and Article 3.219 Civil Code).

¹²⁹ In Lithuania the Adoption Accounting Procedures Order of 1995 requires that due consideration be 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.

¹³⁰ Cambodia (Draft – amendments by working group 2002-2003, Law on the Intercountry Adoption, Article 15); Bulgaria (Ordinance No 3 of 16 September 2003 on the conditions and procedure for giving consent for the adoption of a person of Bulgarian nationality by a foreigner, Article 20), Latvia (Regulation No 111 of the Council of Ministers, 11 March 2003, Articles 21 and 47), Russia (Law of 30 June 1997, Article 122). See also the Philippines, *supra* note 130. (Republic Act No 8552 of 11 February 1998 "An Act establishing the rules and policies on the domestic adoption of Filipino children and for other purposes"). In Belarus, the adoption by foreigners or stateless person other than relatives may only be considered after a period of six months from the child's registration. See responses to the 2000 Questionnaire, *infra* at note 256.

Some States do allow private service providers to assist in this regard.¹³¹ Such providers may have expertise and personnel who can recruit and train families and oversee placements. It is important that public authorities retain supervisory responsibility to ensure that proper standards are maintained and that services are appropriately offered.

¹³¹ See, the Philippines, *supra* note 130, section 3, let. H (Republic Act 8552 of 11 February 1998, "An Act establishing the rules and policies on the domestic adoption of Filipino children and for other purposes"): "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 6 – The intercountry adoption process under the Convention

*"Convention Principle: 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."*¹³²

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.

6.1 The intercountry adoption process

Once it is established that a child is adoptable, and all 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.¹³³

The procedural requirements for each intercountry adoption under the Convention are prescribed in Articles 15 to 22 of the Convention (Chapter IV). 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 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.

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."*¹³⁴

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.

Unfortunately this priority is not always recognised in practice and too much emphasis may be given to the needs of adoptive parents for a child, rather than the needs of a child 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 them to give priority to their requests¹³⁵.

¹³² See Preamble to the Convention, paragraph 3.

¹³³ Article 4.

¹³⁴ See Explanatory Report, *supra* note 1, paragraphs 282 and 283.

¹³⁵ See the response of the International Social Service to question No 6(4) of the 2005 Questionnaire.

Ideally, when the child's best interests are given priority, the competent authorities in the country of origin should undertake permanency planning and register the files of adoptable children in need of intercountry adoption, and inform the receiving country of the types of children in need of families before asking receiving States for files of suitable prospective adoptive parents for these children.¹³⁶ A country of origin which is able to "reverse the flow" of files in this way will achieve a child-centred intercountry adoption process.¹³⁷ (See also Chapter 9.4 of this Guide on preventing pressure on States of origin by receiving States or accredited bodies.)

6.1.1 Summary of the procedure in Chapter IV

The prospective adoptive parents must apply to the Central Authority in the State of their habitual residence.¹³⁸ 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.¹³⁹ It is implicit in the Convention that the adoptive parents' habitual residence country will have 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.

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 laws or procedures by which to determine if a child is "adoptable".

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.¹⁴⁰ The Central Authority then transmits the report on the child to the Central Authority of the receiving State,¹⁴¹ which must determine that the prospective adoptive parents agree with the proposed placement or entrustment,¹⁴² and may, if necessary, approve the proposed placement or entrustment.¹⁴³ Provided that both Central Authorities have agreed that the adoption may proceed¹⁴⁴ and the child has been authorised to enter and reside permanently in the receiving State,¹⁴⁵ 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,¹⁴⁶ the legal procedures, including court procedures, for the adoption must be completed before the child is authorised to leave the State of origin.

¹³⁶ Porto Alegre in Brazil has achieved this ideal. See International Resource Centre for the Protection of Children in Adoption (ISS/IRC) News Bulletin No 65, March 2004, Editorial: "In the child's best interest, which is the supply and which the demand?"

¹³⁷ See International Reference Centre for the Rights of Children Deprived of their Family (ISS/IRC), Monthly Review No 6/2005 June 2005, Brazil: "Reversing the flow of files, a practice that respects the rights of the child and the ethics of intercountry adoption".

¹³⁸ Article 14.

¹³⁹ Article 15.

¹⁴⁰ Article 16(1).

¹⁴¹ Article 16(2).

¹⁴² Article 17.

¹⁴³ Article 17 *b*).

¹⁴⁴ Article 17 *c*).

¹⁴⁵ Article 17 *d*).

¹⁴⁶ Article 28.

6.2 The child

6.2.1 Establishing that a child is adoptable (Article 4 a))

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.¹⁴⁷ 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 provision of family preservation and national adoption services.

The adoptability of a child is determined according to the law and procedures of the State of origin.¹⁴⁸ It is important that the legal criteria as well as medical, psychological and social aspects of adoptability, which may be relevant,¹⁴⁹ 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.¹⁵⁰

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.¹⁵¹ A similar process should be followed for orphaned children.

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.¹⁵² 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).

Unfortunately not every child deprived of parental care is adoptable. In considering whether there are any factors or conditions, such as those relating to health or age, which may render a child "unadoptable", 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.¹⁵³

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's being declared adoptable and sometimes even prior to consents being signed. While such actions may be done with good intentions, or

¹⁴⁷ Article 16(1).

¹⁴⁸ This question is considered in detail in Chapter 7, Legal Issues surrounding Implementation.

¹⁴⁹ See, Explanatory Report, *supra* note 1, paragraph 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, *infra* at note 256.

¹⁵⁰ Andorra (Law of 21 March 1996, articles 8-12); Ecuador (*Código de la Niñez y Adolescencia*, Article 158); Lithuania (Civil Code, Article 3.209). For a broader overview, see the responses to question No 4(c) of the 2005 Questionnaire.

¹⁵¹ Guatemala (Adoption Law, No 2784 of 28 November 2002, Article 16); Ecuador (*Código de la Niñez y Adolescencia*, Article 158); Lithuania (Civil Code, Article 3.209); Romania (Law 272/2004 and Law 273/2004 see the response of Romania to question No 4(c) of the 2005 Questionnaire). See also the response of Peru to question No 4(c) of the 2005 Questionnaire: the task to investigate the child's background and circumstances is carried out by the "*Investigación Tutelar*", which is a process finalized to verify the legal situation of abandoned children.

¹⁵² In South Africa, for example, there is a new Bill that prohibits anyone from relinquishing a child for adoption. See the response of South Africa to question No 11(5) of the 2005 Questionnaire.

¹⁵³ See UNCRC, *supra* note 8, Article 2(1).

because of funding or operational constraints, the practice may give rise to abuse and is contrary to Convention procedure.

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 adoptable, as well as the criteria for making that decision. A central registry should be responsible for maintaining a list of adoptable children.¹⁵⁴

6.2.2 *Ensuring that any necessary consents have been obtained*

A key feature of the Convention in attempting to combat the abduction, sale and traffic in children is the requirement to obtain proper consents to the adoption. This means:

- Obtaining consents from the legal custodian or guardian of the child (the person, institution or authority referred to in Article 4 c) 1);
- Ensuring that the person giving the consent understands the effect of their consent;¹⁵⁵
- Ensuring the consents were given freely, and not induced or improperly obtained by financial or other reward;
- Ensuring that a new birth mother does not give her consent until some time after the birth of her child;
- Ensuring the consent of the child is obtained, when necessary.

It is acknowledged that States of origin may often lack the resources for this important responsibility of ensuring that proper consents are obtained.¹⁵⁶ 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. They should take steps to monitor the operations of foreign bodies or persons to ensure that no undue pressure is exerted by them, or on their behalf, to obtain consents to adoptions.

Receiving States must play their part. They can ensure that the bodies they accredit and the persons they approve to undertake adoptions, must be of the highest ethical and 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 non-accredited persons, they should consider whether it is appropriate to withdraw the accreditation or the approval.¹⁵⁷

¹⁵⁴ Lithuania (Civil Code, Article 3.219 "Adoption Register"). See also the response of Sri Lanka to question No 4(c) of the 2005 Questionnaire.

¹⁵⁵ In Hungary, a mother has the right to change her consent within 6 weeks after the consent was given. See the response of Hungary to question No 4(d) of the 2005 Questionnaire. See also the response of the Netherlands to question No 4(d) of the 2005 Questionnaire: in the Netherlands, biological parents have 60 days for reconsidering their decision.

¹⁵⁶ Responding to question No 4(c) of the 2005 Questionnaire, Finland claimed that not all sending countries send a copy of the consent of the biological mother.

¹⁵⁷ See, for example, the response of Denmark to question No 6(1)(f) of the 2005 Questionnaire, which states that 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 also the responses of Finland and Romania to question No 6(1)(f) of the 2005 Questionnaire.

It should not be forgotten that the child's consent to the adoption is sometimes required, depending on his or her age and maturity.¹⁵⁸ The preparation of the child for the adoption, including counselling, may be required.¹⁵⁹ 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.

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.¹⁶⁰

6.2.2.1 Obtaining consents without inducement

States of origin are required to ensure that an adoption only takes place when the required consents to the adoption on the part of any person, institution, or authority have not been obtained by improper means.¹⁶¹

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.

Determining how to prevent inducement 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 non-accredited persons and their agents in such matters.¹⁶² Receiving States should also be satisfied with the proof that the necessary consents have been obtained, as referred to in Article 16(2). In some cases the identity of the person giving consent may be disclosed.

6.2.2.2 Preventing Solicitation

Of major concern is the reported practice of agents employed by adoption service providers, attorneys, or orphanages who actively seek out families to relinquish a child for adoption, in return for payment.¹⁶³ Generally, these agents are not official employees of the service provider, and are often residents of 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.

¹⁵⁸ Article 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.

¹⁵⁹ Article 4 d)(1).

¹⁶⁰ See Report of the 2000 Special Commission, *supra* at note 37, Recommendation 5.

¹⁶¹ Article 4(3) c). See also Panama (Law No 18, enacted on 2 May 2001 to reform the Family Code of 1994, Articles 309 A to D) (specify the sanctions incurred by any official who profits from the adoption processing); the Philippines (The Domestic Adoption Act of 1998 (Republic Act No 8552), 25 February 1998) (Article t, section 21, provides penalties for violation of adoption law); Guatemala (Adoption Law no. 2784 of 28 November 2002, Article 14); Cambodia (Draft – amendments of working group 2002-2003, Law on Intercountry Adoption, chapter V "Accreditation of Agencies", Article 7).

¹⁶² See Explanatory Report, *supra* note 1, paragraph 376; the United States Draft Regulations, 15 September 2003, Section 96.46(c)(1).

¹⁶³ See the response of Chile to question No 15 of the 2005 Questionnaire.

Some States have chosen to include prohibitions on solicitation in their adoption laws or implementing regulations.¹⁶⁴ States may find examples of such devices in their provisions regulating domestic adoption.¹⁶⁵ Such provisions may also include the use of civil and criminal penalties for these activities, authorising States to investigate and prosecute those who would traffic in children.¹⁶⁶

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.¹⁶⁷

6.2.2.3 Payment of expenses of birth family

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.¹⁶⁸ 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.¹⁶⁹ To prevent abuses, States should ensure that family preservation and reunification services are available, and legal, medical, documentation, translation and travel costs are not imposed on birth families.¹⁷⁰

6.2.3 Preparation of report on the child

States of origin should determine who will prepare the report on the child. It is only afterwards 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.¹⁷¹

¹⁶⁴ See Honduras (U.S. circular on Honduran adoption at < <http://www.travel.state.gov/adopt> > regarding penalties). For Mexico, see the response of Mexico to question No 11(5) of the 2005 Questionnaire "The adoption process was incorporated to the Procedures and Services of High Impact to the Citizen, this helps to prevent the illegal benefits". See also the response of Chile to question No 11(1) of the 2005 Questionnaire: Article 42 of the Chilean law 16.620 prohibits solicitations.

¹⁶⁵ See, for example, Oregon Statute 109-311 (3), United States of America (Oregon).

¹⁶⁶ See Australia (Adoption Act 1994 (Western Australia), Section 122); Canada (all territories); Chile (Law No 19.620 (1999), Title IV, Articles 39-44); Cyprus (Adoption Law of Cyprus No. 19(I)/95); Luxembourg (Law 20 May 2000); Panama (Law No 18, 2 May 2001, Articles 309 A-D); South Korea (The Special Law Decree and Regulations concerning Adoption Procedures, 1 June 1999, Chapter 7, Article 27). See the response of Estonia to question No 11(1) of the 2005 Questionnaire "...selling or buying a child is not allowed (Penal Code)". See also the response of Switzerland to question No 11(1) of the 2005 Questionnaire: Articles 23 and 24 of the Federal Law 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 do not have specific laws on this subject.

¹⁶⁷ (Article 3.1.a.ii): < <http://www.ohchr.org/english/law/crc-sale.htm> >.

¹⁶⁸ See, United States National Adoption Information Clearinghouse Report, available at < <http://naic.acf.hhs.gov/laws/expenses.cfm> >, which states that 46 States of the United States allow reimbursement of expenses

¹⁶⁹ 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.

¹⁷⁰ See, for example, United States of America (8 CFR, 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."

¹⁷¹ See, Explanatory Report, *supra* note 1, paragraph 308.

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."¹⁷² 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.¹⁷³ 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 she or he comes into the care and protection system.

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.

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."¹⁷⁴

6.2.4 Ensuring accurate reports

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.¹⁷⁵

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.¹⁷⁶

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."¹⁷⁷

¹⁷² Article 16 a).

¹⁷³ See, Explanatory Report, *supra* note 1, paragraph 309. See also Italy (Law 184 of 4 May 1983 as amended by Law 476 of 31 December 1998, Title III, Article 24(5), by which a person must be 25 years old to be entitled to have access to information about his or her own origins); Guatemala (Adoption Law of 28 November 2002, Article 3(d): the adopted child has the right to know his or her origins).

¹⁷⁴ See, Explanatory Report, *supra* note 1, paragraph 311. See also Lithuania (Civil Code, article 3.219 "Adoption Register"). See also the response of Sri Lanka to question No 4(c) of the 2005 Questionnaire.

¹⁷⁵ See the responses to question No 7(1)(a) of the 2005 Questionnaire: some responding countries Canada (Alberta and Manitoba); Finland, Lithuania, the Netherlands, Sri Lanka and Switzerland complained about the lack of health and social information on the child.

¹⁷⁶ See Report of the 2000 Special Commission, *supra* at note 37, Recommendation 12.

¹⁷⁷ See Report of the 2000 Special Commission, *supra* at note 37, paragraph 58.

A "model form" medical report on the child was discussed in the 2000 Special Commission.¹⁷⁸ 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.¹⁷⁹

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 Appendix B constitutes a useful aid in improving the quality of, and standardising, reports on the child drawn up in accordance with Article 16, paragraph 1, of the Convention.¹⁸⁰

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.¹⁸¹ However, such laws may be contrary to the Convention as no reservation to the Convention is permitted.¹⁸² In addition, accepted principles of international law preclude a State from using internal laws to avoid obligations incurred under international treaties.¹⁸³

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 can result in 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.

While special needs children should have the same opportunities for adoption as other children, based on the principle of non-discrimination, not all prospective adoptive parents have the necessary skills and temperament to care for such children.¹⁸⁴

6.2.5 "Matching" child and family

Although the term "matching" does not appear in the Convention (because no French equivalent exists)¹⁸⁵ sub-paragraphs *a*) through *d*) of Article 16 describe 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 *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 adoptive parents from among the approved applicants who can best meet the needs of the child based on the reports on the child and on the prospective adoptive parents.

¹⁷⁸ See Work. Doc. No 3, submitted by the United Kingdom on behalf of the informal Working Conference of European Contracting States.

¹⁷⁹ See Report of the 2000 Special Commission, *supra* at note 37, paragraph 59.

¹⁸⁰ See Report of the 2000 Special Commission, *supra* at note 37, Recommendation 13. The form referred to is in Annex 8.

¹⁸¹ See the reservations made by Bolivia at the time of signature in respect of Articles 9 *a*) and 16. The reservations were withdrawn prior to ratification.

¹⁸² Article 40.

¹⁸³ See *Vienna Convention on the Law of Treaties*, Article 27: "Internal law and observance of treaties".

¹⁸⁴ On the specific psychosocial work needed and the adaptation of the procedures to these children, see also International Resource Centre for the Protection of Children in Adoption (ISS/IRC) News Bulletin No 67, May 2004, Editorial: "To promote the adoption of children with special needs". Available at < http://www.iss-ssi.org/Resource_Centre >.

¹⁸⁵ See Explanatory Report, *supra* note 1, paragraph 318.

The term “placement” (not “adoption”) must be used at this stage because the matching 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 been sent yet to the receiving State.¹⁸⁶

The procedures of the State of origin should ensure that the “matching” of prospective adoptive parents with the child is done prior to making a referral to the parents and sending the report about the child described in Article 16. 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 children.

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

As stated in Chapter 2, matching should not be done by the prospective adoptive parents. 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. 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.”

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 relative 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.

6.2.6 *Transmittal of report on child*

Once the Central Authority has determined that the envisaged placement is in the best interests of the child,¹⁸⁷ 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.¹⁸⁸

6.2.7 *Acceptance of the match by the prospective adoptive parents*

When the report on the child and the proposed match with the prospective adoptive parents, is sent either through the Central Authority or through accredited bodies or non-accredited persons, the parents then must decide whether to accept this referral or not. 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

¹⁸⁶ See Explanatory Report, *supra* note 1, paragraph 318.

¹⁸⁷ Article 16 d).

¹⁸⁸ Article 16(2).

important and sometimes difficult. It is important to make the process transparent, with clear deadlines and procedures.

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.

6.2.8 Authorisation to enter country and reside permanently

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, in order for the child to be entrusted to the prospective adoptive parents.¹⁸⁹ This decision will usually be made by the immigration authorities in both States. The requirements of Article 17 cannot be met until the permissions in Article 18 have been obtained.

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.¹⁹⁰ 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.

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.¹⁹¹ 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.¹⁹² 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).

6.2.9 Entrustment of child to parents (Article 17)

Article 17 stipulates that no child shall be entrusted to the adoptive parents until the Central Authority of the receiving State has ensured that the adoptive parents agree to the placement, and until the Central Authorities of both States agree to the adoption. In some cases, the Central Authority of the receiving State may also be required to approve the entrustment.¹⁹³ 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.

¹⁸⁹ Articles 5c) and 18.

¹⁹⁰ See, Explanatory Report, *supra* note 1, paragraphs 185.

¹⁹¹ See Explanatory Report, *supra* note 1, paragraphs 186.

¹⁹² See Explanatory Report, *supra* note 1, paragraph 188.

¹⁹³ See, for example, Germany (Adoption Convention Implementation Statute, Section 5 (1)).

If it becomes apparent that this proposed adoption is not in the best interests of the child, the Central Authorities must not give their agreement under Article 17 c) that the adoption can proceed.

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.¹⁹⁴

6.2.10 *Transfer of child to receiving State*

The transfer of the child to the receiving State is governed by Articles 19, 20, 21 and 28 of the Convention.

Co-operation between authorities is needed to ensure that the transfer of the child to the adoptive parents takes place in appropriate circumstances, in accordance with Article 19. In practice, this usually means that the adoptive parents will travel to the State of origin to get the child, unless exceptional circumstances prevent it.¹⁹⁵ Other issues to be considered at this time are the first contacts between the child and the prospective adoptive parents, as well as the follow up of the possible probationary period.

All these steps must be organised in a child friendly manner, with a professional psychosocial 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.

6.3 **The prospective adoptive parents**

6.3.1 *Application and evaluation of adoptive family*

*"Convention requirement: 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."*¹⁹⁶

A receiving State must decide which authority or body should receive applications from, and perform evaluation of, the prospective adoptive parent(s) to determine if the parent(s) are "eligible and suited to adopt".

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.¹⁹⁷

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.¹⁹⁸

¹⁹⁴ See Report of the 2000 Special Commission, *supra* at note 37, Recommendation 16.

¹⁹⁵ See International Resource Centre on the Protection of Children in Adoption (ISS/IRC) Information Note, June 2003, "Transfer of the Child from the country of origin to receiving country" < <http://www.iss-ssi.org> >

¹⁹⁶ Article 5 a).

¹⁹⁷ See, Explanatory Report, *supra* note 1, paragraph 180.

¹⁹⁸ See, for example, Australia (Western Australia, Adoption Act 1994, Section 40) Assessment of applicants for adoptive parenthood.

Countries of origin intending to give their children for adoption into the care of the receiving State must be assured that the individuals or couples selected by the receiving State as prospective adoptive parents have been properly and thoroughly assessed as suited and suitable to adopt.¹⁹⁹

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, and pre-adoption training, social service personnel determine that the prospective parents have the temperament, skills and training necessary to be approved as adoptive parents.²⁰⁰ This must be done before the matching occurs.²⁰¹

6.3.2 Preparation of prospective adoptive parents

The Convention also requires competent authorities to ensure that prospective adoptive parents receive counselling about adoption, as may be necessary.²⁰² "Counselling" in this context refers to preparation for the adoption and may include training and education.

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, and more serious issues 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 family in a natural disaster; if the adoption means the child is to be separated from friends (or worse still, 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.

The content and methods of the training and education, and the service provider, are for each State to decide. Some countries have compulsory preparation sessions, either in groups or individually, as the case requires.²⁰³ For example, the evaluation of the parents' suitability may have identified that additional preparation is required on particular aspects of the adoption process.

A key question is whether the evaluation is to be done "in blanco" (for any child) or with respect to 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 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 evaluations of parents, which take into account the needs of adoptable children for intercountry adoption in the various countries of origin.

¹⁹⁹ See 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."

²⁰⁰ See Denmark (Consolidation Act No 928, September 14 2004).

²⁰¹ For a global overview on how the home study is performed, see the responses to question No 4(g) of the 2005 Questionnaire.

²⁰² Article 5b).

²⁰³ See, for example, the responses of Austria, Denmark, Estonia, Poland, and New Zealand to question No 4(h) of the 2005 Questionnaire.

Another issue is the appeal mechanism against a negative decision on suitability of the parents. The appeal body is sometimes an administrative review body, without special expertise in children's issues, which makes its decisions based on the decision-makers compliance or lack of compliance, with forms, procedures and regulations or related administrative issues.

6.3.3 Preparation of report on the prospective adoptive parents

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."²⁰⁴ In most cases, this report is also written by the social service personnel who assess if the parents are both eligible and suited to adopt.

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 non-accredited bodies or persons. 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 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).

Emphasis was 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 15.²⁰⁵

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 adoptive parents;
- to prepare the report on the 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.

6.3.4 Transmission of report on adoptive parents

The Central Authority of the receiving State should transmit the report on the adoptive parents to the Central Authority of the State of origin.²⁰⁶

²⁰⁴ Article 15(1).

²⁰⁵ See Report of the 2000 Special Commission, *supra* at note 37, Recommendation 14.

²⁰⁶ Article 15(2).

Receiving States may consider how they will effectively oversee the process of preparing the reports to ensure that accurate reports²⁰⁷ are transmitted to the country of origin.

6.3.5 Receipt of application in the State of origin

States of origin should decide what information and documents are needed from prospective adoptive parents and which authority or body will receive applications. This information should be publicised to receiving States by any means possible.²⁰⁸

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.²⁰⁹

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.²¹⁰

Contrary to good practice, some parents travel to the country of origin and contact the adoption competent authorities or bodies before the matching decision.²¹¹ In other cases, they choose the child and sometimes even bargain directly with the mothers of origin.²¹² This practice creates risks for the children's rights, and violates of Article 29 of The Hague Convention.

²⁰⁷ See Italy (Law 184 of 4 May 1983 as amended by Law 476 of 31 December 1998, Title III, Article 30) which requires a report to be transmitted first to the juvenile court, and then to the Commission for Intercountry Adoption.

²⁰⁸ 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].

²⁰⁹ Article 14.

²¹⁰ Chile, Lithuania and Peru said that parent's reports were inadequate. See the responses of Chile, Lithuania and Peru 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 question No 4(g) of the 2005 Questionnaire.

²¹¹ According to the responses to question No 7(2) of the 2005 Questionnaire, some countries (such as Chile, Germany, Malta, Sri Lanka, United Kingdom (Scotland) and the United States of America) permit prospective adoptive parents to make their own arrangements. Some other countries (such as Denmark, Canada (Alberta and Manitoba) and Switzerland) permit this practice but only in certain limited circumstances.

²¹² See International Reference Centre for the Rights of Children Deprived of their Family (ISS/IRC) Monthly Review No 71, October 2004, "Rights of children deprived of their family: Georgia".

Chapter 7 – Legal issues surrounding implementation

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.

7.1 The general nature of the Convention

The first set of issues concern 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.

7.1.1 Basic procedures and minimum standards

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.

There are basic procedures and minimum requirements in two senses.

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 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.

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 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”.²¹³ The same is true of Article 5.²¹⁴ 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.²¹⁵

²¹³ See Explanatory Report, *supra* note 1, at paragraph 109.

²¹⁴ See Explanatory Report, *supra* note 1, paragraph 175.

²¹⁵ Article 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 Articles 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.”

7.1.2 The Convention is not a uniform law of adoption

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 an agreement). 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 States 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 States.²¹⁶

7.2 Placing limits on intercountry adoption

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 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 Article 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.

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.

7.2.1 Contracting States are not bound to engage in intercountry adoption

The Convention does not oblige a Contracting State to involve itself in intercountry adoption either generally or in a particular case. Ratification / accession does not imply commitment 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. 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. In respect of an individual adoption, Article 17 ensures that an adoption may not proceed without the consent of the relevant authorities in both of the States concerned.

²¹⁶ Article 28.

7.2.2 Is a country of origin obliged to make intercountry adoption arrangements with all receiving countries which are Parties to the Convention?

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.

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.

7.2.3 Is a receiving country obliged to make intercountry adoption arrangements with all countries of origin which are Parties to the Convention?

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 Party to the Convention, there is an obligation on the authorities in the receiving country to facilitate the adoption.

The view of the Permanent Bureau is 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.

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.

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,²¹⁷ as well as to exchange information concerning adoption practices and to keep each other informed about the operation of the Convention.²¹⁸ 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.

7.2.4 *May a country of origin place a moratorium on intercountry adoption?*

There have been examples of countries of origin placing a moratorium, for a definite or indefinite time, on intercountry adoption. The Permanent Bureau has been asked to advise whether this is consistent with obligations under the Convention.

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.

However, the introduction of a moratorium should be accompanied by the application of a carefully considered and sensitive policy towards applications for intercountry adoption, which are, at the time of the moratorium, still in the "pipeline". In particular, it may be difficult to justify applying a moratorium to cases in which the conditions of Article 17, including agreement between the two Central Authorities that the adoption may proceed, have already been met.

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 *United Nations 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 indefinite moratorium on intercountry adoption should be given serious consideration.

²¹⁷ Article 7(1).

²¹⁸ Article 7(2).

7.2.5 *May a receiving country place restrictions on adoptions from particular sending countries?*

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.)

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.

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 of origin.

7.3 Questions concerning the coming into force of the Convention

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. That Annex also explains the provisions governing the coming into force or effect of the Convention.

7.3.1 *The relationship between Article 46(2) and Article 44(2)*

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 6-month period.

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 3-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 6-month period allowed for objections. However, the reasons for preferring the former interpretation are:

1. The wording in Article 44(3) does not expressly state that relations are not established until the expiry of the 6 months. It would have been easy to make this clear, if it had been the intention of the drafters.
2. 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).

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.
4. In the vast majority of cases (*i.e.* where a new State accedes to the Convention) no objections are raised under Article 44(3). (In fact, so far there has only been one case – Guatemala.) 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.

7.3.2 How does the Convention apply to intercountry adoptions, which are already in the "pipeline" at the time of ratification, acceptance, approval or accession to the Convention?

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."

Concern has been expressed in respect of intercountry adoption applications, which are already being processed under bilateral arrangements with States which are also Parties to the 1993 Convention. Article 41 implies that, where applications under bilateral arrangements have already been received, the Convention does not apply. This interpretation is confirmed in paragraph 583 of the Explanatory Report by G. Parra-Aranguren, 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."

In short, applications, which are already in the "pipeline" 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.

It is possible that the Parties to bilateral arrangements would prefer to have the Hague procedures apply to all adoptions, even those which are currently being processed under existing arrangements (or at least to give the applicants this option). This is really a matter for agreement between the two States concerned. 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. One possible approach might be a "fast track" procedure for such cases, ensuring that The Hague conditions are met but avoiding, as much as possible, unnecessary duplication of procedures already undertaken. It would be necessary for formal application to be made to the appropriate Central Authority, but the subsequent procedures could take into account the preparatory work already undertaken.

7.4 Habitual residence and nationality

7.4.1 *Is the nationality of the child or of the prospective adopters relevant in determining the scope of the Convention?*

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."

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 Article 14).

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.

7.4.2 *Is the nationality of the child relevant in determining whether a child is adoptable?*

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 of the State of origin. The State of origin will usually apply the rules, which are relevant to domestic adoptions in that State. On the other hand, it may apply foreign laws if required to do so by its own "applicable 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 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.

7.4.3 *Is the nationality of the adopter relevant in determining his or her eligibility to adopt?*

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 of the receiving State. The receiving State will usually apply the rules which are relevant to domestic adoptions in that State. It is possible that the receiving State may, by its own applicable 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.

7.4.4 *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?*

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 *United Nations 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."*

More particularly, the *Convention on Certain Questions Relating to the Conflict of Nationality Laws*,²¹⁹ 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 same principle is to be found in Article 11(2) of the *European Convention on the Adoption of Children*.²²⁰

A second important consideration is the integration of the child into the adoptive family. This can be 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."

A third principle is that of non-discrimination. The *United Nations 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.²²¹

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)."*²²²

²¹⁹ Signed at The Hague on 12 April 1930.

²²⁰ Opened for signature in Strasbourg on 24 April 1967.

²²¹ Article 26(2).

²²² See J.H.A. van Loon, *supra* note 6, at 298.

In fact some countries provide expressly for the retention by the child of that country's nationality. An example is Bolivia where Article 105 of the Minor's 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.²²³ 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 Indian Citizenships Act 1955. Under the Romanian Law of 1991 concerning Romanian Citizenship,²²⁴ a child who has Romanian citizenship and is adopted by foreigners loses Romanian citizenship only if the adopters expressly so request. In the event of an adoption being nullified, the child is considered as never having lost Romanian citizenship.

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:

"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) 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."²²⁵

A fairly typical example is the British 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.

²²³ See *Constitucion Política de Colombia, Titulo III De Los Habitantes y del Territorio, Capitulo 1 De la Nacionalidad*, Article 96.

²²⁴ Law No 21 of 1 March 1991.

²²⁵ See Report of the 2000 Special Commission, *supra* at note 37, paragraphs 80-82.

7.4.5 *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?*

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.

7.5 Comments on the application of the 1993 Convention in disaster situations, and to displaced children within such situations

In the context of the Asian African Tsunami disaster, the Permanent Bureau issued the following statement:

"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 –

- 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."

7.6 Adoptability of the child and eligibility of the prospective adopter, including "relative" adoptions

7.6.1 Does the Convention require Contracting States to take a uniform approach to the question of eligibility to adopt?

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 paragraph 7.4.3.)

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.

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.

7.6.2 Does the Convention require Contracting States to take a uniform approach to the question of the adoptability of the child?

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 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 paragraph 7.4.2.)

7.6.3 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?

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 *United Nations Convention on the Rights of the Child* (20 November 1989), would argue against any such prohibition.

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.

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 necessary to make a responsible decision.

7.6.4 Do intercountry adoptions, which are "in family" (sometimes called "relative" adoptions) fall within the scope of the Convention?

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.

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.”

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” (Article 15(1)).

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).

7.6.5 Are private adoptions within the scope of the Convention and are they compatible with Convention standards and procedures?

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.

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.

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.

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.

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 present. This does not mean that they are sanctioned by the Convention, but rather that they are subject to Convention requirements. It is very difficult to see how private adoptions can be made compatible with the Convention without losing their "private" nature. In other words, a purely private intercountry adoption arrangement is not compatible with the Convention.

7.7 Failure to comply with the Convention

7.7.1 What measures are possible in the event of a breach of the Convention?

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."

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).

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.

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.

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.

7.7.2 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?

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.

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.

Can the situation be rectified? It would be in the spirit of the Convention, and of the *UN 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.

7.8 Miscellaneous matters

7.8.1 In what circumstances should a Contracting State provide access to adopting persons or others information concerning the adopted child's origins?

The starting point in 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."

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 law of each individual Contracting State, which governs the issue of availability of or access by the child to information. (This is confirmed in the Explanatory Report by G. Parra-Aranguren at paragraph 115.)

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.

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 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.

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.

7.8.2 Interpretation of Article 17 c)

As is stated in the Explanatory Report on the Convention at paragraph 337, the intention behind Article 17 c) is to enable both States, 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".

The Convention does not specify what those "major legal obstacles" may be. That is a matter that the Convention leaves for determination by individual States.

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 paragraphs 7.2.5, 7.6.1, 7.6.2, 7.7.1 and 7.8.3.)

7.8.3 When should the certificate of compliance under Article 23 be issued?

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.

In the case of a country of origin, such as Thailand, where a probationary placement of 6 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.

7.8.4 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?

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 paragraph 328). The decision to entrust the child cannot be taken until the Article 17 conditions have been met.

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.

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.

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.

7.8.5 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”?

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 paragraph 211 of the Explanatory Report).

Chapter 8 – Post-adoption matters

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.

8.1 Preservation of information

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.

Article 30 regulates two different questions: (1) the collection and preservation of the information concerning the child's origin, 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.²²⁶

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.²²⁷ 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.²²⁸ States may also want to clearly determine, and include within their laws, the length of time that records should be kept.²²⁹

8.1.1 Child's right to information

The right of the child to obtain information about his or her origins derives from the right to know his or her parents as provided for in Article 7(1) of the *UN 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."²³⁰ Furthermore, States of Origin are permitted to withhold identifying information from the report on the child in accordance with Article 16(2).

²²⁶ See Explanatory Report, *supra* note 1, paragraph 506.

²²⁷ See Explanatory Report, *supra* note 1, paragraph 507.

²²⁸ See for example, the Philippines (Republic Act No 8043, Article II, Section 4 (b)), which states that the Intercountry Adoption Board shall collect, maintain and preserve confidential information about the child and the adoptive parents; Italy, unofficial translation of (Law 184 of 4 May 1983 as amended by Law 476 of 31 December 1998, Article 37(2)) The Commission for Intercountry 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".

²²⁹ See, for example, United States of America (Federal Register, Vol. 68, No 178, 15 September 2003, page 54119) Department of State and DHS to maintain Convention records for 75 years; Bulgaria (Ordinance No 3, SG, Issue 82, 16 September 2003, Article 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.

²³⁰ See Explanatory Report, *supra* note 1, paragraph 512 ff.

8.1.2 Access to records

Access to records is handled in many different ways by States. Some Receiving States allow unrestricted access to children who have reached the age of majority.²³¹ 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.²³² Some countries of Origin recognise access to information about origins as a protected constitutional right of the child.²³³

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.

8.1.3 Data protection

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.²³⁴ These obligations and safeguards are also given emphasis through the requirements of Article 9 a) 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" .

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.

States should ensure that their implementing measures contain safeguards to preserve the confidentiality of information about the adoptive parents and the child.²³⁵

8.2 Post adoption services

The Convention imposes an obligation on Central Authorities to promote counselling and post adoption services.²³⁶ When developing a national and intercountry adoption system, States should give consideration to who will provide post adoption services. The nature and extent of these services is not specified, but States must take all appropriate

²³¹ See, for example, United Kingdom (Adoption Act 1976, as amended by the Adoption and Children Act 2002, Article 51(a)); Germany (Section 61: Federal Personal Status Act *PStG*); Belgium (Article 45, paragraph 1, al. 2 of the Civil Code); Spain (Articles 34, 36 and 37 of the Law on Civil Status and Articles 12, 139, 141, 167 and 170 of the Regulations of the Law on Civil Status); the Netherlands (Article 22 of the Civil Code); Norway (Act of February 1986, No 8 Relating to Adoption, Chapter 2, section 12).

²³² See, for example, United States (Federal Register, Vol. 68, No 178, 15 September 2003, page 54104, par. 96.42(c)) 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.

²³³ See, for example, Brazil (Constitution 1988, *Título II Dos Direitos e Garantias Fundamentais, Capítulo 1 Dos Direitos e Deveres Individuais e Coletivos*, Article 5 (X, XIV and XXXIV (a)) 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. See also Guatemala (Adoption Law of 28 November 2002, Article 3(d): the adopted child has the right to know his or her origins).

²³⁴ See Explanatory Report, *supra* note 1, paragraph 521.

²³⁵ See, for example, the Philippines (Republic Act No 8043, Article 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. Bulgaria (Family Code Article 67a. (SG 63/2003)) 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.

²³⁶ Article 9 c).

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.

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."²³⁷

8.2.1 *Counselling*

The Convention recognises the importance of counselling for children as well as birth parents and adoptive parents. In Articles 4 and 5, counselling is mandatory as a pre-adoption requirement. In that context counselling is discussed further in Chapter 5.1.2 (Voluntary relinquishment) and Chapter 6.3.2 (Preparation of prospective adoptive parents) and Chapter 6.2.10 (Transfer of the child to receiving State). 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.

8.2.2 *Links with country of origin*

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.

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.

8.2.3 *Service providers*

States may provide post adoption services through social service personnel,²³⁸ or accredited bodies that also approve parents to adopt. Some states include this provision of services as a requirement for accreditation.²³⁹ Services may include counselling and support immediately after adoption, information on the adjustment and needs of

²³⁷ See Explanatory Report, *supra* note 1, paragraph 235.

²³⁸ See, for example, Italy unofficial translation of (Law 184 of 4 May 1983 as amended by Law 476 of 31 December 1998, Article 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."

²³⁹ 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 Canada (British Columbia) (Adoption Regulations, Schedule 2, sections 2 and 3) and the response of Canada (British Columbia) to question No 6(a) and 6(c) of the 2005 Questionnaire.

adoptees over their lifetime, and information on search and reunion issues for adoptees who wish to discover history about their origins.²⁴⁰

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.

8.3 Post-adoption reports to States of origin

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.²⁴¹

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."²⁴²

While the matter of supplying post-adoption reports on individual children 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.²⁴³ In some countries, reports are requested up to the age of majority. In practice, however, States may find it difficult to enforce such a requirement.²⁴⁴ These legal requirements should be respected by the prospective adoptive parents and the authorities in the receiving State where they have been stated as a condition of the entrustment of the child. 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".²⁴⁵ At worst, these reports may be filed away and never read.

²⁴⁰ 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*, Sydney, The Benevolent Society Post Adoption Resource Centre, 2005; A. Young, *Adoption in NSW*, Sydney, The Benevolent Society Post Adoption Resource Centre, Section 9.

²⁴¹ Article 20.

²⁴² Article 9 e).

²⁴³ See the responses of Chile, Cyprus, Latvia and Lithuania to question No 4(j) of the 2005 Questionnaire: in Chile, post-adoption reports are sent for 1 year (law 19. 620, Article 29); in 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; in Latvia, "[i]n accordance with Article 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"; in 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."

²⁴⁴ See 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".

²⁴⁵ See the Preamble to the Convention, paragraph 1.

8.4 Breakdown or disruption of the adoption

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, their preparation for the adoption, and matching of the child and the family by experienced social workers.

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.

Article 21 deals with breakdown of placements and refers to adoptions which are to be completed after the transfer of the child to the receiving country, 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. If it becomes apparent that the continued placement is not in the child's best interests, the Central Authority 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.

Depending on the age and maturity of the child, he or she shall be consulted and, where appropriate, his or her consent obtained in relation to measures to be taken following a breakdown in the placement.²⁴⁶

In fulfilling this requirement, States often grant the responsibility to supervise 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.²⁴⁷

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 new prospective adoptive family found by accredited bodies;²⁴⁸ in other cases by the child welfare authorities of the State.²⁴⁹

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 handle such cases.

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."²⁵⁰

²⁴⁶ Article 21(2)

²⁴⁷ See, for example, the response of New Zealand to question No 7(4) of the 2005 Questionnaire: "There have been two placement disruptions, one relative 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".

²⁴⁸ See, for example, United States (Federal Register, Vol. 68, No 178, 15 September 2003, page 54108, §96.50(d)).

²⁴⁹ 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.

²⁵⁰ See Explanatory Report, *supra* note 1, paragraph 371.

According to the responses to question No 7(4) of the 2005 Questionnaire, only in Estonia and New Zealand, have there 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.

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. This means that the child will have the benefit of the measures of care and protection available to children generally in the country where he / she now has his / her habitual residence.

Chapter 9 – Preventing abuses of the Convention

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. 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.

This chapter attempts to identify known areas of abuse or bad practice which could be addressed in implementing measures.

9.1 Preventing improper financial gain and corruption

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, for example, through the accreditation, regulation and supervision of bodies or persons involved in intercountry adoption, as a means of preventing improper financial gain.

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.

9.1.1 Operational funding for intercountry adoptions

Support for national child protection programmes in developing countries often comes from abroad, through development aid and NGO activity. It is clear that family preservation and national adoption programmes should be adequately funded in order for them to be effective. However, where the source of funding is closely related to the intercountry adoption process, difficult ethical and legal problems may arise.

Programmes may also be funded by individual fees. Article 32 allows for the payment of fees for services rendered, and such fees are generally related to intercountry adoption services. Most States make use of such fees, although controls are warranted to ensure transparency and accountability for their expenditure.²⁵¹ Some States ask families for donations to cover the costs of providing child care and protection services.

²⁵¹ South Korea (The Special Law, Decree and Regulations Concerning Adoption Procedures, 1 June 1999, Article 8) (the total fees requested by the Korean Adoption body from the adopters may not exceed the amount stated by the Minister of Health and Welfare).

The linking of intercountry adoption fees or donations with funding of a child care program may create a dependency on intercountry adoption. 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 implementing reform and facing competing demands for State funds.

States are encouraged to make funding 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 use of funds generated through intercountry adoptions.

9.1.2 Setting reasonable fees and charges

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."*

In order to give further effect to these principles the Special Commission of 2000 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."²⁵²

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."²⁵³

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."²⁵⁴

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.

²⁵² See Report of the 2000 Special Commission, *supra* at note 37, Recommendation 6.

²⁵³ See Report of the 2000 Special Commission, *supra* at note 37, Recommendation 7.

²⁵⁴ See Report of the 2000 Special Commission, *supra* at note 37, Recommendation 8.

On the other hand, some States also have “unofficial” adoption fees – those that are necessary 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 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.²⁵⁵

Such problems are exacerbated by the fact that some bodies or persons will offer such incentives willingly to increase their own placement rate. Once a system of 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.

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).

9.1.3 Contributions

The first 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 Convention²⁵⁶ were prepared to accept systems of donations or contributions subject to a number of safeguards in relation to transparency and accountability.

Within the Special Commission itself the division of opinion was between those experts who 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, and those who 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.

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

²⁵⁵ See, for example, the response of Norway to question No 10(6) of the 2005 Questionnaire: “[F]or example babies and younger children or the most healthy 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 question No 10(4) of the 2005 Questionnaire, which states “...it is well known that the nationals of certain countries offer higher fees and therefore get ‘results’”. [Translation by Permanent Bureau].

²⁵⁶ “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 W. Duncan, Deputy Secretary General, Prel. Doc. No 1 of July 2000 for the attention of the Special Commission of November / December 2000. (Hereinafter, “2000 Questionnaire”). Available at: < <http://www.hcch.net> > under Conventions, Convention 33, Questionnaires and Responses.

and non-Contracting States, and that this could be viewed as the charging of a legitimate cost for the purpose of Article 32.

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.²⁵⁷ 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 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."*²⁵⁸

9.1.4 Donations

Concerns were raised in the 2000 Special Commission about the practice of making donations to adoption bodies, 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."*²⁵⁹

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

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 direct 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.

²⁵⁷ See Report of the 2000 Special Commission, *supra* at note 37, paragraph 47. See the response of Malta to question No 10(3) of the 2005 Questionnaire: "(...)some countries do ask for contribution towards maintenance prior to the child being given in the care and custody of the prospective adoptive parents(...)".

²⁵⁸ See Report of the 2000 Special Commission, *supra* at note 37, Recommendation 10.

²⁵⁹ See Report of the 2000 Special Commission, *supra* at note 37, Recommendation 9.

9.1.5 Corruption

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.”²⁶⁰

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.²⁶¹ To achieve the same purpose, it may also be possible for a country to extend its criminal law penalties to intercountry adoption situations.²⁶² In other countries, penalties are imposed on persons generally, and this would clearly include public officials.²⁶³

9.2 Co-operation to prevent abuses

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.

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;
- relative adoptions made for the purpose of exploiting the labour of the children;
- national (domestic) adoptions by citizens of the country of origin living abroad;

Co-operation between States is necessary to address these practices.

²⁶⁰ See Organisation for Economic and Co-operation Development (OECD), *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 15 February 1999, at Article 1.

²⁶¹ Chile (Law 19.620, Article 42); Switzerland (Law 211.221.31 (LF-ClaH), Articles 23 and 24).

²⁶² See, for example, the response of Latvia to question No 11(1)(a) of the 2005 Questionnaire. Latvia has a draft law before its parliament.

²⁶³ Andorra (Penal Code, Article 105); Canada (British Columbia) (Adoption Act RSBC 1996, Chapter 5, section 84); Ecuador (*Código de la Niñez y Adolescencia*, Articles 155 and 252); Romania (Law No 273/2004, Article 70); Italy (Law 184 of 4 May 1983 as amended by Law 476 of 31 December 1998, Article 72).

9.3 Application of Convention principles to non-Convention countries

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."*²⁶⁴

9.4 Preventing undue pressure on States of origin

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 for individual applicants.

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 sending countries by foreign accredited bodies seeking authorisation. States of origin should report incidents of pressure to the accrediting country. Authorisation to operate in the sending country can be refused or withdrawn by both countries, or by the sending country alone, when accredited bodies or persons act improperly or if the number of accredited bodies exceeds the requirements of the sending country.

Central Authorities of receiving and sending countries 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 adjust or limit the number of bodies accredited for particular sending countries.

²⁶⁴ See Report of the 2000 Special Commission, *supra* at note 37, Recommendation 11.

PART III: ANNEXES

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