

Sabina Albrecht
Student Number : ALBSAB001
Promenadengasse 8
CH-8001 Zurich / Switzerland

Cell : 0041 (0) 79 462 60 74
E-mail : s.albrecht@gmx.ch

UNIVERSITY OF CAPE TOWN

SCHOOL FOR ADVANCED LEGAL STUDIES

MASTER OF LAWS PROGRAME

**INTERCOUNTRY ADOPTION:
A SWISS PERSPECTIVE**

Supervised by

Professor Derry J Devine

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Master of Laws in approved courses and a minor disseration. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing submission of Master of Laws disserations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertations conforms to those regulations.

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INTERCOUNTRY ADOPTION: A SWISS PERSPECTIVE

1 INTRODUCTION

On the seventh of January 2005 the Swiss Federal Office of Justice issued a press release entitled *Victims of the flood disaster: international adoption is not the solution; the avoidance of traumatizing afresh*. Thus, the central authority dealing with international adoptions indeed welcomed the offer by many Swiss citizens to adopt orphans from the affected regions, but at the same time pointed out that international adoption was not considered to be the proper solution to the impending problems. With reference to international law principles it was further pointed out that these children need to remain as close as possible to their familiar environment first in order to clarify their identity and then to locate their parents or other relatives – a time consuming endeavor. An overhasty removal of children from their culture of origin would likely traumatize them anew.¹

While in many countries the adoption of children began as a means of ensuring the continuation of a family line and the passing of property, the modern approach to adoption tends (or perhaps pretends) to be more child-centered, emphasizing the child's right to live in the care of and security within a family. Nevertheless, since international adoption has increased after the Second World War, so too international trafficking in children - a closely associated phenomenon – has become an increasing concern for the human rights movement and international organizations.

Thus, it comes as no surprise that to date no consensus exists among opponents and proponents of the permissibility of transcultural and transracial adoptions. While the issue of intercountry adoption remained controversial for the drafters of the United Nations Convention on the Rights of the Child (hereinafter CRC), in 1993 the international human rights community opened

¹ See <http://www.ofj.admin.ch/d/index.html> (accessed on 31 May 2005).

up an entirely new field of control and cooperation in the case of intercountry adoption with the adoption of the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption (hereinafter Hague Convention), which was ratified by many states, including Switzerland in 1995. In the light of data suggesting that in the 1990s at least 170,000-180,000 children were involved in international adoptions and that in Switzerland alone about 500 foreign children get adopted annually, this paper tries to analyze whether the practice of intercountry adoption in general as well as in terms of the Hague Convention is a viable way to ensure the welfare of the world's children.²

After some introductory comments the paper first looks at the history and evolution of intercountry adoption and then considers possible risks and abuses in the process in the second part. The third part explores international legislation and procedural guidelines governing the practice of intercountry adoptions, beginning with the respective declarations and international instruments and in particular looking at the principles set out in the CRC and the Hague Convention. The way the international law in question is implemented by states is addressed primarily by using Swiss national law as an example in the fourth part of the paper, touching on questions of prevention and control. By assessing the effects of international and national legislation on the practice of intercountry adoption the paper finally tries to reach a conclusion on the contested issue of intercountry adoption – especially from a Swiss perspective.

2 TERMINOLOGY

Before entering the *sedes materiae* it may be useful to clarify the most important terms used in this paper:

Adoption: Originating from the Latin verb 'ad-optare', which stands for 'to elect to', adoption in a broad sociological sense may be defined as "the

² Kane 'The Movement of Children for International Adoption : An Epidemiologic Perspective' (1993) 30 *Social Science Journal* 323 ; Source: Federal Office for Migration (formerly Federal Office for Foreigners), Statistic T333304_D and T33302_D.

institutionalized social practice through which a person, belonging by birth to one family or kinship group, acquires new family or kinship ties that are socially defined as equivalent to biological ties and which supersede the old ones, either wholly or in part.”³ This depends on the kind of adoption, which can be either *plena*, ie granting the child the status of a biological child of the adoptive parents, or *minus plena*, ie maintaining some of the child’s legal links to his or her own biological parents. Thus, adoption nowadays, as opposed to *foster placement*, aims to provide a child with the same rights relating to his or her new parents as the ones of a biological child.⁴

Unlike *domestic* adoption, *intercountry* or *foreign* adoption legally and permanently transfers a child across an international border. The child moves to a family – whatever its nationality - residing in a different country and usually of a different race, culture and language.⁵ Even though intercountry adoption is sometimes also called *international* adoption, the choice of the word ‘inter-country’ – for the first time introduced by Article 6 of the 1965 Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoption – is preferable because it avoids the impression that there is any homogeneous and uniform international type of adoption, governed by substantive rules distinct from national ones.⁶

Throughout this paper the expression ‘intercountry (or foreign) adoption’ is used in the aforementioned sense. It does not in general include internal adoption, the adoption of adults or relatives or adoption by step-parents.

³ Detrick *A Commentary on the United Nations Convention on the Rights of the Child* 343.

⁴ Lucker-Babel ‘Intercountry Adoption and Trafficking in Children: An Initial Assessment of the Adequacy of the International Protection of Children and Their Rights’ (1991) 62 *Revue Internationale de Droit Pénal* 800; Van Bueren *The International Law on the Rights of the Child* 94.

⁵ Masson ‘Intercountry Adoption: a Global Problem or a Global Solution’ (2001) 55 *Journal of International Affairs* 141. Sometimes it seems that the term intercountry adoption is also used for adoptions in which the adoptive parents and the child have different nationalities, see Grosman & Inigo ‘Adoption of Children in Argentina by Local Citizens and Foreign Nationals’ in Jaffe (ed) *Intercountry Adoptions: Laws and Perspectives of “Sending” Countries* 158.

⁶ Delupis *International Adoptions and the Conflict of Laws* 27-28; The term ‘international adoption’ is sometimes also applied to adoptions that involve parents of a nationality other than the child, regardless of their residence, see UNICEF *Innocenti Digest: Intercountry Adoption* 2.

In a broad sense the term *private* (or *independent*) *adoption* – which as opposed to *public adoption* occurs whenever the state is not involved – may cover direct and agency adoptions, the latter usually involving three parties: the biological parents, the adoptive parents, and an agency, be it the Government itself, its subsidiary, a licensed private agency or a purely independent agency or intermediary. Regardless of what the meaning of ‘agency’ is in a given country, an agency adoption in which the state is involved can be referred to as a public agency adoption.⁷

Sending countries are the states from which most of the children are adopted, ie the states of origin in which the children lived before they were transferred abroad. These states are mostly countries belonging to what is habitually called the ‘Third World’, a community of underdeveloped and developing countries.

Receiving countries, ie states to which the children have been or are to be moved for adoption, are almost exclusively western industrialized countries.⁸

Natural parents or biological parents are the couple who conceived the child. *Adoptive parents* and prospective adoptive parents respectively are the persons who either apply for an adoptive child or who have already adopted a foreign child.⁹

Trafficking in children in a broad sense involves a variety of practices. It covers all illegal transfers of minors, such as the sale of babies and children, abuses in intercountry adoption, child prostitution, child pornography and the exploitation of child labour.¹⁰ According to Art. 2 (2) of the Inter-American Convention on International Traffic in Minors, adopted in 1994 in Mexico, international traffic in minors means “*the abduction, removal or retention, or*

⁷ Stein ‘A Call to End Baby Selling: Why the Hague Convention on Intercountry Adoption Should be Modified to Include the Consent Provisions of the Uniform Adoption Act’ (2001) 24 *Thomas Jefferson Law Review* 42. UNICEF *Innocenti Digest: Intercountry Adoption* 8; sometimes the term ‘agency adoption’ is also reserved for official or accredited agencies only, see Masson (n 5) 165.

⁸ Jaffe *Intercountry Adoptions: Laws and Perspectives of “Sending” Countries* 9.

⁹ Lucker-Babel (n 4) 800; Muntarbhorn ‘Trafficking and Sale of Children’ (1991) 62 *Revue Internationale de Droit Pénal* 747

¹⁰ Lucker-Babel (n 4) 800; Stein (n 7) 45.

attempted abduction, removal or retention, for unlawful purposes or by unlawful means. 'Unlawful purpose' includes, among others, prostitution, sexual exploitation, servitude or any other purpose unlawful in either the State of the minor's habitual residence or the State Party where the minor is located. 'Unlawful means' includes, among others, kidnapping, fraudulent or coerced consent, the giving or receipt of unlawful payments or benefit to achieve the consent of the parents, persons or institution having care of the child,".

The following discussion will not consider the selling of babies for purposes other than adoption.

3 HISTORY OF ADOPTION

3.1 General Comments

Since ancient times adoptions rituals have been handed down from different cultures around the world, beginning at least as far back as the Old Testament which records some of the first – however not legally formalized - adoptions in the western world. For example even though Moses was born to Jochebed, he was raised by Bithia and called by her name. Likewise ancient law from other regions of the world, eg the law of the Hindus, Egyptians and Romans recognized adoption as a way to create legal kinship when there were no family ties based on blood. Hence, one might be drawn to the conclusion that adoption as a social institution is indeed a *universal phenomenon* – however this is not so entirely.¹¹

A well-known exception from the principle of universality is to be found in Islamic states – excluding few countries such as Indonesia or Tunisia – where adoption as an artificial creation of parental ties is prohibited for religious reasons by the Koran. Instead under Islamic law the practice of *kafalah* is a widespread form of alternative family care for children who cannot be cared for by their biological parents. *Kafalah* is recognized as a legal institution and considered definitive. Since it enables families to take children into their

¹¹ Stein (n 7) 46; Ceschi *Adoption auslaendischer Kinder in der Schweiz: Aufnahme, Vermittlung und Pflegeverhaeltnis* 23.

permanent care without altering the kinship system, the children are entitled neither to use the family name nor to inherit.¹²

Korea is another example in which the institution of adoption, especially intercountry adoption, remained quite an unfamiliar concept for a long time, with practically no laws governing it and no social workers trained in the field. For Korean society lineage and family heritage were perceived as defining characteristics in identity formation. These would be set at risk by adoption, in particular by adoption by foreigners. Nevertheless, even though adoption has never been an indigenous practice in Korea, after the Korean War the newly inaugurated government, depending on aid from foreign countries in order to cope with the numerous war orphans, actively encouraged intercountry adoption in the late 1960s.¹³

Finally there are countries such as Malaysia or Indonesia where adoptions – as opposed to adoptions sanctioned by the state – have been carried out *de facto* in accordance with traditional law, local customs or religious provisions and in accordance with the beliefs of the parties concerned. Such ‘common law adoptions’, where a parent without engaging in any legal process leaves the child with a friend or relative for an extended period of time, were not recognized by the court.¹⁴

Thus, although the concept of adoption might be considered a universal phenomenon, it has served a range of changing interests and needs throughout the course of time and - as the following outline of its development mainly in Europe will show - it has always been influenced by various factors such as religious beliefs, social customs and political systems.

3.2 Social Impact and Evolution

3.2.1 From the Roman Period to the 20th Century

In *Roman* society, where the adoption of children who had not reached puberty was originally forbidden, the adoption of adults was widespread

¹² UNICEF *Innocenti Digest: Intercountry Adoption* 3; Van Bueren (n 4) 95.

¹³ Hoksbergen *Adoption in Worldwide Perspective: A Review of Programs, Policies and Legislation in 14 Countries* 80.

¹⁴ Collins ‘The influence of western adoption laws on customary adoption in the Third World’ in Bean (ed) *Adoption: Essays in Social Policy, Law, and Sociology* 292-293; Hoksbergen (n 13) 109; Van Bueren (n 4) 95.

practiced in order to avoid the extinction of the family in the male line, a concept mostly influenced by patriarchy and motivated by religious reasons and politics. In a later period under the leadership of Justinian the adoption of children for the purpose of inheritance became permissible under strict conditions. The legal ties created, except in the case of relatives, did not generally supersede the biological ones entirely (*adoptio minus quam plena*). Thus, the purpose of adoption at that time was to mitigate the failure of nature.¹⁵ Likewise under *Germanic* law practices similar to adoption were carried out, but only serving the purpose of inheritance and not absolutely and forever affiliating the child to his or her new family. Adoption at that time can be equated to a contract of inheritance, exclusively aimed at passing on property.¹⁶

Even though various forms of adoption existed in the ancient world, by the seventeenth century and certainly by the middle of the eighteenth century, the concept of adoption as a legal institution had virtually disappeared in most European countries and was not recognized by English common law. During the *Middle Ages* especially, the Christian idea of a closed family circle based on kinship of blood and the system of feudalism were opposed to the concept of adoption as an artificial creation of legal family ties. It was only with the French Revolution and Napoleonic law that the practice of adoption was rediscovered, influenced by the liberal, modern philosophy of that epoch. Nevertheless, the *Code Civil* of 1804 permitted adoption only under strict conditions because “Tout d’abord, cette institution n’a aucune tradition en terre française. De plus, le contexte politique explique ce choix. La France aspire à l’ordre, à la sécurité et à une hiérarchie organisée. Le gouvernement ne veut à aucun prix retrouver le désordre et l’anarchie des années révolutionnaires”.¹⁷

By the nineteenth century the concept of adoption was introduced anew in most of the modern codifications. In the twentieth century it was introduced in England by the Adoption of Children Act of 1926 and in Switzerland by the Swiss Civil Code of 1912. In the United States Massachusetts passed its first

¹⁵ Ceschi (n 11) 25 ; Van Bueren (n 4) 95.

¹⁶ Ceschi (n 11) 26.

¹⁷ Hoksbergen (n 13) 223; Ceschi (n 11) 26-27.

adoption statute in 1851. In such adoptions, the adoptee, according to the Roman model of *adoptio minus quam plena*, generally remained connected to both his natural and adoptive parents, retaining the right to inherit property from both sides.¹⁸

At the beginning of the twentieth century the focus finally began to shift slowly from the needs of the adopting family to the interests of the child. With the emergence of adoption as a means of social welfare for abandoned and orphaned children or for children born out of wedlock, the legal concept of adoption changed, providing for an absolute and permanent cut of all ties to the biological parents as if the adoptee had been legally reborn to her or his adoptive parents. This change from adoption *minus quam plena* (sometimes called 'weak' or 'simple' adoption) to adoption *plena*, ie 'strong' or 'full' adoption, was motivated by the idea of welfare, focusing on the interest of the child, the establishment of a parent-child relationship and (not least) providing for another weapon in the child care armory of the state. In line with this the element of private transaction began to fade in some countries while the importance of selecting adoptive parents and making placements developed as a new task for an emerging class of expert social workers. Instead of adoption being perceived as a private contract, it now became regulated by the state, whose task was to provide a quasi reproduction of the birth relationship through administrative or court procedures.¹⁹

Considering the ancient idea of adoption, which was predominant up to the early twentieth century and which was mainly influenced and shaped by the interests of the adoptive parents, tending to maintain the family line and pass on property, it is not surprising that until that time the practice of adoption remained territorially and culturally limited. As will be shown below there are several factors in its further development, which led to adoption becoming the international phenomenon which it is nowadays.

¹⁸ Hogget 'Adoption law: an overview' in Bean (n 14) 132; Triseliotis *Evaluation of Adoption Policy and Practice* 1; see as well <http://darkwing.uoregon.edu/~adoption/topics/adoptionhistbrief.htm> (accessed on 16 June 2005).

¹⁹ Ceschi (n 11) 6, 27-28; Hogget (n 18) 132-133.

3.2.2 Internationalisation

a) Historical and Political Events

While the practice of adoption is as old as mankind, the adoption of children from foreign countries is a fairly new concept. It is said to have originated on a large scale in the period immediately following *World War II*. Tragedies such as famines, refugee migrations and dislocated families left a significant number of orphaned and abandoned children in their wake, children in need of substitute homes. Furthermore military service personnel stationed around the world, soldiers and sailors sent to Europe during the war, eg to Germany and Japan after 1945, begot a significant number of children - mixed-raced waifs who sometimes were cruelly stigmatized in their countries of origin. The misery of these children mobilized a humanitarian effort, which led to the movement of thousands of orphaned children from countries devastated in war such as Greece, Germany and Japan to other European, especially Scandinavian families, and above all to the U.S., which today, as in the past, is the world's foremost receiving country. Between 1948 and 1962 U.S families adopted 1,845 German and 2,987 Japanese children.²⁰

Likewise as mentioned above (section 3.1) the plight of many orphaned children as a result of the *Korean War* (1950-1953) kept intercountry adoption at the forefront. This was furthered by the Korean government as a means of saving its children, especially through adoption by American families. This development continued with the *Vietnam War*, where many children were left behind by servicemen. It is estimated that – unlike in the case of Vietnam, where the adoption of Vietnamese children by foreigners was prohibited quickly after the end of the war - between 1953 and 1981 38,129 Korean children were placed with American families. Up to the early 1970s Korea remained the main source of children for adoption in developed countries.²¹

Compared to the situation in the U.S and Scandinavia, intercountry adoption in other European countries, with the exception of the years immediately

²⁰ Olsen 'Live or Let Die: Could Intercountry Adoption Make the Difference?' (2004) 22 *Penn State International Law Review* 496-497; Pilotti 'Intercountry Adoption: a view from Latin America' in Hoksbergen (n 13) 143-146.

²¹ Taek Tahk 'Intercountry Adoption Program in Korea; Policy Law and Services' in Hoksbergen (n 13) 80. In 1988 the Korean government imposed severe restrictions on intercountry adoptions.

following the Second World War, played a minor role until recently in both sending and receiving children to be adopted. That all changed after the decline of the totalitarian regime of Nicolae Ceausescu in 1989. Pictures of wide-eyed *Romanian orphans* were widespread as front-page news around the world. These children were said to be the consequence of Ceausescu's draconian policy of procreation, which not only required women to have at least five children but also prohibited contraception and abortion. Furthermore the adoption of a Romanian child by a foreign citizen required direct presidential authorization.²² Humanitarian efforts by foreigners to rescue children from appalling conditions in institutions during the period between 1990 and 1991 were made, since intercountry adoption now operated freely and without any restrictions. In view of the massive outflow of 10,000 children and under international pressure, the Government of Nastase finally imposed a moratorium in 2001. According to the new law, in effect since January this year, intercountry adoption for Romanian children has now become feasible for biological grandparents only.²³

To conclude this non-exhaustive list of historical and political events influencing the practice of intercountry adoption, the governmental family planning policies of *China* and the political upheaval in the former Soviet Union must also be recalled, especially since – beside Latin America - China and Russia have dominated intercountry adoption in the past decade. While in China over-population, restrictions to one-child families and gender preference for male children have made large numbers of children adoptable, it is mainly the economic crisis in Russia and other *Eastern European nations* that account for the fact that in 2002 alone 4,939 Russian children were adopted by U.S citizens.²⁴ As far as *Latin America* is concerned, since 1975 the number of available children from countries such as Colombia, Chile, Peru

²² Zugravescu & Jacovescu 'The Adoption of Children in Romania' in Jaffe (n 5) 41-43; Olsen (n 20) 499-500; Dillon 'Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption' (2003) 21 *Boston University International Law Journal* 248-251.

²³ See www.ccaainstitute.org/detail.php?id=38 (accessed on 17 June 2005).

²⁴ Olsen (n 20) 500-501.

and Guatemala has been steadily growing, mainly due to poverty and rapid urbanization.²⁵

b) World Events

The ever increasing number of orphaned children around the world is not only due to the escalation of *hostilities*, eg in Kosovo, Afghanistan or Iraq, but also (and not last) to the *HIV/AIDS* pandemic. According to recent estimates in just two years, from 2001 to 2003, the global number of children under the age of seventeen who were orphaned due to HIV/AIDS increased from 11.5 million to 15 million, of which an estimated 12.3 million are in sub-Saharan Africa. While this region shows the highest proportion of orphaned children, the total number of orphans is highest in Asia, which in 2003 had 87.6 million orphans from all causes.²⁶ Astonishingly though, only a few African orphans have been placed through intercountry adoption. It is said that this is mainly due to religious and societal reasons. According to the deeply rooted kinship system in African society, an orphaned child would rather and would be proud to be taken into the care of his or her extended family.²⁷

It remains unclear whether or not this is true. But at least it first has to be followed from the African example that the number of orphaned children alone does not influence the frequency of intercountry adoptions taken place in a country, may it be affected by pandemics or natural disasters. Since the situation in sub-Saharan Africa would obviously call for humanitarianism, it secondly raises the question of whether the practice of intercountry adoption is purely motivated by humanitarian concern or rather – to some extent - by the self-interest of adopting families. However, the answer to that question might be found by shifting the focus to the situation in the receiving countries.

²⁵ Pilotti (n 20) 143-145.

²⁶ UNAIDS/UNICEF/USAID *Children on the Brink 2004: A Joint Report of New Orphans Estimates and a Framework for Action* 3.

²⁷ Olsen (n 20) 504. In the Republic of South Africa the Child Care Act 74 of 1983 prohibited the adoption of a South African born child by non-South Africans. The 1996 Constitution requires under section 28 (2) that the best interests of a child are to be paramount in every matter concerning him or her. On this ground the Constitutional Court found the prohibition against adoption of South African born children by non-South Africans to be unconstitutional, see *Minister for Welfare and Population Development v Fitzpatrick and Others*, CCT 08/00, available at: <http://www.constitutionalcourt.org.za/Archimages/1508.PDF> (accessed on 5 August 2005).

c) Demographic and Social Changes

The '*cultural revolution*' struck most receiving countries in the industrialized world in the 1960s and 1970s and many traditional norms and moral values were challenged and replaced: acceptance of birth control through new contraceptive technology and sex education; legalization of abortion; destigmatization of single-parenthood; improvement of social benefits for single-mothers; higher workforce participation of women; postponement of marriage. These factors mainly, together with falling birth rates led to a steady decline in unwanted births and accordingly to a decreasing number of children without families in industrialized countries.²⁸

Hence, while the rate of childless couples increased over the past decades in the main receiving countries, ie the *U.S.*, *Canada* and western European countries such as *Sweden*, *Switzerland*, *France*, *Italy* and the *Netherlands*, the number of children suitable for adoption decreased.²⁹ Furthermore, since infertility treatment had limited success and involved high costs and since opportunities for domestic adoption were rare, intercountry adoption became an alternative to childlessness and a means for creating the western ideal of the *nuclear family*.³⁰

The high number of children in need of family care around the world has constituted a structural problem since World War II. The 'demand' for children in industrialized countries has also exhibited structural features and the motivating factors for intercountry adoption have become more complex. Even though some of the industrialized nations, in particular Switzerland, recorded a slight decrease in intercountry adoptions – probably due to the negative economic climate, high costs, the polemics surrounding the issue and progress in assisted reproductive technology – intercountry adoption still exceeds national placements.³¹

Thus, intercountry adoption does not any more provide a solution to a particular problem. It has also acquired a distinct character, involving countries with unequal levels of socioeconomic development and populations

²⁸ UNICEF *Innocenti Digest: Intercountry Adoption 2*.

²⁹ For an overview, including the procedure of intercountry adoption, concerning the U.S see Jasper *International Adoption*.

³⁰ Masson (n 5) 141; Pilotti (20) 144-146.

³¹ Ceschi (n 11) 38; Muntarhorn (n 9) 747.

of different racial composition. This might be one of the reasons for its contested nature as an instrument of welfare and associated problems which have to be addressed within this context.³²

4 ABUSES AND RISKS

4.1 General Comments

Unfortunately as governments and institutions in the Third World under socio-economic pressure tried to respond quickly to the growing 'demand' for their children - regardless of the necessary infrastructure and administrative mechanisms to proceed properly - illegal acts and malpractices developed. These question the purpose of adoption as an institution of welfare and attempt to legitimate the use of an economic vocabulary involving such terms as 'offer' and 'demand'.³³

Due to the conflict of laws where a foreign child is adopted and lack of cooperation, coordination and control in the adoption procedure, there is room for abuses by criminal networks, intermediaries of all kinds and couples prepared to neglect legal and moral codes by a diversity of methods. Furthermore, determining whether the decision of a biological parent to give up a child for a better future in a materially rich country is voluntary or has been taken under coercion or obtained by fraud is not always easy. Hence many adoptions that appear legal are not always legitimate.³⁴

During past decades international awareness of the commercial exploitation and sale of children has steadily grown. By 1990 the United Nations Commission on Human Rights had created the mandate of the *Special Rapporteur on the sale of children, child prostitution and child pornography*. The mandate in respect of the 'sale' element also covers adoption for commercial purposes where the child is the object of a commercial transaction, exchanged for unwarranted financial gain. Doctrine holds that the selling of children might even reach levels tantamount to slavery or slave

³² Pilotti (n 20) 144.

³³ Posner 'The Regulation of the Market in Adoptions' in Krause (ed) *Parent, Child and State* 60.

³⁴ Becker 'Trafficking and Sale of Children: The Two Sides of the Question' (1991) *Revue Internationale de Droit Pénal* 820-822.

trading, eg kidnapping or concealment of the child's genuine identity, where the very existence of the child as a human being is negated.³⁵

In order to understand the variety of violations of children's rights in kind and intensity, occurring in intercountry adoption, it may be useful to have a closer look at the practical methods of adoption, the inherent risks and the consequences. At the same time it has to be remembered that improper proceedings are not easy to identify as they may have the appearance of seemingly legitimate adoptions.³⁶ Furthermore evidence is often hard to find, since on the one hand the actors are interested in keeping silent and on the other hand international cooperation and monitoring mechanisms are lacking so that irregularities are easily to be concealed.³⁷

4.2 Adoption and Trafficking in Children

4.2.1 Preliminary Note

Abusive practices in intercountry adoption on the one hand may have devastating consequences for a particular child. On the other hand the ramifications also touch the situation of children in general insofar as they reflect and perpetuate the idea of children as objects of rights rather than right holders. Such practice may also induce institutions – with a view to financial gain - to send children abroad rather than trace natural families or look for domestic solutions. Finally countries are more likely to prohibit adoption entirely, and independently of the best solution for a child, once a scandal has been discovered.³⁸ Even though intercountry placements through illegal acts or malpractices do not necessarily have to fail *ab initio*, they may create several difficulties in relation to the child's right to his or her biological and national identity. Knowledge of biological roots and medical and social background information are likely to be lost forever in the course of illegal procedures.³⁹ In light of the growing awareness about the impact of such knowledge on the personal development of a child and considering the

³⁵ UN Documents E/CN.4/1994/84 para. 30-33 and E/CN/2002/79 para. 110 ; Lucker-Babel (n 4) 804.

³⁶ The distinction between a payment to an orphanage for care of the baby and a payment for the orphanage's role in inducing consent of the biological mother may be difficult.

³⁷ Lucker-Babel (n 4) 801.

³⁸ UNICEF *Innocenti Digest: Intercountry Adoption* 7.

³⁹ UNICEF *Innocenti Digest: Intercountry Adoption* 7.

possible consequences of lifesaving health-related information, these children are likely to expect years of turmoil.⁴⁰ As far as the nationality and citizenship of such children are concerned, irregularities in or disruption of the adoption process may result in statelessness and failure to naturalize within the adopted child's country of residence. This in turn may have an impact on the child's rights in matters relating to social security.⁴¹

Thus, illegal acts and malpractices are not only to be condemned as such, but moreover considering the damage it causes a particular child and children in general, they have to be combated internationally by all available means.

4.2.2 Methods and Examples of Use

The major methods and means used in intercountry adoption fraud may be divided into four categories, beginning with the first one covering attempts to make national authorities *change* their *policies* and *practice* under questionable political and economic pressure. The second embraces methods to *obtain children for adoption illegally*, such as: abduction of babies or infants (eg kidnapping); identification of potentially vulnerable mothers and parents, who will be coerced into giving up their child; fraudulent information about stillborn or dead babies; exchange of a child for financial or material reward; incentives to women for conceiving a child predicted for adoption abroad; misinforming both the biological parents and the adoptive parents in respect of the consequences of adoption and the circumstances of the child. The third category covers all practices through which *permission to adopt* is *illegally secured*, eg falsified certificates and corrupt practices. Finally documents such as false birth or paternity declarations are envisaged as is the transfer of a child through a third country, which has no systematic border controls resulting in the *adoption process* itself being *illegally avoided*.⁴²

⁴⁰ Brower Blair 'The Impact of Family Paradigms, Domestic Constitutions, and International Conventions on Disclosure of an Adopted Person's Identities and Heritage: A Comparative Examination' (2001) 22 *Michigan Journal of International Law* 619-620, 631-632; Simon & Alstein *Transracial Adoptees and Their Families: A Study of Identity and Commitment* 83, 116; Bagley et al *International and Transracial Adoptions: A Mental Health Perspective* 6-7, 56-57.

⁴¹ UNICEF *Innocenti Digest: Intercountry Adoption* 7; Report of the Federal Office of Justice BBI 1999 5803-5805, whereupon statelessness mainly affects countries where citizenship is not conferred in case birth is given abroad, eg Chile, Ecuador, Colombia and Paraguay.

⁴² UNICEF *Innocenti Digest: Intercountry Adoption* 6.

During the seventies for instance *Argentina* under the regime of the military junta experienced mass "disappearances" of children whose identity papers had been deliberately falsified and family ties arbitrarily severed. Most of these children were babies born in captivity to mothers who never held or even saw them. It is estimated that during the Argentinean 'Dirty War' as many as 450 children were stolen and given or sold to childless military or police families, in some cases even ending up abroad in Chile or Uruguay (second disappearance).⁴³

No less dark is the period from 1926 to 1972 in the history of Switzerland, when more than 600 Yenish and Gypsy children were ruthlessly hunted down by the '*Oevre d'entraide pour les enfants de la grande-route*', separated from their families and either institutionalized or given into the family care of prospective adoptive parents across the country and even abroad, especially to Germany. As in the case of Argentina these violations were primarily not motivated by financial gain, but driven by national-socialist ideology in pursuit of racial purity and under cover of a "policy of social assistance and welfare", allegedly with the purpose of socializing the children but actually representing a form of genocide.⁴⁴

There are many other tragic examples of abuses of adoption practices, especially the sale of babies and infants for commercial purposes in South American countries. Such was the case in *Colombia*, where the law (before its revision in 1989 regulating parental consent, adoption consent and sanctions for illegal activity) allowed biological parents to give their consent directly to prospective adopters. However, instead of the legal mother, the agent of a trafficker would often appear at the Notary's Office to obtain an identification document concerning the consent.⁴⁵ The examples of Honduras, Guatemala and Brazil - countries hit not only by social, economic and political upheavals

⁴³ Avery 'A Return to Life: The Right to Identity and the Right to Identify Argentina's "Living Disappeared" (2004) 27 *Harvard Journal of Law and Gender (formerly Harvard Woman's Law Journal)* 235-237; Oren 'Righting Child Custody Wrongs: The Children of the "Disappeared" in Argentina' (2001) 14 *Harvard Human Rights Journal* 134.

⁴⁴ Jourdan 'Long pursuit of racial purity' *Le Monde Diplomatique*, October 12, 1999 : <http://www.thata.ch/jourdanmondediploenglish.htm> (accessed on 22 June 2005); Huonker *Vorgeschichte, Umfeld, Durchfuehrung und Folgen des Hilfswerks fuer die Kinder der Landstrasse*: <http://www.thata.ch/hkdlbericht87.htm> (accessed on 22 June 2005).

⁴⁵ Jaramillo de Marin 'Trafficking and the Sale of Children' (1991) *Revue Internationale de Droit Pénal* 833-834.

but also by natural disasters such as Hurricane Mitch - are noteworthy. In *Honduras* senior government officials reportedly received and hid abducted children from poor families in 'fattening centers' from where they were sold to foreign couples for \$ 5,000 each.⁴⁶ In *Guatemala* the annual influx of American dollars into the Guatemalan economy through the booming business of intercountry adoption is estimated at twenty million dollars and the mass of mothers are said to be exploited by all kinds of baby brokers, husbands, lawyers and middle and upper class housewives.⁴⁷ In *Brazil* - where the term 'adoption à la brésilienne' or 'humanitarian trafficking' originated - it is reported that children who were given by their biological parents to families with which they were acquainted have often been moved out of their mothers' reach and falsely registered in a notary's office by the foster parents, allegedly as a sign of a generous act and proof of love. Alternatively mediators, such as hospital employees, midwives or religious support groups, frequently separate mothers from their children in pursuit of a presumably better future for the children.⁴⁸

Many other examples of abuses can be found in countries such as Romania, Russia, Cambodia and Indonesia. Finally a more recent baby selling scandal was reported from *India*, where an NGO was alleged to have sold children to rich foreign couples without having verified their antecedents and without permission from the authorities concerned. This was done mainly by shifting them to a hospital where one of them 'died' while the condition of others was said to be critical. Fortunately 34 infants were rescued before they could be sold.⁴⁹

In the light of these striking examples, one must identify the risks and the triggers which facilitate such abuses in order to better understand the mechanisms and possible prevention strategies.

⁴⁶ UNICEF *Innocenti Digest: Intercountry Adoption* 6.

⁴⁷ Bartner Graff 'Intercountry Adoption and the Convention on the Rights of the Child: Can the Free Market in Children be Controlled' (2000) 27 *Syracuse Journal of International Law and Commerce* 409-412; Stein (n 7) 66.

⁴⁸ Becker (n 34) 823.

⁴⁹ See http://www.adoptionireland.com/campaign/ica_corrupt.html (accessed on 21 June 2005); The Tribune online 'Child adoption racket' April 21, 2001 at: <http://www.tribuneindia.com/2001/20010424/edit.htm> (accessed on 21 June 2005).

4.2.3 Risks

It follows from the examples in section 4.2.2 above that abuses occur not only during periods of armed conflict, natural disaster, socio-political upheaval and economic crisis, but also depend on effective legislation, administrative structures and the proper functioning of the child and family welfare policy in a given country.⁵⁰

As regards *legislation* and *administrative structures* the examples of countries in Eastern Europe and South America show especially that a sound legislative base as well as an efficient, corruption-free judicial and administrative system are fundamental in preventing abuses of intercountry adoption. Nevertheless it is argued that despite an increase in regulation the phenomenon of baby selling has been growing. Strict procedures, long waiting lists, complex adoption regulations and high costs encourage childless couples to avoid official channels and rather to line up to buy black market babies. Furthermore, in economically weak countries, full implementation of legislation might be difficult due to administrative costs and lack of an efficient bureaucracy. There are more likely to continue undesirable practices. Indeed, even though legislation alone might not raise standards, it is obvious – considering examples such as Guatemala - that children in countries with no legal provisions regulating intercountry adoption and correlated issues such as birth registration, abandonment, child care arrangements or maternity homes are at particular risk. As regards the latter, a country's *child and family welfare policy* is crucial. Through active support of biological families, the abandonment of children may be avoided.⁵¹

Another risk is commonly said to be inherent in the allowance of *private adoptions*, where the worst and most frequent problems have been located.⁵² Intercountry adoptions arranged through private agencies and independent intermediaries, mostly professionals such as profit-seeking attorneys, doctors and social workers, prevail in the U.S, where high money is made in this

⁵⁰ UNICEF *Innocenti Digest: Intercountry Adoption* 8.

⁵¹ Posner (n 33) 62; Dillon (n 22) 239-241, 251-252 ; Masson (n 5) 142 ; Bartner Graff (n 47) 409-411.

⁵² Masson (n 5) 153, with reference to UNICEF and the Committee on the Rights of the Child.

field.⁵³ Since private adoption ‘facilitators’ habitually enjoy the trust of the public and presumably guarantee legality, it is easy for them to conceal illegal payments.⁵⁴ It must also be noted that the former ideal of confidentiality was normally more respected in private procedures as adoption procedures were ruled by principles of secrecy and anonymity. Furthermore it is claimed that the creation of centralized authorities leads to excessive bureaucracy and delay, which in turn furthers the ‘underground trade’.⁵⁵ On the other hand it is argued that despite these risks in countries where the creation of cumbersome bureaucracy is restricted due to limited expenditure of resources, private ‘facilitators’ and ‘intermediaries’ may play an important role for administrative and legal reasons and because of the practical implications of the transfer.⁵⁶ In the light of the internationally highly controversial concept of private domestic and intercountry adoption, sending countries tend either to require the interposition of an authorized ‘facilitator’ or to outlaw private market operators altogether, whereas in most receiving countries collaboration with an authorized agency is seldom compulsory.⁵⁷

It has to be emphasized that risk factors inherent in a state’s system or policy are likely to be multiplied in *emergency*, *conflict* and *post-conflict* situations as well as by *socio-political upheaval* or abrupt *economic change*. As stated by both the Swiss Federal Office of Justice and the Hague Conference on Private International Law in respect of victims of the flood disaster, international adoption in such situations is normally inadvisable, at least as long as the national territory is not under the control of the authorities and/or basic services and judicial and administrative structures are not functioning. Tracing parents and other surviving relatives in order to formally establish the eligibility of a child for adoption, especially a refugee child or an unaccompanied minor, habitually takes time. In such situations intercountry adoption should not be contemplated for a period of at least two years after

⁵³ Bartner Graf (n 47) 408-409.

⁵⁴ Stein (n 7) 76.

⁵⁵ UNICEF *Innocenti Digest: Intercountry Adoption* 8; Posner (n 33) 72.

⁵⁶ Lucker-Babel (n 4) 801.

⁵⁷ Ceschi (n 11) 54-55, referring to a report of the Federal Office of Justice whereupon only 10 % of all intercountry adoptions are accomplished through recognized agencies. This paper will not discuss again the delicate issue of private adoption in the context of its regulation by international legal instruments.

the event.⁵⁸ Furthermore, even though intercountry foster placement and respite care – both temporary measures for a set period – may offer children affected by events such as natural disasters or armed conflicts some sort of relief, they should not be taken into account without considering the accompanying risks, especially their use in order to circumvent official legal procedures for intercountry adoption and thereby creating a *fait accompli* with regard to the child's place of residence.⁵⁹

Finally, a factor common to all the aforementioned symptoms is *poverty*, a high risk, which depends very much on the socio-political climate influencing the level of material poverty suffered in a given nation. As is demonstrated by most of the examples of sending countries, such as Brazil or Guatemala in South America or by the more recent events in Central and Eastern Europe, extreme poverty not only exposes children to the most severe hardships but puts the home relationship between parents and their children at risk. Obviously poverty increases the vulnerability of such children to the dangers of child trafficking and attracts allegedly well-intentioned adoption agents to single parent families or adolescent mothers as the most vulnerable of all targets. Thus, not surprisingly the reduction of poverty has been declared as one of the UN Millennium Development Goals to be achieved by 2015.⁶⁰

4.2.4 Discussion

Considering the aforementioned problems surrounding the practice of intercountry adoption it comes as no surprise that it is highly controversial and consensus between scholars and practitioners is far from being reached, not least due to a lack of sufficient data and research relating to statistics, experience and success of intercountry adoptions.⁶¹ To date the different

⁵⁸ Hcch Press Release: *Asian-African Tsunami Disaster and the Legal Protection of Children* (10 January 2005) http://hcch.e-vision.nl/upload/tsunami_e.pdf (accessed on 24 June 2005); see as well Merkelbach 'Reuniting Children separated from their Families after the Rwandan Crisis of 1994: the Relative Value of a Centralized Database' (2000) 838 *International Review of the Red Cross* 351.

⁵⁹ UNICEF *Innocenti Digest: Intercountry Adoption* 9.

⁶⁰ Becker (n 34) 820-821; UNICEF *The State of the World's Children 2005: Childhood under Threat* 8, 17.

⁶¹ PRO: Dillon (n 22), Olsen (n 20). According to Dillon UNICEF has to be classified as CONTRA (or at best ambiguous), see Dillon (n 22) 253-255.

doctrines and political views taken within the debate can briefly be summarized as follows.

Opponents – also called abolitionists – argue that from the perspective of sending countries, intercountry adoption has a negative impact on child welfare systems in these countries. It distracts from the child's need to the advantage of the foreign applicant. Furthermore it undermines the improvement of local welfare services, which are accused of furthering 'neo-colonialism' and 'imperialism' and are tempted to see the solution to the country's child care problems in the export of its children. From the receiving countries' point of view the proliferation of placements for healthy foreign babies hinders the placement of domestic infants, especially older children or children with diseases, who become 'hard to place'. Finally, stressing mainly scandalous cases, opponents assume that intercountry adoption inevitably leads to abuses, coercion and corruption and is not in fact motivated by humanitarianism but rather by selfishness and greed, which is mainly satisfied on black markets.⁶²

Proponents or promoters emphasize the welfare of individual children and argue that intercountry adoption may offer children suffering from horrible living conditions a warm home, care and affection within a family environment and at the same time it may also represent the best solution for families without children.⁶³ Against the abuse argument it is contended that such problems are not caused by the institution as such but are rather the result of too much regulation, too strict requirements for, and assessments of, prospective adoptive parents and last but not least procedures which are too lengthy. As far as the allegation of 'neo-colonialism' is concerned, it is argued that transracial and international placements of children are beneficial not only to parents and children but also to the community as a whole, since it encourages understanding and appreciation of foreign racial and cultural heritages and nourishes the feelings and experiences of a common humanity.⁶⁴

⁶² Masson (n 5) 148-150.

⁶³ Olsen (n 20) 489-490; Liu 'International Adoptions: An Overview' (1994) 8 *Temple International and Comparative Law Journal* 193-194.

⁶⁴ Masson (n 5) 149 ; Olsen (n 20) 491.

Finally *pragmatists* take the reality - namely the placement of children across borders - as a starting point from which follows the need to regulate intercountry adoption to eliminate malpractices and improve standards. Hence, pragmatists emphasize questions of prevention and control while admitting that legislation alone cannot be considered as satisfactory. Instead they suggest not only new practices but also a rethinking by all actors at different levels, from applicants, agencies and intermediaries up to the judiciary and immigration services.⁶⁵

Whether - as pointed out in the literature – criticism of intercountry adoption can simply be ticked off as negative rhetoric, bad press and biased journalism (for using slogans such as ‘market’, ‘profiteering’ and ‘astronomical sums’), or whether the political resistance to intercountry adoption is rather due to the irrational fears of groups who perceive their children treated as property, who - when taken away - leave them with feelings of shiftlessness and suspicion, is hardly a question that helps the discussion to move forward.⁶⁶ Undoubtedly both the terrible histories of ‘mass removals’ of children across the world as well as single cases of abuse have to be condemned in the severest terms, regardless of whether the story ended successfully and the child lived happily ever after with his or her adoptive parents. Starting with the delicate question of race and without judging hastily, it nevertheless seems arguable that transracial placement of a child is detrimental to the adoptee and the family - since it is said that a child without access to its culture will have more emotional problems and the adoption will not work out. The contrary thesis is propounded by sociological studies, which support the view that such children are able to adjust their personalities successfully as adults and develop awareness of and respect for race as well as being at ease with their own racial heritage – hence, a rather optimistic conclusion.⁶⁷

⁶⁵ Masson (n 5) 150-151.

⁶⁶ Dillon (n 22) 215- 218.

⁶⁷ Simon & Alstein (n 40) 27-28, 108-109, 140-143 ; Bagley ed al (n 40) 72, 77, 79, 88-89, 163-165, 172; see Marilyn & Loyal Rue ‘Reflections on Bicultural Adoption’ in Bean (n 14) 253; these authors have out of their own experience come to the conclusion that Bicultural adoptive families are not qualitatively unique, since “- *all* children are vulnerable to insecurity and isolation; *all* parents are plagued by uncertainty and guilt – we are just suggesting that the normal problems of family life become magnified in a bicultural adoptive setting. The problems have the same shape, they are just larger. But there remains a very distinct possibility that the joys of parenting are also larger in an adoptive

Furthermore and compared to institutional life, studies suggest that children who grow up in institutions are more likely to suffer from permanent psychological damages than children growing up in foreign adoptive families, since attachment and bonding with a consistent primary caretaker is found to be critical during the child's formative period in order to experience feelings of trust, which are important for his or her personal development.⁶⁸ Considering for example China, where population control is a major problem and where sons enjoy preference over daughters, masses of abandoned and stigmatized female babies end up in orphanages run by the state under harsh regimes.⁶⁹ Needless to say that these babies - it may be the same for Latin American babies born out of wedlock in countries ruled by 'Machismo' - have hardly a chance to get placed domestically.⁷⁰ Hence, it follows that intercountry adoption in such cases and under normal circumstances may indeed represent the best solution for both the child and the single mother, who most probably will also suffer stigmatization in the country of origin.

Finally as concerns the high amount of money said to be involved in intercountry adoption, one would indeed welcome spending it on services in developing countries to support families, thus preventing them from abandoning their children. Nevertheless, it is doubtful whether prospective parents would use the money to support local child welfare services. The view is that it is in fact primarily couples who have adopted a foreign child who are inclined to support welfare services in the child's country of origin.⁷¹

Without anticipating a conclusion before examining the issue thoroughly it can be said with assurance that opportunities offered by social services, income and housing support for children to grow up with their biological parents instead of with foreign or domestic adoptive families - or in institutions as worst case scenarios – would represent the best solution for all parties involved, above all the child. Nevertheless, there seems to be much support

family”.

⁶⁸ Dillon (n 22) 221-224; Bagley ed al (n 40) 172-173, 236-237.

⁶⁹ Dillon (n 22) 228-229; Bagley ed al (n 40) 173, 187-189.

⁷⁰ Hayman 'Adoption Issues in Latin America: Behind the Silence and the Secrets' (2003) *The Boothe Prize Essays* (Stanford) 23-24, whereupon under *Catholic Machismo* the adoption triangle (ie child, biological mother and adoptive parents) are likely to be faced with 'classism', 'racism', or 'sexism'.

⁷¹ Bagley ed al (n 40) 173.

for the ambivalent view shared by pragmatists that upon a realistic perception of the world, intercountry adoption, when conducted properly, can offer children in need, even if ethnically different from the adoptive parents, a loving home and cultural support.⁷²

However, the question whether intercountry adoption is justified at this point as a solution in limited circumstances when safeguarded by international rules (considering the existing international legal framework and its implementation) has yet to be addressed in the next chapter.

5 INTERNATIONAL LEGAL FRAMEWORK

5.1 Introductory Comment

Responses by the international community covering a wide range of patterns of human exploitation - from slavery and the slave trade, bonded labor and trafficking in women to apartheid and the exploitation of child labor - began with the *1926 Convention on Slavery*, which was expanded in 1956 by the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*. The fact that two decades later the latter instrument gave rise to the debate about its application to the displacement of children in general, reflects the diversity of actors involved in such activities and the broad range of legal instruments touching on intercountry adoption and correlated issues such as trafficking in children.⁷³

It would go beyond the scope of this paper to explore each of these instruments entirely. Thus international legislation primarily concerning sale and trafficking in children which only indirectly affects the practice of intercountry adoption will not be discussed in this study.⁷⁴ After giving a brief outline of the most important and often mentioned international instruments

⁷² Bagley ed al (n 40) 192; Dillon (n 22) 253-254; Masson (n 5) 166; Stein (n 7) 81-82; Olsen (n 20) 524-525.

⁷³ Lucker-Babel (n 4) 802-803; Stein (n 7) 69-70.

⁷⁴ eg *Universal Declaration on Human Rights 1948* (mainly Articles 4,12,25 (2)), which with the term 'slavery' in Article 4 also covers traffic in women and children; *UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1949*, which as well focuses on the trade in woman and children; *Inter-American Convention on International Traffic in Minors 1994*, quite a new instrument which aims at avoiding and punishing the traffic in children for whatever purpose.

applicable to intercountry adoption this chapter will first concentrate on the CRC and secondly on the Hague Convention. It should be noted that the first set of principles underpinning all subsequent instruments dealing with intercountry adoption was established in a UN seminar held in 1960 in Leysin, Switzerland. Unfortunately - despite a wide range of participants - no representative from the Third World were invited.⁷⁵

5.2 International Legal Instruments in General

5.2.1 Conventions⁷⁶

*Global*⁷⁷

- *Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoption 1965*: This instrument covering the adoption of children less than 18 years of age is noteworthy mainly for the sake of completeness, since it had little success and hardly came into effect in practice.⁷⁸
- *International Covenant on Civil and Political Rights 1966* (mainly Articles 17 and 24): This instrument first of all prohibits any arbitrary or unlawful interference with privacy or family, secondly entitles the family as the natural and fundamental group unit in society to protection by the state and finally sets forth that every child shall be registered immediately after birth and that he or she has a right to nationality. This treaty indirectly touches aspects of adoption.⁷⁹

⁷⁵ Bagley (n 40) 138-146. A number of experts from sixteen European countries elaborated twelve principles. Two of them were overriding, first that adoption is the *best substitute* in the absence of care from the natural or extended family and secondly that the *best interests of the child* must be paramount at all times.

⁷⁶ As opposed to declarations a convention creates rights and obligations and is legally binding for the ratifying state parties, whereas the former embraces intentions and moral codes.

⁷⁷ This list is not exhaustive, for more treaties see Delupis (n 6) 15-18. Some of them might moreover be considered as merely regional efforts.

⁷⁸ The Convention had been ratified only by three European countries (United Kingdom, Austria, Switzerland) and will cease to have effect in 2008, see http://hcch.evison.nl/index_en.php?act=conventions.text&cid=75 (accessed on 29 June 2005).

⁷⁹ Lucker-Babel (n 4) 806. Likewise the *European Convention on Human Rights 1958* contains no specific reference to adoption, wherefore challenges to intercountry adoptions have been considered under the provisions relating to privacy and family, ie Articles 8 and 12.

- *International Covenant on Economic, Social and Cultural Rights 1966 (mainly Article 10)*: This correlated instrument also declares the family to be the natural and fundamental group unit in society, which should be accorded the widest possible protection. Likewise special protection should be provided for children.⁸⁰
- *UN Convention on the Rights of the Child 1989 (CRC, see below.)*
- *Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption 1993 (Hague Convention, see below).*

Regional

- *European Convention on the Adoption of Children 1967*: Applicable to international and national adoptions of minors this instrument - which is criticized for primarily aiming at the unification of national laws and for not providing the adoptee with a right to know his identity - nevertheless embraces a number of safeguards relating to matters of consent, authorization and financing.⁸¹
- *Inter-American Convention on Conflict of Laws concerning the Adoption of Minors 1984*: Like the instrument just mentioned this treaty mainly deals with aspects of private international law and only marginally embraces direct rights of the child. In contrast to the former the child and not the adoptive parents is the connecting factor. However, at this point it is noteworthy that the problems of intercountry adoption in fact require collaboration between the country of origin and the one of destiny.⁸²
- *African Charter on the Rights and Welfare of the Child 1990 (mainly Article 24)*: Although not mandating the practice of intercountry adoption this document sets forth basic principles applicable to the practice of intercountry adoption.⁸³

⁸⁰ Detrick (n 3) 343-344.

⁸¹ Van Bueren (n 4) 98-99; Lucker-Babel (n 4) 810; Delupis (n 6) 37-46.

⁸² According to Van Loon 'la Convention de la Haye et la Convention interaméricaine souffrent l'une et l'autre d'avoir été négociées au sein d'un groupe régional', see Ceschi (n 11) 87; Lucker-Babel (n 4) 810.

⁸³ Brower Blair (n 40) 358.

5.2.2 Declarations

- *UN Declaration of the Rights of the Child 1959 (mainly Principles 6 and 9)*: Based on the 1924 League of Nations Declaration of the Rights of the Child (Geneva Declaration) - which is regarded as the cornerstone of children's rights, namely referring to orphans and waifs - this instrument not only stresses the importance of tangible needs but also the child's need for love and understanding within a family.⁸⁴
- *UN 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 1986 (mainly Article 13 and following)*: This instrument, which specifically addresses adoption and children's welfare by setting up a basic framework, has served as the main foundation for later regulations on adoption, especially for the CRC and the Hague Convention. It will be further discussed below (hereinafter referred to as 1986 UN Declaration).⁸⁵

5.3 UN Convention on the Rights of the Child 1989 (CRC)

5.3.1 History and Purpose

Even though some of the above-mentioned human rights treaties apply to children as much as to adults and moreover contain special provisions relating to children, it was decided within the United Nations in the late 1970s to draft a specific convention on children's rights, starting with a text proposed by the Polish delegation to the United Nations, which itself was based on the 1959 Declaration on the Rights of the Child. After 10 years of drafting the CRC, a comprehensive list of human rights relating to children, was adopted in 1989 and entered into force the following year.⁸⁶ Since then it experienced

⁸⁴ Olsen (n 20) 487, 492-495. The 1959 Declaration is said to be a result of the events in the aftermath of World War II. Principle 6 states that '*The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and or moral and material security;...*'.

⁸⁵ Liu (n 63) 195-196; Detrick (n 3) 332. This declaration is said to be the follow-up action to the *World Conference on Adoption and Foster Placement*, held in Milan in 1971. Since the U.N. set up guidelines without explicitly supporting adoptions as the sole solution, they might take an ambiguous stance in the debate.

⁸⁶ Van Bueren (n 4) 13-15.

an unprecedented number of ratifications by countries across the world, counting 192 States Parties today (only missing the U.S and Sudan).⁸⁷

The rights of the child envisaged in the CRC have to be seen as an integral part of human rights, including child related provisions from other human rights treaties, as well as novel aspects about the survival, protection, development and participation of children.⁸⁸ Speaking in terms of the four P's the CRC is concerned with the *participation* of children in decisions affecting their own destiny, the *protection* of children against discrimination and all forms of neglect and exploitation, the *prevention* of harm to children and the *provision* of assistance for their basic needs.⁸⁹ Therefore it is said that the most important improvement in the legal status of children introduced by the CRC is that it creates a definitive body of international law on children. As such it also embraces provisions concerning the practice of adoption in general as well as intercountry adoption in particular.⁹⁰

5.3.2 Principles in Articles 20 and 21 of the CRC

Articles 20 and 21 of the CRC, the two main provisions specifically dealing with adoption, firstly reflect the commitment set forth in the Preamble, whereupon 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*', and secondly incorporate some of the recommendations of the 1986 UN Declaration, to which the Preamble explicitly refers.⁹¹ Taking into account cultural relativism and the various forms of alternative care practiced across the world, the CRC only obliges States parties to provide special protection and assistance for children deprived of their family environment, leaving open the means such as *inter alia* foster placement, *kafalah*, adoption (domestic and intercountry) or, if necessary,

⁸⁷ Status of Ratifications of the Principal International Human Rights Treaties as of 9 June 2004, see <http://www.unhchr.ch/pdf/report.pdf> (accessed on 9 May 2005).

⁸⁸ A child is defined in Article 1 of the CRC as any person under the age of eighteen.

⁸⁹ Van Bueren (n 4) 15.

⁹⁰ Heintze 'The UN Convention and the Network of the International Human Rights Protection by the UN' in Freeman & Veerman (eds) *The Ideologies of Children's Rights* 75.

⁹¹ See above 5.2.2; Detrick (n 3) 346. Nevertheless the criticism has been made that the CRC rather seeks to protect the rights of the child by strengthening the family unit, see Bartner Graff(n 47) 413-114.

institutionalization.⁹² The controversial issue of intercountry adoption was finally solved by stating in the *chapeau* of Article 21 that only states which recognize and/or permit the system of adoption as such shall ensure the following.⁹³

a) Best Interests of the Child / Subsidiarity (*chapeau of Article 21 and Article 21 (b)*): The paradigm of the best interests is already embedded in the general principle of Article 3 of the CRC, requiring that the best interests of the child shall be a *primary consideration* in all actions concerning the child. Even so it is recalled and emphasized in Article 21 by the wording borrowed from Article 5 of the 1986 Declaration ‘that the best interests of the child shall be *the paramount consideration*’ within the system of adoption as such.⁹⁴ Despite the elusive character of this principle – there is no universally accepted definition of the best interests – it follows from Article 5 of the 1986 Declaration that the best interests of the child in relation to placements of children is assured, when not only tangible needs but also the intangible needs for love and understanding are met. According to Article 13 of the 1986 UN Declaration, the primary aim of adoption is to provide a child, who cannot be cared for by his or her own parents, with a permanent family. Obviously, as long as a child lives in a functioning family, his or her paramount interest lies in the preservation of this family. The family as the fundamental unit of society is affirmed by Articles 3 (3), 5 and 18 of the CRC, obliging States Parties first to respect the responsibilities, rights and duties of parents, the extended family or the community and secondly to assist them appropriately in their child-rearing responsibilities. The duty of the state is to provide adequate care only when parents or other responsible persons - despite support - fail to do so.⁹⁵

Even though according to Article 21 (b) intercountry adoption shall be recognized by States Parties as an alternative means of child care, it is clear from Article 20 (3) – which requires that due regard shall be paid to the

⁹² See Article 20 (1)-(3).

⁹³ Despite this liberty some Islamic countries have nevertheless made reservations to this Article.

⁹⁴ Veerman *The Rights of the Child and the Changing Image of Childhood* 187-188; Detrick (n 3) 347.

⁹⁵ Olsen (n 20) 487-488, 511; Veerman (n 94) 187-188.

desirability of continuity in a child's upbringing and to his or her ethnic, religious, cultural and linguistic background – that the best interests of the child are to be best served by respecting the principle of *subsidiarity*, ie by finding 'any suitable manner' of alternative care in the child's country of origin (compare Article 17 of the 1986 UN Declaration).⁹⁶ Thus, although it is increasingly recognized that institutionalization may have unpredictable negative long-term effects on children, it is nevertheless not relegated to a last preference by the CRC. Quite the opposite seems to be the case, since the suitability of an institution is likely to be approved if it is a 'group home' or other well-staffed facility close to a family environment. Moreover, according to the general principle of the 'best interests', States parties are obliged to ensure that institutions, services and facilities for children conform to the standards established by competent authorities, particularly in the areas of safety, health and the number and suitability of the staff.⁹⁷

Hence, as far as it is explicitly recognized by Article 21 (b) that inter-country adoption may *inter alia* be considered as an alternative means of child care, if a child cannot be suitably cared for in its country of origin, the CRC neither opposes nor favors intercountry adoption clearly. Altogether by emphasizing the principle of *subsidiarity* it rather seems to be concerned about transracial and transnational placements of children – most probably from a political point of view.⁹⁸ By no means can it be said to encourage intercountry adoption.

b) Authorization (Article 21 (a)): This principle obliges State parties to ensure that adoption (and intercountry adoption) of a child is authorized only by competent authorities who determine whether the adoption - in view of the child's status concerning parents, relatives and legal guardians - is permissible and that, *if required*, the persons concerned have given their

⁹⁶ Committee on the Rights of the Child *General Guidelines for periodic reports* UN Doc. CRC/C/58 para. 84. According to the CRC's *travaux préparatoires* especially Latin American countries expressed the view that intercountry adoption should be treated as an extreme and exceptional measure, see Detrick (n 3) 351.

⁹⁷ See Article 3 (3).

⁹⁸ UNICEF's policy in regard to intercountry adoption is founded on the CRC, see UNICEF *Revised Guidance Note on Intercountry Adoption in the CEE/CIS/Baltic Region 2* at http://www.unicef.org/ceecis/Guidance_note_Intercountry_adoption.pfd (accessed on 5 July 2005).

informed consent to the adoption on the basis of such counseling as may be necessary. The decision is taken in accordance with the applicable law and procedures and on the basis of all pertinent and reliable information.⁹⁹ When requested by the Committee on the Rights of the Child, State Parties have to provide information on the competent authorities, the applicable law and procedures, the required pertinent and reliable information, and the preconditions in the light of the child's status under which the adoption is considered permissible.¹⁰⁰ Due to the reservation '*if required*', the CRC unfortunately seems neither to require the informed consent of the relevant persons nor to guarantee that such consent is based on appropriate counseling, including counseling on the alternatives to and consequences of adoption.¹⁰¹ Taking into account the general principle of the right to be heard under Article 12 of the CRC the participation of the child should be ensured and due weight given to his or her views.¹⁰² This interpretation also corresponds to Article 15 of the 1986 UN Declaration, which provides that sufficient time and adequate counseling should be given not only to the child's own parents and the prospective adoptive parents, but, where appropriate, to the child himself/herself.¹⁰³

c) Equivalent Standards (Article 21 (c))¹⁰⁴: According to Article 21 (c) read with Article 25 and supplemented by guidelines drawn up by the Committee on the Rights of the Child a child involved in intercountry adoption shall enjoy the same safeguards and standards as in national adoption, placements shall be subjected to periodic reviews and appropriate mechanisms shall be

⁹⁹ According to intercountry adoption in particular, Article 22 of the 1986 UN Declaration provides that no such measure should be considered before it has been established that the child is legally free for adoption and that any pertinent documents necessary to complete the adoption will become available.

¹⁰⁰ *General Guidelines for Periodic Reports* (1996) UN Doc. CRC/C/58 para. 83.

¹⁰¹ Even though the use of the word 'shall' in the chapeau is quite forceful in this Article.

¹⁰² Since children primarily affected by intercountry adoption are infants or babies, there is as of yet no method for determining the will of a newborn or an older baby, see Bartner Graff (n 47) 415. But according to the general right to be heard in Article 12 (2) of the CRC the child shall in any administrative action affecting him or her be given the opportunity to be heard either directly, or through a representative or an appropriate body.

¹⁰³ See also Article 16 of the 1986 UN Declaration, under which the relationship between the child and the prospective adoptive parents should be observed by specially trained child welfare agencies or services prior to the adoption.

¹⁰⁴ Compare Article 20 of the 1986 UN Declaration.

established to monitor the situation of the child, including following his or her placement in intercountry adoption.¹⁰⁵ Even though the CRC foresees that national and intercountry adoption practices, policies and requirements should be equivalent, the *travaux préparatoires* indicate that from a practical point of view it would most probably be unrealistic to require absolutely equivalent safeguards and standards.¹⁰⁶ Indeed, considering the examples of malpractices mentioned in section 4.2.2 above, the CRC seems to pay lip service to the 1986 UN Declaration, which *inter alia* provides that intercountry adoption should generally be made through competent authorities or agencies applying safeguards and standards equivalent to those existing in national adoption. Furthermore States should establish policy, legislation and effective supervision for the protection of children involved in intercountry adoption and should ensure that only where such measures have been taken should the adoption proceed.¹⁰⁷

d) Improper Financial Gain (Article 21 (d)): By providing that States Parties shall take all appropriate measures to avoid that placement results in improper financial gain for those involved, the CRC once again borrows from the 1986 UN Declaration. Article 20 of the latter provides that intercountry adoption should in no case result ‘in improper financial gain for those involved in it’. The prohibition by the CRC can be considered rather weak. It does not define ‘improper financial gain’. It also implies that there may be gains from intercountry adoption that could be considered proper and hence permissible.¹⁰⁸ In light of the examples discussed above, especially the difficult decisions about motivation for payments to orphanages, the vagueness of the legal text is not surprising. Since however the sale of children is effected rather by profit-seeking individuals than by supervised agencies employing trained personnel, this provision is crucial. However,

¹⁰⁵ See Article 25 on the need for periodic review of placements. See also *General Guidelines for Periodic Reports* (1996) UN Doc. CRC/C/58 para. 84; Detrick (n 3) 440.

¹⁰⁶ Detrick (n 3) 351.

¹⁰⁷ In particular see Article 20, Articles 18-19 and 21-24 of the 1986 UN Declaration. According to Article 21 special precautions should be taken in cases of intercountry adoption, which are conducted through persons acting as agents for prospective adoptive parents.

¹⁰⁸ See the CRC's *travaux préparatoires* referred to in Detrick (n 3) 353.

guidelines concerning financial issues are to be found in other instruments, *inter alia* in the Euradopt Ethical Code, which provides that the fees charged by professionals should be proportionate to the work carried out and that the salaries of the personnel should be reasonable.¹⁰⁹

5.3.3 Other Interrelated Provisions of the CRC¹¹⁰

a) Non-discrimination (mainly Articles 2 and 23): The principle that all children should enjoy their rights without discrimination on grounds such as race, color, gender, language, religion, origin, property, birth status and disability implies that all children should equally enjoy the rights recognized in the CRC. In this context children with disabilities and older children are likely to suffer discrimination in intercountry adoption. Due to their age or special needs such children are often 'hard-to-place'. Statistics show that healthy and non-handicapped children between one and five years are advantaged in intercountry adoption.¹¹¹

b) Survival and Development (mainly Articles 4 and 6): Article 6 is the basis for all economic, social and cultural rights embraced by the CRC. It recognizes that every child has the inherent right to life and *obliges* State Parties to ensure to the 'maximum extent possible the survival and development of the child'.¹¹² While the term 'survival' is concerned with those basic needs that must be met to sustain human life (food, shelter, sanitation, etc.), the verb 'develop' emphasizes the need to ensure full and harmonious personal development, both from the material and spiritual point of view. This right is protected insofar as States must adopt appropriate measures to ensure and respect the right to survive and develop, eg by combating poverty and assisting the most disadvantaged children such as orphans and abandoned children.¹¹³ Nevertheless, the term 'the maximum extent possible' indicates that implementing the CRC requires resources and measures which

¹⁰⁹ Articles 20 and 21 of the Euradopt Ethical Rules at <http://www.euradopt.org/ethical-rules.htm> (accessed on 5 July 2005).

¹¹⁰ This enumeration does not claim to be exhaustive.

¹¹¹ Olsen (n 20) 510; Kane (n 2) 328.

¹¹² See Article 6 (2) of the CRC under which 'State parties shall ensure (...)'.
¹¹³ Hodgson 'The Child's Right to Life, Survival and Development' (1994) 2 *International Journal of Children's Rights* 383-386.

may not be possible for poorer countries. When resources are lacking and parents or extended families are absent, intercountry adoption could in fact be considered as a viable means of promoting the survival and development of a child in a given case.¹¹⁴

c) Name, Nationality, Identity (mainly Articles 7 and 8): Since Article 7 recognizes a child's right to have a name, to be registered immediately after birth and to acquire a nationality, this provision is crucial for the protection of children born out of wedlock and asylum-seeking and refugee children. In other words, it is crucial for the prevention of malpractices in intercountry adoption (abduction, sale, traffic).¹¹⁵ The Committee on the Rights of the Child requires States not only to indicate measures adopted to prevent non-registration of children immediately after birth, but also measures to sensitize the public and promote the importance of birth registration. Furthermore considering the risk that failure in or disruption of the adoption process may result in statelessness, states are explicitly requested to adopt measures (in accordance with their national law and obligations under relevant international instruments) ensuring the child's right to acquire a nationality, in particular where the child would otherwise be stateless. This danger is especially present where a mother moves to the receiving country to give birth to a prospective adoptee and the receiving country applies the *jus sanguinis* system (ie when nationality is acquired by virtue of being born to parents who are nationals), while the sending country does not confer nationality where birth takes place abroad (*jus soli*).¹¹⁶

Finally as far as the child's right to know and be cared for by his or her parents is concerned (Article 7 (1)), neither the CRC nor the 1986 Declaration establishes an unequivocal right to information on identity in an adoption arrangement.¹¹⁷ Not even Article 8 – under which the child's right to preserve

¹¹⁴ Hammarberg 'Children' in Eide ed al (eds) *Economic, Social and Cultural Rights* 292-293; Olsen (n 20) 509.

¹¹⁵ See as well Article 24 (2) of the *International Covenant on Civil and Political Rights* (ICCPR) and the 1961 *Convention on the Reduction of Statelessness*.

¹¹⁶ *General Guidelines for Period Reports* (1996) UN Doc. CRC/C/58 para. 49-53.

¹¹⁷ Note the reservation 'as far as possible' in Article 7 (1). Articles 7 and 8 were inspired by the abduction of children in Argentina during the 'Dirty War'. Accordingly they aim at protecting children from fraudulent deprivations of some or all elements of their identity. Some commentators are also said to take the view that Article 7 gives rights to know the

his or her identity (including *inter alia* family relations) has to be respected - creates an absolute right of access to adoption records.¹¹⁸ Considering the trend away from the clean-break idea to greater flexibility and openness in adoption arrangements, especially domestic ones, one might wish the CRC had taken a clearer and different position on this question. Even though there are practical difficulties with the idea of open adoption and the maintenance of social ties with biological parents in an international context, at least access to adoption records (incl. social and medical history) could be made available, especially when there is such compelling psychological and medical need from the adoptee's perspective.¹¹⁹

d) Abduction, Sale, Traffic (mainly Articles 9, 10, 35): As far as malpractices in intercountry adoption are concerned, Article 35 obliges State Parties to “take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form”. Furthermore Articles 9 and 10 deal with the child's right not to be separated from his or her parents against their will and with family reunification.¹²⁰ According to the Committee on the Rights of the Child State Parties are requested to adopt measures of a legislative, administrative, educational and budgetary nature, ie legislation (including the qualification of these acts as criminal offences), information campaigns (including media), budget allocation for policies and programs, identification of indicators, establishment of monitoring mechanism, creation of special units among law

identities of genetic parents, see O'Donovan 'Interpretation of Children's Identity Rights' in Fottrell (ed) *Revisiting Children's Rights: 10 Years of the UN Convention on the Rights of the Child* 77-78.

¹¹⁸ Brower Blair (n 40) 646-650, 667, referring to statements of Cynthia Price Cohen and Geraldine van Bueren, who has observed that withholding information identifying the biological parents is justified because confidentiality, in some countries of origin, may constitute a matter of life or death for the biological mother.

¹¹⁹ Duncan 'Regulating Intercountry Adoption – an International Perspective' in Brainham & Pearl (eds) *Frontiers of Family Law* 51-52, referring to John Triseliotis who observed that “The significance of the emotional links between especially an older child and a mother or father or a grandparent were often underestimated and some children were cut off from emotional lifelines before they had established new ones. A range of studies suggests that contact does not threaten the stability of the placement, provided the new family have agreed to it. On the contrary, contact seems to help stabilize the arrangements.”

¹²⁰ Note: Article 11 of the CRC, under which State Parties shall take measures to combat the illicit transfer and non-return of children abroad refers to what is more popularly known as international child abduction by a parent, or parental kidnapping, see Detrick (n 3) 203.

enforcement officials and services to support the physical and psychological recovery and social reintegration of children.¹²¹ In order provide effective international measures for the prevention and eradication of such practices the *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography* to the CRC was adopted in 2002. This could also be considered as an attempt to rescue intercountry adoptions from abuses and malpractices.

5.3.4 Implementation and Enforcement

The protection and promotion of children's rights under the CRC is not based on an individual petitioning system but on a *self-reporting* mechanism. States report to the *Committee on the Rights of the Child* on the national legislation and programs undertaken to comply with treaty provisions. The Committee on the basis of such reports examines progress in the realization of obligations and formulates recommendations.¹²² Such a system of self-assessment is said to be weaker than systems providing for individual petition or inter-State challenges. Furthermore, the high number of reservations by State Parties is also considered to limit the impact of the CRC.¹²³ Carrying out its tasks the Committee may resort to the specialized agencies, the United Nations Children's Fund (UNICEF) and other United Nations Organs.¹²⁴ As regards the status of the CRC as well as its application in domestic law, the Committee obviously does not take a position on the choice between the transformation and incorporation approaches. Only where constitutions provide for the direct incorporation of an international legal text, can the CRC be invoked directly in a national court and subject to the condition that the respective article is sufficiently clear.¹²⁵

¹²¹ *General Guidelines for Periodic Reports* (1996) UN Doc. CRC/C/58 para. 161.

¹²² See Articles 43-44 of the CRC. Progress in the reporting mechanism is said to be slow. The Committee faces serious problems of non-submission of reports and many of them have been overdue almost from inception, see Olsen (n 20) 518.

¹²³ Fottrell 'One step forward or two steps sideways? Assessing the first decade of the United Nations Convention on the Rights of the Child' in Fottrell (n 117) 13.

¹²⁴ See Article 45 of the CRC. UNICEF is not a specialized UN agency, but the main partner body for the propagation and implementation of the CRC, primarily concerned with the economic, social and cultural rights of children.

¹²⁵ Otherwise invoking articles of the CRC in a national court depends upon the corresponding national provisions, see Van Bueren (n 4) 380-381; see also Hammarberg (n 114) 298.

Article 4 requires States parties to take ‘*all appropriate legislative, administrative and other measures*’ for the implementation of the rights recognized by the CRC. The starting points for questions of implementation are General Comment No. 5 and the General Guidelines for Periodic Reports, which contain reporting guidelines by the Committee on the Rights of the Child.¹²⁶ The General Comment emphasizes *general measures* – including those of a political nature – necessary for the realization of the principles and provisions of the CRC, for example national legislation, its review and adoption, establishment of coordinating and monitoring bodies at national and local levels, comprehensive data collection, training, appropriate policies, services and programs, especially National Programs of Action (NPAs) for Children adopted by countries as a follow-up to the World Summit for Children.¹²⁷ Finally with regard to general implementation measures Articles 42 and 44 (6) are also of importance. They oblige states to make the CRC and their reports to the Committee widely known to the public. They facilitate invaluable public debate on policy matters in which the role of the media is essential in sustaining strategies for social mobilization. The latter is an especially important measure for implementing and promoting the principles enshrined in the CRC relating to the practice of (and malpractice in) intercountry adoption.¹²⁸

Furthermore Article 21 (e) obliges State Parties, where appropriate, to conclude bilateral or multilateral arrangements or agreements for the implementation of the principles and objectives of intercountry adoption referred to in section 5.3.2 above. Within this framework states shall endeavor to ensure that placements across borders are carried out by competent authorities and organs, especially in order to prevent the sale and trafficking of children for the purpose of intercountry adoption.¹²⁹ Moreover they are requested to collect data on children involved in intercountry adoption, segregated by age, gender, status of the child, country of origin and situation

¹²⁶ UN Doc CRC/GC/2003/5 and UN Doc CRC/C/58 (1996).

¹²⁷ Committee on the Rights of the Child in *General Comment* No. 5, UN Doc CRC/GC/2003/5 para. 9; at the World Summit for Children (New York, 1990) the *World Declaration on the Survival, Protection and Development of Children* as well as a Plan of Action were signed, see <http://www.unicef.org/wsc>. (accessed on 7 July 2005).

¹²⁸ See Article 17 of the CRC.

¹²⁹ Detrick (n 3) 354.

of both the biological and adoptive family.¹³⁰ As is shown above (section 5.2) a number of international conventions governing the adoption of children has been concluded in the context of private international law, aiming at the unification of substantive law and procedure. The most important so far, the Hague Convention, will be dealt with in more detail in the next chapter.

5.3.5 Conclusion on Chapter V

Taking into account that the original draft of Article 21 obliged State Parties to undertake measures to facilitate adoption generally, the final version recognizing 'that inter-country adoption may be considered as an alternative means of child's care' may be regarded as rather disappointing, especially from the point of view of proponents of intercountry adoption.¹³¹ In view of the number of institutionalized children and the effect of institutionalization on their development, the priority attributed to practically any suitable manner of care in the child's country of origin is indeed regrettable. On the other hand the CRC's emphasis that the best interests of the child shall be *the* paramount consideration in any adoption process and that safeguards and procedures shall be fully respected is to be welcomed. This is so even though it is doubtful whether in an international context equivalent safeguards and standards can truly be ensured in practice. The absence of particular provisions regulating access to adoption records and the permissibility of private adoptions, one of the main sources of abuses and malpractices, may also be criticized.

The reproach that only a few rudimentary guidelines are provided in the CRC instead of the intended basic guidelines seems to be justified, even when taking into account the above discussed provisions regulating some aspects of intercountry adoption. Especially with regard to the means for implementation in Article 21 (e) one may reach the conclusion that the most important work in this field has been postponed for future negotiations, most probably from political considerations.¹³² Nonetheless, the Convention is of

¹³⁰ *General Guidelines for Periodic Reports* (1996) para. 85.

¹³¹ Detrick ed al *The United Nations Convention on the Rights of the Child: A Guide to the 'Travaux Préparatoires'* 305.

¹³² LeBlanc *The Convention on the Rights of the Child: United Nations Lawmaking on Human Rights* 121.

great importance. Its widespread ratification and its recognition in all debates at national and international levels have made it the most authoritative standard-setting instrument on the rights of the child. In terms of binding international law, it enshrined for the first time the principles according to which adoption has to be governed from the child's point of view and which set the basic framework for further elaboration.¹³³ Even if one would wish that the Committee had the tools and the authority necessary to enforce - instead of only to monitor - compliance with the Convention, the Committee's role in supporting the practice of intercountry adoption must not be underestimated.¹³⁴ Thus, the Committee's role is to ensure that all the members are familiar with the concept and understand the importance of intercountry adoption. That intercountry adoption is (or can be) a possible alternative in furthering the best interests of a child in a given case should be the message to be conveyed.

5.4 The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption 1993 (Hague Convention)

5.4.1 History and Philosophy

After three years of negotiations on a new draft on the protection of children and co-operation in respect of intercountry adoption the Hague Convention was approved unanimously at the *Seventeenth Session of The Hague Conference on Private International Law*.¹³⁵ The project was in fact mandated by Articles 20 and 21 of the CRC, which set the basic framework for the issue. Since the social reality of intercountry adoption had changed dramatically by the early 1980s, the former 1965 Hague Convention could never cope with the new worldwide dimensions. Hence, a new approach was called for to protect children in intercountry adoption. More than 60 countries, including 31 non-Member States of the Conference, and 17 inter-governmental and non-

¹³³ Van Bueren (n 4) 101; LeBlanc (n 132) 273.

¹³⁴ Olsen (n 20) 518.

¹³⁵ Parra-Aranguren 'History, Philosophy and General Structure of the Hague Adoption Convention' in Doek et al (eds) *Children on the Move: How to Implement Their Right to Family Life* 63. The seventeenth Session was held at the Hague from 10 to 29 May 1993.

governmental organizations took part in the drafting. Special attention was paid to make possible the participation of countries of origin, mostly not Members of the Conference.¹³⁶ At the end, on 29 May 1993, the Convention was immediately signed by Mexico, Costa Rica, Romania and Brazil, some of the major sending countries. It entered into force in record time on 1 May 1995.¹³⁷ To date it counts 66 Contracting States, including 19 non-Member States of the Conference.¹³⁸

The Hague Convention can be characterized as an agreement on proper procedures between countries that choose to maintain and promote intercountry adoption programs. Even though it is a child of the CRC, specifically designed to implement Article 21 of the latter, it is not truly a human rights convention. Rather it seeks to shape the practice of intercountry adoption, first by *reinforcing protection of children's rights* affected by intercountry adoption, secondly by *establishing a mechanism of cooperation* between nations in this field and finally by *recognizing* only those intercountry adoptions as valid which have been certified in accordance with the procedure established by it.¹³⁹ It has to be noted that the requirements of the 1993 Hague Convention only represent a *minimum*, not a maximum.¹⁴⁰

The Convention starts by recalling in the Preamble, '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.'

¹³⁶ Duncan 'The Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption 1993: Some issues of special relevance to sending countries' in Jaffe (n 5) 217-218; the following non-member states were present at the final session: Albania, Belarus, Benin, Bolivia, Brazil, Bulgaria, Burkina Faso, Colombia, Costa Rica, El Salvador, Ecuador, Haiti, Holy See, Honduras, India, Indonesia, Kenya, Republic of Korea, Lebanon, Madagascar, Mauritius, Nepal, Panama, Peru, Philippines, Russian Federation, Senegal, Sri Lanka, Thailand and Vietnam.

¹³⁷ Van Loon 'Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption' (1995) 3 *The International Journal of Children's Rights* 364. See also Article 46 of the 1993 Hague Convention.

¹³⁸ According to the latest update of 14 June 2005, see at http://www.hcch.net/index_en.php?act=conventions.status&cid=69#nonmem (accessed on 8 July 2005). The U.S. as the main receiving state has not yet ratified the Convention.

¹³⁹ Dillon (n 22) 208-209. Van Loon who characterizes the Convention as a multi-dimensional instrument observes that international private law 'is becoming increasingly permeated by elements of judicial and administrative co-operation and, likewise, the field of human rights and private international law are touching more and more frequently. The Convention is the fruit of this new development and, in order to be well understood, it should be looked at with a mind aware of the increasing significance of international cooperation for the unification of private international law and growing interaction between human rights law and private international law', see Ceschi (n 11) 88.

¹⁴⁰ Parra-Aranguren (n 135) 66.

Despite the explicit reference to the CRC and the 1986 UN Declaration contained in the last section of the Preamble, the Convention differs from these instruments on one important point: by 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’ it seemingly indicates a preference for intercountry adoption over in-country institutional care and non-family care. Even if the two instruments differ on this fairly fundamental point, the contradiction is downplayed by scholars who draw attention to the fact that the Hague Convention may only accomplish such goals as are set by the CRC.¹⁴¹ Unquestionably, the Hague Convention commits itself primarily to the ‘best interests’ of the child (and not the family). Even though it accredits central importance to the *principle of subsidiarity* in the Preamble as well as in Article 4 (b), it is said – with a view to the child’s best interests’ - to rather advocate a *flexible* application and interpretation of the subsidiarity principle. The long-term ‘best interests’ are said to be generally safeguarded when the following hierarchy of options is respected: family solutions over institutional placement; permanent solutions over provisional ones; national solutions over international ones.¹⁴² Finally – albeit indirectly – the Hague Convention, according to its Preamble, aims at *preventing* the abduction, the sale of, or traffic in children, not by outlawing them directly but rather by outlining procedural requirements whose observance is thought to prevent these malpractices.¹⁴³

These are the main ideas on which the Hague Convention is based and in the light of which the further provisions of the treaty are to be interpreted.

5.4.2 Objectives and Scope (Chapter I)

According to the ideas expressed in the Preamble the threefold objectives of the Hague Convention are summarized in Article 1 as follows:

¹⁴¹ Dillon (n 22) 209-215; Bartner Graff (47) 420.

¹⁴² See Article 4 (b). Duncan ‘Intercountry Adoption: Some Issues in Implementing and Supplementing the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption’ in Doek ed al (n 135) 77-78. UNICEF *Innocenti Digest: Intercountry Adoption* 5.

¹⁴³ The Convention does not deal explicitly with criminal matters. See also Article 35 of the CRC. Stein (n 7) 76. According to Parra-Aranguren the *Inter-American Convention on International Traffic in Minors* was established on a suggestion by Interpol to introduce penal provisions in order to complement the 1993 Hague Convention.

- a) *to establish safeguards to ensure that intercountry adoption take place in the best interest of the child and with respect for his or her fundamental rights as recognized in international law;*
- b) *to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children;*
- c) *to secure the recognition in Contracting States of adoptions made in accordance with the Convention.*

It is noticeable that in contrast to other treaties dealing with international private law the Hague Convention does not establish conflict rules on jurisdiction or the applicable law between the Contracting States. Instead it provides for recognition of adoptions, where a child – any person below the age of eighteen at the time of adoption - 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')'.¹⁴⁴

In cases where the State of origin is not a Contracting State it is argued that the unilateral application of at least some basic safeguards by the receiving State is to be recommended, since the objective of maximum protection for children is independent of reciprocity.¹⁴⁵ Furthermore in cases where the adoption has international features but is not strictly 'intercountry' – for example refugee or internationally displaced children, who are adopted in the State of residence following displacement or a prospective adoptive child who has moved *en ventre sa mere* to the receiving State for delivery – at least some of the safeguards should be applied in such 'domestic' adoptions and the situation treated as coming within the scope of the Convention.¹⁴⁶

The term 'adoption' in a broad sense covers both simple and full adoptions and is applicable regardless of whether the adoption is approved by judicial

¹⁴⁴ Article 2 makes it clear that the transfer of the child may take place either after his or her adoption in the State of origin, or for the purposes of such an adoption in the receiving State or in the State of origin.

¹⁴⁵ See Duncan (n 142) 80-82. Requirements and controls in respect of the prospective adoptive parents can be especially applied by the receiving State in all cases. Likewise responsibilities in relation to the child could also be imposed in a flexible manner on the authority approving the adoption in the receiving State.

¹⁴⁶ Duncan (n 142) 82-84.

order, administrative decision or by private arrangement.¹⁴⁷ On the other hand it 'covers only adoptions which create a *permanent* parent-child relationship', thus excluding for example long-term fostering arrangements or the Islamic *kafalah* from the scope of the Convention since they do not alter the kinship of a child.¹⁴⁸ In line with the movement towards abandonment of the western 'clean-break' model of adoption and the emphasis on the importance of continuing links with the biological family, this restriction becomes increasingly questionable. Indeed, there may be cases, especially those involving older children and refugee or other internationally displaced children, where something less than adoption, ie a more temporary or 'non-permanent' solution may be appropriate to serve the 'best interests' of the child. Undoubtedly, sooner or later there will be a need for international cooperation in regulating such intercountry alternative care arrangements in the same way as for adoption in the Hague Convention.¹⁴⁹

5.4.3 Minimum Substantive Requirements (Chapter II)

In adoptions under the treaty, the minimum responsibilities of the State of origin and the receiving State are distributed between them and defined in Articles 4 and 5, but neither exhaustively nor mutually exclusively.¹⁵⁰ According to *Article 4* the *State of origin* is primarily responsible for establishing and verifying *adoptability* (ie age, legitimacy) and *eligibility* of the child for intercountry adoption, observance of the *subsidiarity* principle, and obtaining the *necessary consents* from the persons, institutions and authorities in question. Consent has to be obtained after due counseling and information as to its effect (especially concerning the child's leaving the country and the termination of the legal relationship between the child and the family of origin). Consent must be freely given and without any inducement. It must be in the required legal form and expressed or evidenced in writing. In the case of the mother it has to be given only after the birth of the child.¹⁵¹ Finally, depending on the age and maturity of the child and following Article 12

¹⁴⁷ Duncan (n 136) 223.

¹⁴⁸ Ceschi (n 11) 96; Duncan (n 142) 79

¹⁴⁹ Duncan (n 142) 84-85.

¹⁵⁰ See for example Article 28 of the 1993 Hague Convention.

¹⁵¹ According to UNICEF *Innocenti Digest: Intercountry Adoption* 14, a 'blanket' consent which does not name any specific adoptive parents restricts the risk of trafficking.

of the CRC, the same requirements in relation to his or her consent have to be established and verified by the State of origin.

The responsibilities of the *receiving State* are stated in *Article 5*, which imposes a duty to determine the *eligibility* and *suitability* of the prospective adoptive parents to adopt, to ensure such *counseling* of the prospective adoptive parents as may be necessary and *authorization* for the child to enter and reside permanently in that State.¹⁵²

At first sight these requirements seem reasonable and appropriate to ensure that the adoption is carried out in the 'best interests' of the child and that the institution is protected from abuses and malpractices. The detailed requirements regarding the *consent* of the persons concerned can be considered especially capable of protecting the child in intercountry adoption process. Nonetheless it should be noted that the State of origin is free to determine whose consent is required and in what form precisely, what forms of counseling and advice are envisaged and what is to be understood as 'free' consent.¹⁵³ Indeed, a satisfactory definition is hardly possible, since the choice for the biological parents is often constrained by economic factors. Likewise because 'inducement' is not defined, the Hague Convention hardly provides the means for discovering unwarranted payments in practice. In addition, radical differences between the consent law of the sending and receiving States could result in an adoption not to be proceeding, either due to the possibility of a *veto* from the receiving State under Article 17 (b) and (c), or – in cases of violation of public policy - due to non-recognition of the adoption by the receiving State under Article 24. The development of certain essential elements and common standards for consent and agreement on common forms for it are therefore called for.¹⁵⁴

Another critical point may be the uneven *distribution of responsibilities*, since obviously the main burden of regulating and controlling is imposed on the

¹⁵² Suitability does not only refer to legal or economic aspects but also psychological, social and medical ones. Therefore in some receiving countries a specific training course which aims at providing information about the stages, rewards and possible stumbling blocks in the process is compulsory for prospective adoptive parents.

¹⁵³ Duncan (n 136) 220.

¹⁵⁴ Duncan (n 142) 78-79. A Special Commission of the Hague Conference on the Implementation of the 1993 Convention (met in October 1994) approved a model form of Consent to the adoption of a child. See as well Stein (n 7) 76-77.

State of origin. Even though these are good reasons for this - namely to enable the latter to play a major part in control - it is questionable whether States of origin, which are often suffering from serious economic problems, limited budgets and difficulties in administering vast geographical areas, are able to cope with such high expectations.¹⁵⁵ Intense cooperation with the receiving State is therefore all the more important.

5.4.4 Central Authorities and Accredited Bodies (Chapter III)

To fulfill the responsibilities just mentioned the Hague Convention requires that each member country create a *Central Authority*. Federal States are free to appoint more than one. Generally the mandate of the Central Authority covers all duties that are imposed by the Convention, especially the confirmation of the validity of a biological parent's consent and verification that the consent is obtained in an acceptable manner.¹⁵⁶ Where more than one Central Authority is designated, States are requested to appoint a particular one responsible for *communication* (including provision of general information about matters such as legislation, statistics, standard forms) and *cooperation* with their counterparts in other Contracting States.¹⁵⁷

In addition to these international functions, which have to be carried out by the Central Authority directly, there are other *case-specific duties* which may also be performed by other *public authorities* or – except the duty of preventing improper financial and other gain under Article 8 – by other *duly accredited bodies*.¹⁵⁸ Such bodies may handle the collection, preservation and exchange of information about the situation of both the child and the prospective adoptive parents. Furthermore they are allowed to facilitate, follow and expedite the process and to promote adoption counseling as well as post-adoption services. Finally they may exchange general evaluation reports and, depending on the law of the State, reply to justified requests from foreign authorities about a specific adoption situation.¹⁵⁹

¹⁵⁵ Duncan (n 142) 75-76.

¹⁵⁶ Stein (n 7) 75.

¹⁵⁷ See Article 6.

¹⁵⁸ See Article 9. According to Duncan 'Regulating Intercountry Adoption – an International Perspective' in Bainham & Pearl (n 119) 58, these will normally be approved adoption agencies, which have to meet standards for accreditation.

¹⁵⁹ See Article 9.

The admission of duly accredited bodies was mainly introduced to recognize that in practice private organizations often fulfill an important role as intermediaries and facilitators in the process of intercountry adoption. These bodies are not only recognized and allowed by the treaty, but are also subject to strict regulations and requirements, such as proof of competence, *non-profit objectives*, qualified personnel and supervision by the State.¹⁶⁰

Likewise in *private (or independent) adoptions* provision is made for the admission of bodies and individual persons (doctors, lawyers) other than accredited bodies as intermediaries, subject to the condition that the Contracting State has made the relevant declaration under the Convention.¹⁶¹

The allowance of private adoptions by the Convention has caused much debate, since this form of adoption is most likely to be associated with abuses (eg baby selling) and illicit activities (eg poor selection and matching, failure to explore alternatives in the child's country of origin). Sending countries especially called for the compulsory participation of accredited bodies to prevent illegal practices, improper financial gain and any possibility of abuse.¹⁶² Proponents of private adoption on the other hand argued that individual professionals such as lawyers or doctors could habitually operate more efficiently, flexibly and promptly than public agencies and could call on experts when needed. Furthermore they pointed out that malpractices could not be avoided by excluding it. Rather with its introduction appropriate control and supervision would in fact be possible. The final reason why the Convention does not prohibit private adoptions lies in the concern that such a restriction would have prevented important receiving States – especially the U.S., by far the most important state permitting private activities of private individuals – from becoming parties to the treaty. This in turn would have been counter-productive to its objectives.¹⁶³

¹⁶⁰ See Article 10 and 11. According to Article 13 the designation of the Central Authority (including the extent of their functions) and the contact details of the accredited bodies have to be deposited at the Permanent Bureau of the Hague Conference on Private International Law.

¹⁶¹ Their contact details have also to be deposited at the Permanent Bureau of the Hague Conference on Private International Law, see Article 22 (3).

¹⁶² See Article 21 (e) of the CRC, which seems to support their stance by requiring that 'the placement of the child in another country is carried out by competent authorities or organs'.

¹⁶³ Duncan (n 136) 224-225; Ceschi (n 11) 103-104, with reference to the *travaux*

To take into account of legitimate concerns about the risks associated with private adoptions, there are several provisions aimed at balancing the different interests. First Contracting States may *veto* - as sending States - the activities of private bodies or persons in foreign adoptions processes concerning their children.¹⁶⁴ Secondly, *delegation* to private bodies or persons of the preparation of reports on the child and prospective adoptive parents is subject to restrictions. To guarantee proper procedure these documents always have to be prepared under the responsibility of the State.¹⁶⁵ Thirdly private bodies and persons have to meet the *minimal requirements* outlined in Article 22 (2), namely conditions relating to integrity, professional competence, experience and accountability, and have to be qualified by ethical standards and by training or experience to work. Finally they are subject to the *supervision* of the competent authorities of the State which permits them to operate.¹⁶⁶

In contrast to accredited bodies, remarkably the Hague Convention does not exclude private intermediaries from pursuing *profit* within the conditions and limits established by the competent authorities of the State. On the other hand private bodies and individuals are also subject to *Article 32*, under which 'no one shall derive improper financial or other gain from an activity related to an intercountry adoption'. Here the Convention finally throws some light on '*improper financial gain*' - already contained in Article 21 (d) - by declaring that 'only costs and expenses, including reasonable professional fees of persons involved in the adoption, may be charged or paid'. Furthermore 'directors, administrators and employees of bodies involved in an adoption

préparatoires. It has to be noted that nevertheless the U.S. has unfortunately not yet ratified the 1993 Hague Convention

¹⁶⁴ See Article 22 (4), whereupon any Contracting State may declare that adoptions of children habitually resident in its territory may only take place if the functions are performed by the Central Authority, public authorities or by accredited bodies. If the State of origin does not declare so, its silence is interpreted as consent that adoptions in the receiving State may be performed by private bodies or persons; see Ceschi (n 11) 104-105. For example India, Philippines, Columbia and Romania have barred private adoptions, insisting on the use of recognized or licensed agencies, see Duncan (n 158) 54.

¹⁶⁵ See Article 22 (5).

¹⁶⁶ Critics point out that private agents, who previously worked under the table without any regulation, now obtain the trust of the public more easily since they are surrounded by an air of legality, see Stein (n 7) 76-77.

shall not receive remuneration which is unreasonably high in relation to services rendered.¹⁶⁷

The worst and most frequent problems are said to arise in the context of private adoptions. Even the Committee on the Rights of the Child – because of the many abuses – urges that the responsibility in intercountry adoption must not be left to profit-seeking individuals. Rather it should be centralized in the hands of authorities.¹⁶⁸ Having said that, adoption carried out by accredited bodies or public agencies is no guarantee *per se* that the procedure is conducted properly. Furthermore it is highly questionable whether the prohibition of private adoptions alone can simply deter those private bodies or individuals from their activities.

Thus, at least in theory the solution represented by the Hague Convention seems to be appropriate, since it - to some extent - tries to regulate and monitor private actors involved in the process. Unfortunately, from a study of the literature and the examples mentioned in sections 3.2.2 and 4.2.2 above, one is drawn to the conclusion that here the treaty has had only limited success, at least up to now. This comes as no surprise, considering that monitoring and supervision are entirely left to the respective states and the Hague Convention itself does not explicitly impose an obligation on State Parties to criminalize and punish illegalities such as questionable payments to private agents. As long as abuses are not criminalized and punished, private adoptions have always to be considered as high risk.

5.4.5 Procedural Requirements (Chapter IV)

The procedure outlined in Articles 14 to 21 aims at protecting the adoption triangle, ie the child, the biological and the prospective adoptive parents. In

¹⁶⁷ Ceschi (n 11) 103. In 2000 a Special Commission in the Hague approved three recommendations in relation to costs and expenses: a) 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 (...) b) Prospective adopters should be provided in advance with an itemized list of the costs and expenses likely to arise from the adoption process itself (...) c) 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, 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) para. 41.

¹⁶⁸ UNICEF *Innocenti Digest: Intercountry Adoption* 8.

the receiving country an intercountry adoption starts with an application presented by the prospective adoptive parents to the relevant Central Authority. After eligibility and suitability to adopt have been verified, a report on the prospective adoptive parents including all necessary information (eg identity, background, social environment) is transmitted to the Central Authority of the State of origin.¹⁶⁹ If the State of origin does not permit the disclosure of information on identity, it has to be assured that the identity of the mother and the father are not revealed in the report.¹⁷⁰

It is the latter's responsibility to determine the adoptability of the child – considering his or her upbringing and background as well as ensuring the necessary consents – and to complete a corresponding report. The report has to be prepared regardless of any matching of the child with a prospective adoptive family. The quest for a placement that is in the best interests of the child shall be processed by the State of origin (*matching*) based only on both reports. Hence, the State of origin is responsible for choosing a particular child and the prospective adoptive parents. It thus takes a pre-decision on the child's placement, which has to be agreed by the applicants.¹⁷¹

The decision by the State of origin that the child should be *entrusted* to the prospective adoptive parents assumes that the agreement of the adoptive parents is certain, and that - when necessary - the Central Authority of the receiving State has approved such decision.¹⁷² Finally both Central Authorities involved must have agreed the continuation of the process and the receiving State must have determined the child's authorization to enter and reside permanently in its country.¹⁷³

These core requirements embraced in Article 17 reflect the idea of cooperation in and coordination of child care and migration policies between the states involved. They also balance interests by giving the right to decide

¹⁶⁹ See Article 15.

¹⁷⁰ See Article 16. Note also Article 28, providing that the Convention does not affect any law of a State of origin which requires that the adoption of a child habitually resident within that State take place in that State or which prohibits the child's placement in, or transfer to, the receiving State prior to adoption.

¹⁷¹ UNICEF *Innocenti Digest: Intercountry Adoption* 14, according to which the proposed matching should be presented to the selected prospective adoptive family for approval.

¹⁷² See Article 17. The term 'entrust' is used intentionally to denote the physical transfer of the child, see Duncan (n 136) 222.

¹⁷³ See Article 17 (d).

on the placement of the child to the State of origin, while enabling the receiving State to *veto* a placement to which it does not agree.¹⁷⁴ It is recommended that – but only after the matching is made and shortly before the adoption is finalized - the child and the prospective adoptive parents should get to know each other.¹⁷⁵ The transfer of the child itself shall take place in secure and appropriate circumstances and – whenever possible – in the company of the adoptive (or prospective adoptive) parents.¹⁷⁶

If a placement should unfortunately turn out for the worse after the transfer of the child, the receiving State is responsible for taking all necessary protective measures. These include removal of the child from the prospective adoptive parents, arrangement of temporary care or a new placement with a view to adoption, and as a last resort – if the child's interest so requires - the return of the child to the State of origin.¹⁷⁷

It should be noted that the negotiators of the Convention could not reach consensus on the question of post-placement and pre-adoption *probation periods* and accordingly on the place where the final adoption decision should take place. Many South American Countries were worried especially by the idea of a child leaving their borders without having a secured status as adoptee. On the other hand several European Countries (especially U.K. and Switzerland) valued a probation period as an indispensable stage for securing the integration of the child in his or her new family. Article 28 leaves the decision to Contracting States. It provides that a country may insist that the adoption take place within its jurisdiction before a permission to leave the territory is issued to the child. Whenever the States involved have agreed on an appropriate division of pre-adoption responsibilities, the place where the adoption is finally approved cannot be that decisive anymore.¹⁷⁸

¹⁷⁴ Van Loon (n 137) 467. A refusal by either one of both states at the very moment when the child is to be entrusted does not require any justification, since adoptions should principally only be made if both States are in agreement, see Parra-Aranguren (n 135) 70.

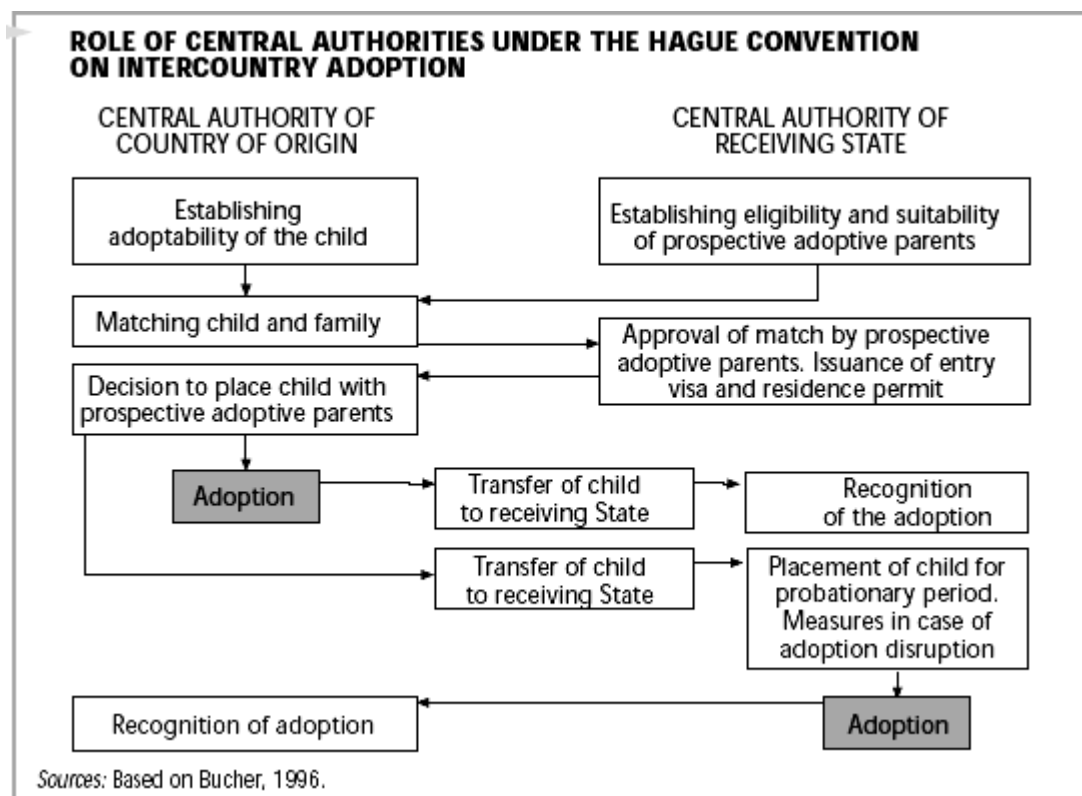
¹⁷⁵ Since good matching is the key to success in an adoption process, it is recommended that this decision is only entrusted to child welfare professionals, see UNICEF *Innocenti Digest: Intercountry Adoption* 14 -15.

¹⁷⁶ See Articles 19 and 20. The latter requires Central Authorities to inform each other about the process and completing measures, as well as about the progress of the placement in case a probationary period is required.

¹⁷⁷ See Articles 20 and 21.

¹⁷⁸ It was argued that only after a waiting period the adoption should be finalized. Since the child would then live with the adoptive family in the receiving State, the authorities of the

Schematically the procedure is summarized by UNICEF as follows:¹⁷⁹



5.4.6 Recognition and Effects (Chapter V)

Since the entrustment of a child demands the approval of both States directly involved, the adoption can - with good reasons - be recognized not only by the two States but by all other Contracting States as well. Accordingly Article 23 provides for recognition *by operation of law*, once the document evidencing adoption has been certified by the competent authority is presented.¹⁸⁰ Such recognition can be refused by a Contracting State in two cases only: first if the adoption is manifestly contrary to a State's public policy, considering the child's best interest (eg fraud or duress exerted on a mother to procure consent); secondly if the Contracting State has made a declaration under Article 25. Under this any Contracting State can declare 'that it will not be bound, under the Convention, to recognize adoptions made in accordance with an agreement concluded among Contracting States, to improve the

respective states would have to approve the adoption, see Duncan (n 136) 223-224.

¹⁷⁹ Source: UNICEF *Innocenti Digest: Intercountry Adoption* 14.

¹⁸⁰ Parra-Aranguren (n 135) 71. The Special Commission of 17-21 October 1994 recommended a model form for the certificate of conformity of intercountry adoption.

application of the Convention in their mutual relations, as permitted by Article 39'.¹⁸¹

Recognition under the Convention in all cases includes recognition of the legal *parent-child relationship* between child and adoptive parents and of *parental responsibility* in the latter.¹⁸² Furthermore Article 26 (2) provides that 'in the case of an adoption having the effect of terminating a pre-existing legal parent-child relationship, the child shall enjoy in the receiving State, and in any other Contracting State where the adoption is recognized, rights equivalent to those resulting from adoptions having this effect in each such State. For the converse case, ie where an adoption granted in the State of origin does not terminate the pre-existing legal parent-child relationship, Article 27 provides that 'it may, in the receiving State which recognizes the adoption under the Convention, be converted into an adoption having such an effect – if the law of the receiving state so permits and if the consents (...) have been or are given for the purpose of such an adoption.'

5.4.7 Additional Safeguards (Chapter VI)

In view of the experiences in Romania and Latin America, where guided visits for prospective adoptive parents by local brokers to birth parents at home were not uncommon in order to obtain the latter's consent in exchange for money, *Article 29* contains one of the most important safeguards with respect to the requirement of free consent.¹⁸³ This provision generally prohibits any *contact* between the prospective adoptive parents and the biological parents or any other person caring for the child before the adoptability of the child and the eligibility and suitability of the parents are determined. Contact is allowed

¹⁸¹ Parra-Aranguren (n 135) 72. Article 39 reads as follows: (1) The Convention does not affect any international instrument to which Contracting States are Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument. (2) 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.

¹⁸² See Article 26.

¹⁸³ Van Loon (n 137) 468.

for in two cases only: adoptions which take place within a family; contact that is in compliance with the conditions established by the State of origin.¹⁸⁴

Another important issue concerning preservation, access and treatment of *information* relating to the child's origin - including both identity of the biological parents and medical history - is dealt with in *Articles 30 and 31*.¹⁸⁵

Based on the growing awareness of the psychological benefits to be derived from knowledge of biological roots and the origin of adoptees, the Convention obliges Contracting States in all cases to preserve such information, independently of whether access to it is (or is yet) permitted by the law of that State.¹⁸⁶ That such data should be treated with confidentiality actually goes without saying.¹⁸⁷

To conclude this non-exhaustive list the provisions concerning *supervision* and *monitoring*, especially *Articles 33 and 42*, should be noted. According to Article 33 any competent authority shall immediately inform the Central Authority, once it has found that a provision of the treaty is not respected or that a correlative risk impends. The establishment of appropriate measures is then the responsibility of the latter, which – as is the case for all authorities involved in the process of adoption generally – shall act expeditiously.¹⁸⁸ Furthermore Article 42, reflecting the practice under several other Conventions establishing judicial and administrative cooperation, provides that a Special Commission shall be convened regularly in order to review the practical operation of the treaty.

5.4.8 Conclusion on Chapter V

The main strengths and weaknesses of the Hague Convention may be described as follows. The model of co-operation combined with shared responsibilities between the receiving and the sending State, resulting in the

¹⁸⁴ Here again the Convention places control in the hands of the sending country, but without specifying a precise form of regulation, see Duncan (n 136) 226.

¹⁸⁵ Which should be read in conjunction with Article 16 (2).

¹⁸⁶ Van Loon (n 137) 468. The intention of this provision was to secure the availability of such information, especially in cases where countries which traditionally do not allow access to the information might decide to do so in future. During negotiations attention was drawn also 'to the potential for disaster when within certain cultures the identity of the parent of a child born outside wedlock becomes known.'; see Duncan (n 136) 226.

¹⁸⁷ See Article 31.

¹⁸⁸ See Article 35.

automatic recognition of an adoption by all Contracting States, is basically justified and appropriate to regulate and control the manifold multilateral aspects of intercountry adoption. This is confirmed by its wide and rapid ratification by both receiving and sending countries.

The treaty's success is most probably also due to its flexible and open approach to different contested matters, such as place of jurisdiction for the final adoption decision, the probation period, choice of law regulating issues such as the capacity to adopt, the nature of the deciding body, access to information on identity, the different requirements in relation to the necessary consents and the circumstances for pre-adoption contact. Even though this openness and flexibility may be welcome to some extent - especially from a pragmatic point of view – first appearances may nevertheless turn out to be disappointing. Since *inter alia* uniform criteria to determine the adoptability of a child or the eligibility of prospective adoptive parents are lacking and rules controlling the consent procedures are absent, children do not enjoy equal protection and the adoption process even risks breaking down if the receiving State vetoes under Articles 17 and 24.

By far the most problematic point not clearly resolved by the Convention is the approval of private or independent adoptions and hence the activity and responsibility of private intermediaries. Despite some weak forms of control (mainly through differing professional standards), effective measures against illegalities and abuses occurring in independent or private adoption, namely a deterrent penal legislation, is lacking. Besides, as long as private adoptions are accepted, the principle embodied by Article 21 (e) of the CRC requiring only competent authorities or organs to carry out international placements of children is not strictly respected.

Likewise it is questionable whether the aims of the Hague Convention effectively comply with the philosophy of the CRC. The latter confronts the practice of intercountry adoption with distinct skepticism. The former while it does not explicitly encourage intercountry adoption seems to prefer such a solution to domestic non-family child care alternatives. Anyway, it is noticeable that attention is not specifically drawn to the dangers and risks associated with transnational placements of children. This is understandable when one considers that the administrative framework needed for the proper

functioning of the treaty is only justifiable when there is a respectable demand for the service.

The administrative organization required, the level of supervision and the range of services are likely to present a burden for the State of origin as the party with major responsibility. It is questionable whether the often limited resources of such countries are not better spent on the development of domestic family support and child placement services. Finally, even though the Convention's merit may be seen in the improvement, clarification and coordination of the procedure, the question remains whether it in fact helps to detect and avoid cases where intercountry adoption is inappropriate.

6 SWISS NATIONAL LEGAL FRAMEWORK

6.1 Introduction

Since neither the CRC nor the Hague Convention contain detailed provisions for intercountry adoption but rather minimum standards and a basic framework for cooperation between the countries involved, it is left to the State Parties to give flesh to the international principles through their national laws. As far as Swiss law is concerned, it has to be noted that according to its *incorporation approach (monistic tradition)* - an international law friendly system – public international law does not have to be transformed into national law for its domestic applicability. Hence, Article 5 (4) of the new Swiss Federal Constitution stipulates that public international law as an integral part of its internal legal order takes priority over national law.¹⁸⁹ This applies, of course, to the CRC and the Hague Convention. Provided that an international provision is sufficiently clear and self-executing, it can be applied directly in Swiss law.¹⁹⁰

Before assessing the compatibility of Swiss law with the international law of intercountry adoption, it has to be kept in mind that Switzerland is a *federal state*. The legislative power is divided between the *Confederation* and 26

¹⁸⁹ The new Federal Constitution, which was adopted in 1999, entered into force on the first of January 2000, RS 101. Article 5 (4) of the Constitution reads as follows: "The Confederation and the Cantons shall respect international law".

¹⁹⁰ Jametti Greiner 'Das Haager Adoptionsuebereinkommen und seine Umsetzung im schweizerischen Recht' (1997) 52 ZVW 176-177.

Cantons, each of them establishing their own legal orders. According to Article 3 read with Articles 42 and 43 of the Federal Constitution, Cantons are sovereign in exercising all rights, including legislation in matters that are not specifically attributed to the Confederation by the Constitution.¹⁹¹ In contrast to the wide ranging field of civil law (including family law), which is entirely a matter of federal legislation, there are other child specific fields which are left to the cantonal legislative power, such as education (Article 62 of the Constitution), welfare and family benefits (Article 115 of the Constitution) and last but not least the organization of the judiciary and civil justice (Article 122 of the Constitution).¹⁹² Even though the laws of the Cantons may differ on some points, they habitually agree on fundamental principles, since they must comply anyway with constitutional freedoms and international law.¹⁹³ Furthermore Cantons are obliged to implement federal law in conformity with the Constitution and the statutes.¹⁹⁴

Foreign relations are federal matters. Participation in shaping foreign policy and supervising foreign relations are duties attributed to the *Federal Parliament*, the highest authority, consisting of the *House of Representatives* and the *Senate*, each of them having equal power.¹⁹⁵ The Federal Parliament must approve an international treaty, which is not by statute or international treaty within the powers of the Federal Government. The *Federal Government*, a collective body consisting of seven members, is in any case responsible for signing and ratifying international treaties and for their submission to the Federal Parliament for approval.¹⁹⁶

¹⁹¹ According to Article 3 Cantons are sovereign insofar as their sovereignty is not limited by the Federal Constitution; they shall exercise all rights which are not transferred to the Confederation; for the Federal Constitution see <http://www.admin.ch>.

¹⁹² Article 122 of the Constitution stipulates that legislation in the field of civil law and civil procedure is a federal matter, whereas the organization of the judiciary and civil justice are cantonal matters unless otherwise provided by statute.

¹⁹³ According to Article 49 of the Constitution 'federal law takes precedence over contrary cantonal law. The Confederation shall ensure that the Cantons respect federal law.' With the ratification of a treaty, the treaty becomes part of the federal law.

¹⁹⁴ Article 46 of the Constitution.

¹⁹⁵ See Article 166 of the Constitution. The House of Representatives is composed of 200 Representatives of the People (Article 149), while the Senate consists of 46 delegates of the Cantons (Article 150).

¹⁹⁶ See Article 184 (2). The decisions of the Federal Parliament are taken in both Chambers and in the Federal Parliament in Joint Session by the majority of those voting, see Article 159 of the Constitution.

As far as the CRC and the Hague Convention are concerned, their status under Swiss law may be summarized briefly as follows.

6.2 The CRC and the Hague Convention under Swiss Law¹⁹⁷

6.2.1 Status of the CRC

Shortly after the CRC was adopted, the Swiss government declared on 4 December 1989 that it would sign the treaty as soon as possible, while deliberating about a few possible reservations under Article 51 and various legislative amendments to be introduced prior to ratification. Finally, as an act of international solidarity, the CRC was signed by the Federal Government on 10 April 1991. In 1994 it asked Parliament to approve the treaty with a number of reservations.¹⁹⁸ The reservations relate to Swiss legislation on parental authority (Article 5 of the CRC), naturalization (Article 7), family reunification (Article 10 (1)), treatment of children deprived of liberty (Article 37 (c)) and criminal procedure with regard to minors (Article 40).¹⁹⁹ After approval by the Federal Parliament on 13 December 1996, the CRC was ratified on 24 February 1997 and entered into force for Switzerland a month later, on 26 March 1997.²⁰⁰

At this time there were a number of contradictions between Swiss law and provisions of the CRC, including those relating to the position of the child in inter-country adoption. Even though many of them disappeared later on with the ratification of the Hague Convention and the federal law implementing the Hague Convention, there are a few noteworthy observations to be made:²⁰¹

As far as intercountry adoption is concerned, under Swiss law the best interests of the child are the guiding principle and - in compliance with Article

¹⁹⁷ The European Convention on the Adoption of Children of 24 April 1967, by which Switzerland has been bound since 1 April 1973, will not be discussed in this paper.

¹⁹⁸ Guillod 'Swiss Law and the United Nations Convention on the Rights of the Child' in Freeman (ed) *Children's Rights: A Comparative Perspective* 223.

¹⁹⁹ See http://www.unhcr.ch/html/menu3/b/treaty15_asp.htm. (accessed on 20 July 2005).

²⁰⁰ Biaggini 'Wie sind Kinderrechte in der Schweiz geschuetzt? Tragweite, Umsetzung und Durchsetzung des Uebereinkommens in der Schweiz, Bedeutung des 'Kinderschutz-Artikels' (Art. 11) der neuen Bundesverfassung' in Gerber Jenny & Hausammann (eds) *Die Rechte des Kindes: Das UNO-Uebereinkommen und seine Auswirkungen auf die Schweiz* 36.

²⁰¹ *Initial Report of the Swiss Government on the Implementation of the CRC* (1 November 2000) UN Doc CRC/C/78/Add.3 para. 349-356.

21 of the CRC – adoption is only allowed if it will be for his or her good.²⁰² According to the Federal Government intercountry adoption ‘should be considered as an appropriate means of giving children a family, only if the children cannot, in their country of origin, be suitably brought up either in their own family or in an adoptive or foster family.’²⁰³ Thus, like the 1993 Hague Convention, Swiss law seems to prefer family solutions to institutionalization.²⁰⁴

With regard to the reservation on the right to acquire a nationality (Article 7 of the CRC), the Committee on the Rights of the Child not only expressed its concern but also recommended an expeditious revision of the Swiss naturalization law.²⁰⁵ In contrast to the doctrine of *jus soli*, which is not recognized in Switzerland, Swiss nationality is only conferred on a child if one of his or her married parents or unmarried mother is Swiss.²⁰⁶ As was observed by the Committee on the Rights of the Child, children adopted abroad had to pass a waiting period of two years (now reduced to one year) before being formally adopted. Thus, they risked becoming stateless. Unfortunately the revision of the naturalization law, submitted to the vote of the People and the Cantons, was rejected on 26 September 2004.²⁰⁷

Finally it should be noted that the right - ‘as far as possible’ - to know the biological parents (Article 7 (2) of the CRC) is implied under this progressive Swiss law. While the adoptive child’s right to know his or her biological parents was accepted by some scholars even before it was recognized as part of the law dealing with genetics and medically assisted procreation, it is now incorporated into Article 268c of the Swiss Civil Code of 1907 (hereafter

²⁰² See Article 264 of the Swiss Civil Code of 1907, RS 211 (hereafter CC). As under the CRC a child under Swiss family law is defined as any person up to the age of 18, when he or she attains majority, see Article 14 of the CC.

²⁰³ *Initial Report of the Swiss Government on the Implementation of the CRC* (1 November 2000) UN Doc CRC/C/78/Add.3 para. 335, with reference to the *Federal Council Circular of 21 December 1988 to the Supervisory Authorities concerning the Placement of Children and Intermediary Activity for Eventual Adoption* FF 1989 I 8, in ch. 114.1.

²⁰⁴ Compare Article 21 (b) of the CRC.

²⁰⁵ *Concluding Observations of the Committee on the Rights of the Child: Switzerland* (07/06/2002) UN Doc CRC/C/15/Add.182 para. 7 (b), 36-37.

²⁰⁶ Biaggini (n 200) 230.

²⁰⁷ See <http://www.parlament.ch/zoom/homepage/do-archiv/do-buergerrecht/do-buergerrecht-volksabstimmung.htm>. (accessed on 21 July 2005).

CC).²⁰⁸ This amendment was explicitly welcomed by the Committee on the Rights of the Child.²⁰⁹

Whether the Committee's expectations with regard to further changes promised with the ratification of the Hague Convention – *inter alia* the establishment of an adequate follow-up with a view to eliminating ill-treatment and violations of children's rights – were fulfilled, is a question that still has to be addressed further below.

6.2.2 Status of the Hague Convention

a) History. After the Federal Government had submitted a draft paper for comment by interested expert groups in 1992, the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption was signed by Switzerland on 16 January 1995. Subsequently the Federal Office of Justice drafted a federal statute to give effect to the Convention in Swiss law and to incorporate the Convention procedure into existing Swiss placement and adoption procedures. Even though the ratification of international treaties with similar structures to the Hague Convention usually does not require introductory legislation in Switzerland, the Government considered it appropriate in this case to coordinate the Convention procedure with existing legislation and structures relating to adoption in Switzerland. Decisions under Article 17 of the Convention especially needed a legal basis which was hardly to be found in the then existing Swiss law. In February 1997 the legislation packet was submitted for comment by the public and then, together with a report of the Federal Department of Justice and Police, submitted to parliament for debate. After three sessions (from March 2000 to March 2001) the mandate was postponed due to contention on supervising intermediary agencies. At the final deliberation in June 2001 the federal *Statute on the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption* (hereafter Statute on the Hague Convention) was approved and the Convention itself ratified on 24 September

²⁰⁸ Under Article 268c of the CC (as amended on 22 June 2001) an adoptive child at the age of 18 may access information about his or her biological parents at any time. In case the child is below the age of 18 access may be requested when there is a special interest worthy of protection. See as well Biaggini (n 200) 233.

²⁰⁹ *Concluding Observations of the Committee on the Rights of the Child: Switzerland* (07/06/2002) UN Doc CRC/C/15/Add. para. 36.

2002. On 1 January 2003 the Statute on the Hague Convention finally entered into force.²¹⁰

b) Swiss Law of Adoption: As mentioned above the Statute on the Hague Convention serves as a framework and connecting factor between the Convention and the national procedures. Besides various amendments necessitated by the ratification of the Hague Convention in 2001, these procedures are regulated mainly by three federal legal instruments.²¹¹ First the substantive rules and principles are contained in *Articles 264 to 269c of the CC*, beginning with the provision that a child may only be adopted when it has been cared for by the prospective adoptive parents (in the role of foster parents) for at least one year.²¹² This requirement is linked to *Article 316 of the CC*, under which the placement of a child with foster parents or in an institution has to be authorized by the tutorship authority or any other body appointed under cantonal law, which has to supervise the placement. Hence, while regulation of the substantive requirements for family placement is attributed by statute to the Federal Government, the supervision of foster children was generally a matter left to the Cantons.²¹³

In October 1977 the *Federal Ordinance regulating the Placement of Children* (hereafter OPE) was adopted by the Government.²¹⁴ Prior to the ratification of the Hague Convention it applied not only to domestic adoptions, but in all cases where a foreign adoption could not be recognized by Switzerland under the 1989 Federal Act concerning International Private Law or where an adoption had not been granted abroad and the child (aged less than 18 and of foreign nationality) was placed in Switzerland with a view to subsequent adoption.²¹⁵ With reference to the requirement of equivalent safeguards under

²¹⁰ Amstutz & O'Connor *Internationale Adoption: Die Umsetzung des Haager Adoptions-uebereinkommens in der Schweiz. Eine Untersuchung mit Empfehlungen aus Sicht der Sozialarbeit* 48. Especially debated was the question whether the Cantons or the Confederation should be responsible for supervising intermediary agencies.

²¹¹ Legislation on adoption as part of the civil law is within the competence of the Confederation.

²¹² Before the amendment in 2001 the probation period was two years. Further requirements concern preconditions in relation to the child (eg age) and the prospective adoptive parents.

²¹³ See Article 316 (2) of the CC.

²¹⁴ See RS 211.222.338.

²¹⁵ *Initial Report of the Swiss Government on the Implementation of the CRC* (1 November

Article 21 (c) of the CRC (see 4.3.2 c above), the OPE not only required authorization and supervision of such placements, but also required compliance with further conditions.²¹⁶ In addition to the provisions of the OPE the *Federal Ordinance on Intermediary Activity with a view to Adoption of 28 March 1973* prohibited undue material gain for the persons involved in the placement of children.²¹⁷ Hence, even before ratification of both the CRC and the Hague Convention, intermediaries were entitled only to compensation for expenses and modest remuneration for their work. Furthermore foster parents were not allowed to pay any amount to an intermediary or to natural parents for their services of care.²¹⁸

Finally, with ratification of the Hague Convention not only was the new federal statute on it adopted but also a number of amendments to Article 264 et seq of the CC and revisions of the OPE. In addition the 1973 Ordinance on Intermediary Activity was replaced by the new *Federal Ordinance on Intermediary Activity with a view to Adoption of 29 November 2002* and by the *Federal Ordinance on Fees for Services with a view to Adoption of 29 November 2002*.²¹⁹ The Federal Government explicitly emphasized that these instruments, the Statute on the Hague Convention, the CC, the OPE and the two Ordinances of 29 November 2002 should be read together whenever the law is applied to intercountry adoption in Switzerland.²²⁰

Before looking in more detail at how intercountry adoption is regulated under Swiss law today and how the Hague Convention is implemented in Switzerland, a few statistical data might first be of some interest.

2000) UN Doc CRC/C/78/Add.3 para. 340-342.

²¹⁶ See Article 6 of the OPE, before amendment on 29 November 2002. These conditions related partly to the qualities of the foster parents, partly to the consent of the authority responsible for the placement in the State of origin and partly to the necessary reports to be submitted by the foster parents

²¹⁷ With ratification of the Hague Convention and entry into force of the federal statute on the Convention this ordinance was abrogated.

²¹⁸ *Initial Report of the Swiss Government on the Implementation of the CRC* (1 November 2000) UN Doc CRC/C/78/Add.3 para. 353.

²¹⁹ See RS 211.221.36 and RS 211.221.312.3.

²²⁰ See *Report of the Federal Government concerning the Hague Convention* BBl 1999 5808. The Statute on the Hague Convention answers only questions which are not regulated in the Hague Convention itself and concretizes, as far as necessary, the provisions of the latter.

6.3 Intercountry Adoption in Switzerland

6.3.1 Facts

According to statistics a total of 1,043 children were adopted in Switzerland in 1997. 502 were of European origin (including 310 of Swiss nationality). Among the others 71 came from Africa, 251 from America (particularly Brazil and Colombia) and 228 from Asia (particularly India and Thailand).²²¹ In 2000 the total number of adopted children decreased slightly to 808, of which 394 came from Europe (including 198 Swiss children). Among the others most, namely 192, again came from America, 148 came from Asia and 79 from Africa.²²² In 2002 the number of adopted children continued to decrease to 702. As in the previous years, only a few were of Swiss nationality, namely 144, while the majorities were children of foreign nationality.²²³ According to the Federal Government it is assumed that the annual number of intercountry adoptions ranges between 500 and 750. Recently Romania and Russia became especially important as sending countries.²²⁴

Obviously in Switzerland the number of foreign children adopted exceeds the number of domestic adoptions by far. By international comparison, especially with Sweden, a country of 8.8 million which is said to hold the record in the number of foreign adopted children per capita and considering the Swiss ratio of 3804 adoptions to a population of 6.5 million for the period from 1993-7 (see schemata below), Switzerland may be qualified as an important receiving country.²²⁵ Thus the legal protection of children affected by intercountry adoption through appropriate and effective procedures is all the more important.

²²¹ *Initial Report of the Swiss Government on the Implementation of the CRC* (1 November 2000) UN Doc CRC/C/78/Add.3 para. 358-359. As pointed out by the Federal Government, Swiss statistics apply to the child's nationality and not to his or her country of origin. Therefore the figures might be not absolutely precise and might have to be read with care, see *Report of the Federal Government concerning the Hague Convention BBI* 1999 5797.

²²² Source: Federal Office for Migration (formerly Federal Office for Foreigners), Statistic T333304_D and T33302_D.

²²³ Source: Swiss Federal Statistical Office T 1.3.2.5.5.

²²⁴ *Report of the Federal Government concerning the Hague Convention BBI* 1999 5797.

²²⁵ Source: UNICEF *Innocenti Digest: Intercountry Adoption* 3.

**The Upward Trend in Intercountry Adoption,
Examples of Some Major Receiving Countries 1993-1997**

	1993	1994	1995	1996	1997	1993-7
Canada	1740	2045	2022	2064	*1799	**9670
France	2783	3075	3028	3666	3528	16080
Italy	1696	1712	2161	2649	2019	10237
Netherlands	574	594	661	704	666	3199
Sweden	934	959	895	908	834	4530
Switzerland	923	741	665	742	733	3804
USA	7377	8333	9679	11340	13620	50349
Total	16027	17459	19111	22073	23199	**97869

* Data for 1997 are preliminary.

** Considering that data for Canada are incomplete, the total figure should be higher.

Sources: **Canada:** Ministry of Community and Social Services, 1998; **France,** Ministère des Affaires Etrangères, 1998; **Italy,** Ministero di Grazia e Giustizia, June 1998; **Netherlands:** Ministry of Justice, May 1998; **Sweden and Switzerland,** International Social Service, Geneva, 1998; **USA:** U.S. State Department, Bureau of Consular Affairs, July 1998.

6.3.2 Implementation of the Hague Convention in Switzerland

At the outset it should be noted that the procedural and organizational provisions of the Statute on the Hague Convention (in chapter 2) are applicable to adoptions and placements only if the child's country of origin is a Contracting State. The provisions relating to protective measures for the child (in chapter 3), including obligations under the Hague Convention itself and penal provisions, apply to adoptions of children from both Contracting and non-Contracting States.²²⁶

a) Organization: The *Central Authority of the Confederation*, appointed by the Federal Government, is the Service for International Child Protection which forms part of the *Federal Office of Justice*. In an international context its task is – as far as not delegated to cantonal authorities - to transmit and receive documents and reports from abroad and to represent Switzerland vis-à-vis foreign Central Authorities. Internally the federal Central Authority advises the Cantons on legal matters, enacts regulations for the implementation of the Hague Convention and facilitates the exchanges of opinion and experience

²²⁶ Amstutz & O'Connor (n 210) 49-50.

between the federal authorities, intermediaries and the Central Authorities of the Cantons.²²⁷

According to Article 3 of the Statute on the Hague Convention read with Article 316 of the CC, each *Canton* has to appoint a single *Central Authority* responsible for the placement of a child with a view to subsequent adoption.²²⁸ Even though the establishment of 26 cantonal authorities was highly contested, the idea that they should be primarily responsible for the implementation of the Convention (eg preparation of reports on prospective adoptive parents, consent to the matching of the foreign authority and for the adoption process to continue, the decisions about the return of the child and the issuance of adoption certificates) finally prevailed.²²⁹

b) Application and Procedure.²³⁰ An application begins (if necessary via an intermediary agency) with the submission of a request to the Central Authority of the prospective adoptive parents' Canton of residence for provisional authorization of the placement of a foster child. The authority has to prepare a dossier concerning the prospective adoptive parents. This consists of the provisional authorization, a report on the applicants and any necessary translations.²³¹ If the dossier is prepared by an intermediary agency, the Central Authority has to approve it. In all cases the dossier – before being transmitted abroad - has to be finally examined by the federal Central Authority, ie the service for international child protection. After the report on

²²⁷ See Article 2 of the Statute on the Hague Convention, with reference to Articles 6 (2), 9 (a), (d), (e), 13, 15 (2), 16 (2), 17, 18, 20 and 21 (1b).

²²⁸ See Article 316 (1bis) of the CC as amended with the adoption of the Statute on the Hague Convention on 22 June 2001, in force since 1 January 2003. Formerly the Cantons were free in determining their own organization and appointing more than one body responsible for the placement of foster children. These bodies were often lacking the necessary experience for intercountry procedures. See as well Article 268c (3) of the CC, which was also amended and under which the Cantons have to appoint a single body responsible for advising and supporting mature adoptees in their quest for their biological parents.

²²⁹ Hegnauer 'Die Schweiz und das Haager Uebereinkommen ueber die internationale Adoption' in Meier/Siehr (eds) *Rechtskollisionen. Festschrift fuer Anton Heini zum 65. Geburtstag* 187-190. Compared to France, Italy, U.K. or Sweden, where only one Central Authority is appointed, the establishment of a total of 27 Central Authorities was criticized for being inappropriate.

²³⁰ According to Article 4 (2) of the Statute on the Hague Convention the procedure basically conforms with the OPE.

²³¹ If the identity of the child has already been determined, the Central Authority has to decide about a definitive authorization.

the child, including the necessary consents, has been received, the cantonal authority obtains the approval of the prospective adoptive parents who must sign the relevant declaration.²³²

The decision about the continuation of the process (Article 17(b) and (c) of the Hague Convention) depends on whether the child shall be adopted only after his or her placement in Switzerland or whether the adoption shall be approved by his or her country of origin. In the first case the process may proceed, if the Central Authority of the Canton, in its role as supervisory body for foster children, approves the placement of the child with the prospective adoptive parents under the requirements of the OPE, and if a visa has been issued or the issue of a residence permit is no longer in doubt.²³³ In the second case the Central Authority may approve an adoption in a child's country of origin, if the child is at least 16 year younger than the adoptive parents, the adoption is in the child's best interests (and does not unduly disadvantage other children of the adoptive family), the adoptive parents fulfill the requirements of Article 264 a and 264 b of the CC, and the cantonal authority has made sure of the necessary consents.²³⁴ The Central Authority has to arrange for an appropriate examination of the parents, either through a person with skills in social work or psychology and with experience to work in the field of foster children and adoption, or through a suitable intermediary agency.²³⁵ If a probation period is not required by the State of origin and the adoptive parents and the child have had no personal contact before, the adoption is only

²³² See Article 5 and 6 of the Statute on the Hague Convention, with reference to Article 15 (1), 16 and 17 (a) of the Hague Convention itself.

²³³ For the requirements under the OPE see Article 11a et seq. Besides the suitability of the prospective adoptive parents (personality, health, educational skills, living conditions) there are additional conditions which need to be satisfied when a foreign child who has lived abroad is placed in Switzerland. Under Article 11c the foster parents must be prepared to accept the child with his or her particularities and to teach him or her about the country of origin as far as his or her age so allows. Additionally the following documents have to be submitted: a medical report on the child's health, a report on the child's life (as far as details are known), a document certifying the parent's consent or a statement by an authority from the country of origin explaining why such consent could not be given, a statement by a competent authority of the child's country of origin certifying that the child may be placed in Switzerland.

²³⁴ See Article 8 and 9 of the Statute on the Hague Convention. Under Articles 264a and 264b of the CC a couple has to be married for at least 5 years or has to be older than 35, before being able to adopt jointly. A single parent also has to be older than 35.

²³⁵ See Article 11d of the OPE.

approved by the Central Authority on condition that the prospective adoptive parents first visit the child.²³⁶

If an adoption in the country of origin affects the acquisition of Swiss nationality, the Federal Office of Justice issues a document permitting entry to Switzerland. The entry of the child has to be notified by the adoptive parents to the Central Authority of the Canton, which has to inform the tutorship authority, the federal Office of Justice and if necessary the aliens' police. The Central Authority of the Canton is also responsible for the adoption certification, if the child is adopted in Switzerland.²³⁷ The fees for the services of the federal Central Authority are charged in accordance with the above mentioned Federal Ordinance of 2002 (see 6.2.2 b) They range from CHF 200 to 1,000. Decisions by the cantonal Central Authorities are in the last instance subject to administrative appeal to the Federal Supreme Court.²³⁸

c) Protective measures: Chapter 3 of the Statute on the Hague Convention establishes a number of new measures to protect children affected by intercountry adoption. If a child has been adopted before his or her entry to Switzerland and if it can be expected that the adoption will be recognized, the tutorship authority immediately appoints a *legal advisor* for the child for a period of 18 months (from entry of the child or time of appointment). His or her duty is to support the adoptive parents – who are already vested with parental authority - in their child-rearing responsibilities and to report on the development of the adoption relationship at the latest one year after his or her nomination.²³⁹ In the case where a child will be adopted only after his or her entry into Switzerland, the tutorship authority of the Canton is obliged to appoint a *tutor* for the child for a probation period of one year. Thus, the prospective adoptive parents are not yet vested with parental authority and the child is legally represented by the tutor, who supervises the probationary period. The same procedure is provided for cases where an adoption which is approved abroad cannot be recognized in Switzerland.²⁴⁰

²³⁶ See Article 10 (2) of the Statute on the Hague Convention.

²³⁷ See Articles 10-14 of the Statute on the Hague Convention.

²³⁸ See Article 16 of the Statute on the Hague Convention.

²³⁹ See Article 17 of the Statute on the Hague Convention.

²⁴⁰ See Article 18 of the Statute on the Hague Convention.

According to experience applicants frequently try to circumvent the official paths by applying for authorization only after the child's entry to Switzerland. Article 19 of the Statute on the Hague Convention therefore provides for special measures to be taken in such cases. The Central Authority of the Canton, ie the cantonal supervisory body for foster children, has to entrust the child immediately – ie before he or she adapts to his or her environment - to a suitable foster family or place him or her with an institution. Legal remedies against such decisions will not involve the suspension of the effects of the decision pending final court resolution. If the interest and the welfare of the child so require, the child may by way of an exception remain with the receiving family until a solution has been found. The Central Authority arranges the return of the child to his or her country of origin, if this serves his or her best interests. If the child remains in Switzerland the tutorship authority is responsible for taking measures to protect the child's welfare.

Furthermore Article 20 of the Statute on the Hague Convention imposes a duty on anyone who – either with or without authorization – receives a child from abroad for adoption to pay his or her maintenance costs in Switzerland to the same extent as for their own children (see Article 276 et seq. of the CC). Since the duty to provide for the child's maintenance is only extinguished if the child is adopted by third parties or returns to his or her country of origin, this obligation also applies even if an adoption is not granted and the child has to be placed elsewhere.²⁴¹

d) Penal Provisions: As seen above (section 5.3.3.d) under Article 35 of the CRC State Parties are obliged *inter alia* to take all appropriate national measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form. Likewise one of the main objectives of the Hague Convention is to prevent the abduction, the sale of, and traffic in children. Furthermore Article 32 provides that no one shall derive improper financial gain or other gain from an activity related to intercountry adoption and finally

²⁴¹ See for the time before ratification and implementation of the Hague Convention, *Initial Report of the Swiss Government on the Implementation of the CRC* (1 November 2000) UN Doc CRC/C/78/Add.3 para. 345.

Article 29 prohibits any contact between the prospective adoptive parents and the child prior to the receipt of the necessary consents.²⁴²

Besides the civil measure contained in Article 19 of the Statute on the Hague Convention - under which a child is immediately to be removed from the prospective adoptive family if the latter has not followed the applicable procedures - Switzerland also introduced three new penal provisions in relation to the crimes of circumventing formal procedures, procuring improper financial gain or other gain in order to obtain a child for adoption, and finally in relation to trafficking in children. Under Article 22 of the Statute on the Hague Convention a person who receives a child from a Contracting State for future adoption without having obtained authorization (Article 8 of the Hague Convention and Article 8 of the federal Statute on the Hague Convention) shall be sentenced to a term of detention or to a maximum fine of CHF 20,000.--. Furthermore a person who infringes the terms and conditions of permits issued by the cantonal Central Authorities shall be sentenced up to a maximum of CHF 10,000.--. The main objective of this penal provision is to enforce the authorities' right to participate in the matching decision.²⁴³

Any procurement of improper benefits for intercountry adoption is now penalized under Article 23 of the Statute on the Hague Convention. Article 23 provides that a person who grants the biological parents or other persons responsible for the child an improper financial or other gain in order to obtain a child for adoption shall be sentenced to a term of imprisonment (one month to 3 years) or to a maximum fine of CHF 40,000.--. Such malpractices – even though they are obviously to be condemned – were not criminalized in Switzerland prior to the implementation of the Hague Convention in 2001.²⁴⁴

Finally trafficking in children is now explicitly penalized by Article 24 of the

²⁴² In 2000 a Special Commission in the Hague approved three recommendations in relation to costs and expenses: a) 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 (...) b) Prospective adopters should be provided in advance with an itemized list of the costs and expenses likely to arise from the adoption process itself (...) c) 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. See *Report and Conclusions of 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) para. 41.

²⁴³ Amstutz & O'Connor (n 210) 67.

²⁴⁴ Amstutz & O'Connor (n 210) 67.

Statute on the Hague Convention, under which a person who – in return for the promise of benefits – participates in malpractices in order to find children for the purpose of adoption shall be sentenced to imprisonment. If the offender acts commercially or as member of a gang or criminal organization, he or she shall be sentenced to a jail term (maximum 10 years) and to a maximum fine of CHF 100,000.—CHF. Thus, in contrast to Article 23, this provision applies to persons other than the prospective adoptive parents and covers malpractices such as the brokering of children without authorization, the establishment of contacts, the procurement of documents and all other practices which facilitate trafficking in children. So far such practices could only be prosecuted first as trafficking in human beings if they were to facilitate ‘fornication by others’ or secondly, if the parents or other legally responsible persons were forced by violence or threat to part with the child.²⁴⁵

To what extent Article 23 (procurement of improper benefits) and Article 24 (trafficking in children) will be effective in combating abuses and malpractices remains to be seen, especially since most of these offenses take place abroad and obtaining evidence may therefore be a major problem. Furthermore it has to be kept in mind that even in absolutely correct legal procedures considerable amounts are paid. Thus differentiating between improper and proper benefits is not that easy. Hence, to ensure that the new penal provisions are not merely symbolic, strict enforcement is all the more important.²⁴⁶

e) Independent Adoptions: As seen above (section 5.4.4) the Hague Convention leaves it to the Contracting States to decide whether and in what way they want to involve private organizations in the adoption process. As at the international level, the role and the status of private agencies were also highly contested in the process for implementation of the Convention in Switzerland. Opponents argued that on average only one out of three adoptions is processed by intermediary agencies, which are specialized on no

²⁴⁵ Compare with Articles 196, 180 and 220 of the Swiss Penal Code, see Kuhn *Die Umsetzung des Haager Adoptionsuebereinkommens als Massnahme der Qualitaets-Entwicklung im Adoptionswesen* 18.

²⁴⁶ Kuhn (n 245) 19.

more than a few countries of origin and are therefore lacking the necessary experience. Besides, a number of organizations were said not to satisfy the requirements of the Hague Convention. Furthermore since these organizations concentrate on different aspects, some more on their tasks in relation to the country of origin, others on the preparation of prospective adoptive parents, they were said not to meet all the demands.²⁴⁷

Even though private agencies are not allowed to perform the functions of the Central Authority, they are not prohibited by Swiss law. Article 4 of the Statute on the Hague Convention explicitly refers to the possibility that the application of the prospective adoptive parents may be prepared with the support of intermediaries. Hence it follows that advising, accompanying and supporting the prospective adoptive parents was at least acknowledged by the legislator as an important task for intermediaries, which they should carry out seriously. In addition Central Authorities are allowed to delegate the preparation of the social report on the parents to intermediaries, subject to the condition that they have the professional qualifications (Article 5 (2) of the Statute on the Hague Convention).²⁴⁸

Despite the rejection of delegation of Convention duties to intermediaries, the latter's tasks were not fundamentally altered under the new legislation, ie the *Federal Ordinance on Intermediary Activity with a view to Adoption of 29 November 2002*.²⁴⁹ Hence, the field of intermediary actors still covers counseling of the prospective adoptive parents (including information about particular difficulties in relation to intercountry adoption), finding opportunities for persons willing to adopt, participating in the examination of the adoptive parents' suitability, ensuring the necessary documentation and accompanying the foster family and then the prospective adoptive family respectively.²⁵⁰ In the light of this catalogue of activities it should be noted that finding eligible children for adoption – a core task for intermediaries – is not touched by the

²⁴⁷ Amstutz & O'Connor (n 210) 81. As for 1997 the list of agencies with a cantonal authorization to work in intercountry adoption contained 23 names of organizations and individuals, of which 12 referred to the same country. See Jametti Greiner (n 190) 183.

²⁴⁸ Kuhn (n 245) para. 2b.

²⁴⁹ See RS 211.221.312.3.

²⁵⁰ See for example Articles 2, 9, 10, 11, 12 and 13 of the Federal Ordinance on Intermediary Activity with a view to Adoption. Whether an intermediary is allowed to act in another Contracting State depends on the law of that State, see Article 9 of the Federal Ordinance.

new legislation. Thus, the Central Authority is neither obliged nor able to find a child for persons who are willing to adopt. Likewise counseling, preparation and accompanying the applicants is an important field of intermediary activity, which is of importance in order to achieve the objectives of the Convention. Although intercountry adoption is not to serve the interests and wishes of the applicants, the latter nevertheless have to be acknowledged as one of several parties whose needs have to be taken into account. Otherwise illegality and selection by inappropriate criteria are to be expected.²⁵¹

Under the new legislation supervision of intermediary activity is no longer a cantonal matter. Authorizing and supervising intermediaries are instead transferred to the Confederation in order to establish one single qualified body, to centralize the process and to unify criteria for the admission of intermediaries.²⁵² The general requirements for obtaining a license are listed in Article 5 of the Federal Ordinance on Intermediary Activity with a view to Adoption as follows: proof of a good reputation (including good reputation of auxiliary persons); proof of experience in the field of adoption (as a general rule including schooling in youth welfare); knowledge about the Swiss law of adoption and Swiss institutions; presentation of working methods; indicating the way information, sensitization, preparation, accompaniment and care of the applicants are ensured; submission of a finance plan, and fees tariff which has to be approved by the authorities. Additionally legal persons have to submit their statutes.

As far as intermediary activity in relation to children from abroad is envisaged, the following additional requirements have to be met: knowledge about cultural and social conditions in the States of origin; knowledge about international adoption law and the adoption law of the States of origin; a transparent operating method, which serves the superior interests of the children and which complies with the ethics of adoption; contacts with intermediaries in the States of origin.²⁵³

²⁵¹ Kuhn (n 245) para. 2c.

²⁵² See Article 269c of the CC, as amended with the adoption of the Statute on the Hague Convention on 22 June 2001. It provides that any professional intermediary activity or any such activity in relation to a profession requires authorization by the Confederation, regardless of whether such activities are undertaken for remuneration or not.

²⁵³ See Article 6 of the Federal Ordinance on Intermediary Activity with a view to Adoption.

The remuneration of intermediaries is regulated in Article 14 of the Federal Ordinance with a view to Adoption. An intermediary is only entitled to compensation for his or her expenses and to appropriate remuneration for his or her endeavors. In addition to the penal provisions of the Statute on the Hague Convention (Article 23 on the prohibition of improper financial benefits and Article 24 on trafficking in children) Article 14 (2) of the Federal Ordinance prohibits any compensation of the intermediary or biological parents by the foster parents. Any infringement of the duties of intermediaries is punished by revocation of license, the most severe sanction, a maximum monetary fine of CHF 5,000.— or a warning.²⁵⁴

In view of these requirements it is noteworthy that intermediary activity is not expected to become entirely professionalized, especially as schooling and training in the field of adoption and youth welfare are demanded only 'as a general rule'. Even though such an approach may allow for the organizational and functional varieties of intermediaries in Switzerland, the question whether intermediaries should become professionalized has already emerged, at least in the literature.²⁵⁵ The fact that as of now only 16 licensed intermediaries are registered – while before the revision of the law regulating intermediary activity 21 intermediaries operated with a cantonal license - indicates that to some extent concentration and tightening up have occurred.²⁵⁶ It is however argued that an accentuation of the requirements for authorization can only be justified when additional criteria may *de facto* guarantee a qualitatively better procedure in relation to the placement of foster and adoptive children.²⁵⁷

As noted by the Federal Office of Justice, involving an intermediary is indeed not compulsory but it will make sense anyway, especially as countries such as Bolivia and Ethiopia demand such participation. Hence, today there is a general tendency both in sending and receiving countries to allow intercountry adoptions only in cases where recognized and closely collaborating

²⁵⁴ See Article 18 of the Federal Ordinance on Intermediary Activity with a view to Adoption.

²⁵⁵ See Amstutz & O'Connor (n 210) 101; Kuhn (n 245) para. 3.

²⁵⁶ Only 8 Cantons issued licenses, most of them being from Geneva, Vaud, and Zurich. A few were from Aargau, Fribourg, Ticino, Valais and Berne. Their field of operation varied widely, see Kuhn (n 245) para. 3. According to the published list of 24 June 2005 a total of 16 individual persons and organizations were registered as licensed intermediaries, most of them specialized on one single country of origin, see <http://www.ofj.admin.ch/d/adoptionen-index.html>. (accessed on 28 July 2005).

²⁵⁷ Kuhn (n 245) para. 3.

intermediaries are involved. Even in Switzerland it is argued by scholars that compulsory participation by authorized intermediaries would exclude risky activities on the part of the prospective adoptive parents.²⁵⁸ In this sense also the Federal Office of Justice informs the public by pointing out that intermediaries may contribute substantially to the adoption process with counseling, accompanying and supporting the prospective adoptive parents.²⁵⁹

6.3.3 Jurisprudence of the Federal Supreme Court

Case law on intercountry adoption in Switzerland is rare - for whatever reason. Whether this situation is about to change in the near future due to the implementation of the Hague Convention and the introduction of legal remedies against the decisions of the Central Authorities of the Cantons (Article 16 of the Statute on the Hague Convention) remains to be seen. As of today the Federal Supreme Court has not yet considered an adoption case under the new legislation.²⁶⁰

From the jurisprudence of the Federal Supreme Court applying previous legislation it can be deduced that the probationary period (formerly two years) was one of the most contested matters. In an earlier case in 1985 concerning adoption by a stepparent, the Court had to consider the rejection of an application by a father to adopt his wife's son, who was born out of wedlock in 1964 and who had lived up to 1983 with his grandmother in Germany.²⁶¹ The application was filed on 30 May 1984. On 31 July 1984 the son was registered at the applicant's place of residence and the stay permit was issued by the aliens' police on 28 August 1984. Referring to the then Article 264 of the CC, under which a child could only be adopted, firstly if the prospective adoptive

²⁵⁸ See Ceschi (n 11) 193.

²⁵⁹ See information of the Federal Office of Justice at <http://www.ofj.admin.ch/d/adoptionen-index.html> (accessed on 28 July 2005).

²⁶⁰ According to information, provided on 9 August 2005, by Mr lic.iur. Guler from the legal department of the Central Authority of Zurich. According to the disclosure only two adoption procedures have been carried out in the Canton of Zurich since the Statute on the Hague Convention entered into force. The more recent case 5A. 35/2004, where the Federal Supreme Court had to decide about the authorization of foster placement for a child of foreign nationality, did not concern an intercountry procedure, since the child was already residing in Switzerland.

²⁶¹ See decision of the Federal Supreme Court of 18 September 1985, BGE 111 II 230.

parents had cared for the child and seen to his or her upbringing for at least two years and secondly if the establishment of a parent-child relationship, in all the circumstances, could be expected to serve the child's welfare, the Court confirmed the judgment of the previous instance. According to this the objective of the compulsory probationary period is to prove that a permanent mental and spiritual relationship, akin to the one within biological kinship, has developed between the child and the prospective adoptive parents and not merely a superficial one. Living together in daily life should be tested and the persons involved should be given the opportunity to become familiar with each other. This requires that the prospective adoptive parents take the child literally into their home and care for him or her personally. Financial support only or holiday stays once in a while are not considered sufficient. The applicant's argument that the child had passed a total of 262 weeks of holidays with him since 1967 and that the mother's place of residence, and accordingly also that of the child, was in Switzerland even before 1984, could not therefore hold water.

In a later case concerning the recognition of a foreign adoption decree, the situation was considered differently.²⁶² In this case the Federal Supreme Court annulled the preceding decision of the Department of Justice and Police of the Canton of Geneva. Entry of a birth into the register of births based on a foreign adoption decree had been rejected. The adoption of the foreign child, born on 24 January 1992, by a Swiss couple residing in Switzerland had been approved by the Supreme Court of Washington on 20 February 1992. The adoptive mother – a double citizen - was also a national of the U.S.

According to the applicable Swiss Code of Private International Law (hereafter Swiss CPIL) a foreign decision or act regarding birth status is entered into a Swiss register if the decision was within the competence of the body who rendered it, if no ordinary appeal can be lodged against the decision or it is final, and lastly if there are no grounds for refusal in the light of Swiss public policy, ie the decision is not manifestly incompatible with Swiss *ordre*

²⁶² See decision of the Federal Supreme Court of 13 January 1994, BGE 120 II 87. Similarly in a more recent case concerning visa permission for family members of a foreigner residing in Switzerland (2A.65572004) the Federal Supreme Court had to decide indirectly about the recognition of an adoption approved by the authorities of Macedonia.

public.²⁶³ In relation to this last mentioned requirement the court had to decide whether the recognition of a foreign adoption which had been approved only 27 days after the adoptive child's birth and without having passed a probationary period is incompatible with the Swiss public policy. Besides the compulsory probationary period the consent of the biological mother under Article 265b of the CC cannot be given for six weeks after the child's birth. In addition such consent may be withdrawn within six weeks following its receipt by the authority.

As was pointed out by the court the caveat of *ordre public* is an exception which therefore has to be applied restrictively on matters of recognition and enforcement of foreign decisions. Since recognition constitutes the norm, departure from it requires good reasons. Such reasons could not be found by the court, even though the biological parents' consent – as part of the individual's right to personality – was lacking when the adoption in question was approved. Besides, the adoption decree neither contained information about the biological parents nor mentioned their identity. The adoption dossier only showed that the private agency which had been charged by the court with the necessary investigations had given its consent, considering that the adoption would be in the child's best interests. Furthermore an affidavit evidenced that the biological parents had renounced their parental rights and agreed to adoption. Hence, arguing that nothing in the adoption dossier indicated that the adoption in question would be contrary to the child's best interests – in fact quite the opposite, since the child had already lived almost two years with the adoptive parents – the court concluded that Swiss *ordre public* was not opposed to the applicant's request to enter the adoption in the Swiss register. As long as the strict provisions concerning jurisdiction are fulfilled, a foreign adoption decree will be recognized, regardless of whether the procedure abroad included a probationary period or other requirements of Swiss law.²⁶⁴

Considering the two cases decided by the Federal Supreme Court it may be concluded that under previous legislation domestic and intercountry adoptions

²⁶³ See Article 32 (1) and (2) read with Article 25 to 26 of the Swiss CPIL (RS 291).

²⁶⁴ See Article 78 of the CPIL, under which adoptions decided abroad are recognized in Switzerland provided that they have been granted in the State of domicile or in the National State of the adopting person or the adopting spouse.

were not subject to equivalent standards. While for domestic adoptions the probationary period was considered compulsory and was therefore applied very strictly, the absence of such a period in a foreign adoption process was not perceived as an obstacle for recognition and enforcement of the foreign adoption decree in Swiss law. Considering the objectives of adoption as a means of promoting child welfare the decision of the court - emphasizing the child's best interests - is indeed to be welcomed. Last but not least the two cases clearly demonstrate the practical need for international coordination of and cooperation in adoption, especially in order to avoid the domestic refusal of recognition to an adoption approved abroad under different legislation and subject to diverging requirements. Thus, it comes as no surprise that one of the most important contributions of the Hague Convention is the Contracting States' duty to recognize adoptions, carried out under the Convention and certified accordingly, automatically and without further examination. This principle ensures the certainty of the child's legal status in different countries.

7 CONCLUSION

Since its beginning in the ancient world, adoption as a social institution has experienced a drastic change of meaning. What once served to preserve the family in the male line, mainly for purposes of inheritance, became a means of social welfare for abandoned and orphaned children. At the same time the focus shifted from the interests of the adoptive parents to those of the adoptive child. By the early twentieth century adoption was no longer a private transaction but rather a mirror image of the birth relationship brought about by administrative or court procedures and resulting in the absolute and permanent cutting off of the biological family.

Influenced by historical and political events such as World War II, the Korean and Vietnam Wars, governmental family planning policies in Eastern Europe and China, political upheavals in the former Soviet Union, poverty and rapid urbanization in South America and more recently the spread of the HIV/AIDS pandemic, adoption became the international phenomenon it is today, with

economically wealthy western States as receiving countries and developing and emerging States as sending countries.

What was once presented as humanitarianism by receiving countries (where the Cultural Revolution of the sixties and seventies resulted in increasing rates of childless couples and a decrease in the number of adoptable children) could to some extent be perceived as selfishness and the desire to satisfy the western ideal of the nuclear family. Demand for children in the industrialized world and supply by the Third World, whether voluntary or not, became a structural problem associated with colonialism and imperialism.

It is not astonishing that in such a situation the Third World, suffering from socio-economic pressure, tried to respond quickly to the growing demand for its children. Unfortunately as the tragedies of Argentina, Brazil and Romania and the even more recent baby selling scandals show, the worldwide demand for children is not always satisfied by legal means. The prospect of financial gain not only induces biological parents to give up their children for a materially better future in the western World, but also attracts dubious actors such as baby brokers and other unseemly intermediaries, especially in private or independent adoptions.

However, with the proliferation of abusive practices international awareness of commercial exploitation has steadily grown. It is not only armed conflicts or natural disasters that contribute to the growing number of abuses, but legislation, administrative structures and child and family welfare systems play a major role in controlling and preventing malpractices in intercountry adoption. Nevertheless, to date consensus between opponents – those stressing the negative impact of intercountry adoption on the national child welfare system - and proponents of intercountry adoption - emphasizing the beneficial effects for all parties involved and explaining abuses as the result of too much regulation and strict requirements - has not yet been reached. The fact is, that the transition from mono-ethical and regionally restricted adoptions to transnational and transcultural procedures not only involve psychological, social and political problems, but above all legal problems resulting from the encounter of highly divergent and conflicting legal orders. Hence, from a pragmatic point of view the need for regulation and

coordination of intercountry adoption procedures to control and prevent abuses cannot be ignored.

Among several international endeavors to solve the legal and social problems, beginning with a set of principles established by the UN in 1960, the most important improvement was the introduction of guidelines by the CRC, the definitive body of binding international law on children's rights. The main principles in Articles 20 and 21 (based on the 1986 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) are the best interests of the child, subsidiarity, authorization by competent authorities, equivalent standards (including periodic reviews of placements), and avoidance of improper financial gain.

Even though the CRC admits that a child should grow up in a family environment for his or her full and harmonious development, intercountry adoption is nonetheless recognized as no more than one form of alternative child care. It should be considered only as a last resort, ie when any kind suitable of alternative care, including institutionalization, cannot be found in the child's country of origin. The impact of the other principles, which are anyway only relevant for countries where adoption is recognized and/or permitted, might be qualified as rather weak, considering first that private adoptions are still allowed internationally, second that the requirement of equivalent standards is hardly realistic in practice and finally that there is no strict dividing rule between proper and improper financial gain.

The effect of other provisions of the CRC dealing with interrelated aspects of children's rights affected by intercountry adoption, such as the right to survival and development, the right to nationality and identity or the State's duty to prevent abduction, sale and traffic, are mitigated either due to a country's restricted resources, the possibility of specific reservations by State Parties or open and vague legal formulations. In addition, due to the CRC's implementation mechanism (ie the self-reporting system) the Committee on the Rights of the Child only enjoys a limited choice of enforcement measures. In the light of these weaknesses, and anticipating the establishment of the 1993 Hague Convention, the State Parties' duty to cooperate with the object of arriving at an agreement (*obligation de negotiando* in Article 21 (e)) could -

ex post – be qualified as one of the most effective obligations. Solving the problems involved in intercountry adoption calls for collaboration between the country of origin and the one of destiny.

In this sense the Hague Convention is a model of cooperation - combining shared responsibilities of sending and receiving state and automatic recognition – and can be qualified as an appropriate system for implementing and safeguarding children's rights in intercountry adoption. In contrast to the CRC's strict commitment to the principle of subsidiarity, the Hague Convention rather proposes its flexible application in favor of the child's best interests, and consequently in favor of intercountry adoption.

In view of the Convention's practical rather than theoretical approach, it is plausible that there are only minimal substantive requirements concerning responsibility for determining adoptability and suitability and ensuring the necessary consents. Likewise it is not astonishing that any decision on jurisdiction or the applicable law is lacking and contested matters such as allowing private adoptions or probationary periods are left to the choice of Contracting States. This openness is likely to be the secret of the Convention's success. At the same time it could also turn out to be a weakness, especially when considering private adoptions, where exploring domestic solutions and controlling cash flows are hardly possible. Private adoptions might not only be considered as contrary to the CRC's provisions on competent authorities but also opposed to the welfare of children in general due to the risks inherent in the transfer of children beyond effective state control. When account is taken of the particularly uneven distribution of responsibilities between sending and receiving state, intense cooperation between competent authorities should be all the more important. Such cooperation might also be preferable to the establishment of an international body, as is sometimes proposed in the literature.

The Convention's most beneficial contributions to the protection of the adoption triangle in practice can be seen in the procedural requirements (including matching), the recognition of certified adoptions by operation of law and last but not least the additional safeguards concerning contact between the adoptive and biological parents prior to consent and the treatment of information on the child's origin. The question finally, whether the Hague

Convention is able to operate properly and have the desired effect, depends on the way it is implemented nationally.

In Switzerland the Hague Convention, which was ratified on 24 September 2002, is implemented primarily through the Statute on the Hague Convention, in force since the first of January 2005. In accordance with the Convention and the CRC, to which Switzerland is also a Party, the best interests of the child are the guiding principle in any adoption procedure. Since the majority of adoptions carried out in Switzerland concern children from abroad, participation in the Hague Convention is crucial to make allowance for the specific characteristics of intercountry adoption. Hence, with the adoption of the federal Statute on the Hague Convention – as a framework and interface between the Convention and national procedures – various amendments in Swiss law became necessary:

The new competence of the Confederation to regulate and organize supervision of foster placements and adoption placements respectively is more adequate than the former liberty of the Cantons in determining their own organization. With the establishment of one federal Central Authority, which supervises, coordinates and advises the 26 cantonal authorities, competence, experience and communication with foreign authorities may be centralized in favor of a harmonized, efficient and transparent practice. At the same time the Cantonal authorities are likely to be closer to the facts of a case and more familiar with the circumstances, and are thus not entirely deprived of their duties. Examination, counseling and preparation of the prospective parents, ensuring the necessary consents, deciding on the continuation of the process, and providing for the necessary visa or residence permits are better off at a cantonal level.

Furthermore the new protective measures in appointing a legal advise for children whose adoption has been approved abroad, are not only beneficial for safeguarding and monitoring the welfare of the adoptive child, but are also suitable for supporting the adoptive parents in their child-rearing responsibilities. Likewise the appointment of a tutor for the duration of the probation period where the adoption is to be approved in Switzerland, should be qualified as beneficial, regardless of whether the requirement of a probationary period itself is considered appropriate or not. At least with the

reduction of the probationary period to one instead of two years, the welfare and interests of a child in intercountry adoption procedures are more likely to be respected.

Besides the observance of procedural requirements, including the immediate removal of the child in case the applicable procedure has been circumvented by the adoptive parents, the impact of the new penal provisions to prevent the abduction of, the sale of or traffic in children should not be underestimated. Enforcement of the state's right and duty to participate in the adoption process calls for penalization of any attempt to circumvent it. Similarly it is important that granting or procuring improper financial gain to obtain a child for adoption are penalized not only where a third party is involved, but also – especially as Switzerland is a typical receiving country - where the prospective adoptive parents themselves are the offenders. On this point the Swiss legislation could be qualified as exemplary.

As far as independent adoptions are concerned, intermediary activity in Swiss law is not prohibited. Nor are private actors allowed to perform the functions of the Central Authority. Instead they are permitted to participate in particular duties mandated by the authorities, such as examination of the prospective adoptive parents' suitability or counseling them. The new federal competence to regulate and supervise intermediaries includes strict requirements for obtaining a licence and provisions concerning remuneration. These are important steps to mitigate and monitor the well-known risks. Even though intermediaries play a minor role in Switzerland, where only 16 licence holders are registered, their legitimation is still questionable, particularly since they do not have to meet specific professional requirements. Only in case such requirements are provided for, a serious and substantial contribution to the adoption process, especially by counseling, accompanying and supporting the adoptive parents, may – at least to some extent – be guaranteed. Last but not least, with a view to the CRC, the strong role of the Central Authorities is in all cases to be welcomed.

Assessing the overall effects of international and national legislation on the practice of intercountry adoption, one is drawn to the conclusion that important improvements in relation to the procedure have been achieved, from which not only biological and prospective adoptive parents, but above all

adoptive children as the most vulnerable members of the adoptive triangle, benefit at the end of the day. From a Swiss perspective, considering the amendments which have been introduced since the ratification of the Hague Convention, intercountry adoption may offer a viable means of ensuring the survival and development of a child in a given case. Prohibition of intercountry adoption is not at all the solution.

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