

Joint Council of Europe and European Commission Conference
**Challenges in adoption procedures in Europe:
Ensuring the best interests of the child**

30 November – 1 December 2009 – Strasbourg, Palais de l'Europe – Room 1

Conférence conjointe du Conseil de l'Europe et de la Commission européenne

**Les enjeux dans les procédures d'adoption en Europe :
Garantir l'intérêt supérieur de l'enfant**

30 novembre – 1^{er} décembre 2009 – Strasbourg, Palais de l'Europe – Salle 1

Justice
Spravedlnost
Грaвoсъдiе
Justicia Δικαιοσύνη Giustizia
Ceartas Justice Gustizzja
Pravosodje Öigusküsimused
Justiz Oikeusasiat Tieslietas Igazság
Rättsliga frågor Teisingumas Justiča
Spravodlivost Sprawiedliwość
Retlige anliggender Justiție



PROCEEDINGS/ACTES

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PROGRAMME

MONDAY 30 NOVEMBER 2009

8.00 – 9.00 **Welcome and registration of participants**

THE REVISED EUROPEAN CONVENTION ON THE ADOPTION OF CHILDREN: FROM CONCEPT TO PRACTICE

9.00 – 9.15 **Opening speeches**

- Maud de BOER-BUQUICCHIO, Deputy Secretary General, Council of Europe
- Alain BRUN, Acting Director, Directorate General Justice, Freedom and Security, European Commission

9.15 – 10.15 **Session I – Children in the adoption process**

Chair and Moderator – Rosemary HORGAN, Solicitor, Member of the Working Party which drafted the revised Convention on Adoption, Ireland

- **The child's legal status in adoption**
Nigel LOWE, Professor of Family Law, Cardiff University, United Kingdom
- **The case law of the European Court of Human Rights concerning adoption**
Isabelle BERRO-LEFEVRE, Judge at the European Court of Human Rights, Council of Europe
- **The child's consultation and consent in adoption**
Mia DAMBACH and Cécile MAURIN, Children's Rights Experts, International Social Service, Switzerland
- **An example of national practice - Azerbaijan**
Elgun SAFAROV, Deputy Head of Division of the State Committee on Family, Woman and Children Programme, Azerbaijan

10.15 – 11.00 **Discussion**

11.00 – 11.15 *Coffee break*

11.15 – 12.00 **Session II – Adults in the adoption process**

Chair and Moderator – Patrice HILT, Professor of private and penal law, Expert in family law, Strasbourg University, France

- **The consent of the birth parents to the adoption**
Brian SLOAN, Lecturer in Law, King's College Cambridge, United Kingdom
- **Who can adopt? Taking into account societal changes**
Robert WINTEMUTE, Professor of Human Rights Law, King's College London, United Kingdom
- **Adoptive parents: changing the legal approaches - Ukrainian tendencies**
Irina ZHYLINKOVA, Professor, Civil Law Department of National Law Academy, Ukraine

12.00 – 12.30 **Discussion**

12.45 – 14.15 *Lunch hosted by the European Commission, Restaurant Bleu, Palais de l'Europe*

14.15 – 15.30 Session III – Access to one's origins: striking the right balance

Chair and Moderator – Irma ERTMAN, Thematic Coordinator on Children, Ambassador Extraordinary and Plenipotentiary of Finland to the Council of Europe

- **The example of French legislation**
Marianne SCHULZ, Lawyer, Directorate of Civil Affairs and Seal,
Ministry of Justice and Liberties, France
- **Access to one's origins as a human right**
Dragoljub POPOVIĆ, Judge, European Court of Human Rights, Council of Europe
- **Access to one's origins from a psychological point of view**
Philip JAFFÉ, Professor of children's rights, Director of the University Institute Kurt Bösch,
Switzerland
- **Experience of an adopted person**
Fritz FROEHLICH, Austria

15.30 – 16.15 Discussion

16.15 – 16.30 Coffee break

16.30 – 17.15 Session IV – Role and responsibility of public and private bodies

Chair and Moderator – Ulrike JANZEN, Chair of the Council of Europe's Committee of Experts on Family Law, Ministry of Justice, Germany

- **Adoption in the United Nations Convention on the Rights of the Child, and a particular case of adoption of Roma children in Hungary**
Maria HERCZOG, Member of the United Nations Committee on the Rights of the Child
- **Preliminary enquiries to the adoption**
Bettina BAUMERT, Family Judge, Germany
- **Making national adoption easier - the view from Russia**
Olga KHAZOVA, Professor, Institute of State and Law, Russian Federation

17.15 – 17.40 Discussion

17.45 Signatures of the European Convention on the Adoption of Children (Revised) (CETS No. 202) – Committee of Ministers' foyer

19.00 Reception offered by the Mayor of Strasbourg at the Town Hall

20.30 Dinner hosted by the European Commission – Maison Kammerzell, Strasbourg

TUESDAY 1st DECEMBER 2009

INTER-COUNTRY ADOPTION: LESSONS LEARNED, PROBLEMS AND PERSPECTIVES

9.00 – 9.45 Session V – The 1993 Hague Convention on Adoption: Protecting the best interests of children in inter-country adoption

Chair and Moderator – Jean-Paul MONCHAU, Ambassador in charge of international adoption, France

- **Review of the operation of the 1993 Hague Convention: a global perspective**
William DUNCAN, Deputy Secretary General, The Hague Conference on Private International Law
- **How the 1993 Hague Convention helps to protect the best interests of children in inter-country adoption**
Jenny DEGELING, Secretary, The Hague Conference on Private International Law
- **The role and responsibilities of receiving countries: the importance of the inter-country adoption technical assistance programme**
Laura MARTINEZ MORA, Coordinator, Technical Assistance Programme,
The Hague Conference on Private International Law

9.45 – 10.30	Discussion
10.30 – 10.45	<i>Coffee break</i>
10.45 – 11.30	<p>Session VI – The right to a family in the international legal framework and in practice</p> <p>Chair and Moderator – Melita CAVALLO, President of the Juvenile Court in Rome, former President of the Italian Central Authority for International Adoption, Italy</p> <ul style="list-style-type: none"> • The right to a family: analysis of the existing legal framework Isabelle LAMMERANT, Expert on adoption and children's rights, Espace adoption, Geneva, and Lecturer at Fribourg University, • Long-term institutional placement and foster care and the best interests of the child Violeta STAN, Paediatrician, specialised in child and adolescent psychiatry and neurology, Senior Lecturer at the University of Medicine of Timisoara, Romania • Preventing abuses in adoption procedures: suggestions and best practices Marlène HOFSTETTER, Terre des Hommes, Head of International Adoption Section, Switzerland • The experience of Romania Edmond McLOUGHNEY, Country Representative, UNICEF Romania • The experience of Bulgaria Krassimira NATAN, Lawyer, Bulgaria
11.30 – 12.15	Discussion
12.30 – 14.00	<i>Lunch hosted by the European Commission, Restaurant Bleu, Palais de l'Europe</i>
14.00 – 14.45	<p>Session VII – Towards a European Adoption Policy?</p> <p>Chair and Moderator – Salla SAASTAMOINEN, Head of Civil Justice Unit, Directorate General Justice, Freedom and Security, European Commission</p> <ul style="list-style-type: none"> • Thinking ahead of the present situation: is a European adoption policy desirable? Claire GIBAUT, former Member of the European Parliament, France • The results of the study carried out by the European Parliament Raffaella PREGLIASCO, Istituto degli Innocenti, Italy • The results of the study carried out by the European Commission Patrizia DE LUCA, Team leader, Civil Justice Unit, Directorate General Justice, Freedom and Security, European Commission • Experience of an adoptive parent: the lack of recognition of adoption decisions as an obstacle to the free movement of persons in the European Union Brigitta TOTH, Mother of an adopted child, United Kingdom
14.45 – 15.30	Discussion
15.30 – 16.15	<p>Session VIII – Conclusions and Recommendations</p> <p>General Rapporteur – Rosemary HORGAN, Solicitor, Member of the Working Party which drafted the revised European Convention on the Adoption of Children, Ireland</p> <p>Final remarks</p> <ul style="list-style-type: none"> • Salla SAASTAMOINEN, Head of Civil Justice Unit, Directorate General Justice, Freedom and Security, European Commission • Jan KLEIJSEN, Director of Standard-Setting, Directorate General of Human Rights and Legal Affairs, Council of Europe
16.15	End of the conference

PROGRAMME

LUNDI 30 NOVEMBRE 2009

8.00 – 9.00 **Accueil et enregistrement des participants**

LA CONVENTION EUROPÉENNE RÉVISÉE SUR L'ADOPTION DES ENFANTS: DE LA CONCEPTUALISATION À LA PRATIQUE

9.00 – 9.15 **Discours d'ouverture**

- Maud de BOER-BUQUICCHIO, Secrétaire Générale adjointe, Conseil de l'Europe
- Alain BRUN, Directeur faisant fonction, Direction Générale Justice, Liberté et Sécurité, Commission européenne

9.15 – 10.15 **Session I – L'enfant dans le processus d'adoption**

Présidente et modératrice - Rosemary HORGAN, Avocat, Membre du Groupe de travail ayant rédigé la Convention révisée sur l'adoption, Irlande

- **Le statut juridique de l'enfant dans le processus d'adoption**
Nigel LOWE, Professeur de droit de la famille, Université de Cardiff, Royaume-Uni
- **La jurisprudence de la Cour européenne des droits de l'homme en matière d'adoption**
Isabelle BERRO-LEFEVRE, Juge, Cour européenne des droits de l'homme, Conseil de l'Europe
- **La consultation de l'enfant et son consentement dans la procédure d'adoption**
Mia DAMBACH et Cécile MAURIN, Experts en droit des enfants, Service Social International, Suisse
- **Un exemple de pratique nationale - Azerbaïdjan**
Elgun SAFAROV, Chef adjoint de la division du Comité d'état sur le programme de la famille, des femmes et des enfants, Azerbaïdjan

10.15 – 11.00 **Discussion**

11.00 – 11.15 *Pause café*

11.15 – 12.00 **Session II – Les adultes dans le processus d'adoption**

Président et modérateur – Patrice HILT, Maître de conférences en droit privé et sciences criminelles, Expert en droit de la famille, Université de Strasbourg, France

- Les parents biologiques: leur consentement à l'adoption
Brian SLOAN, Maître de conférences en droit, King's College Cambridge, Royaume-Uni
- Qui peut adopter? Prendre en compte les mutations sociales
Robert WINTEMUTE, Professeur des droits de l'homme, King's College London, Royaume-Uni
- **Parents adoptifs: changer l'approche juridique - les tendances en Ukraine**
Irina ZHYLINKOVA, Professeur, Département du droit civil, Académie de droit national, Ukraine

12.00 – 12.30 **Discussion**

12.45 – 14.15 *Déjeuner offert par la Commission européenne, Restaurant Bleu, Palais de l'Europe*

14.15 – 15.30 **Session III – L'accès à ses origines: trouver le juste équilibre**

Présidente et modératrice – Irma ERTMAN, Coordinatrice thématique sur les enfants, Ambassadeur extraordinaire et plénipotentiaire de la Finlande auprès du Conseil de l'Europe

- **L'exemple de la législation française**
Marianne SCHULZ, Rédactrice, Direction des affaires civiles et du sceau, Ministère de la justice et des libertés, France
- **L'accès à ses origines en tant que droit de l'homme**
Dragoljub POPOVIĆ, Juge, Cour européenne des droits de l'homme, Conseil de l'Europe
- **L'accès à ses origines du point de vue psychologique**
Philip JAFFÉ, Professeur en droit des enfants, Directeur de l'Institut universitaire Kurt Bösch, Suisse
- **L'expérience d'une personne adoptée**
Fritz FROEHLICH, Autriche

15.30 – 16.15 **Discussion**

16.15 – 16.30 *Pause café*

16.30 – 17.15 **Session IV – Rôle et responsabilité des organismes publics et privés**

Présidente et modératrice – Ulrike JANZEN, Présidente du Comité d'experts du Conseil de l'Europe sur le droit de la famille, Ministère de la Justice, Allemagne

- **L'adoption dans la Convention des Nations Unies relative aux droits de l'enfant, et un cas particulier d'adoption d'enfants roms en Hongrie**
Maria HERCZOG, Membre du Comité des Nations Unies des droits de l'enfant
- **Enquêtes préliminaires à l'adoption**
Bettina BAUMERT, Juge aux affaires familiales, Allemagne
- **Faciliter l'adoption nationale – les tendances en Russie**
Olga KHAZOVA, Professeur, Institut d'état et de droit, Fédération de Russie

17.15 – 17.40 **Discussion**

17.45 **Signatures de la Convention européenne en matière d'adoption des enfants (révisée) (STCE n° 202) – Foyer du Comité des Ministres**

19.00 *Vin d'honneur offert par le Maire de Strasbourg - Hôtel de Ville*

20.30 *Dîner offert par la Commission européenne – Maison Kammerzell, Strasbourg*

MARDI 1^{er} DÉCEMBRE 2009

L'ADOPTION INTERNATIONALE: LEÇONS TIRÉES, PROBLÈMES ET PERSPECTIVES

9.00 – 9.45 **Session V – La Convention de La Haye de 1993 sur l'adoption: protéger l'intérêt supérieur de l'enfant dans l'adoption internationale**

Président et modérateur – Jean-Paul MONCHAU, Ambassadeur chargé de l'adoption internationale, France

- **Réexamen du fonctionnement de la Convention de La Haye de 1993: une perspective globale**
William DUNCAN, Secrétaire Général adjoint, Conférence de La Haye de Droit International Privé
- **Comment la Convention de La Haye de 1993 aide-t-elle à protéger l'intérêt supérieur de l'enfant dans l'adoption internationale?**
Jenny DEGELING, Secrétaire, Conférence de La Haye de Droit International Privé
- **Le rôle et les responsabilités des pays d'accueil: l'importance du programme d'assistance technique en matière d'adoption internationale**
Laura MARTINEZ MORA, Coordinatrice technique du Programme d'assistance, Conférence de La Haye de Droit International Privé

9.45 – 10.30 **Discussion**

10.30 – 10.45 *Pause café*

10.45 – 11.30 **Session VI – Le droit à une famille dans le cadre juridique international et dans la pratique**

Présidente et modératrice – Melita CAVALLO, Présidente du Tribunal pour enfants de Rome, ancienne Présidente de l'Autorité centrale italienne pour l'adoption internationale, Italie

- **Le droit à une famille: analyse du cadre juridique existant**

Isabelle LAMMERANT, Expert en matière d'adoption et de droits de l'enfant, Espace adoption, Genève, chargée de cours à l'Université de Fribourg, Suisse

- **Le placement de longue durée en institution et famille d'accueil et l'intérêt supérieur de l'enfant**

Violeta STAN, Médecin pédiatre, spécialisée en neurologie et psychiatrie de l'enfant et de l'adolescent, Maître de conférences, Université de médecine de Timisoara, Roumanie

- **Prévenir les abus dans les procédures d'adoption : suggestions et meilleures pratiques**

Marlène HOFSTETTER, Terre des Hommes, Chef de la Section Adoption Internationale, Suisse

- **L'expérience de la Roumanie**

Edmond McLOUGHNEY, Représentant national, UNICEF Roumanie

- **L'expérience de la Bulgarie**

Krassimira NATAN, Avocate, Bulgarie

11.30 – 12.15 **Discussion**

12.30 – 14.00 *Déjeuner offert par la Commission européenne, Restaurant Bleu, Palais de l'Europe*

14.00 – 14.45 **Session VII – Vers une politique européenne d'adoption?**

Présidente et modératrice - Salla SAASTAMOINEN, Chef de l'Unité Justice civile, Direction Générale Justice, Liberté et Sécurité, Commission européenne

- **Aller au-delà de la situation actuelle: une politique européenne d'adoption est-elle souhaitable?**

Claire GIBault, ancien Membre du Parlement européen, France

- **Les résultats de l'étude menée par le Parlement européen**

Raffaella PREGLIASCO, Istituto degli Innocenti, Italie

- **Les résultats de l'étude menée par la Commission européenne**

Patrizia DE LUCA, Chef d'équipe, Unité Justice civile, Direction Générale Justice, Liberté et Sécurité, Commission européenne

- **L'expérience d'un parent adoptif: le manque de reconnaissance des décisions d'adoption, obstacle à la libre circulation des personnes dans l'Union européenne**

Brigitta TOTH, Mère d'un enfant adopté, Royaume-Uni

14.45 – 15.30 **Discussion**

15.30 – 16.15 **Session VIII – Conclusions et Recommandations**

Rapporteur Général – Rosemary HORGAN, Avocat, Membre du Groupe de travail ayant rédigé la Convention européenne révisée sur l'adoption des enfants, Irlande

Remarques finales

- Salla SAASTAMOINEN, Chef de l'Unité Justice civile, Direction Générale Justice, Liberté et Sécurité, Commission européenne

- Jan KLEIJSEN, Directeur des activités normatives, Direction générale des droits de l'Homme et des affaires juridiques, Conseil de l'Europe

16.15 **Fin de la Conférence**

Day 1, 30 November

The revised European Convention on the Adoption of Children: From concept to practice

Opening Speeches:

1. Maud de Boer-Buquicchio, Deputy Secretary General, Council of Europe

"Hello, would you like to adopt me?" This is what a little boy called Mondo would ask the people he met.

"There were people who would have liked to because Mondo seemed a nice little boy, with his bright-eyed, round face. But it was difficult. They could not just adopt him like that, straightaway" and this is what French author Jean-Marie Gustave Le Clézio, the winner of the 2008 Nobel Prize for Literature, wrote in his story Mondo.

Le Clézio was right not to reduce adopting a child to the result of a mere whim, whether on the part of the adoptive parents or of the child. As he so rightly expressed, you cannot adopt "just like that, straightaway". There are rules to be complied with and responsibilities towards the child.

And that is precisely the reason why we are gathered here today: to have an exchange of views on these rules and responsibilities and on how our societies can best provide a loving family to the high number of children who, like Mondo, are without parental care.

Let me be clear from the very outset. There is no right to adoption for parents looking for children. There is however a right of the child to a family. The prime objective of adoption should therefore be to give a child a family and not to give a family a child. The child's best interests (BIC) should be the primary concern for both the adoptive parents and the bodies in charge of adoption.

The Council of Europe has been addressing adoption issues since the early 1960s. We started in 1967, with our first Convention on Adoption. It influenced the domestic laws of Contracting States in Western Europe through a minimum of essential principles of adoption practice.

Since 1967, important social and legal changes have taken place in Europe. The notion of the family is not the same today as it was back then. Our societies have changed. So we sat down and revised our convention in 2008 in order to address these changes. The UN Convention on the Rights of the Child, whose 20th anniversary was celebrated last week, was our guiding light. The best interests of the child became the backbone of the revised convention. The child,

the main actor in the adoption arena, was given a voice in the adoption procedure: his/her consent became in any event necessary as of the age of 14. Another important feature in this respect is the possibility for the adopted child to have access to his/her identity.

During the revision process, we could not go as far as we would have liked to on a number of sensitive and controversial issues. But I am convinced that the revised convention improves substantially the procedure for child adoption. It makes it more transparent, more efficient and, most importantly, resistant to abuse.

One of the sessions today will focus on adults in the adoption process and who can adopt. A major improvement brought by the revised convention is the requirement of the consent of both the mother and the father of the child to the adoption. Another improvement, optional though, for Contracting Parties, is the possibility to apply the Convention to same-sex couples who are living together in a stable relationship. I am sure that each of us in this room has a different idea of what a child's best interest is in that context. In many countries, children are removed from their families because they are poor, illiterate, homeless. In many countries, same sex couples are not allowed to adopt, whereas singles can. I am convinced that the discussions on this topic will be lively and fruitful and this is exactly the role of the Council of Europe: to advance human rights by overcoming the obstacles created by different approaches, opinions and legal systems.

But let me share with you my personal conviction in that regard. I believe that there are many things that social services and society can give to a child: education, health, care, food. There is however something that children rarely get from institutions but should always get from their parents and this is love, protection and respect. And that is not exclusive to married, rich or educated mothers and fathers.

Ladies and gentlemen, The Convention has been signed by eleven States and we are expecting two more signatures today. I trust that ratifications will follow shortly. Children without parental care need a solid national and international legal framework which excludes any risk of abuse or trafficking.

A solid legal framework for adoption at national level paves the way for a stronger legal framework for inter-country adoption. Indeed tomorrow, we will focus on inter-country.

And I should like to share a personal experience with you in that respect. Some years ago, I was invited to take part in a televised debate for a major television channel in France. When asked what I thought about French nationals adopting child victims of the Tsunami, I favoured the approach of exhausting all suitable solutions within the country, indeed the community, of origin before considering IA. The day after the debate, I started receiving messages from colleagues and French citizens expressing their agreement or disagreement with my views. Amongst those messages was an extremely aggressive and anonymous letter from a person who had adopted a child from abroad and who accused me of depriving children from abroad of suitable homes and loving families.

Let me therefore explain once again: in many cases, legislation alone cannot determine the best interests of each individual child in each particular situation. That is why, in my opinion, decisions on children's future must be based upon the widest possible choice of options, if their best interests are to be fully respected. Children like Mondo deprived of family homes deserve no less than this. The Council of Europe considers inter-country as a valid option, particularly when it offers a permanent family environment to children that otherwise would face long-term placement in institutions. Provided, and I insist, that the BIC is respected and that international conventions are implemented.

Finally, ladies and gentlemen, I should like to underline the co-operation between the Council of Europe, the European Commission, the Hague Conference as well as the United Nations. My special thanks go to the European Commission for their generous support in the organization of this Conference. I firmly believe that on such sensitive issues as adoption, with such a direct impact on the lives of so many children, it is essential that our message is the same: that the interests of the child always come first.

Ladies and gentlemen, the Council of Europe is very committed to the protection of children's rights. May this Conference add a new stone to the building of a Europe for and with children.

2. Alain Brun, Acting Director Justice, Directorate-General Justice, Freedom and Security, European Commission

I'm particularly happy to open this very important conference together with the Deputy Secretary General of the Council of Europe. It is important because of the subjects that we shall be dealing with, but also because at the end of today the Revised European Convention on Adoption of Children will be signed by some European Countries.

Let me mention here the work that has been carried out by the Hague Conference on Private International Law and thank our colleagues in the Hague for the support and co-operation that they have given us in order to organise the work today and tomorrow.

Co-operation between the Council of Europe and the European Union has become stronger with time. Every single year since 2003, for instance, we organise the European Day of Civil Justice. It's an example of this co-operation, a co-operation that will be reinforced and institutionalised thanks to the Treaty of Lisbon. This Treaty calls upon the EU to adhere to the European Convention on Human Rights, and includes also a number of different elements for the protection of children.

First of all, the Treaty of Lisbon sets out explicitly the protection of children's rights, as an objective of the EU. Moreover, it gives legal binding force to the European Charter of Fundamental Rights. In its Article 24 the fundamental rights of the child are enshrined, and these are directly based upon the 1989 New York Convention and focused on the concept of the best interests of the child.

For some years already the EU has been working on protecting the rights of the child in all of its policies. This objective has become concrete with the Commission's Communication of 2006 entitled '*Towards A European Strategy for the Rights of the Child*', followed in 2008 by a Resolution of the European Parliament on the same subject.

However, at the present time, there is no common adoption policy within the EU. The subjects that we'll be discussing at this conference are not yet regulated at the EU level so there is no particular obligation on EU Member States, in this respect, apart from, obviously, the overall general obligation expected of all States to respect the fundamental rights of persons.

It is not for me to take a stand on this and say whether a European adoption policy is appropriate or not. This is a subject that will be addressed tomorrow. Ideas do not really converge. Some Members of the European Parliament are in favour. However, neither the Commission's Communication of last June concerning a legislative programme for the development of the so-called area of justice, freedom and security for the next five years, nor the Stockholm Programme, which is to be adopted in the days to come, by the European Council, contain any elements along these lines.

But even though there is not yet any legislative policy on adoption within the EU, it is, nonetheless, a subject that interferes with many EU policies, e.g. the fight against discrimination, immigration, asylum, family reunification, free movement of people within the Union, or even judicial co-operation amongst the authorities of the Member States and the recognition of national decisions regarding adoption.

If the EU wants, as it says it does, to protect and foster the rights of children, then it will necessarily have to take into account the issue of adoption, and this is the reason why

the European Commission and the European Parliament, wanted to deepen their knowledge of the matter of the adoption between Member States carrying out two comparative studies to take an over view of the current situation.

I am deeply convinced that this conference and the various ideas that will be discussed here will no doubt constitute an essential step towards the definition of a common European approach to adoption. It's paramount that we should work together at the European level in order to facilitate comparisons, mutual knowledge and, ultimately, mutual trust.

Session I - Children in the adoption process

Chair - Rosemary Horgan, Solicitor, Member of Working Party which drafted the revised Convention of Adoption, Ireland

As a member of the Working Party, I've been asked to give you some of the background and context for the Revised European Convention on the Adoption of Children, but, to keep it short, what I will tell you is that to assess the position in the individual countries a questionnaire was sent to the member countries in order to evaluate the convergence and divergence in national laws and policy in the area of adoption. Twenty-three states and one international organisation, International Social Services, replied to the questionnaire, the text of which is available on the Council of Europe website. And the questionnaire and the replies to the questionnaire highlight the sensitivities and differences amongst member states on this sensitive topic.

The final revised convention was adopted by the Committee of Ministers on the occasion of its 118th session in Strasbourg. The backbone and structure of the revised adoption convention is of course that the best interests of the child are of paramount importance, and no adoption should be permitted or annulled if this requirement is not met. Madame Boer-Buquicchio has already given a good outline, so I won't dwell on it further, and simply ask you to recall that the child is the 'pole star' which must guide the competent authorities in navigating through the adoption constellation of interests in which the child is a vulnerable party in a process conducted by adults.

The child's legal status in adoption
Nigel Lowe, Professor of Family Law, Cardiff University, United Kingdom

It's my pleasure to give the first substantive paper of the conference, and if you like I'm going to give you the basic menu, namely what adoption actually is and in particular the status provisions. Just before though I mention in detail the children's legal status in adoption, I ought to say that the Council of Europe will be looking more generally at the issues of child status through a Working Party which

will do its work throughout next year, in 2010. And some of the points that one might raise about status in adoption may well be able to be absorbed in the Working Party of next year.

The 2008 Convention is first of all really trying to harmonise substantive law of Member States, setting minimum standards, and the object is essentially to update and clarify the 1967 Convention. And that quotation comes from the "*Achievements in Family Law*" document published by the Council of Europe in 2008.

The major provision of the 2008 Convention is Article 11: the whole idea is that in full adoption the child will become a full member of the family and will have the same rights and obligations as a child born or in the family. The adopters will have parental responsibility for the child and crucially the adoption will terminate any legal relationship between the child and the former family. That encapsulates what was generally understood of a full adoption, subject to two qualifications, the first of which is in Article 11 (2) which tries to deal with the problem of step-parent adoption and following the modern idea that we no longer wish to have the idea that the birth parent has to adopt his or her own child, and so in the step-parent adoption it is the adopter, the partner, that does the adopting, and that's a very useful provision.

Article 11 (3) allows State Parties to make exception to the legal severance effect of adoption in relation to such issues as the child's surname and impediments to marriage or to entering into a registered partnership. And then, finally, Article 11 (4) says that, notwithstanding all this, it's perfectly within the State's competence to have provisions for other forms of adoption which have a more limited effect, namely this Article permits States to continue to make provisions for so-called simple adoptions.

So that's the basic provision of Article 11. And if we quickly compare that with the provision of Article 10 of the 1967 Convention, and I'm not going to read it out, but you can see phrases 'having the same rights and obligations as a child born in lawful wedlock' and talks about in Article 10 (2) 'legitimate' and 'illegitimate' children, all those types of references have been in effect excluded from the new Convention in an effort to modernise it.

So my first basic point is that I commend Article 11 in the sense that it is a very good definition and put in a modern way. But there are, however, more subtle or, at any rate, less obvious changes that might at least give pause for thought. For example, whereas the 1967 Convention makes specific provision in relation to maintenance, property rights and succession, the 2008 Convention doesn't. Again the 2008 Convention takes a different stance in relation to children's surnames, although not, I think, dramatically so.

So those are the basic introductory points. Looking at all in a bit more detail, the first heading I've got is the

severance principle, by which I mean the effect of a full adoption cutting off the original legal relationship. Now, it does accurately reflect the general European position, but I would just raise two questions as to whether that's right. You could argue that complete severance is disproportionate. Is it justified that the legal relationship with one's siblings should automatically be severed? I wonder whether that principle would in fact survive an Article 8 Convention of the European Convention of Human Rights challenge. And similarly, one might argue that it shouldn't automatically cut off the relationship with grandparents, and particularly in the case of a step-parent adoption you will have the maternal grandparents but it will be a cut off of the legal relationship elsewhere. So you could argue that it's actually unfair discrimination, contrary to Article 14 if you take it in conjunction with Article 8. So, in other words, I have just put to you that the severance principle is absolutely, irrefutably right.

Step-parent adoption provisions, I think, are actually straightforward and I don't wish to say any more about that. The 2008 Convention permits States to make an exception to the severance rule in respect of the adopted child's surname and prohibitive degrees of marriage. It does seem right that there should not be an absolute rule about the position of surnames and that there is a degree of discretion and so I think 11 (3) is fair enough. Equally, although I think it's new, having a continued prescribed degree of relationships for entering into a marriage or civil partnership is clearly right because, if the rules of consanguinity are based on eugenic and moral grounds as they are, of course that in reality remains so and therefore it is right, I would say, to maintain that. But what's not there is, for example, whether there should be similar rules extending to the crime of incest. I just mention that in passing.

Now 11 (3) only gives you two examples and it's not intended to be exhaustive and does not preclude other derogations being made to the severance principle, and in particular the continuation of certain financial obligations of parents of origin. An issue that's not actually mentioned is: what about continuing maintenance obligations? Indeed in the original draft, and really quite close to the end of the final conclusions, some idea that there should be continuing maintenance obligations was actually in the draft version right to the end, but was taken out. In the sense that it puts the child in exactly the same legal position as if the child had been born in marriage you could argue that you don't need it, but it is different to 10 (2) of the 1967 Convention and you wonder whether it should have been mentioned, or at least in the explanatory report. But that raises an interesting dilemma, as to how far you can derogate from the principle of severance and still have a full adoption. This is an academic lawyer speaking here but you can play around with that concept, and of course that also comes up in the issue of succession.

So turning now to property and succession, again this is an area that was expressly dealt with in the 1967 Convention,

but in oldy worldy terms it has to be said, whereas the 2008 Convention, as part of its policy to modernize the 1967 Convention, actually removed all the references to succession and property rights. Now you can certainly argue that you don't need to have it in the convention because it clearly says you're in the same position as if you were born into the family but it would be useful if it had been mentioned again, at least in the explanatory report, but this is an area that we may be able to revisit in the 2010 deliberations.

Moving on to the next issue of nationality. This is expressly governed by Article 12 and in very simple terms, and very usefully and very importantly what it is aiming to guarantee is that the child has a nationality, and secondly to avoid statelessness. Personally, I would have preferred it to have been mentioned in terms of citizenship rather than nationality, but my lawyer friends tell me that there isn't really any difference. It's been modernised to ensure it's in compliance with the Nationality Convention.

The next, and very important issue, is in relation to access to information. This is governed by Article 22 (3). I think this is an extraordinarily important area. All research shows that we all need a sense of identity and many laws developed children's access to records in fact through their adoption legislation, though it's generally been more extended. Actually, 22 (3) is a very robust provision, and saying that even if national laws permit anonymity, there is the power of the court to override it. And I got very excited about that until about midnight last night. At dinner I was talking to one of our British colleagues and we were talking about the powers of reservations, and having been present at the final discussions of the Adoption Convention, I assumed I knew all the reservation powers in detail but after that conversation I realised that I didn't, and there is the power to make a reservation on 22 (3) in particular. I can understand that because, although the Working Party had particularly in mind the French and the Italian practice of mother's being able to have anonymous births, as I understand it there is a more fundamental divide, between, broadly, eastern and western Europe, particularly the UK. Whereas in the UK we've moved more and more towards open adoptions, there's a completely different stance in the east, where it is a very secret process and I can see there are many countries that will take the reservation on 22 (3). But I would like to see 22 (3) really work, but that's only about the anonymity point. What isn't there is more general right to genetic information.

There is more to say, but hopefully that gives you a flavour of what is to come.

Rosemary Horgan

I should say that in respect of essential and non-essential provisions that all the revised Convention is mandatory, except reservations are possible on three fronts, all reservations may in the future be withdrawn so that it should prove to be very flexible.

The case law of the European Court of Human Rights concerning adoption

Isabelle Berro-Lefevre, Judge at the European Court of Human Rights, Council of Europe

I would like to thank the organisers for inviting the European Court of Human Rights, which I have the honour of representing here, to participate in this conference. With regard to family law, for the court, the best interests of the child is a crucial if not dominant factor in assessing all the situations concerning children, even if this principle in fact doesn't appear in the European Convention on Human Rights. You know that it is very difficult to define this notion of "best interests of the child" because essentially it is factual and also it depends on a factual approach which has to be done on an ad hoc basis which sometimes conflicts with other interests. For instance, regarding adoption, there could be a conflict between the best interests of the birth parents, the adopting parents and society as well. Adoption was in the past considered a way of handing down a name or bequeathing a fortune, but this was progressively turned towards the exclusive interests of children without families and now it corresponds to the need to give to the child a replacement family when the original family is missing or not able to look after it, to take charge of bringing it up. So adoption makes it possible to give a family to a child, not a child to a family as the Court has often recalled in its judgements. Every adoption is therefore the meeting of two stories, that is of a child who is already born, sometimes who is quite grown up, and with no family to look after it, and that of the future parents who would very much like to bring into their lives, for the whole of their lives, one or several children and surround them with all necessary affection.

In bringing together these two expectations, adoption corresponds to the needs of the child who has no family, in order to provide a family for the child to allow it to grow and develop as an adult. Now, is it possible to consider that there is a right to adopt which is guaranteed by Article 8 of the Convention, the right to desire to have a child that would be put on an equal footing with the rights of the child themselves? What is the place of the child as regards the wishes of its adoptive parents? This is what we will look at as a first part.

Now, if we look at adoption as just a link between two players, the adopted and the adopting, is often to forget the existence of a third player, that is the birth parents who also benefits from the right to respect of private life and family guaranteed by Article 8 of the Convention. This is a triangular view of adoption, very dear to the heart of Isabelle Lammerant, who in her book "Adoption and Human Rights in Comparative Law", perfectly highlights the recognising of all the key players in this very special tripartite relationship.

So I would like to look at the case law with regard to the birth parents. If we look at adoption, which is the protective relationship between a child and adoptive parents,

now the Commission then the Court, who several times have been petitioned with regard to obstacles to adoption which people who wish to adopt have met, have affirmed that the Convention does not guarantee a right to adopt, nor the simple right to raise a family. The Court though said that the right to adopt is not in fact granted either by international instruments such as the 1989 United Nations Convention on the rights of the child, or the 1993 Hague Convention. Therefore, Article 8 of the Convention does not appear applicable to the preliminary phases of adoption, because there is not yet a "family life" in the meaning of the case law of the court.

With the case *Frette v. France* (1982), concerning a single homosexual person who wanted to adopt, the court recognised that domestic law recognised the right of any single person to adopt and this comes under Article 8 of the convention. Therefore, it considers that Article 14, which is a ban on discrimination, could also be called upon if the implementation of this faculty saw that there was a treatment of discrimination based on sexual orientation of the applicant. This viewpoint was challenged by three of the seven judges of the court in their partially concurring opinion on the Frette case which said that the Convention did not apply because the Convention did not in fact enshrine the right to a child, and therefore did not protect the right to create a family. The only possibility for requesting adoption does not provide a right to obtain it.

The *EB v. France* judgement of January 2008 goes further than the Frette case (on the applicability of Article 8 of the convention and also on the substance of the dispute), and some commentators wondered whether we were not seeing a progressive inclusion of the right to adoption in the convention. But referring once again to the principles enshrined in its previous case-law, the Court considers very clearly that the right of access to adoption is an additional right which the French state has deliberately decided to protect and which comes under private life. Having said this, recalling the position adopted in *Frette*, the Court reaffirms that the refusal to allow a homosexual to adopt does not in fact undermine the right of the applicant to the free development of their personality and does not in fact affect their private life. But a door was open with regard to applications concerning preliminary phases to adoption introduced by applicants calling on discrimination.

Judge Mularoni, in her dissenting opinion, recalls that the right to private life has been interpreted very broadly by the court, in *Evans v. U.K.* and *Dixon v. U.K.* judgements. Perhaps the moment has come to recognise the possibility of asking to adopt a child within the field of application under Article 8. This means that the Court could no longer declare inadmissible because of incompatibility with the convention all applications made by applicants who, under their national law, have been recognised able to adopt a child. The question remains open and doubtless the court will shortly have to face up to it.

The notion of “family life” has been very extensively interpreted by the Court, e.g. in *Pini and Bertani v. Romania* (2004), the Court considers that the judgement on adoption is a constituent act of family life. In this case, the Italian adoptive parents, under Article 8, complained of the non-execution by Romanian authorities of the adoption decision because of the vehement opposition of the adopted little girls, aged 9 at the time, who wanted to remain in Romania in the orphanage where they had always lived. The Court admitted the applicability of Article 8 to relations which had purely been legal, up to that point, between the adoptive parents and the girls, despite the absence of cohabitation or *de facto* links which were sufficiently close between the applicants and their adoptive children.

The refusal to grant exequatur to an adoption judgement given abroad because domestic law restricted adoption to married couples constitutes for the Court a disproportionate undermining of family life, in *Wagner v. Luxembourg* (2007). This was an affirmation of the importance of the recognition of pre-existing family links, taking into consideration the best interests of the child which should always predominate.

It's also this lack of taking into consideration biological and social law which meant that Switzerland received condemnation in the *Emonet case* because the State did not guarantee the applicants the respect of family life which they could claim under the Convention. The Court said that the State mechanically and blindly applied the provisions of Swiss law on adoption, which had led to the break of parentage between a mother and her daughter, who was over 21 and handicapped, only because she had been adopted by the mother's cohabitant.

The scope of protection of family life because of adoption was also reaffirmed regarding succession in the *Pla and Puncernau v. Andorra* case where the Andorran authorities had judged that, because he was adopted, the applicant could not be considered as the son of a legitimate marriage and could therefore not claim to succeed to the grandmother. This was a sensitive case within the local legal tradition and also affected the interpretation of a will and therefore there were clashes of various rights and interests. The court nonetheless felt that the interpretation that was carried out by the national jurisdiction was in flagrant contradiction of the principles of the Convention, particularly the ban on discrimination, recalling very clearly that adoptive children still find themselves in a legal position as if they were the biological child of their parents in all respects.

Clearly the protection of family life, which is evoked by adoptive parents and for which the courts seem to observe very carefully, sees itself in these cases strengthened by a systematic search for the best interests of the child in so far as it creates the basis for adoption, even if you consider that these interests are often, but not always, convergent.

Let's examine now the rights of the child and the family of origin, the birth family. If the creation of a family by adoption is subordinate to the interests of the child, nonetheless the court will verify whether in fact adoption does meet the best interests of the adopted person, the adopted child. There are various considerations, but there's also more obscure facts with regard to adoption which I feel in the general interest of the person adopted should never be concealed, that is the existence of the birth family. We should not forget that adoption brings together in most cases two families with differing interests, each one being entitled to the right of their family life as guaranteed by Article 8 of the Convention. And the Court therefore has had to look into the legitimacy of decisions leading a child to be integrated in a new family and also to break off, to sever links with their birth family. And the court always recalled that the interest of the child is twofold, firstly Article 8 cannot authorise a parent to take measures which may be damaging to the health or the development of the child. On the other side, it's also clear that the link between the child and their birth family should be maintained except in extreme cases. Breaking or severing a link of this kind would mean that the child is cut off from his/her roots and may be considered to be a form of social ill treatment.

The place of a child should in principle be with their birth family and so therefore their best interests would be only in exceptional circumstances a severance of this family link. Therefore if the lack of family life between a parent and a child seems to justify the authorities pronouncing adoption, despite the consent of the parent, the lack of family life must be true and effective, i.e. the parents are not interested in their child and it should not be the will of the authorities to separate them. In the *Keegan v. Ireland* case the Court condemned Irish authorities for having placed a child for adoption unbeknownst and without the consent of his unmarried, birth father who wanted to have guardianship. This placement meant the creation of a link between the child and potential adopting parents, and then the decision to adoption. But sometimes time makes the situation clearer and assessment of reality of family life between a child and their birth parents, and the balance between the interests of each, may be more delicate. So there was a *Soderback v. Sweden case* (1998), where a biological father complained about a decision to put his child up for adoption by the mother's husband without his consent and this was infringement of his right to respect of family life, but the Court considered that the best interests of the child was to be integrated into the family which had brought it up until that time, namely with the mother and the adoptive father.

The need to stabilise legally and psychologically a child in a host family has also been covered by a judgement *Kearns v. France* (2008), concerning the question of the two months deadline for withdrawing consent to adoption granted by French law in order to claim the child back. The best interests of the child should be predominant and therefore

the child should be able to benefit from effective and stable emotional relations within a new family and develop family ties. Therefore, the Court concluded there was non-violation of Article 8 of the Convention. In the already mentioned case *Pini and Bertani v. Romania*, the Court also said that a child of sufficient maturity should have the possibility to express his/her opinion on the adoption, because otherwise it would not be possible for a child to be integrated in a harmonious way in the new adoptive family.

Today it's impossible to mention all possible questions which are very sensitive and complex affecting the subject we are dealing with. The Court should make a choice between divergent interests, namely those of the birth family and the adoptive family. Because of this conflict, it is very difficult to protect the best interests of the child. This is why the role of each player, the authorities, the national jurisdictions, the States, but also the Court, it seems to me, must make sure that each of the players is respected. The child, first and foremost, and above all, but not only the child. And I am sure that the respect of the adopted child implies that of its adoptive family and also that of its birth family as well.

Rosemary Horgan

We are hugely indebted to you for that magnificent tour de force of European case law on the adoption of children. Some fabulous insights for us all here I'm sure.

The child's consultation and consent in adoption

Mia Dambach and Cecile Maurin, Children's Rights Experts, International Social Service, Switzerland

Mia Dambach

It's a real pleasure for ISS to be present today at such a big occasion to deal with adoption. And today Cecile and I are going to be talking about consultation and consent of the child in adoption.

International law makes it very clear that the child has a right to participate in decisions that affect him or her. There can be very few decisions that would affect a child more where he or she should live, with whom and when a filiation tie should be created. So, in that respect, we would expect that the right of the child to be consulted and to participate in such an important decision should have a high priority. However, the children are not the decision-maker in the adoption process, but rather that they are part of the decision making process so that their views will be taken into account, in addition to those of the other experts.

Today Cecile and myself would like to present to you the topic of consultation and consent of the child in the adoption process in 3 sections. Firstly, we would like to give you an overview on the international laws governing the right of the child to be consulted. Secondly, we will discuss how these laws are translated into different national legal

contexts in Europe. And thirdly, we'll talk about how we can then apply these laws in practice, on the ground, by citing some good practice. Cecile will present the third part to you in French for a truly international presentation today.

International law: Article 12 of the Convention on the Rights of the Child is one of the four main pillars of the Convention and it is the Article that clearly elaborates the right of the child to be consulted according to his or her maturity and evolving capacities. The Committee on the Rights of the Child, in May 2009, released the general comment on this Article, and in particular there are paragraphs which deal with alternative care and adoption. Paragraphs 53 and 54 state that when discussing the placement option for a child, as soon as the child becomes in need of alternative care, it is important to include the child in the process from the very beginning and consult him or her about the placement options, whether it be kinship care, foster care, kafala or adoption. Once the decision is made, paragraph 56 and 57, discuss in more detail how to include the child in that process and the Committee recommends that the effects of the adoption are clearly explained to the child and if possible to obtain the consent of the child. So clearly the Committee on the Rights of the Child found that it is important to consult the child in the adoption process.

The consultation of the child is also a clear principle in the 1993 Hague Convention (Article 4 (2) d).

It is included also in the Guidelines for the Alternative Care of Children which was recently welcomed by the UN General Assembly in New York, which are *soft law* dealing with alternative care of children. The right of the child to participate is dispersed throughout the whole text. In particular, paragraph 63 emphasises the need to provide the child with all the necessary information about alternative care and paragraph 64 states that if the child believes that he or she is not capable of forming his or her own opinion, children may request that other important persons in the child's life be consulted, maybe a grandmother, an aunt or even a teacher, but in any event someone that they have confidence in.

The right of the child to be consulted is expressed clearly not only in international law, but also in regional instruments as well, such as the European Convention on Adoption, already mentioned today. Its Article 5 provides for inclusion of the child in the consents to the adoption, and Article 6 foresees that his or her views are to be taken into account in the placement decision itself.

So, if we were to summarise the two main points of international law, dealing with the right of the child to be consulted, then we would say firstly, in the placement decision itself, whether it's in kinship care, fostering or adoption, it's important to include that child in the decision making process, and secondly, when adoption is decided for the child, as it is considered being in the best interests of the child, then the effects of the adoption should be explained

to the child and, also, the consent, or non-consent, of the child should be included as well.

Now, dealing with how these international provisions are translated into different national legal frameworks, we have tried to summarise some laws of European countries. Regarding the aspect of the placement option, Norway provides a good example, as the Children's Act requires that, when the child reaches the age of seven, it shall be allowed to voice its view, before any decisions are made about the child's personal situation. This, of course, includes where the child will live, with whom and when a filiation tie will be made. So, from the age of seven, already the Norwegian legislation allows children to be included in the decision-making process.

As for the second aspect, explaining the effects of the adoption and including the consent, or non-consent of the child, what we found was that it is a clear principle in all of the legislative frameworks of every European country that we had access to in varying degrees. In some countries, the consent is compulsory from the age of 10, whilst others say it is compulsory from the age of 15. We think that 15 is a bit too high, especially as we know children are mature enough to express their wishes from a much earlier age as well, and even the European Convention says from the age of 14 we should start looking at the child's consent. But, in addition to the requirement of a minimum age, we found, in different national laws, other provisions that give better safeguards to this principle of the child to be consulted in the adoption process. In Iceland, for instance, we found a specific requirement that the effects of the adoption must be explained to the child, whether it's a simple adoption, a full adoption, what's going to happen to the child, is the filiation tie going to be permanently severed. Moreover, in Italy, the consent of the child has to be given personally, so it's not just 'I think that the child says yes to this adoption' but the child personally has to explain his or her wish. In Latvia there is a requirement that the consent of the child should be confirmed by a tribunal or another independent body, and so that ensures that another assessment of the child consent is made, to confirm that the child really is consenting to this adoption. In other laws we found that the consent must be provided not in the presence of the prospective adoptive parents, in order to take the pressure off the child to 'please' these people, to not hurt their feelings.

Another last aspect that I want to deal with is that we found in some national legislative frameworks the consent of the child can be dispensed with when the child is already living with the family. So we assume that would be in the case of step-parent families, or in foster care situations and where administratively we believe that it would be much easier just to say 'OK, we just jump from foster care to adoption', but it is important is that the consent shouldn't be dispensed with in those situations. We shouldn't automatically assume that the child is accepting an adoption because foster care is different to an adoption

and a filiation tie is permanently being made or not made. Even the Committee on the Rights of the Child, in their general comment, clearly made a recommendation that even in those situations it's important to include the consent of the child.

Good laws are, however, just the first step of respecting the right of the child to be consulted, and have his or her views included. The second step, which is more difficult, is how do we implement these laws in practice.

Cecile Maurin

Once this legislative overview has been given, let's talk about the consultation of the child. Every single actor involved has to have some know-how, judges, psychologists etc, and so, very quickly, I'm going to run through all the various standards and skills that are required when consulting the child in order to get his/her consent or lack of consent to adoption and announcing the final decision.

So the professional who's in charge of consulting the child is faced with a challenge: on one hand, what are the wishes and needs of the child, on the other hand, not making the child responsible for the final decision, obviously. It's absolutely necessary therefore for everything to be done well, to have the necessary environment, to listen fully to what the child has to say, to respect the child, to create an environment that is totally favourable to the child expressing himself or herself.

So listening to a child, exploring the views of the child that means first of all you have to have enough knowledge about what the child has gone through, how the child has gotten through to where he is right now, what are the previous traumas that the child's been through.

Professor Schofield, English professor in Social Law at the East Anglia University, has said that the theory of development helps to identify the strengths and the weaknesses of the child and to make sense of his or her behaviour, to enable to make the child feel competent and valuable.

Professor Schofield proposes a developmental model, a tool available at the English association for family adoption and placement (BAAF).

Listening to the child means also developing a relationship of trust with the child, by showing empathy, listening to what the child himself has got to say, and how he says it. Very often it's a very deeply hurt child so you have to know what the child means by the various things he says, how you're going to interpret his various reactions to different kinds of situations. Trust also means that the conversation with the child has to be totally confidential; the child has got to be sure that nothing he says will ever be repeated outside of that room.

And it also means that the child can say 'no' to some questions. The child has to be sufficiently at ease to change

his mind if he wants to, to make some mistakes, or even to leave some questions unanswered. And, finally, good communication with the child means taking into account his skills, his talents, which are different from those of the adults, not inferior to but different from, so you have to take into account his own experiences, and what the child in himself wants to say to the adult. This means the adults have to be overseen and supervised in order to develop and to hone the necessary skills.

An environment favourable to the child expressing himself also means that it should be preferable, when possible, to let the child choose where he wants the conversation to take place. In a BAAF study from 1998 it is reported a ten year old child who once said he wanted the conversation to be out in the open because he felt better in the open. Also the professional has to use a very informal style to reassure the child. Both the professional and the child need to prepare for the meeting. In the same study, it is said that the children have expressed their wish to be prepared for the conversation, to know which subjects will be addressed and which kind of follow up is expected.

The length of the conversation also depends on the child. Some children speak more easily than others. It's got to be adapted to their age, their maturity, to their psychological conditions, making sure that you do not stress out the child, and maybe it's better to split it into two or three conversations rather than a very lengthy conversation. And the person who's in contact with the child should remain the same during the process in order to develop trust. The child won't trust someone who's totally new to him. Also, the person interviewing the child has to use the kind of language that the child will immediately understand. Two English research organisations have developed a method which is known as the "mosaic approach", a whole set of visual and verbal tools to enable the child to express himself or herself. These tools include the use of cameras and participatory activities developed by the child symbolizing the environment, the family etc. Several activities are carried out by the children so as to enable them to place emphasis on the persons, the places and the events most interesting in their life, vis à vis adults.

It's hard for a child to express himself, so you need to have tools, methods for questioning the child specifically, for example the "magic question" developed by a Quebecois researcher. The 'magic' question is asked to the child and enables him/her immediately to conjure up his own desires, his own wishes, it acts as a trigger for the child. The American Institute Erikson also in a work called *'What children can tell us'* has proposed a guide to questions that can be put by professionals to children.

In the case of abuses, when the child has been ill treated, the professional can use tools like games or story telling to make child talk about his/her experience, as it is pointed out in the Erikson study. The professional should, if it's necessary, resort to outside experts.

So, once all of this set-up is underway, all the conditions are there to enable the child to express himself freely, but when the time comes for the child to express its consent the child has to be told what adoption is, the consequences etc., particularly where the consequence will be severance of ties with a birth family, they need to know that.

The child has to be aware that it's going to be his or her own choice, so they've got to be shown all the possible alternatives so that the child must understand exactly what's going to happen in case he chooses one particular alternative. What happens if he's adopted, what happens if he's not adopted and the child should be free to ask every single question that he may think of, about his birth parents, what do they look like, where do they live, is he going to have siblings, or also the adoptive parent, what do they look like, is he going to have siblings. This is all part of the practical counselling the child needs to get.

Now whatever the opinion of the child is, it's important for the professional to check up if this opinion reflects his or her real needs. Sometimes the child will say no to adoption because he doesn't want to be separated from his birth family, or he's too traumatised by the whole abandonment that he's been a victim of and he doesn't like at all the idea of going to live with someone he hardly knows. It's important, under these circumstances, to have some mediator coming in and who's going to be working with the consent of the child, in order to see what are the real needs of the child that are being hidden behind the emotions that he shows.

From the very beginning of the conversation, the professional needs to be clear, has got to let the child know 'your opinion is important', that this will be taken into account, even if the final decision could not necessarily reflect his or her opinion. The child has to understand that it's in his/her best interests, the advice of other people is also taken into account: psychologists, social workers, birth parents etc.,.

There are guidelines on how the best interests of the child should be determined issued by the UN Commission for Human Rights, which give practical guidance to explain to the child why his or her opinion has not been followed. These guidelines are designed to facilitate the agreement of the child on the adoption project. Otherwise, there is every likelihood that the child will make the adoption situation fail because he will feel that the situation was imposed and therefore he/she will not accept it and make it fail, because the child would feel injustice, anger vis à vis the imposed family environment.

And now it's up to my colleague to conclude with a testimony of a child.

Mia Dambach

We just wanted to conclude with a positive experience of a child who was consulted in the adoption process and this child said about the social worker 'She didn't preach

to me, I could open up to her. She made my life like a road and said "Right, let's walk down this road together and tell me what you come to." It was then me that had to come to it, and I could get there in my own time.'

Rosemary Horgan

Thank you for many insightful and thoughtful views on how we actually give voice to a child.

Session II - Adults in the adoption process

Chair – Patrice Hilt, Professor of private and penal law, Expert in family law, Strasbourg University, France

Strasbourg University has been working closely with the Council of Europe and the European Commission, for some time now, and being from Strasbourg I would like to welcome you here for this discussion about adoption and maybe also to the Christmas Market tonight. This second section looks at adults in the adoption process. The best interests of the child presupposes that we take into consideration also the role of the adults in the adoption process. Adults fall into two categories, those that have agreed to have their child adopted, and there is a lot of questions, who can give consent, what sort of consent can they give, is there any privileged form of consent, how is it possible to avoid abuse and fraud, that is something which exists too, and also the role of the judge in the process. And then there is the second category, adults who want to adopt a child. This is something that has been debated for several years now, and here we have the question of who can adopt, only spouses and also non-married couples, including homosexuals. This is the problem addressed by Article 11 of the revised CoE adoption Convention.

The consent of the birth parents to the adoption

Brian Sloan, Lecturer in Law, King's College Cambridge, United Kingdom

The position of the birth parents of a child to be adopted is one of the most important and controversial aspects of any adoption process. This applies especially to the circumstances in which the need for their consent will be dispensed with. The issue of consent is addressed by Article 5 of the Revised European Convention on the Adoption of Children 2008, and its provisions reflect the fact that most forms of adoption 'terminate the legal relationship' between the child and his family.

According to Article 5, *inter alia*, the consent of the 'mother and father' of the child to be adopted is required before an adoption can be granted. The need for consent should be dispensed with only 'on exceptional grounds determined by law'. The consent of a person without parental responsibility is not required under the Convention, although under the original 1967 Convention an unmarried father's

agreement was not required even if he had parental responsibility.

I want to examine some aspects of Article 5, and I hope you will forgive me for doing so with particular reference to English Law. After introducing the English legislation, I will discuss the circumstances under which a court will dispense with the need for parental consent in England and Wales, and examine some of the procedural hurdles facing birth parents seeking to oppose adoption orders. I'm then going to talk about the legal position of the parent (specifically the father) without parental responsibility, as regards consent to and knowledge of the adoption process.

Domestic adoption (NA) in England and Wales is currently governed by the Adoption and Children Act 2002. The Act must be read in the context of the Government's policy that adoption should be used as a means of finding a permanent home for children who might otherwise 'drift' through compulsory care provided by the state. This reflects a general trend across Europe and beyond towards seeing adoption as a mechanism benefitting children rather than childless couples. But the UK Government's policy raised concerns about how the interests of biological parents could be safeguarded under the 2002 Act.

It is significant that child welfare (or the best interests of the child) is declared to be the 'paramount' consideration in adoption decisions under the English 2002 Act. The Revised Adoption Convention also places emphasis on the BIC. Nevertheless, Article 4 appears to regard welfare as a necessary, rather than a sufficient, condition for the making of an adoption order. By contrast, the English Act creates a risk that child welfare will be regarded as a sufficient condition for an adoption order to be justified.

Previously, child welfare was merely the 'first' consideration under the English Adoption Act 1976. The change introduced in the 2002 legislation ostensibly brought English Law into line with the UN Convention on the Rights of the Child. That said, the apparent compatibility is undermined by the fact that the House of Lords equated the words 'paramount' and 'sole' decades ago. This restrictive approach remains influential despite the jurisprudence of the European Court of Human Rights. The interpretation means that, in theory at least, the interests of the birth parents are considered only so far as that is consistent with the BIC.

Against this background, I want to consider the circumstances under which the requirement for consent to adoption, which applies to parents with parental responsibility and legal guardians, may be dispensed with under the 2002 Act. Two grounds are set out in the Act, and the decision on whether or not to dispense with consent is taken after it has been found that adoption would be in the BIC.

The first ground on which consent can be dispensed with, uncontroversially, is where 'the parent or guardian cannot be found or is incapable of giving consent'. This corresponds to the first example of a valid ground provided in the Revised Adoption Convention's Explanatory Report.

The second ground is much more difficult, since it means that in England and Wales parental wishes can be overridden where 'the welfare of the child requires the consent to be dispensed with'. Under the old Adoption Act 1976, if the relevant parent could be found and was capable of giving agreement, it had to be shown that he was withholding consent 'unreasonably', or had mistreated the child in some way. The 2002 provisions have the potential to conflate the question whether adoption is in the BIC and whether parental consent should be dispensed with, in substance setting down a single welfare-based test.

In my view, it is difficult for child welfare to constitute an 'exceptional ground' for the purposes of the Revised Convention, since welfare is evidently the most important factor in every adoption decision. The second example of a ground for dispensation set out in the Convention's Explanatory Report is that consent is being refused 'for reasons which may be regarded as a misuse of the right to do so'. This is consistent with the grounds contained in the English Adoption Act 1976, and is arguably narrower than the general welfare-based ground contained in the 2002 Act.

It is possible that the circumstances in which a court could conceivably find that a child's welfare required a dispensation would inevitably constitute 'exceptional grounds' for the purposes of the Revised Convention. But the lack of distinct circumstances in which parental consent can be dispensed with may increase the likelihood of such a finding.

Moreover, while it had been hoped that the use of the word 'requires' in the 2002 Act might result in a higher standard of welfare test being applied, the Court of Appeal has refused to apply an 'enhanced welfare test'. It did emphasize the need to consider the child's welfare throughout his life, reflecting an 'extended meaning' of welfare that was expressly written into the legislation for the first time. But this is unlikely to render welfare an 'exceptional ground' for the purposes of the Revised Convention.

Professor Kerry O'Halloran argues that in France and throughout much of the rest of Europe, 'the adoption experience is virtually entirely a consensual process'. In England and Wales, by contrast, it seems that once adoption is considered to be in the BIC, it will follow almost automatically that parental consent should be dispensed with.

The interests of the birth parents in England and Wales are further prejudiced by procedural requirements, so that the test for dispensing with consent is sometimes omitted at the final stage of the adoption process entirely. The

parents must apply for leave to oppose the making of a final adoption order where the child has been placed with prospective adopters by an adoption agency. Thankfully, placement will occur without consent only by court order and where a threshold of 'significant' harm to the child has already been passed. This gives some protection to the interests of the parents, as does the requirement to satisfy the child welfare and dispensation tests at the placement order stage. However, the parents must apply for leave in order to have a placement order revoked, and the limited circumstances in which leave is granted significantly undermine this protection.

In England and Wales, the withdrawal of consent is ineffective once an application for a final adoption order has been made, and the leave of the court is required where the parents have given consent to placement or adoption and now wish to oppose the making of that order. Article 5(1) of the Revised Convention states that parental consent must not have been withdrawn before an adoption is allowed, although there is room for each state to determine its own procedure. Indeed, the European Court of Human Rights has noted the diversity in provision for withdrawing consent across the contracting parties.

In England and Wales, where leave is required, it will be given only where the court is 'satisfied that there has been a change in circumstances' since either the original consent was given or the placement order was made. The courts have thus far taken a restrictive approach, and emphasized that they retain a discretion on the question of leave even where a relevant change has been found. Where leave is required and refused, the adoption is treated as being unopposed and there is no need even to dispense with consent. This is particularly problematic where the original placement for adoption occurred without parental consent.

The English provisions on parental consent to adoption and its related procedural hurdles are potentially open to challenge under Article 8 of the European Convention on Human Rights. In *Görgülü v Germany* the European Court of Human Rights emphasized that the severance of family ties could be justified only in 'very exceptional circumstances'.

That said, the European Court's attitude to adoption has been described as 'rather ambiguous'. Whether an adoption against parental wishes breaches Article 8 is highly dependent on the facts of the case. The margin of appreciation allocated to States plays a pivotal role, and the extent of the child's relationship with the biological parent in question may be a crucial factor.

Whether or not the 2002 Act is compatible with the Convention on Human Rights, once an adoption agency in England and Wales becomes involved in a child's life, the birth parents will have an undesirably difficult time if they seek, as many understandably do, to oppose the adoption.

I now want to briefly examine the position of the unmarried father without parental responsibility (or 'PR'). He is protected by Article 5 of the Revised Convention only if he has been given 'the right to consent to an adoption' under the relevant domestic law. This somewhat circular provision does little to safeguard his interests. Moreover, as a recent case dramatically demonstrated, his interests may be given equally little weight in the English context. The case of *Re C (A Child) (Adoption: Duty of Local Authority)* concerned a mother who had become pregnant after a one-off sexual encounter, and made it clear that she wished the resulting child to be adopted shortly after birth. She kept the pregnancy secret from biological father, who did not have PR, and refused to identify him. The Court of Appeal ordered the local authority charged with the child's care and eventual adoption not to take any steps to inform the father of the child's birth or adoption. The priority was to find a permanent home for the child, who was four months old by the time of the hearing, without any further delay.

The Revised Adoption Convention's Explanatory Report emphasizes that the lack of a consent requirement relating to a parent without PR 'does not mean that such a parent should not be informed, as far as possible, of the adoption proceedings'. In *Re C*, however, Lady Justice Arden was to some extent influenced by the lack of a consent requirement relating to the father. She regarded the case as 'exceptional', and it is unclear why she did so. It may have been a case where the mother did not disclose the pregnancy to the father simply because she wanted nothing further to do with him.

If the father in *Re C* had possessed parental responsibility, of course, his consent to the adoption would have *prima facie* been required. There is divergence across the legal systems in Europe on the circumstances in which a father may obtain PR, with around half of the European jurisdictions automatically allocating it to both parents, regardless of their relationship.

In England and Wales, however, a biological father who is not married to the mother of a child does not currently obtain parental consent automatically. The most common way for him to do so is to be registered on the child's birth certificate and most are now so registered, and there is further reform being undertaken to make such registration almost mandatory. For the time being, biological fathers like the one in *Re C* are left ignorant of their child's adoption which I would argue is objectionable in a lot of circumstances. The result in *Re C* was arguably mother-centered with potentially detrimental consequences for both the father and the child. The lack of a consent requirement relating to some unmarried fathers both illustrates and perpetuates the idea that the relationships of such individuals with their biological children are presumed to be less important than those of birth mothers. I would suggest that a more balanced approach between the rights of mothers, fathers and children is necessary.

Allow me to conclude. I have argued that the circumstances in which parental consent will be dispensed with and related procedural requirements may leave doubts as to English adoption law's compatibility with the Revised Convention because of a disproportionate focus on child welfare. But I have also highlighted an area where domestic law is more clearly in line with the Convention, and yet there is potential for injustice. Given the increasing numbers of children born outside of wedlock, perhaps it is time to give more recognition to the parent without parental responsibility in the adoption process, both domestically and on a European level.

Patrice Hilt

Thank you for that contribution Mr Sloan. It really gave us a high quality overview of the different issues relating to adults and biological parents in the adoption process. Now who can adopt? This is a big source of debate as well with views changing from Member State to Member State.

Who can adopt?

Taking into account societal changes

Robert Wintemute, Professor of Human Rights Law, King's College London, United Kingdom

Just in case you are watching the webcast on the Council of Europe website and get a close up of my face, yes, it is true, one side of my face is shaved, and the other is not. This is not a new fashion trend, but this morning my electric razor died, suddenly in the middle of the process... a friend at breakfast suggested that I explain it this way: the clean shaven side represents the genetic and legal parent, and the unshaven is the non-genetic, social parent of the child who has no legal recognition.

The title of my presentation is: "*Who can adopt? Taking into account societal changes*". This conference is about insuring the best interests of the child, and this is insured by making the pool or class of potential adoptive parents as large as possible. That was certainly the intent behind the UK government 2002 reform. And this means, when we are talking about unmarried individuals, that it is actually rare to find an exclusion of a particular class of people in advance. However, social prejudice can lead exceptionally to exclusions, and I can give you the only example I know of in the entire world of this particular exclusion which is from the State of Florida. In 1977 a law was passed which says "*no person eligible to adopt under this statute may adopt if that person is a homosexual*". That is the law in the State of Florida. Apparently, they have no other comparable exclusions. You can be convicted of a serious criminal offence etc., but this is the only one exclusion. There are various constitutional challenges in the process and it leads to very unjust situations. Lesbian and gay individuals are allowed to foster children in the State of Florida. So you have children who have lived with lesbian and gay parents for many years and the parents would like to adopt them but they are not allowed to. And the children constantly live under the threat that the State

is going to decide to take them away from their foster parents and have them adopted by someone else. As one commentator summed up this Florida law, 'better no parent than a lesbian or gay parent seemed to be the view of the Florida legislator at the time.' That is a highly exceptional law.

However, in France, the highest administrative court effectively created case law permitting administrative officials to refuse to allow lesbian and gay individuals to adopt. If they disclosed that they were lesbian or gay at the beginning of the adoption process instead of hiding their sexual orientation, their applications would be rejected. They would be turned down as potential adoptive parents. The French court made its decision clear in the case of Philip Frette in 1996.

About the same time, the courts in England and Scotland were reaching the exact opposite conclusion. So in France you have a civil code that says any adult over a certain age may adopt and the court interpreted an exclusion based on sexual orientation that is not in the civil code. In England and Scotland the courts interpreted that, as the act said nothing about lesbian or gay individuals, therefore they are eligible to adopt.

Philip Frette took his case to the European Court of Human Rights. I actually argued the case for him before the court, and the ultimate vote was that three judges found that this was discrimination, contrary to the Convention, one judge found that it was not discrimination, that the difference in treatment was justifiable, and three judges abstained on this question. They did not express an opinion, but said that for technical reasons Article 14 of the Convention was not applicable. So it was a divided court and a rather unclear decision.

However, in a second case *EB v. France*, a lesbian woman who had been turned down as ineligible to adopt a child, took her case which was ultimately heard by the Grand Chamber of the court, I represented third party interveners, for non-governmental organisations (NGOs), in that case, and advised Ms EB's lawyer. The decision of the court on the principle was 14 to 3 that this is discrimination, contrary to the Convention and that the excluding lesbian and gay individuals from the opportunity of adopting a child in countries where unmarried individuals are eligible to adopt children is discrimination contrary to Article 14 of the convention, combined with Article 8, respect for private and family life.

On the facts of the case, the vote was actually ten to seven because some of the judges thought there was another legitimate reason for turning down her application. After the case, Ms EB reapplied for permission to adopt and was turned down again by the Department of Jura, an incredible decision. Her lawyer challenged it in the administrative court and, on 10 November 2009, the decision

was quashed and she has now received her preliminary approval to adopt, after nearly 12 years fighting for that. Combined with Frette's case a total of 18 years to change this policy.

The position is now clear for 47 Council of Europe Member States. If any country allows unmarried individuals to adopt, then they must not exclude lesbian or gay individuals. I must stress that we are talking about equal access to the opportunity to be considered as a potential adoptive parent of a child, not a right to adopt, as that does not exist and is an impossibility.

Now, in its judgement in *EB v. France*, the court implicitly rejects all of the arguments against allowing lesbian and gay individuals to adopt, but does not actually expressly address them. I will cite four different kinds of harm that could be cited as reasons for not allowing a lesbian or gay individual to adopt:

- risk of the child being sexually abused or otherwise physically harmed – it is insulting even to make that argument, to suggest that lesbian and gay individuals are different from other human beings who will love and care for a vulnerable child, but I mention it because it is part of deep seated social prejudice against such adoptions, especially regarding gay men;
- the child will grow up with psychological problems being raised in this unusual family situation – there is no evidence in the several studies carried out in this area in different countries (USA, U.K., Spain);
- the child will be raised to be gay – there is, I would argue, a strong analogy between sexual orientation and religion, in the sense that it's invisible and it's hard for other people to understand, but in this respect there is no analogy: religion is part of culture that is transmitted from parent to child, parents teach the child about religion, but that is not the case for sexual orientation. No one knows the cause of sexual orientation, but it is not parental teaching. In fact, the vast majority of lesbians and gays are raised by heterosexual parents. And according to the study, the majority of children raised by lesbian mothers are heterosexual;
- prejudice of third parties – teasing and bullying in school, stigmatisation in society. In anti-discrimination law we generally never accept this as sufficient justification for discrimination. In school, for instance, children are teased for all kind of reasons, but this not a ground for denying adoption. In a famous decision of the US Supreme Court *Paul More*, a white mother married an Afro-american man and the custody of the child was taken away because of the racial prejudice. The court said that the law cannot stop prejudice but it must not give effect to it.

We now turn to the question of adoption by a same sex couple and this arises in two contexts. One, where the child is the legal child of one parent who has a partner. May the partner adopt the child and become a second parent,

particularly when there is no other living parent? The second context is where a same sex couple wishes to adopt an unrelated child, jointly at the same time.

In a few Council of Europe countries adoption by a married, different sex couple is the only form of adoption. There are other countries such as France where there is adoption by an individual but only married different sex couples may adopt jointly and each other's children.

The main point of my presentation is that the linkage between marriage and the right to adopt jointly, or the right to adopt a partner's child should be ended, because it's actually in the best interests of the child to be adopted, in many situations, by a couple who is not married. Looking at changes in legislation in both Europe and the US, there are more countries now in Europe where a child can have two legal fathers or mothers, than countries where a same sex couple can marry. In fact there are 10 countries (the five Nordic countries, Netherlands, Belgium, Spain, Germany and the UK, excluding Northern Ireland) where a child can have two legal fathers or two legal mothers, but there are only five countries where a same sex couple can marry. In the US it's similar, there are only four States where a same sex couple can marry, compared to ten or more States where they can adopt.

The changes in society are reflected in the new Article 7 of the revised convention which says *'the law shall permit a child to be adopted, a) by two persons of different sex who are married to each other, or in a registered partnership if that exists, or by one person'* but Article 7 (2) says *'states are free to extend the scope of this convention to same sex couples who are married or in a registered partnership, and to different and same sex couples who are living together in a stable relationship'* so this goes beyond the different sex married couple.

With couples the main issue would be stability. A State would not want a child to have a relationship with two parents if there is no stable relationship between them which will lead to disputes about custody etc. Marriage is treated as evidence of stability, but other evidence does need to be considered, registration, co-habitation etc.

As for the best interests of the child, allowing an unmarried couple to adopt jointly is merely reflecting the reality of the child's life. The child is not going anywhere. The question is whether it is better for the child to have one legal parent or two legal parents. And most legislators and judges conclude that it's better to have two. This means two sets of inheritance rights, financial support, pension rights etc, and also in day to day life it's very difficult for the parent who has no legal relationship with the child in connection with schools, hospitals etc having no parental authority whatsoever.

Two same sex parents is something new, but we will get used to it, as we have learned to accept a woman as captain of an aircraft. This is an area where governments should

lead society, rather than follow public opinion. Public opinion polls are based on prejudice, not on evidence.

To conclude, I would like to put a human face on this question. I am a gay man and have lived almost my whole adult life without the possibility of marriage or access to joint adoption. Fortunately in December 2005 the legislation changed in England and Wales, the Adoption and Children Act 2002 and the Civil Partnership Act 2004 came into force. So I was able to enter into a registered relationship with a same sex partner, even though it's not called marriage, but it is better than nothing and now in the UK any couple may adopt jointly.

Three years ago, I got a second chance at love, I met a wonderful man from Indonesia, we have a civil partnership, and in June his sister came to visit with her two children and it was a marvellous experience. So I'm hopeful that in the next couple of years we might get the chance to adopt and I'm now convinced that we could be excellent parents for a child in need of a family.

Patrice Hilt

Thank you very much for this interesting perception of possibilities for homosexuals to adopt and your overview of what's happened in different States. I noted that you have a deep knowledge of European legislation and case-law and I believe that in this area a comparative approach is essential.

Adoptive parents: changing the legal approaches – Ukrainian tendencies

Iryna Zhylinkova, Professor, Civil Law Department of National Law Academy, Ukraine

In 1991, Ukraine proclaimed itself an independent state. The major changes resulting from this have become the foundation for the start-up process of establishing the new role of the child. There are more than 9 million children in Ukraine. According to official statistics, more than 100,000 of these are deprived of parental care. This represents approximately 1% of the total number of children in the country. In particular there are orphans (who do not have parents) and other children deprived of parental care (whose parents are alive). Among them the number of orphans is relatively small with the majority of children, about 70%, being so-called "social orphans", meaning that their parents are still alive.

Adoption is considered in Ukraine to be the most acceptable ways of caring for children. So in recent times, the number of new laws concerning adoption have been enforced. During the process of amending the adoption legislation, one of the main questions asked was who had the right to become an adoptive parent and consequently which persons may not have the right to adopt children.

During the time when Ukraine was part of the Soviet Union, the list of demands for adopters was minimalistic. According to the law, a person only needed to meet three requirements to adopt, they were

- age of majority
- legal capacity
- being not deprived of parental rights.

Since the adoption of the new Ukrainian Constitution in 1996, the process of substantial changes has begun. The retrospective analysis of Family Law legislation shows the existence of two main tendencies in its development :

- the general elaboration and impetuous enlargement of normative rules concerned to the adoptive parent's characteristics;
- raising the requirements of the adoption candidates.

Since the years of independence, four legislative acts were adopted, stipulating new rules concerning adoptive parents. Therefore, besides the basic requirements in these new legislative acts, new requirements have been established. The new legislation stipulates seventeen new requirements for the candidature of adoptive parents. Almost all of them are invariable, meaning that they cannot be changed or ignored by the court in a particular case.

The nature of such requirements is different. According to legislative analysis, the respective requirements can be classified in five groups as follows:

- A general personal characteristics of the adoptive parent;
- B attitude of the adoptive parent to the child and upbringing of children in general;
- C psychological and physical health of the adoptive parent;
- D financial situation of the adoptive parent;
- E ability to provide psychological and physical security for the child.

A. The first group of these requirements concerns general personal characteristics of the adoptive parent. In particular there are named persons who cannot be adopters, such as persons of specific age, e.g. younger than 21 years, same sex couples, and, as a common rule, persons who are not married to each other.

B. The second group of requirements concerns the attitudes of the adoptive parent to the child and upbringing of children in general. At this point it is forbidden to adopt children for:

- persons whose interests are contrary to those of the child;
- persons deprived of parental rights if those rights were not updated, etc.

C. The restrictions classified to the third group concern persons who don't meet the requirements of psychological and physical health:

- persons limited in capacity and declared incapable ;
- persons who need special treatment in a psychiatric establishment, etc.

D. Requirements regarding the financial situation of the adoptive parent.

- persons who have no permanent residence
- persons who have no permanent income, etc.

E. The last group for adopters contain restrictions regarding:

- alcohol or drugs addicted persons ;
- persons who were sentenced for a certain categories of crimes, such as crimes against life and health, sexual freedom and sexual integrity of a person, etc.

Nevertheless, not all the legislative changes stipulating stricter requirements to the adoptive parents were indisputable. Some brought about strong arguments. Probably the most serious problems concerned the new rule included into the Family Code in 2008 on the difference between the age of a child and adoptive parents., which stipulated in the Article 211 of the Family Code of Ukraine 'the difference in age between the adopter and the child cannot be greater than forty-five years'.

Upon the enforcement of this amendment the Commissioner for Human Rights of Ukraine appealed on 5 August 2008 to the Constitutional Court of Ukraine with the constitutional appeal to recognize the unconstitutional character of these respective provisions.

The Commissioner emphasized that today in Ukraine there are 100,000 children deprived of parental care. In 2007 only 3,434 were adopted. The Commissioner also stressed that instead of doing the maximum to enable adoption, the new Family Code of Ukraine had become an obstacle to the realization of children's rights to education in the family circle.

In practice, this restriction means that 45-year-old men and women are prohibited from adopting new-born children, 46-year-olds from adopting children under 2 years, etc. However, it is generally accepted that adopters of this age are more responsible and morally ready for child-rearing. Thus, the introduction of amendments to the code prevents them from exercising this right.

It is widely known that the ex-Cancellor of Germany, Gerhard Schroeder, has adopted two children from Russia, a boy and a girl. The age difference between the children and the adopter constitutes 56 and 61 years. According to Ukrainian legislation, such adoption would have been impossible despite the fact that the adopter has all the pre-conditions to take the child into the family, and his wife falls within the stipulated age to adopt.

The Commissioner also considered it totally unacceptable that a situation where one spouse has the right to adopt, and the second, through this legislative provision, does not have it, deprives both spouses of the right to create a family.

Ignoring the arguments of the Commissioner for Human Rights, the Constitutional Court of Ukraine delivered a judgment in February 2009 whereby the mentioned age restriction for adoptive parents was recognized constitutional. According to the Constitutional Court, the decision stipulating the requirements to age difference between the adoptive parent and a child within the competence of the Parliament of Ukraine as the only legislative body. This competence is caused by the responsibility for the fate of orphans and children deprived of parental care according to principles of relations between parents and children established in the Constitution of Ukraine.

It is important to mention that the judgment of the Constitutional Court was not delivered unanimously. Three of the eighteen Commission Court Judges made minority reports on this issue of not agreeing with the judgment of the Court.

There are some reasons for such legislative prescriptions of the new family legislation of the Ukraine. The fast enlargement of legislative conditions concerning the candidacy of adopters and the raising and the elaboration of requirements stipulated in the legislation for the adopters, have various reasons.

These reasons are of a positive and negative nature.

The positive reasons there can be named as follows:

1. Raising the requirements which the adopter has to meet is meant to guarantee the children's rights, provide child care, eliminate any possible threat to a child's life, one's mental or physical health when handing over the child to a new family.
2. The other positive factor is that Ukraine makes essential efforts to create legislation which would answer the modern needs of a democratic state. The Family legislation of Ukraine does not contain any discrimination norms and provisions meets all the European standards. On this point, the appraisal of the requirements for the candidacy of the adoptive persons meets the general tendencies of securing the best interest of the child.

However, there are some negative factors which influence the development of the legislation:

1. First of all, the political influence has to be mentioned. Politicians at different levels often speculate on the idea of giving the preference to national adoption (NA) rather than international adoption (IA). Not taking into account the real needs of the child, they protest against IA using slogans such as "We won't give up Ukrainian children to foreigners!" etc. This question becomes popular today, a few months before the upcoming presidential elections. This year, the new legislative draft has been passed to the Parliament in which the moratorium for IA is stipulated.

2. There is one more negative factor. Upon the declaration of its independence, Ukraine began the opening-up process towards Europe. This had results also in the field of adoption. In recent times, foreigners from different countries began to apply for adoption of Ukrainian children. Some organizations and separate persons have also appeared, willing to render commercial services in the sphere of adoption. Adoption in Ukraine can be accomplished exclusively by governmental agencies which have the respective competence. Any intermediary or commercial activity directed at adoption is forbidden. However, in practice the process of IA has a commercial nature. It is widely known that Ukraine has become the donor of IA. Thus many mediators offer their services in this process.

The General Prosecutor of Ukraine has made repeated reports on the fact that the information on adoption has become a tool of trade. There were a few resonant cases connected to illegal IA. For example in 1992 a criminal investigation took place into the case where 124 Ukrainian orphans were brought to the USA for medical treatment and 56 of them did not return and their whereabouts are unknown. Ukrainian society is very worried about such situations. Every instance of children's rights violation, especially connected with IA, has a wide resonance.

Financial interest of certain persons or organizations makes it difficult to confirm equity and transparency in the process of adoption.

Therefore, legislative restrictions and special requirements stipulated in respective acts on adoption are meant to secure the child's safety and social interests. Yet Ukraine is making great efforts to make legislative norms work in practice and guarantee the observance of children's rights.

To conclude. I can say that Ukraine is now experiencing a fast growth of quality legislation on adoption. First of all, the legal novelties concern the person of the adoptive parent. Implementation of new requirements which an adopter has to meet are the result of positive and negative reasons of an objective nature.

Patrice Hilt

Thank you indeed for telling us about the new Ukrainian legislation which we have seen really clearly regulated in detail for the adoption process.

General discussion

Helene Labbouz, France

I have a question for Wintemute, about the case you talk about in Besancon, can you please explain it again? it was going before the European court and then the court in Besancon didn't want to execute the case?

Robert Wintemute

Yes, it's an interesting example of execution of a judgement of the European Court of Human Rights. Normally what

should happen after the court declares a violation is that the government of France, in this case, must first show, must demonstrate to the Committee of Ministers in the Council of Europe that they paid the compensation that was awarded to Ms EB and what steps have been taken to make sure that this will not happen again, whether this involves change in legislation, instruction to administrative officials etc. I'm not sure what, if anything, the French government has done in that regard but one would think normally what should not happen again is that the individual applicant shouldn't suffer the same problem, so it was actually quite shocking that she had the courage to re-apply after her long struggle and she was rejected again. And with due respect, I would say this is partly the fault of the court. Some of the judges said that one of the reasons given in her case was legitimate, her partner was not sufficiently interested in the adoption, which was an unfair reason to give because the partner was not going to have any legal rights, and also if the partner emphasised their relationship, basically sat on the sofa and kissed and hugged Ms EB during the interview with social workers, the risk is that they would reject the application altogether. So they're in a no-win situation, but because of that when she applied the second time, despite favourable opinions from psychologists, social workers, all those involved, the actual departement itself took the decision to reject her application because of some minor disagreements in the interview with EB and her partner, perhaps as to the age of the child they'd prefer, I'd have to look up exact details. But really going down to look for tiny little excuses to reject their application. And this is what happens in discrimination, once overt discrimination is prohibited it can go underground, so instead of saying 'You can't adopt because you're a lesbian', they say 'Hmm, we don't like your apartment, it's not suitable for a child' so there are very easy ways to hide discrimination which I think is what happened in this case. But EB's lawyer actually wrote to the committee of ministers and started a case in the administrative court in Besancon. And fortunately the court of Besancon found that the decision was illegal, and the departement decided not to appeal and the 'agrément' was issued.

Marco Griffini, Amici dei Bambini, Italy

I have a question on the possibility of adopting by homosexual couples. Anyone who works with minors who are abandoned knows that one of the major problems they have is the construction of their identity, as there isn't any clear parental figure and the minors do not know with whom to identify themselves, a father or a mother. Adoption resolves this problem in most cases. So my question is, are we truly sure that adoption by a homosexual couple is successful in solving this problem of the construction of identity of a minor, or could it be, on the contrary, an obstacle in the perspective of the best interests of the child?

Robert Wintemute

I think the problem you are referring to is a separate problem. Being an adopted child is difficult, an extra challenge in society. I'm not an expert on this issue but my own impression is that it's just a difference because living in a society where most children are not adopted, and you are adopted that sets you apart and you have to ask yourself 'why?', 'was there something wrong with me?', 'was I a bad child?' etc, 'where are my roots?', there's the sense of loss of identity. In fact, I think there's too much emphasis on genetic origins in society, and actually this emphasis can be the root of racism, because it assumes that people we are genetically connected to are closer than others, but I think that is an entirely separate issue. I do not know of any evidence that this problem is worse for children adopted by same sex couples. So I don't think that it's a reason not to allow adoptions by same sex couples. I would also say that it's important in these debates to remember that the assumption is that there is this perfect married different sex couple waiting to adopt the child and that that is what should be done, and if that option isn't available then no adoption whatsoever, but I think the reality for many children in the world, especially outside of Europe, that the options are adoption, possibly by same sex couples, or no adoption at all. So, ultimately, you have to ask yourself: is it better for the child to have two mothers, or two fathers, or no parents at all?

Melita Cavallo, Italy

I believe that it might depend on the age of the child. If the minors are eight years old or so, they might find it rather difficult to be in a family with a homosexual couple. If the children are very young, perhaps it won't be so difficult.

Robert Wintemute

Interestingly, you mention the question of age, I can recommend a film to you 'Patrick 1.5' produced in Sweden, I don't know if you've seen it. Two men try to adopt a child and they receive a letter saying that Patrick 1.5 is going to be placed with them and they're delighted and it turns out that it's Patrick aged 15, and he has a history of knife crime etc and he hates being placed with them and says 'I'm not going to be with these horrible gay fathers, no way!' It's a very touching film, but I can see there might be some resistance by the child, they might be more aware of prejudice against same sex parents, but at the end of the day the child wants someone to love them and take care of them, and I'm sure if they're coming from a bad situation, of foster parents or a state home, they would probably be very glad to be adopted by two women or two men, and that's in fact what happens: there's a happy ending in Patrick 1.5 and, despite his initial resistance, he's glad to have been adopted.

Pia Brandsnes, Euroadopt, Denmark

This is not a question that has been discussed in Euroadopt, but I would like to share my personal opinion. Regarding the identity thing, I just think that any adopted child will

struggle with identity, some of them a lot, some of them a little, I think parents' sexuality will have whatever influence on that, but the struggle will always be there. We cannot remove it. It's just part of life of being adopted, and I say that as being adopted myself, but I find it interesting that we do adoptions because the children need parental care and we always try to assess the parent's ability to give parental care as the first thing in order to accept them for adoption. I think it's very interesting that this is not the first thing in the case of homosexuals. I don't understand frankly why sexuality becomes more important than parenting ability. In fact we all agree that sexuality should never come into contact with the child, so I just wonder why parental ability is not the most important thing?

Brigitte Siebert, Central Authority of Northern Germany

I would like to point out that we have to make a distinction between the fight for legal rights for same sex couples, which is a thing that should take place, and the situation of the children. The situation is not, as you pointed out, that there are many children who can't find parents so I think that there is no real need to enhance the numbers of people looking for children to adopt. On one side, discrimination of same sex couples should be ended and they should have the same rights, but if we look at the best interests of the child, there is no chance for same sex couples to compete with heterosexual couples because as long as we have discrimination in this society against homosexuals, it will be another challenge for these children. As you said, they have the extra challenge of being adopted, and then they have another challenge to be adopted by a couple that experiences discrimination.

Arun Dohle, Against child trafficking

I'm researching adoptions and child trafficking for the purpose of adoption. I'm also an adopted person and I would like to ask Wintemute. I was amazed to hear the story of the Indonesian child which you are trying to adopt, did I get this right?

Robert Wintemute

Yes, a child, but no specific country or child or anything like that yet.

Arun Dohle

Often children who are made 'adoptable' do have parents. I'm very concerned that most of the children who are adopted are not real orphans, they have parents, so the right of the child in the first place is to stay with the birth family.

Robert Wintemute

Responding to the point that we should not place children with same sex parents because of the prejudice experienced by the parents because that is bad for the child, I don't think that we would make that argument or would accept if for any other sort of discrimination, if the parents are Jewish, or Muslim, or Turkish, or of different races etc,

or religious minority, that argument would not be used so I don't think it should be used exceptionally in this area.

As for the idea of 'competition', for married different sex couples in Europe for a small supply of babies available for adoption. I have two responses: one that this idea of limited supply fails to take into account genuine orphans in other countries who might be available for adoption, and also older children. One reason behind the UK's legislation 2002 is that the government there takes the view that it's better for a child that is two, four, six, eight years old who has parents, but whose parents cannot care of them for whatever reason, drug addiction, all kinds of problems, it is better for that child to sever that legal relationship and put them in a stable home in terms of their life prospects than to try to maintain the link with the birth parents. That is not policy in every European country I know.

And then again returning to the question of discrimination, the fact that there's a limited supply of children doesn't mean we should discriminate in deciding who has access to that opportunity. Only 47 people can be judges at the European Court of Human Rights, out of hundreds of thousands of lawyers in Europe. But if women are not allowed to be judges, that's an issue of discrimination so I don't think the supply should be relevant.

As for International Adoption, I understand that there is a problem of children having parents and even the parents being misled as to what's happening to the children when they're placed with an orphanage etc and definitely that's something that should be combated. If and when my partner and I adopt a child, and if and when the child is from another country I would want to make sure that the child did not have living parents, or that the parents had consented to the adoption.

Joan Hansink, United Adoptees International, Netherlands

I'm really concerned that this whole discussion is focussed about discrimination. Where is the place of the child? Where is the best interest of the child? The statistics show that at this time there are 50 couples, heterosexual, for one adopted child. I'm adopted also, and I know from personal experience, and that of many other adoptees, that it's very difficult to grow up as an adoptee. And why do we also put children in this 'special' situation with gays and lesbians if those people don't want a special position? I hope I made myself clear. That's my concern.

Robert Wintemute

Well, I could say to you, perhaps in your country someone might say to you 'You are from an ethnic minority and that would be an added difficulty for the child therefore the child should not be placed with you.' Would you think that was fair or discriminatory?

Joan Hansink

If it's in the best interests of the child I would agree. I'm from the Netherlands and we are a very, very liberal country, but I don't think the discussion is about discrimination, the interest of the child must come first, and equal treatment for gays and lesbians is not what this conference is about.

Robert Wintemute

I think if the question were racial discrimination you might have a different opinion. If the Netherlands passed a law tomorrow that only white, married, different sex couples may adopt children because it's in the BIC you would object to that law.

Joan Hansink

No, you are wrong because in Holland it's possible to adopt in America. It's the only country in the world right now where they can adopt. We have many celebrities who adopt and they are like an example for other couples. You were saying that there is not much research about children grown up with gays and lesbians, there is a lesbian professor Laura Briggs, I can give you her report, and she has investigated those children.

Robert Wintemute

You keep avoiding the question. I asked you to compare racial discrimination, if the Netherlands said only white, married, different sex couples in the Netherlands may adopt children you would have no objection to that?

Joan Hansink

Yes, if it's in the best interests of the child.

Robert Wintemute

Do you think it's in the best interests of the child, let's say, that a white child should never be raised by a mother of east Asian origin, is that your position?

Joan Hansink

No, I didn't say this, and that's not the discussion.

Rosemary Horgan

Might I share with you that in the working group this was equally a controversial topic, we had very lively sessions, and 17 of the 23 replies to questionnaires, on this topic were not in favour of the concept. Having said that the working group felt that we should have some flexibility on it, because large numbers of countries allow and permit adoption as to the BIC. Because it is the reality for some children that they are growing up, being raised by gay and lesbian couples and if that is their reality on a day to day basis it seems rather strange not to allow them to be adopted by those couples. So, as you can see, it is a topic where we have to have a little bit of flexibility on it. And also I would say that the revised convention does not oblige any country to introduce this concept in your national laws, so a level of subsidiarity exists.

Session III - Access to one's origins: striking the right balance

Chair – Irma Ertman, Thematic Coordinator on Children for the Committee of Ministers, Ambassador Extraordinary and Plenipotentiary of Finland to the Council of Europe

This morning we have heard very interesting interventions on the position of adults and children in the adoption process and now we will move to a more specific topic, access to one's origin. Professor Lowe mentioned this morning the severance principle, that in principle all ties with the family of origin will be cut, but also he was pondering whether that was too definitive. Do we need some leeway in this matter? Is knowing one's origin a human right? And what are the conditions of access to this information? How do we assist the child, or a more grown up person, with this situation? During this session, we will have four speakers, who will approach this issue from different angles: legislation, human rights, psychology and the experience of an adopted person.

The example of French legislation

Marianne Schulz, Lawyer, Directorate of the Person's and Family's Rights, Ministry of Justice, France

I'd like to talk with you about the French experience of finding out about one's origins. You probably know that France has a special particularity with regard to the most part of other countries and that is that in France anonymous birth is allowed. This is in fact intrinsically linked to the problematic of access to origins so I'm going to speak of the two things together, because I believe that the whole question of access to origins cannot be understood without taking into account the specificity of the French situation.

Anonymous birth is a long-standing practice in France, going back to the seventeenth century, with the "wheels" which have been replaced in certain countries by "baby boxes" where you can put the baby in a hatch and the inviolable anonymity would be preserved for the mother. Also the French Revolution recognized this right. Normally a bell alerted when a baby was left on the wheel, so that it could be immediately collected and be safe. There has been various legislation in the course of the years to deal with the issue, but the principle of the anonymous birth was never questioned.

At the beginning of the 20th century, the wheels were replaced by open offices, where the mother could hand over the child anonymously and receive some information and counselling. So legislation has never challenged this possibility but the law has been slightly modified accordingly to the societal changes.

Only since the 90s a public debate has emerged on this issue. There have been claims made from people who were

born under the cloak of secrecy, these children 'under X', who, once they became adults, found that they couldn't have access to their origins, knowledge of their birth parents and their identity. And the birth mothers, some of them bore witness to the suffering they had gone through without knowing what had happened to the child. This debate gave rise to work in the 90s to amend the law in order to have the mother's identity recorded and facilitate the access of the child to his /her origins without her being forced to do so.

The new law of 22 January 2002 was unanimously adopted by Parliament, after lively and complex discussions in the Parliament and the media, and is the law regarding to access to personal origins of adopted persons and wards of State.

This law has different aspects: on one hand, it makes it possible to have anonymous birth, but it facilitates also the collection of data on the identity of the mother, so it does make specific provisions for it. On the other hand, the law establishes a body responsible for finding out one's personal origins: the National Council for the access to personal origins (CNAOP). This body has the task to collect information and investigating cases of children born under anonymity.

Concerning the anonymous birth, the Family code foresees that in France a woman may ask for her identity not to be divulged, thereby giving birth without giving any identity documents. The law of 2002 has made certain provisions, firstly to provide information about the mother, and also to collect a maximum amount of information so that social and psychological backup can also be provided to the child. This is given by a professional specifically trained, who explains to the mother the legal consequences of her decision, her rights to recover the child, the importance of a child knowing their origins and she is invited to provide non-identifiable information about her history, health, the father, and reasons for anonymity. So after all this information is provided, it is a deliberate choice for the mother to give the information.

She may put in a sealed envelope for the child her identity which may be given only to the child later on if he or she requests this personal information. The cloak of secrecy means that there is a birth certificate at the Civil Status Registry, but without the mother's identity. The number of anonymous births has dropped considerably as compared with the 60s, and is now 500 – 600 per year. A survey has demonstrated that half of the mothers do leave identity either in the file of the child or in a sealed envelope, and about a quarter leave an object for the child, 10% leave a letter, and only a quarter who leave nothing for the child.

Pursuant to the 2002 Law on the access to personal origins, anonymity can only be asked for at the time of the birth, and not once the child has been born. Prior to 1996, on

the contrary, both parents, or one of them, could ask for anonymity during the minority of the child and entrust the child to the Social Services After 1996 this was possible only until the child was one year old, and since 2002 only up to the birth. If the mother changes her mind on being anonymous, she can send a letter to the Council but her identity will not automatically be communicated to the child, except if the child so desires. If the child doesn't ask, she will never know.

Now the child. Once born anonymously and handed over to Social Services or possibly a private body or agency, there will be a two month period where either of the parents may recover the child without any other formality than having proceeded to the formal recognition of the child, in order to establish filiation. After two months, the child becomes a ward of the state definitively and may then be adopted.

Once the child has been placed in a family for adoption, no further claim by the birth parents is possible. In the best interests of the child it is felt necessary to find a family, as soon as possible, in which he or she will be accepted and therefore there is a guarantee for the placement of the child. This usually takes three months or so from the birth.

The father, in this set-up, has a right under the law, though in practice it may not be that simple to exert it. For a long time, case law was hesitant in France about recognising whether a father could claim a child born "under X" to raise it. There was a divergent jurisprudence on the matter end of 90's. In a case of 1997, the Appeal Court of Riom, in the Auvergne, felt that this recognition could not have an effect because it concerned a child whose mother was never supposed to have given birth. In other cases, case-law admitted this recognition by the father. In its judgement of 2006 the Cour de Cassation has solved the issue, by stating that recognition could be acceptable as long as the tie of filiation had been established before placement of the child in a family for adoption.

The identification of the child by the father could be complicated by the fact that the identity of the mother is not known.

The 2002 law foresees that, in this situation, when the father encounters these difficulties, he can address the Public Prosecutor asking him to carry out an enquiry in order to identify the child, its place of birth, and then recognising this on the birth certificate. Even with only 500 – 600 of these births a year, this could be a difficult task. This is a serious obstacle for fathers despite the law that exists. This is one of the criticisms against this legislation.

The child may have wanted to know his origins, and we see an increasing number of claims to do so. And this goes further than knowledge of the parents, it's the history, the reasons for abandonment etc, and the law allows for the

child to request access to details of personal origin once they've reached the age of discernment. This gives rise to further difficulties, because it's difficult to assess, not just about age of majority, but age of discernment as perceived by their adoptive parents. A request is submitted to the National Council for personal origins, this new body that was set up under the law of 2002, attached to the Ministry responsible for Family Affairs.

The Council was established in September 2002. It has 17 members made up of different administrations concerned, departments, and associations representing adoptive families, women's rights and adopted persons and wards of the State fighting for their right to information. The Council is consulted on relevant proposals, takes charge of investigations, but isn't a permanent body but rather people coming to meetings every 2 – 3 months, supported by a general secretariat of 7 – 8 staff. The Council also have special delegates who are specially trained to investigate the particular cases, and they try to find the mother or the father because previously, as I said above, the father could also ask for anonymity even once the filial tie had been established, but usually it's the mother.

As the mother is found the delegates approach her to talk about her privacy and the right to private life and she may or may not accept disclosure to the child. At the moment of the mother's death, the identity will be communicated to the child unless she has expressly precluded this.

The number of people which has asked for the access to origins is anyway low: around 4% of persons potentially concerned.

Despite anonymity it's possible to identify the mother in about half the cases. (Figures are given on our website). In about 70% of cases the woman who has been approached does agree to disclosure to the child.

The law has been criticised and challenged because it is felt that it doesn't sufficiently protect the rights of the child because it only provides a possibility for access to origins, and not a right, and because it doesn't protect the rights of fathers and other members of the family e.g. grandparents who have no rights at all.

In the last three years, there have been various proposals to move away from anonymous birth towards 'protected' birth, which means the mother would have to give her identity and then there would be automatic communication to the child once he or she had reached the age of majority and has made the request to access to his/her origin. But there is no unanimous support for this and there is some criticism, particularly with regard to public health and protection of the mother and child when birth takes place, because some people feel that, if we were to go back on that possibility of anonymous birth, then some women would not go to the maternity hospitals but they might just give birth in the street or without proper protection.

But if there should be a development, then we must bear in mind that, in this difficult situation, we should find an acceptable solution taking into account the public health imperatives, the rights of the child and the mother, and also the certainty of the adoptive filiation.

Access to one's origins as a human right **Dragoljub Popovic, Judge of the European** **Court of Human Rights, Council of Europe**

Mater semper certa est: the old rule of Roman law based on a biological fact of giving birth does not seem to apply in our times, or at least it does not apply automatically. In spite of having given birth to a child the mother may remain unknown in terms of law. An ancient tradition in France, as we have heard, has survived to this day. In order to prevent infanticide and abortion, French legislation allows the mother to give birth anonymously and avoid being registered as such for legal and administrative purposes. Only a few countries followed the French pattern in this respect. Those are Italy and Luxembourg.

On the other hand, there are countries in which the parents have a statutory obligation to register as such e.g. in Scandinavian countries. There are also countries like Belgium and Hungary that allow mothers to give birth discreetly although not completely anonymously. This is close to the practice taking place in Germany in some of the Länder, where the so-called "baby boxes" have been instituted, giving the opportunity to mothers to abandon the children they give birth to and remain unknown.

This overview shows that comparative law is divergent on the subject. In some countries it is the right of the child that prevails, whereas in others the rights of women are favoured. The question may therefore arise, has a child a right to know who his mother or father was? Or, in other words, is there a right of access to one's origins under the European Convention on Human Rights?

Our story goes back to the 1960s and takes place in Paris. A man and a woman who were co-habiting already had a child when a second child was born to them during their relationship. The man was employed and worked for a modest monthly wage. He had also been married to another woman and had a child with her. He therefore declared himself incapable of taking on a new burden in sustaining another child. The mother, who was unemployed and who was somehow given shelter by a lady she was helping at home, seemed to have no other choice but to go along with her partner's wishes. She abandoned her daughter and remained unknown to the child.

The sole language of the administrative act she had to sign to achieve such a way out of her mischievous situation is quite expressive. It says '*I abandon my child. I request that this birth be kept secret.*' More than 30 years later, the abandoned child, who had meanwhile been adopted (her name was Pascale Odièvre), began struggling for access to the truth and to learn her origins. She had lost her case

in France, before filing her application with the European Court of Human Rights. The Court first dealt with the applicability of Article 8 of the Convention. The Court's finding was that the circumstances in which a child was born form a part of private life guaranteed by Article 8 of the Convention. Therefore, the Court found Article 8 applicable to the case. The case was given a Grand Chamber judgement in the year 2003.

Although the Court found reasons for distinguishing this case from two others, it found those relevant for the ruling in this case. In *Odièvre* case, the applicant was trying to trace her mother who had expressly requested that information concerning her remain confidential. The two cases the Courts cited as relevant points of reference because of their similarities were *Gaskin v. UK* 1989, and *Mikulić v. Croatia* 2002. In *Gaskin*, the applicant, who had been taken into care at a very young age, complained of the failure of the administration to grant him unimpeded access to the information contained in his personal files. The Court found Article 8 of the Convention applicable to the case, and ruled by 8 votes to 6 in favour of finding its violation. The applicant's interest to receive information on his childhood and early development was in conflict with the confidentiality of public records. The Court's ruling was that '*the interests of the individuals seeking access to records relating to his private and family life must be secured when a contributor to the records either is not available or improperly refuses consent.*'

The crucial circumstance in *Gaskin* was that the applicant's mother had passed away and could not give consent for the applicant's access to his personal files. The Court's ruling was that the system restraining access to personal files could comply with the convention only '*if it provides that an independent authority finally decides whether access has to be granted in cases where a contributor fails to answer or withholds consent.*'

The Court was right to compare the *Gaskin* case to *Odièvre* because in both cases the issue was whether the administration should be allowed to withhold data contained in the public records. In *Mikulić* case, the issue was the duty of a Member State to the convention to enable an independent authority to determine the paternity claims speedily. The European Court of Human Rights ruled for the applicant, finding violations of various articles of the Convention and among those also a breach of Article 8. The applicant was a five year old girl complaining of the length of a paternity suit and a lack of remedies to compel the alleged father to comply with a domestic court's order for a DNA test to be carried out.

In both cases, the Court ruled in favour of an independent authority, competent to have a say in disputes at a national level so far as private life was concerned. In *Odièvre*, it was clear that the interests of the unknown mother and of the child were competing. The question was entrenched and

according to French legislation it was the mother's interests who were favoured.

There have recently been certain improvements of legislation in France, to encourage mothers to assume responsibility for their children, to afford access to certain information, and provide that the mother can waive confidentiality. However, the French system remains faithful to its basic standpoint being favourable to mothers and enabling them to be 'X' women, that is to give birth anonymously. The Court's attitude towards the competing interests was that '*the States must be allowed to determine the means which they consider to be best suited to achieve the aim of reconciling those interests.*'

At this point two other issues inevitably arise. Those are the fair balance, or proportionality, and the margin of appreciation accorded to the state parties to the Convention. Proportionality or striking a fair balance is one of the tests that the court frequently uses when rendering judgements. It appeared to be one of the most important issues in *Odièvre*. The judgement was rendered by 10 votes to 7, the majority opinion was expressed in paragraph 49 of the judgement where it was stated '*the French legislation seeks to strike a balance and to ensure sufficient proportion between the competing interests.*'

That was one of the major points of disagreement amongst judges in this case. In their joint dissenting opinion, the dissenting judges firstly put forward the necessity of examining whether fair balance has been struck between the competing interests. Their main finding was that the Court's task in this case was '*to perform a balancing of interests and examine whether in the present case the French system struck a reasonable balance between the competing interests.*' The dissenting judges were of the opinion that the French legislation hindered the fair balance test because of providing for a mother's definitive refusal which is binding on a child and leaving the letter without legal remedies to challenge the mother's decision. That is why the dissenting judges stated '*as a result of the domestic law and practice, no balancing of interests was possible in this case, either in practice or in law. In practice, French law accepted that the mother's decision constituted an absolute defence to any request for information by the applicant, irrespective of the reasons for or legitimacy of that decision.*'

According to the dissenting judges' opinion, the solution of the problem of striking a fair balance between the competing interests was to be found in the ruling in *Gaskin* which they exhaustively cited in paragraph 17 of the joint dissenting opinion. The kernel of the rule is that the system which makes access to records dependent on the consent of the contributor cannot be considered compatible with Article 8 of the convention unless it properly secures individuals' interests i.e. if the system provides that an independent authority finally decides whether this has to be granted

in cases where a contributor fails to answer or withholds consent.

Closely connected to the issue of proportionality, is the one of the margin of appreciation of the Member States of the Council of Europe being parties to the Convention. That was also a matter of dispute between the minority and majority of judges in the Grand Chamber who gave the judgment in the French case. The majority found that *'the Court considers that France has not overstepped the margin of appreciation which it must be afforded in view of the complex and sensitive nature of the issue of access to information about one's origins, an issue which concerns the right to know one's personal history, the choices of the natural parents, existing family ties, and the adoptive parents.'*

The dissenting judges contested the majority approach stating that the French legislation could not satisfy the Convention standards for the sake of several reasons. According to the legislation in force the mother was only invited to supply information. She could refuse disclosure, even after her death, and there was no independent body vested with the power to order disclosure of the data, preserving public records. Their conclusion was that *'the initial imbalance is perpetuated as the right to access to information about one's personal origins ultimately remains the mother's sole discretion.'*

The majority, however, ruled in favour of France, finding its legislation compatible with the Convention despite the fact that it favoured women's rights to the detriment of those of children. The *Odièvre* judgment thus grants a marginal appreciation to France in respect of its legislation.

It is to be noted that the Court has not had an opportunity to reconsider its position on the subject. The *Odièvre* judgment remains the leading case in the field and it should be noted that it did not have much echo in Court's case law. However, although there is a lack of identical cases in which this precedent would be followed, there were some in which similar issues were raised, *Jaggi v. Switzerland* (2006), and *Phinikaridou v. Cyprus* (2008).

In *Jaggi*, the applicant who had been placed with a foster family, met his mother when he was 19. The mother told him that the father was a certain A.H. The latter refused to undergo tests to establish his paternity, for it had already been established by a court of law rendered when the applicant was only 9 years of age, that A.H. was not his father. After the death of A.H., the applicant brought proceedings requesting a DNA test to be performed on the mortal remains of A.H. The Federal Court of Switzerland dismissed the applicant's claim, on the grounds that the measures submitted by the applicant appeared to be excessive in view of the principle of proportionality. The applicant complained before the European Court of Human Rights that he had been unable to have a DNA test carried out on a deceased person in order to ascertain

whether that person was his biological father. He allegedly suffered a violation of his rights under Article 8 of the Convention.

The Court found that a refusal to carry out DNA tests affected the applicant's private life. The peculiarity of this case is due to the fact that the recognition of biological paternity would have had no effect on the register of births, deaths and marriages. It appeared that the applicant's intention was merely to learn the truth about his origins. The court found for the applicant and declared that there was a breach of Article 8 of the convention. The Court's reasoning was that *'the preservation of legal certainty cannot suffice in itself as a ground for depriving the applicant of the right to ascertain his parentage.'*

The Court thus referred to the judgement rendered at the domestic level when the applicant was 9 years of age as to the main source of legal certainty. In the Court's view the right to know the truth prevailed over the reasons of legal certainty, as well as over the rights of third persons.

In the *Phinikaridou* case, the applicant was abandoned by her biological mother who had left her outside the house of a woman who gave her to Mrs Finicarido. The latter brought the applicant up. When the applicant was 52 years old, her biological mother, just before dying, revealed to the applicant her biological father's name. Shortly after, the applicant introduced proceedings for the recognition of paternity. Her claim was time barred according to the legislation in force. The applicant challenged the constitutionality of the piece of legislation providing the time-limit. The case was referred to the Supreme Court of Cyprus to rule on the constitutionality issue.

The Supreme Court ruled that the legislation in force did not infringe constitutional provisions. The applicant filed a complaint with the European Court of Human Rights, alleging that the statutory three year limitation period had prevented her from instituting proceedings for the judicial recognition of paternity. She invoked Article 8 of the Convention. The Court referred to its own rulings (*Odièvre*, *Gaskin*, *Mikulić* and *Jaggi*). It found for the applicant stating: *'she was deprived of this right (to bring proceedings) even though she was in a situation where she had not had any realistic opportunity to go to court at an earlier stage.'* The Court's finding was that, because of the absolute nature of the time-limit provided for by the domestic legislation, fair balance had not been struck between the different interests involved. As in many other cases, the Court used here the proportionality test to reach its decision. The fair balance test was performed by the Court in order to confront the right to know one's origins with the presumed father's right in being protected from claims concerning facts that go back many years, and those of third parties e.g. the presumed father's family. In the Court's view it was the right to learn one's origins that prevailed over other interests.

It seems to be clear enough that the conclusion of this rather short analysis should be that the right to know one's origins is guaranteed in the law of the Convention although it has not been mentioned as such in the convention text. It has emerged in the European Human Rights Law as an outcome of a wide interpretation of the scope of the notion of private life- I'm referring to paragraph 53 of the *Phinikaridou* judgement-. Such a stance of the Court's, which has been formulated in 2008, is a confirmation of the previous Court's attitudes, expressed in 2003, with a reference back to 1989. (*Gaskin*) It clarified the European Court of Human Rights position on the subject.

In 1989 the Court referred to a vital interest, protected by the Convention, in receiving the information concerning childhood and one's early development. As far as the wording is concerned, the Court seems to have overcome its earlier timidity in its recent judgements. The Court's bolder statement in favour of the right to know one's origin has found place in the *Jäggi* judgement as well. The Court stated in paragraph 37 of the judgement that the right to know one's origins was a part of the right to identity which formed an integral part of the notion of private life. In 2008 the Court summarised its position in *Phinikaridou*, explaining the jurisprudential origin of the right of know one's history.

What remains for discussion is the margin of appreciation. The Court has so far ruled in favour of a possibility of providing for a mother's veto, or her right to withhold consent for her child's access to data. *Dicta* of certain judgements which run counter to such an attitude are not convincing enough to make one conclude that the court's position in *Odièvre* has been overruled. It remains a rule.

A final remark should be made on what one might call a policy in the noble sense of the word. Whether the child's interests should be favoured, or those of the mother, is a question to which social developments will give a proper answer. They have so far been divergent. It is not only a matter of different traditions existing in various countries, but also a subject of dispute of social strata and various classes of population, relying on their opinions and interests.

Access to one's origins from a psychological point of view

Philip Jaffe, Professor of children's rights, Director of the University Institute Kurt Bosch, Switzerland

This presentation is only an approximation and not the actual experience of adoptees. That is because it reflects the viewpoint of a non adopted psychologist. As my presentation unfolds, here are some the key words which structure the content: identity, lack of information and secrecy, loss, fantasy, bewilderment, search for one's origins, and fiction.

Let me start off with the concept of «identity» from a psychological perspective. The great psychologist Eric Erikson's

definition of mature identity was '*a feeling of being at home in one's body, a sense of knowing where one is going, and an inner assuredness of anticipated recognition from those who count*'. Grotevant underscores this definition with the very clever assertion that '*the essence of identity is self-in-context*'. Three levels of interaction shape identity, those of self-reflection, family relationships, and wider social interaction.

Identity formation is a core developmental task for all children as they explore the boundaries of their physical self almost at birth, but also, from the very first instants of life, they enter into a relational frame, essentially with their birthmother, these interactions as well becoming essential building blocks of their identity. Identity, knowing who one is, where one is, who surrounds us, constitutes a crucial component of emotional security. What is striking about one's identity is that you and I, non-adopted persons, are able to answer the question '*who am I?*' through a fairly seamless process of reflection. Not quite the same thing for the adopted child, because being adopted is a non-normative characteristic, a non-adopted adolescent does not usually have any need to integrate the fact of not being adopted into his or her identity. This is clearly different from the adopted child or adolescent who can only answer the question '*who am I?*' with some degree of investigation. This is quite a different task than to look at who one is, to not have a readily available answer within, which creates the need, sometimes an intense burning need to turn outwards and set out to get answers.

Getting answers often has more in common with a quest than simply retrieving information from willing sources. Professionals who work with adopted children know that, outside of the practice of open adoption, secrecy and lack of information are still fairly common hoops that the identity seeking adopted child must contend with and jump through. Secrecy and lack of information can literally be a maddening experience. Some years back, in Massachusetts, I treated a young man by the name of David who had killed his adoptive father and nearly succeeded in killing his adoptive mother. His developmental history was fascinating. As the knowledge of his adoptive status gradually emerged at various cognitive stages of his childhood, and especially as he entered adolescence and actively sought answers, David's mental health had progressively deteriorated into an atypical psychotic state. Frustration and anger were his defining emotions and a feeling of being different in his core identity became a constant preoccupation. In fact, David developed unusual olfactory hallucinations and delusions that he gave away an unbearably bad odor that others were bound to notice and use as a pretext to distance themselves. However, even as David's mind disintegrated, the investigative quest for identity continued with sufficient goal-directedness and he randomly visited numerous adoption agencies, aggressively requiring baffled and scared front office staff to fill him in on the blanks of his identity and genealogy.

The human need to construct one's identity, to feel at home in one's body, pushes a majority of adopted children to embark on a restless search for answers about their origins. They will encounter many dead ends, starting with their adoptive parents who may not want to share information or, it is sometimes pointed out, for whom it is hurtful that their adoptive child searches for his or her origins because it implies a form of rejection of the new family they aspire to maintain. It is therefore vital for adoption staff to prepare adoptive parents during the pre-adoption stages so that they may anticipate their child's search for his or her origins. As stated, after adoption, almost all adoptive parents must deal with their child's persistent questions regarding his or her origin. And while some parents who feel secure enough to answer questions and facilitate this process can truly be cited as successful models of common sense, many adoptive parents struggle and fumble, for answering a child's questions is indeed at the very least a most delicate process which must balance accompanying the child at various stages of his or her emotional and cognitive development, but also not go beyond some form of tipping point beyond which the adoptive parents undermining the adoption graft, avoiding a forward-looking stance and being dragged down by guilt.

As the adopted child keeps questioning and his or her search intensifies, and depending on the adoptee's developmental stage, there is a curious process that gets under way, intertwining the acknowledgement of loss, mourning and the active production of fantasy to make up for the various forms of loss and to compensate for the accompanying unpleasant emotions. That is because loss, to state the obvious, is a central experiential element that adoptees must mentally metabolize and accept, not only the loss of their genealogical continuity and the physical proximity of their birthparents, but also the sense of unquestioned belongingness they had enjoyed until then in their adoptive families, as well as, in the case of transracial adoption, the loss of cultural continuity. And to use a wonderful formula I am unsure of who to attribute to: *"The shape and the extent of the loss is itself unknown"*. So, most often, after many questions and a frustrating quest, adoptees discover that they must contend with the reality that they know not what is lost of their history and of their identity.

The human mind does not accept blank zones readily and just like other social groups dealing with lack of information and secrecy, think of medically assisted procreation, adopted children tend to fill the blanks and to generate fantasies about who they are and where they come from. For a long time, the psychoanalytic model was proficient in describing these fantasies, albeit somewhat simplistically... the adopted person's fantasizes were of having a twin leading a different life somewhere, having been bought, stolen, kidnapped, abused, neglected, etc. In psychotherapy, the therapist was often viewed as a particularly ambivalent parental transference figure, mostly a fantasized birth parent, who is idealized but also despised for having created

the adoptee's state of abandonment. Searching for one's origins could be described as the understanding of the trauma that has defined one's past, so says psychoanalysis. One is what one has lost would be a fair way of summarizing. Once the mind is able to wrap itself around this terrible childhood experience, the adoptee could turn with some hope to his or her future life.

While the psychoanalytic approach must not be discarded, for indeed loss and trauma are unavoidable ingredients of adoptions, the psychological field has evolved into a much more elaborate understanding of the sense of personal identity and of its components, this understanding taking into account the notion of personal narrative.

Each person in this room is constantly updating our personal narrative about what we see and hear, about who we are and how we relate to others, and so on. This constant flow of information that we are processing and archiving is part of our sense of agency, the feeling that we have some mastery over our environment, of ourselves in context. The fact of the matter is that your personal narrative, like mine, is simply highly subjective, even fictitious in that facts are undocumented, information is distorted and personalized. I would like to suggest, perhaps controversially, that, in some ways, adoptees and non adoptees are alike, in that in our personal narrative, all origins are inventions, neither recoverable nor verifiable. However, it is obvious that some origins have a truer ring to them and the more so when origins are known. But even when origins are not known the line separating truth from fiction is often blurred. Indeed, a common experience among adopted children is to juggle with two origins, and the one that is obscured from reality is the one that generates the adopted child's greatest creative process.

Many years ago, in 1964, Sants wrote a memorable scientific paper called *"Genealogical bewilderment in children with substitute parents"*. His thesis was that not knowing one's origin could have a bewildering effect on children, induce a great state of confusion, and have a negative effect on the adopted child's personal growth. From a historical perspective, genealogical bewilderment really reflects the adoption practices in those dark days of secrecy aimed at constructing a family fiction that erased the very notion of adoption. Fortunately, adoption practices have evolved over the past decades and it has become clear that adopted children must be provided with some of the factual elements that make up their history and can fuel their personal narrative. Because we have come full circle and we now know that the adopted children's compulsion to search for origins becomes a compulsion to create them. Literal and factual information are like pieces of a puzzle, they serve to help map out what is not known, they help in constructing a childhood, and they support the creative narrative that adopted children must implement to hold on to a stable sense of self for the rest of their lives. After all, I hope you agree with me, it is undeniable that adoption

represents a psychological fiction despite any attempt to create a judicial reality.

In conclusion, given that retrieving some pieces, any pieces, of one's literal origin helps us all, but above all adopted children's, generate a satisfactory personal narrative, it would be very ironic indeed if the child's best interests doctrine from a children's rights perspective somehow did not generate administrative and legal best practices preserving and providing access to information regarding personal origins and facilitating the journeys adoptive families and adoptees undertake if they so chose to search for their origins.

Irma Ertman

After three theoretical points of view we have the experience of learning from the experience of an adoptive person. Mr Fritz Froehlich is here to tell us of his personal experience. He studied law, mass communication and political science at the University of Vienna and has been working in international development on relief programmes especially in the Middle East region with a special focus on Gaza, the West Bank and Palestinian refugees.

Experience of an adopted person

Fritz Froehlich, Austria

Congratulations to professor Philip Jaffe, not only theoretical but also in real terms hitting the nails. My name is Fritz Froehlich, or my name is Miera Peckodah, my biological parents come from the other side. I was born on 21 February 1960 in Klagenfurt in Austria to stateless parents, coming out of the second world war and the aftermath of it, they had to leave Yugoslavia, they did not agree with the regime in this time in Yugoslavia where my father was championing democracy, human rights and other issues since the late 19th century because he was born in 1893. And, for financial reasons, the family had to decide to give me up for adoption at birth.

I was not immediately adopted, I was in foster homes for about four years. I have no recollection of those years in my memory and I have never undergone any therapy to find out. I was then collected, just before my fourth birthday, by my adopting Austrian parents, the family Froehlich, who gave me a home, sheltered me, tried to protect me, brought me up.

Unfortunately, they kept the adoption secret from me. For me the adoption was a kind of unknown reality. Until I got to know about the adoption, by accident, I had the same dream every night, that the people, my parents, with whom I lived were strangers and the environment I moved in was strange to me. Repeated questions 'Am I your child?' were not answered positively 'Yes, you are.' I grew up a few years in Italy then returned to Austria where I finished high school and went to university.

For anybody it's a very personal experience at the end of the day, but I think I realised that for an adopted child, for refugees, for migrants, there is enhanced necessity to be adaptable to your environment, to migrate between cultures, to seek integration, at times, and it's a very personal act accompanied by a whole set of insecurities, fear, aggression, revolt, disobedience, provocation, which are basically means of placing yourself. I personally always believed that any human being who tries to define, to control, to change time, place and space, where you are put into, or you try to define it for yourself, for this you need your personal belonging, you need identity, to be accomplished, so you can be an important feature in life, so you can effectively become part of it and not just of maintenance, or adaptation.

So I spent my early childhood years in Trieste in Italy, then in Vienna, studied mass communications, industrial relations and during my school days really developed quite a sense of social responsibility searching for some ideals which I maintained. I still believe in the dream of social justice, in the dream of equality, and peace. And also I believe that we have to turn into more global citizens and less global villages.

Before joining the university, I had to search for some documents for the application and, all of a sudden, without any support or guidance, because my adoptive parents were away for business reasons, I found the adoption documents. So, all of a sudden, I was confronted with the reality that I'd dreamed about 'Yes, you are adopted' and it was very shocking. I severed family relations for 2 – 3 years, communications broke down with accusations back and forth, who was at fault or not at fault, even understanding that it was in the best intentions of the adoptive parents who wanted to protect something, to protect this idea of a family, it was difficult to accept it personally.

I still think it was wrong to conceal the truth as it was a breach of trust and has denied me for quite some period of time, of my life, a part of my identity. So I understood at this moment that my origins are different. I was born as Miera Peckodah, a typical Croatian name from Dalmatia I discovered later on and my parents' names, the basics you find in such a document from 1960, 1964.

For the first 2 – 3 years after finding this information I was not seeking anything, probably I was too shocked to deal with the issues, so you let it flow over you, do other things, keep busy with other things. Life went on and, after my studies, I started to work in development, in humanitarian assistance, worked with refugees in the middle east, and I found some friends, one of them, who also sits here, was basically responsible for to be able to help with solving some of the miracles, which is Edo Korljan from the Council of Europe, because he still spoke Serbo-Croatian. I have been denied this opportunity, most probably a talent, to acquire the language as part of culture.

I also have to add something very interesting. My wife's brother-in-law is also adopted with the opposite experience, where he was told that he was adopted, but he was also told a false story. He was told he was a refugee from the former Yugoslavia or Romania, while his mother was Italian. Here, the reverse happened. His mother turned up after 40 years, with much more psychological problems for him to deal with as a result. For me it was easy because I basically resolved some of the history for myself.

So, when I read the new European Convention on Adoption -somebody can always be critical, could be more progressive, could be more forward looking, there could be more controls, more monitoring instruments- understanding the consensus we built for this internationally, I think the convention is important. It is progress from what was existing in the past, and in a sense gives you the right to know one's origins and protects part of the information which is needed, so I'm fully supportive of this as an adoptive child.

For me, the next jolt was about the age of 40, when I felt the urge after my children were born, to look for identity. I was a little bit blocked in between because there was a war again in former Yugoslavia, and years have passed. It was easier later on, also because of the internet e.g. we found the details about my mother and where my mother emigrated to on the internet from a genealogy list of a small church in Canada which was posted on the internet in 2002. So the information was out there and with other parts of the puzzle you could find it.

We then also found some mentions in history books, looked through this, Mr. Korljan looked further in Croatia, tried to find an archive, no legal procedures, we didn't ask any judge, basically people were freely giving information away, and we found the rest of the story. My biological father was a lawyer, born 1893 in the region of Zhada, used to work in the 20s and 30s in Belgrade as a judge, established a business for himself and was running "Assicurazioni Generali" in the 'kingdom' of Yugoslavia. He moved with his first wife in the Banchover region on behalf of the mainstream Croatian political party, the Croatian peasants' party, for whom he worked at this time as advisor, trying to strengthen national identity of the Croatian minority there, and defend Croats before the courts. His department was a kind of Croatian representation.

In 1928 his best friends, the Prime Minister of the Kingdom of Yugoslavia and the Minister of Agriculture were assassinated, by somebody of Serbian origin, in the National Assembly. So at this time you plan the counter coup, and in 1934 some Croats assassinated King Alexander and the French Foreign Minister, in Marseilles. My biological father defended one of the accused persons there and didn't rest until that person was released, by their own accounts that there was no proof of his involvement, which costed him other legal procedures.

He returned later on to Zagreb, got remarried in 1942 to my birth mother who was an opera singer at this time. Her husband had been assassinated by the Ustasha, he was a Croatian poet. Because of, again, political activities, they found their way together. Around 1945 – 46 they had to leave former Yugoslavia because they were thrown out by the regime, the family property has been confiscated this time. They had to live six months in Trieste, Italy, then in Austria, stateless. 1960 I was born, my mother was 45 at this time, my father was 67, and I was their second son. Their first son had left for Canada two years earlier. My father died in 1962. My biological mother left in early 1964, after she knew that I was adopted, to Canada. She apparently tried before that again to reconnect with me, and had, I heard, to swear in another court procedure not to seek any contact with me. She died in Toronto in 2002 at the age of 87.

Going back to Croatia, going back to the archives, I found my cousins, I found my half brothers, two of them living in Canada and one of them in the United States, and luckily I found my full brother in Canada and we keep contact on a regular basis, we visit each other, we are trying to keep up the relationship.

For the new legislation, one of the new problems is that it is all costly. This is time consuming, and, depending on where you are adopted from, who's going to translate for you the documents? Who's going to be your lawyer? Who's going to be your advocate? Who's going to help in the search? So I think it will be very important if and when you think about establishing information off the record, what information is going to be included. And I'm going one step further; it should always include some of the genetic information that is there today. Look at the developments that are there today in medicine, what people are talking about, keeping stem cells to help you later on. Questions of organ transplant, questions of diseases, questions of addictions, unknown things, but also might be a way to give adopted children parts of their identity back by allowing them access to their real mother tongue, something not taught by the mother, but something that they might have a genetic predisposition toward more easily than other languages and that's why I said in the beginning maybe we just have to stop being global villages, we have to become global citizens. Here we have to understand that society is opening up and there's more in there than just an interest in personal relationships. My family, my children, I have also, probably for identity reasons, given my first son the same name to keep it in the family, I've taken my wife and both sons back to Croatia, I showed them to my family and introduced them to try to understand this part of history and to live this together with me also as part of the identity of this new family nucleus, which doesn't stop and shouldn't be isolated in the past.

Ending with this, I can only say that we all share social responsibility and it's a common responsibility, and I think

adoption should not be taken too easily and the individuality of each adoption case needs to be taken care of from the side of the parents who want to adopt and from the side of the children.

Irma Ertman

Our session should give ample grounds for a good discussion because we have gone from an example of legislation to how the European Court of Human Rights has developed our interpretation, our views, on adoption, to the metaphysical question of who I am, and then to a private experience of adoption. I open the floor for your questions and comments.

General discussion

Pia Brandsnes, Euroadopt

I just wanted to state that Euradopt and Nordic Adoption Council have very decisive rules on what we think that should be full access for adoptees to their origin. And the reason of this belongs on the children's rights is because it's our responsibility to ensure that as much as possible is documented, this is exactly what the child cannot do themselves. It's a very important responsibility but I also fear sometimes that we are now bordering on illusion of control of the situation because all the time we are about 20 years behind in legislation. We make rules right now for what we hope is necessary 20 years from now when somebody comes and asks. And it will always be almost exactly what they want to have. But also I think that the future is out of control, it's an illusion to think that information about people will be the same in 20 years time. There is no way to guarantee to any parent about being undisclosed in 20 years time. It's important to think about whether promises made right now make any sense in 20 years time. I see a future where you could easily have DNA databases that anybody can tap into. It could happen and it's not that science fiction anymore. You already have adoptees finding biological families on Facebook and this is the future so it is important to be careful and then I got a little bit scared with the wishes from you in documenting medical things, DNA etc. I think the truth is that, compared to other people in populations where they live, most adoptees are better documented than everybody else. There is so much information that isn't included in the public records of other children of the same age and time, and the problem with information is that it attracts the wrong people. There are so many researchers attracted to all this information, they're not using it for the purpose that we are intending, for the persons' personal interest later on. I can see a future where adoptees can never have insurance for anything because all of these things are documented. So we need to be very careful, especially with medical information.

And I think there is some confusion between human rights and children's rights. I'm all for preserving the child's rights whilst they are children, but at the time when adoptees are looking for the information that is then available they have rights of access but they don't have children's rights

anymore, because they are adult and have to live in the equality of that human right together with everybody else.

Peter Heisey, Association Biruinta, Romania

I am an adoptee as well an adopter. With almost every presentation today my life has been touched one way or another by the information that was presented. My question is for Jaffe, because it relates to his explanation of the origins of identity and I would simply like a little further explanation if possible on the self-reflection aspect of those three factors that contribute to identity. Sir, if you could, would you explain a little further what that means?

Philip Jaffe

The origins of identity are really difficult to pin down and they probably have biological roots, and certainly gestational roots as well. At birth we know that children, babies, enter into a whole explosion of cognitive growth and relational growth, and those are the first two dimensions if you will of their identity formation. Entering into a relational frame with their birth parent and also discovering through their senses their environment so that's where it starts basically. In attachment theory we talk about primary attachment versus secondary attachment, and primary would be more biologically influenced than the second that you develop later on.

Peter Heisey

Yes, that's very helpful. My follow up question is to what degree does the geographical spot where the child is born relate to his identity, if any?

Mircea Opris, free lance journalist, Romania

Question for Heisey, I would really like to know exactly what is your organisation in Romania dealing with?

Peter Heisey

Perhaps we should speak privately afterwards?

Irma Ertman

Yes, I think so.

Philip Jaffe

I don't have sufficient knowledge to answer on that point, sorry.

Regina Jensdottir, Head of Division of the Council of Europe

Question for Schulz. In your presentation did you say that a mother can give information if she wishes to do that under the name 'X'; do women have their awareness raised as to the possible needs children may have? I think you said 500 - 600 anonymous births in France every year is that correct? What about the time periods available? I would imagine that these are all children that would be available for adoption by French families. Could you just tell us on average how long it takes from birth to adoption?

Violeta Stan, Romania

I'm a paediatrician and teach at the Faculty of Medicine at the University. After the political changes in 1989, it was clear that there was a problem with abandoned children, they didn't have a legal status, we had children coming into clinics but they couldn't be treated because they didn't have identity documents. People talk about an identity. How can you have an identity if you don't have a legal identity? Now we tried, with this project "*House with the open windows*" to raise young people's awareness, focussing on identity, using the attachment theory, giving them a person who would be their point of reference. It's a project in which more than 300 children have participated so far. But what roots are we talking about though? Cultural roots, the roots that come from those around them? What roots can give you access to your own identity if it's an identity which is not linked into a specific place.

We have in our house with open windows a philosophy that says "I take you for your soul, your humanity, raise you for humanity and you will become a well-rounded person". If you're not loved by someone it's very difficult for children to grow up. We had lots of things that are written in the diaries of these children, all the details of their lives, setting out what their roots were and this was to help them with their identities from childhood to adolescence. We've tried to set up projects in Romania based on children adopted at a very low age, below two years of age, and perhaps will be able to find some answers from that project in the next three years.

Clare Gibault, former MEP

I am also a mother of two African children. I have a question for Froehlich. Are you alright now? Because I think you have been able to forgive your biological parents, but have you forgiven also your adoptive parents after all these rejections? Can you not say that my life has been momentous and eventful and as Mr Jaffe said 'I've come a long way'?

Marco Cappellari, Amici dell'Adozione, Italy

I am an adoptive parent and represent an association of adoptive families and I was very struck and moved by what Mr Froehlich had to say about his adoptive past, and maybe we need to pause and think for a moment. I would also like to inject some positive thinking because Mr Froehlich was talking about 1960, whereas the culture of adoption today has evolved in many countries and families rarely hide the fact of adoption from their adopted children. We were talking also about problems of adoptees but let's think at the fact that often biological children come from unplanned births. Now, Italy it's a country where there is very severe legislation on adoption so there's great selection and years of waiting for adoption so I believe we should think about the great advantage of adopted children, because they are totally certain that they are wanted, desired by their parents.

Marianne Schulz

To answer your question, these women who gave birth under X, they usually haven't had much assistance in their pregnancy, they may have tried to hide themselves from their family etc so they have very few people looking after them. But we do try and look after them as soon as there is some sort of professional contact, already at the end of the pregnancy or even at the moment of the birth because what the law says is that, in case of anonymous birth, there have to be at least two people designated to look after these women in each department in France. These people look after their health, mental and physical health and provide the women with information, such as on financial aid, legal aspects, and repercussions of their choice on the future of the child; it's a full training to ensure that these women understand what's going on. So we really do raise their awareness, also on the consequences of their choice for the child. We encourage them to leave information for the child about the father or the health background etc. When the law was adopted, we thought there might be a flood of requests but in fact there haven't been so many, about 4,000 requests filed with the National Council for information on origins. As I said before, only 4% of the people potentially concerned by this law.

I work at the legal department, not on the ground. I've been in the National Council since 2002. Sometimes it's not so easy to help these women. I've heard about cases for example where women turn up whilst in labour, give birth and two hours later they've left via the window. So all sorts of things happen. But we look after these women. We do everything that we possibly can.

As to the time before adoption, these children are adopted very quickly, about three months, except for those with special needs, in most cases. The minimum period for granting an adoption is about six months. Studies have been carried out by the ministry of justice looking at adoptions in 2007. The adoption process varies depending on the age of the child. The younger the child is, the earliest is the adoption.

Fritz Froehlich

Yes, I'm fine. Still, I've forgiven my birth parents and my adoptive parents, but you don't forget. It becomes a part of your history in your memory system. There is only one regret you always have, that you didn't have the time with them. Basically I was late, my mother died two years before I knew of her, I didn't have the time with my brothers, we did not grow up together so we were separate. And you have to make the time to be together, a week in a year talking until 2 o'clock in the morning, just trying to share and cope in a short period of time. It could be different with the relatives refuting it but in our case it was, from the beginning, very clear. There was no economic interest from any side so we all had made our lives somewhere separately and we found ourselves together, but we were lucky. I might not have had the financial means to pay for

these long research, translation of documents, etc-. You have to invest, otherwise you will not find.

Philip Jaffe

I'm answering the last question. I'm rather wary of using terms such as having an advantage, being better. I wouldn't say that adoptive children have it easier than non-adopted children in that they are really wanted by their families, I just think that the experience is different. You can't quantify love; it's not a scientific term. What I'm interested in is whether the conditions are sufficiently good for the child to be looked after in a favourable situation for that child, if it's in an adoptive family, or in a birth family, a traditional family. I'm ready to admit that with some adoptive families there is this great outpouring of love and care for the child you must also think that perhaps the more of that outpouring there is the more of a lack, or an absence, that child is going to feel, the adoptee. So you've got to be very careful because the child may tell himself that 'I'm being loved so much by these adoptive parents that my loss is huge, it's enormous' and he might develop under this idea. So it's better to avoid stereotypes.

Session IV - Role and responsibility of public and private bodies

Chair – Ulrike Janzen, Chair of the Council of Europe's Committee of experts on family law, Ministry of Justice, Germany

We spoke a great deal this afternoon about the requirements applicable to adoption, the need to have consent from parents, we talked about the demands on adoptive parents, the importance of providing advice and counselling, the rights of the child in the adoption process, ensure that we do things in the best interests of the child, and we agree that the interests of the child are the highest priority in the process, but, of course, all of this has to be put into practice. This last part of the conference will deal with public and private bodies, e.g. those that select children, and ensure that procedures are run properly. There are authorities and courts, so public bodies, but also privately run organisations too.

Adoption in the United Nations Convention on the Rights of the Child, and a particular case of adoption of Roma children in Hungary

Maria Herczog, Member of the United Nations Committee on the Rights of the Child

I'm going to talk about two different issues: firstly about the relations between the UN Convention on the rights of the Child with the revised adoption Convention, and some relevant issues related to our topic today; secondly, I would like to present a piece of research we did two years ago at the request of the Roma Rights Centre in Hungary. Their

interest was primarily the over-representation of Roma children in the care system, the segregation of them at an early stage i.e. already at kindergarten age, and the adoption of Roma children by Roma or non-Roma parents.

First of all, I find it very important that in the revised Convention on the adoption of children, the preamble states, amongst other things, that the UN Convention on the Rights of the Child, is taking into account and particularly Article 21 on adoption. It is also recognized that the best interests of the child shall be the prevalent consideration.

I am just listing a number of articles that are also relevant from the point of view of the adoption; although they are not specifically about adoption, they are worth taking into consideration.

Article 5 it's about the parental guidance and child's evolving capacities. If we are talking about adoption, then, in those terms, from the biological and adopting parents' points of view, we have to take into account parental guidance and the parents' capacity to take good enough care of their children. Not mentioning the evolving capacities of children, which is absolutely essential when we are talking about a child's views to be heard in the adoption procedure, as from the convention's point of view it is very important, for instance from the consent point of view. When it comes to the decision-making bodies, it is one of the most essential issues to be serious about the evolving capacities, in order to be realistic about the capability of the child to give a fair consent decision.

As far as Article 7 is concerned, this is the child's rights to be known and cared for by parents; the preservation of the child's identity in Article 8; Article 9 the non-separation from parents except when necessary in the best interests of the child; Article 10 on family re-unification and from this respect we are not talking about the termination, the annulment of an adoption, although in many countries like Hungary, sadly this is legal, despite being contrary to the best interests of the child in many ways.

Article 11: protection from illicit transfer and non-return; Article 16: protection from arbitrary interference with privacy, family and home; Article 18: parents having joint responsibility and the new convention is very clear about it, and Article 35 on the prevention of sale, trafficking and abduction, just like the Optional Protocol on the sale of children, child pornography and prostitution. These articles are equally relevant and during these two days we don't have sufficient time to discuss all the subjects.

There are other elements to be mentioned, first that the Committee for Rights of the Child acknowledges the rights of the children who are adopted and recognises that not all countries allow adoption. In some countries, no matter if it's domestic adoption or international adoption,

adoption is not an option, hopefully we will talk about this on another occasion.

Also, the minimum requirements for adoption procedures; this is also closely related to the agency issues. What are these protocols, are they in place, are they legally binding, how can they be monitored? In the cases of International Adoption, it seems to be absolutely common sense that we should consider it only if the child cannot be suitably placed in his or her country, but it's not always happening.

The right of the child for family security and permanency, it seems to be absolutely obvious again that we are looking at a follow up mechanism of adoption but in many instances it's not in place. Another issue that should be tackled when we are talking about agencies and their responsibilities for the adoption is whether they are doing proper preparation of parents and children and whether there is a follow up mechanism to check if the children are developing in accordance with their needs.

The convention on the rights of the child remains neutral about desirability of adoption. Article 20 speaks about it as one of the possible options for the care of children without families. Again this is the responsibility of the agencies who are dealing with children's issues and the adoption, and whether they consider adoption as a first opportunity, a second, or last opportunity depending on the policies and practices.

Another case we haven't tackled yet is the issue of siblings placed together or separately into adoptive families, and this is again a very important responsibility of the given agency whether it's private or state run, how are the decisions made in the best interests of the child.

Another issue is that of the other relatives; as mentioned earlier, it's often not just the parents but also grandparents, aunts and uncles, and other relatives that should be taken into account, and we haven't had the chance to discuss this today.

In the previous session there were excellent presentations on identity and history. I would like to mention just one aspect which I find extremely relevant and that is that we should keep accurate and accessible records of the adoption and other documentation of the care history. So those children who are not adopted at a very young age could have a documentation of their life. As we heard from Mr Froehlich, he hasn't got any memories of the first four years. We know that this must be a very hard burden in itself, but we have to be sure that, if children want to know about their life history, spent in the care system, then we have to keep appropriate track of the records, not just about the birth family but also the care system e.g. in different foster care placements or institutions.

Very quickly, due the time constraint, I want to share with you the research conducted by the European Roma Rights Centre. Three researchers asked professionals in focus group meetings to talk about the adoption of Roma children in Hungary. I know that this is not unique to Hungary. In Hungary, the Roma identity, as any ethnic identity, cannot be recorded unless this is agreed to by the parents. This means that, officially, they are not registered as Roma if the parents are not willing to declare their Roma background. But, according to legislation, prospective adoptive parents can refuse to accept any child they are not willing to adopt. We are aware of the Eastern European situation. Most of the prospective adopters, about 95% of them, refuse to adopt Roma children, children with disabilities or even older children. My question is then 'who is Roma?' because what is happening is a very controversial situation, the professionals are making a decision, based on their belief, or observation, or the prospective adoptive parents are making a decision based on a picture or on a personal meeting with the child, which is not a strong identity insurance.

The other thing which we can also ask in relation to this is: if the prohibition of identification based on human rights is forbidden, how can we help to build an identity for a child who is considered as Roma, or who is adopted and not considered as Roma? As we heard in the previous session, this can lead to confusion. We have many, many cases where children are identifying themselves later when they are teenagers or even later, when they learn about their background, and this is causing a lot of tragic situations for them.

The next question is: why do the parents refuse identifying their children as Roma? We know the answer; they fear this would be disadvantageous for them. So how can the child's identity be preserved, and how can birth parents play a role in this?

In some cases, in Hungary, Roma origin must be proved, for instance, to be eligible for a grant based on positive discrimination. How can a Roma child whose parents did not allow the ethnic identity to be recorded, benefit from this? If you are not aware of your Roma background, or you don't want to declare yourself Roma, how can you have access to all these resources? Not mentioning the current scandal in Hungary, when some 'smart' people declared their children as Roma, among them mayors and very respected politicians, who wanted to have access to the grants and there is no legal way to refuse their application. Anyone can declare him or herself to be of whatever ethnic background they feel like doing so.

The next set of questions: Parents who are refusing to adopt certain groups of children, are eligible for adoption? Are they good enough prospective parents if they are refusing certain groups of children? The other side of the coin is: should we push adoptive parents to adopt someone that they don't accept? In which case these children's

best interests won't be met if these parents cannot love and nurture these children as their own?

Also the question of preparation for adoption is an important element here, because what we can see from our research is that the more preparation, and the higher the quality of this preparation is, for prospective or foster parents, this clearly helps understanding the needs of children and also a better choice can be made by the adoptive parents. But then the question is whether the preparation should be compulsory, on what basis, and who should do it, how can we monitor the quality of it?

The next issue is how should a decision be made on these refusals? How many refusals are acceptable? Because if there is a long waiting list, as in most countries, and prospective adoptive parents are selecting these children, there are parents who are waiting for the 10th opportunity, because nobody is good enough for them and these children are queuing up and waiting for adoptive parents and we don't know what is the optimum criteria in these cases.

One of the prospective adoptive mothers, who had no prejudice whatsoever, told us during the focus group discussions, *'I think adoption is a huge challenge in itself, requiring a lot of energy. I'm not sure whether we would have been able to make this extra effort by adopting a Roma child.'* Can we agree with her? Can we judge her statement, or should we make a policy? What can we learn about the matching of prospective adoptive parents and their children?

Researchers seldom get any feedback from policy makers or politicians. But we feel really privileged because, two years after our research, our ombudsman responsible for minorities and our ombudsman responsible for data protection, last week made a statement, and I'm absolutely convinced they read our research and proposals. They said that there is a need for identification and documentation of the ethnic background of children in public care in the form of a family history book or legendary, to give them a chance to learn about their family's past without a clear documentation and registration discrimination. So this is a fair solution but I don't think that this is resolving the entire problem.

Preliminary enquiries to the adoption

Bettina Baumert, Family Judge, Germany

I'm going to talk about personal hearing of children in German adoption proceedings, that is proceedings before the court. This is a way of learning a little bit about the children. I'll tell you about the law and then I'll give you cases from my own experience as a court judge in Berlin.

In our procedure, there are different bodies that can hear the child: Firstly, there is the youth office or the adoption agency, which can also be a private body; the law doesn't say that either of these has to hear the child personally.

However, those bodies are legally obliged to give a statement to the Court saying whether or not adoption is in the interests of the child, so this is a specialist expert opinion which can only be drafted by specially trained people.

Now the will, wishes, ties and needs of the child have to be included in that report and I think that means you really have to have a personal chat with the child as well. Some people have said today that the discussion can only take place with the child alone, without the adoptive parents or the birth parents present, otherwise the child might not feel free to give his or her free views.

Secondly, the child must also be heard by the Court as stipulated by the law. There is a statutory requirement to hear every child personally, except in two cases: if the child is so young that this would not be possible e.g. in case of babies. After six years though, when the child goes to school and is able to express itself, I would expect to hear that child. The other case is if the child would be disadvantaged by so doing e.g. the hearing would traumatise the child. The Court has to hear the child itself, not just rely on opinions of the youth work office, or agency, and the Court has to decide for itself what ties and needs etc the child has.

There is nothing in the law saying how the child is to be heard by the court. I think the child should be heard on his or her own, but if there are siblings that are being adopted then they could be present and the children could be heard together, but not the adoptive parents. The third subject that can hear the child is his/her legal representative, if his appointment is deemed to be in the best interest of the child.

The child has to be informed about the stage of the adoption process which has been reached, but that's according to the child's age.

In practice I've seen two cases where there are obstacles to the adoption. Firstly, where the child thinks the adoptive parent is his/her birth parent e.g. if the child does not know any other father than his step-father and believes that is the birth father. Now that is something that could be dealt with in discussions between various bodies but it's not possible for the Court to deal with this matter. It's not really for the court or youth worker to explain this to the children. It's really a question of upbringing as to when parents explain to their children exactly what their background is and it's basically for that person to decide knowing their own child. This is an obstacle to adoption because this is against the constitutional child's right to be heard.

In the adoption procedure, the child has to participate personally, otherwise it's not possible for us to see exactly what the child's situation is. So if the child really isn't aware of his or her origin then that is an obstacle to the proceedings, we cannot establish all the facts. If the child cannot be told what – his origins are, then the proceedings in my view

have to be staid until the child has been informed of his or her origins. And then, concerning the stepfather adoption, if the mother refuses to tell the child that we are talking about a step-father then I can't force her to do that. If the stepfather does not help to explain matters to the child then we would say that is not in the child's interests, and what we've seen time and time again is that it is damaging for the child not to know where he or she comes from. That is something we've seen in recent research as well. This can be harmful for the mental health of these adopted children. So that would speak against the adoption.

The second problem case was also with a step-father adoption: two girls came before me, eight and ten years of age, they've been living with their step-father for a long time, they knew he was the step-father, but sometimes they had contact with their birth father, the mother was married to the step-father and there was a good report from youth services. I heard the two girls together, in my capacity as family matters judge, and I asked them openly and directly what they knew about the adoption and what they thought about it. The eight year old said to me 'I don't want to be adopted, I want to continue seeing my birth father', so I was a bit taken aback by that. Really that's the sort of thing which report from the youth office should have contained. But it turned out that the youth office had only spent 45 minutes talking to the family and never spoke to the girls on their own, so they had only looked at what the step-family looked like and didn't ask what was the link with the birth father, how often the children saw the birth father etc.

Therefore, I appointed a legal representative for the children to this case as it was quite clear that the mother had a conflict of interests. The legal representative spoke to the father, spoke to the family; I spoke to the mother, the step-father, the birth father. It turned out that there was a real problem as a result of the separation of the birth parents. The father had stopped paying maintenance, wasn't very reliable at all, and the mother was trying to push him to one side, to get him out of her life.

Very often the children did in fact see their father, but at one point came up against a ban on seeing him imposed by the mother even though they were sometimes at the grandparents' house which was only five minutes away from where the birth father lived. This is something that had not been examined properly by the youth office, and I think there they didn't do their job properly, hadn't actually established all of the facts properly. When it comes to ties with the birth father which the children had, irrespective of how often they saw him, it's really the children's feelings which are most important. That tie would speak against the adoption because it would lead to a break between legal links between the children and their birth father. So there was a very important psychological aspect to this. I could not agree to the adoption, I had to reject the application. There were very important reasons for this.

When it comes to step-child adoption, it's important for me to say that the point of this is not to reward a good step-father and punish a bad birth father. It's really a question of ties, it's a case of how the family 'hangs together'. If we had approved the adoptions the children would not have found themselves in a better position at all. I think both of these cases show you why it is important, very important, to have a personal hearing of the children and it shows how important is the job of the agencies concerned is as well, it's not just a case of ticking boxes. This is something that doesn't, I think, get covered enough in the convention here. There we talk more about consent; I don't think saying 'yes, I want to be adopted' by the child is sufficient to do away with a hearing of the child.

In the case that I was talking about just now, the ten year old would have liked to be adopted, but she still had the same need to see her birth father, so consent on its own isn't the decisive point.

Making national adoption easier – the view from Russia

Olga Khazova, Professor, Institute of State and Law, Russian Federation

What is the purpose of adoption? The purpose of adoption is to find a family for a child left without parental care in order to provide the child with full physical, mental, spiritual, and moral development. This is what is stated in the Russian Family Code, which, after the Convention on the Rights of the Child, also stresses that, when arranging family placement, due regard shall be paid to the child's ethnic, religious, cultural and linguistic background, to the possibility of continuity in a child's upbringing and education. In accordance with this requirement, Russian citizens have the advantage over foreigners in adopting Russian children. The Family Code provides that Inter-country Adoption (IA) of Russian children is permitted only if there is no possibility for these children to be adopted by Russians, permanently residing on the territory of the Russian Federation, or by the child's relatives irrespective of their place of residence.

Adoption is a rather painful and highly politicized issue in Russia. As many of you probably know, Russia is one of the main sending countries. The point is that after the USSR breakdown, in the beginning of the 1990ies, Russia faced the IA boom, and since then there was a stable increase in foreign adoptions, while the number of national adoptions (NA) was decreasing. By 2003 number of foreign adoptions reached nearly 8,000 and for the first time exceeded domestic adoptions (DAs). In 2004, the next year, the number of foreign adoptions was already nearly 9,500 while the number of DAs kept decreasing.

It was clear that something urgently needed to be done to improve the situation. It was necessary to reverse the trend. The state had to develop or invent certain strategies to stimulate Russians to adopt Russian children, and

to develop NA it was necessary to make it more available and appealing. To a certain extent it succeeded. Therefore, I will focus mostly on what has been done during the recent years.

I will indicate several different initiatives that aimed at making Russian DA easier, both technically and psychologically, and their results. I will start with the results.

2005 was the first year when we had slight increase in NA. In 2006 and 2007 the gap between DA and IA increased in favour of NA. The last year, 2008, there were 9,530 DAs and the number of IAs dropped significantly to 4,536 compared to nearly 9,500 in 2004.

Now, let's turn to what actually has been done. First, in 2004, Russian Family Code was amended with the provisions that soften the rules concerning suitability of adoption applicants. Without going into detailed analysis of the requirements that would-be adopters should meet, I will just mention those that were changed which concern adopters income and living conditions. Under the code a person shall not be an adoptive parent if this person:

- does not have an income that could ensure subsistence level to an adopted child; and
- does not have a dwelling space that meets the established sanitary and technical requirements.

Both of these provisions were strictly imperative and did not allow any judicial discretion. The amendments allowed the court, when considering an adoption case, to disregard these requirements taking into account the interests of the child going to be adopted and the facts that would justify adoption in such circumstances. Though important the income and housing conditions may be, love and care that a child taken away from children institution may receive in a loving family may outweigh this in a certain situation – this was the main reasoning behind these amendments. Sure, it did not mean that the children might be adopted by homeless people or people who live in cellars or roof spaces.

The Plenum of Russian Supreme Court gave some guidance to the courts, having explained that the court may depart from the requirements concerning income and housing conditions when a child is adopted by his/her relative (family member); or when a child had been living with a prospective adopter before adoption proceedings were started and treats the prospective adoption applicant as the parent; or another example is when an adoption applicant lives in the countryside (rural areas), and has household plot (subsidiary husbandry), e.g. in poor dwelling conditions. Also, under the amendments, these requirements shall not be applied in cases when a child is planned to be adopted by his/her step-mother or step-father.

The second point I would like to make is this: in 2006 and subsequent years, adoptive parents got to be entitled to different allowance paid from federal and regional sources. These payments differ in form and amount. It is a lump sum payment paid upon adoption, similar to that which is paid to biological parents when a child is born; it is also a monthly payments paid to those who adopted a child in some regions. The amount of payments paid to adoptive parents differs from region to region, and in some of them it is relatively low, while in other regions it is quite significant. For instance the amount of a lump sum paid upon adoption reached USD 1,300 in Tomsk and even USD 5,000 in Stavropolsky krai, which is a pretty significant sum for a Russian family.

The third point, and my attitude to the third initiative is that it is contradictory, was prolongation of the period during which a child is available for DA for three months. I cannot explain how the system of registration of children available for adoption in the State Data Bank for Children Without Parental Care operates, because is too technical to be explained here, but the result of the three-month extension of keeping information about a child in this database meant that on the whole a child may be transferred for IA only upon expiration of eight-month period since the child became available for adoption, instead of five months before the amendments.

In fact, whether this provision is in the BIC or not is a question. On the one hand, indeed, it extends the period during which a child may be adopted within the country, that's true. On the other hand, it extends the period during which a child has to live in children institution. Eight months period on the whole may turn out to be too long for a child, if a child is a newborn or only several months old, taking into account what an evolution a human being makes during the first year. It is also well-known that if a child has health problems, which is often the case in adoption, every day may count.

Finally, fourth point which I would like to draw your attention to has no relation to law. It was also important to change public attitude towards adoption. It was necessary to make adoption popular and fashionable, and not as something which adoptive parents should make a secret of and that they should hide. With this aim in view, a kind of adoption advertising has started on the central and especially local TV programmes, radio programmes, and in the local newspapers. What is important, adoption has started to be discussed in a positive tone, people have been provided with information about children available for adoption, children who are looking for a family, and have been explained about the adoption procedure and what specifically the persons willing to adopt a child should do, where to apply, etc.

I will give you just one example of what may be called success practice or success story.

The success story concerns one of the Russian regions, Krasnodarsky krai, located in the south of Russia, bordered in the south by what is left of Russia's Black Sea coast. As the result of different measures undertaken in this region, the situation with children left without parental care has greatly improved in different respects. To anticipate, there is some data, which speak for themselves.

In 2006, in Krasnodarsky krai, there were 789 children left without parental care that were registered as neglected children and transferred to the children institutions.

In 2007, there were already 321 children registered and transferred to the children institutions. In 2008, there were already 280 children registered, and during the first 9 months of 2009 – 191 children. Two years ago, in 2007, in Krasnodarsky krai, there were about 4,000 children that lived in 40 children institutions. Currently there are 1418 children that live in 29 institutions. Another noticeable result is that the number of cases when adoption was terminated dropped significantly.

These amazing data are the result of a set of different measures carried out in different directions and on different levels. In particular, special emphasis has been put on informing people about state support that is provided to the families. Also, a system of education and support of such the families was created with parents being taught there many different things, but, most importantly, they are taught how to overcome difficulties that are inevitably connected with taking a strange child to the family. The result of these strategies is that children institutions in Krasnodarsky krai are becoming empty.

To conclude I would say, whether the increase in the Russian NA should be attributed to these measures or to something in particular, it is hard to say. No doubt, state allowances, a kind of remunerative incentives, must have been one the main catalysts of increase in the number of DAs. However, I would not attribute this increase exclusively to financial support, though important it might be. Most probably, it was the result of all the steps made in this direction altogether.

Though we still cannot say that there are no problems with regard to adoption left at all, and all is quiet on the Russian adoption front, positive dynamics is evident, and this is in my opinion the most important thing.

General discussion

Melita Cavallo, Italy

I am, and have been for many years, a judge for minors and I've had some experience in declaring adoptable some of the Roma children for NA. They were all children who are now adults and have succeeded very well, done very well at school, and very well at social life now, so I'd like to say that if every country where these children have been put up for adoption could give such a positive assessment of the situation then perhaps there could be a more positive

attitude to it. I have to say that in Italy we want to be able to widen the scope of adoption to adolescent children who have grown up in orphanages or institutions and so they've sometimes stayed there for years and years. There were procedures for staying a few months and then being adopted in Hungary, so these are positive outcomes as well. It seems to me this disadvantage and this prejudice against Roma children is really something that must be swept away. It can be swept away through press, through television, through strong political messages and this is something that I'm quite ready to call on these children, who have now actually grown up, to bear witness to the situation. And they are very intelligent. There were even two handicapped children who lived with very simple families, families working on the land, and they've done very, very well. I think that there is a real prejudice and we need to fight this prejudice against Roma children being adopted.

Maria Herczog

Thank you very much for your comment. There are several things I can say. One is that if we are not changing the attitudes, prejudice, stereotypes against Roma children in general then adoption is not an exception. It has to change the climate all over the region to help children be placed into their families, and also if the situation would change, namely the segregation and poverty issues, then far fewer children would end up in residential care, in public care, and would be up for adoption. So our primary task is supporting biological families to take good care of their own children so they are not adopted outside the family.

The other thing concerning the adoption of Roma children is that we have got a lot of criticism in Hungary, and similarly in Romania, though our history of adoption is very different, is that although many children are staying in care because no-one wants to adopt them, once it is becoming an issue of IA then there is a very strong resistance, that IAs should not be increased, and this debate hasn't a chance to be debated here, perhaps tomorrow. How can we proportionately look at the needs of a child? What is better for a child from his or her point of view? Staying in a care system because no one wants them domestically, or being adopted abroad, primarily Italy and Spain are really willing to adopt from Hungary even Roma children, well mostly Roma children. And there has been a lot of professional discussion about it because some are for and others against.

I guess it needs more clarification, what are the root causes and how can adoption procedure prevent it by more family support and if it's not possible then encouraging local people. As my colleague Olga was just describing in the Russian situation, allowances are an option, although it's a very delicate issue because we know that it can generate a willingness to adopt based on a need for money or the allowances which wouldn't be very good. But when it comes to Roma families who could adopt these children, this could be an issue because what we are facing very often is that Roma families would love to adopt Roma

children and they are not found suitable because of their housing problems, or their lack of income, not because they are not suitable parents for these children. So in these cases family allowance or support should be definitely provided.

Pia Brandsnes, Denmark

I'd like to say from Denmark's point of view we've adopted some amounts of Roma children from Bulgaria and Romania with no problems at all. I think Denmark is a country with no prejudice at all against them. I think to some extent I understand the reluctance to send children out of the country but you have to own up to the fact that if you don't want them yourself then, well, it's just an opinion. You asked a very clear question about whether parents were actually suitable for adoption if they didn't want to and I think that compared to everything you don't know about an adoptive child, Roma or not, it's like an illusion of knowledge. If you're not ready to take that in then you're not ready for everything else that you don't know.

Daniela Bacchetta, Vice President of the Italian Central Authority on Inter-country Adoption, Italy

I am Vice-president of the Italian Commission for International Adoptions but today I'm speaking as a judge for minors dealing with national adoptions for many years now. I'm very interested in talking about the subject of the adoption of Roma children as they are adopted by Italian couples, not only from Hungary, but also from other countries of Eastern Europe. With regard to a question which was put earlier by the rapporteur, namely: if the couple don't feel able to adopt a Roma child, it could still be considered apt to adopt in general? Well, I think that this should be linked to awareness, every European country has experienced increasing awareness, like in capacity to take older children, or children who are not so perfect in terms of their health, and it's the same also regarding adopting Roma children.

I have also to say I'm a little bit bitter and staggered by some of the statements I've heard today, because we have to recall that we are in 2009, and issues like preparation of the prospective parents, principle of subsidiarity, the right to know one's origins, they are an integral part of our European awareness, of what adoption should be. It seems to me that no one could today question the importance of these principles. In particular, regarding the truth about origin, one thing is talking about the right to see files, knowing what happened in a given year, and another thing is to know that you're adopted, to know that you come from a certain background and that you were also a state ward at some stage.

Now in Italy, since the law adopted in 2001, children have the right to know where they come from. Children who weren't told had a black void. There is certainly a need to go back to their origins. I've known it, I've seen it in those people who knew nothing about their past because they

were not recognized at birth. It is different for those who have been abandoned later but anyway know their origin.

I feel a bit bitter having heard this afternoon that adoption is something that is looked upon as something which is not very positive, as something which leaves scars. Mr Froehlich's story was something rather special because he was talking about a special situation. Now we, as judges for young people, we know many other stories, there are children who are the fruit of a union of desperation and despair e.g. the mother was schizophrenic and the father was alcoholic, the father was in prison, all these desperate, extreme cases, and these are children who were just given birth in the back of a lorry, that sort of thing. These are the terrible things we have to see everyday.

Unidentified

I've a question to Khazova. I can speak from experience as an adoptive mother in Russia in terms of IA. I agree that NA is the best option for the child, but there are many children who will not have unfortunately that option because they have a health issue or because of their ethnic origin, they will not be adopted nationally. And it's a comment really to say that the IA system since 2004 has become so difficult. I myself have so far done 134 documents to submit to the regional court. Is it not in the best interest of the child for those children who will not be adopted nationally, and in my case it's a child who is five years old who has a hepatitis G virus and who's now in the orphanage for the older children, up to 18, where I have seen 200 children in that situation with no hope of being adopted nationally. The question is really why is Russia obstructing IA.

Olga Khazova

Thank you for the question, but I'm afraid I can't give you an answer because this is the question I am always asking myself 'Why are we so much against IA?' I agree with you completely. There are so many children in terrible situations in children's institutions; some of them may be good, some of them, to put it mildly, are not that good. And these children, especially if they have serious health problems, really have no prospects of being adopted within Russia. We need to look at the whole issue retrospectively.

When in the 90s this IA boom started there were indeed a lot of violations. Children disappeared. Legislation was not prepared for so many IAs. Nobody was prepared and from a legal and technical point of view there were a lot of violations. So due to this fact children just disappeared somewhere, abroad and in institutions. There were a lot of stories in the media and on behalf of the general prosecutor, so this was a reality on one part. Most probably it produced some negative general attitude from the society, that we are losing our genetic heritage, but when they say that they forget about those with no chance to be adopted domestically. Step by step, slowly, there is definitely a positive trend. One of the concerns, which has some reason, by the state was that we cannot control in any way what's

going on with a Russian adopted child when it crosses the border of another country because we cannot influence in any way placement control. There are certain measures and rules worked out by the ministry of education for reporting to Russian consulates in respective countries. But there is a limit of what we can do.

There was a strong opposition within a certain period of time over the ratification of the HC; we signed it in 2000 but still have to ratify it. But now there is a positive trend in working out bilateral agreements with the countries where Russian children are often adopted, in particular the very first bilateral agreement ratified this October with Italy.

Maria Herczog

As a member of the UNCRC committee and this is not related only to the Russian case, what we see according to the convention, is that the states have an obligation to take into consideration the best interest of the children living in the respective countries. So I don't think that the message that they should export the problems to other countries, other families, is a good one. What we can do is ensure that every country takes responsibility to provide good quality health care, forms of care to the children who were born in the country and I would very strongly support those efforts that can be made on behalf of foreign countries who can afford that on behalf of organisations to give local care and nurturing to these children, because I guess this is the solution and not IA.

Unidentified

I've got a question for our Russian colleague. Why hasn't Russia joined up to the Hague Convention? Why the bilateral conventions?

Olga Khazova

There was definitely certain resistance to ratification of this convention because there were different reasons, and all of them were never properly articulated. But my understanding is that there was a provision on probate adoption, which doesn't exist in Russian law and it would be very contradictory to our system. Also, there were voices or opinions that post placement control doesn't provide adequate protection to children adopted abroad. And because the need for agreement, for treaty was urgent, it was decided to try to work out bilateral agreements where the participating countries can develop the best provisions they can think of. The Russian-Italian agreement is a kind of success attempt and it is just the first one. I think other agreements will follow, as this is just a beginning.

Signatures of the European Convention on the Adoption of Children (Revised) (CETS No. 202)

Spain and the Netherlands signed up to the convention.

Day 2, 1 December

Inter-country adoption: lessons learned, problems and perspectives

Session V - The 1993 Hague Convention on Adoption: Protecting the best interests of children in inter-country adoption

Chair – Jean-Paul Monchau, Ambassador for international adoption, France

Good morning. I hope that you had a restful evening, which was very called for after the very exhausting day yesterday, plus the magnificent dinner the European Commission hosted for us, and Madame Salla Saastamoinen has to be thanked for that. Indeed the sauerkraut was fabulous, out of this world.

But now we have to get down to business. In our first day we looked at children in the process of adoption, we also looked at adults in the process of adoption, we looked at access to one's origin, finding a fair balance, and the role to be played by public and private institutions.

Today we'll be talking about international adoptions, what the problems are, what are the issues at stake, and what are the perspectives. This morning's session will be devoted to the 1993 Hague Convention on Adoption (HC), and it is entitled: *Protecting the best interests of children in inter-country adoption*. This morning we have with us probably three of the best specialists on the convention. And it seems to me that the rights of children has become a political issue, this was born out by the United Nations Convention on the Rights of the Child, but the 1993 Hague Convention obviously does play a key role in this increasingly political approach to the issue of the rights of children. I am the Head of the Central Authority for adoption in France and I can see what people in France wanting to adopt are motivated by they have this idea that parents do have a right to adopt, but obviously this should never override the consideration of the best interests of the child.

The best interests of the child is a concept that can be perceived differently. We heard yesterday that so many things can be put into these words: best interests of the child. Each person has his or her own approach and that is only natural, but sometimes we believe there's a magic

formula. I'm saying this because I'm always dealing with adopters, with non-governmental organisations, with accredited bodies, there are so many people involved and we have to delve into all of this. It's admittedly a most complex situation where interests don't necessarily converge, so you can see that this is a concept hard to define. You may remember the former Minister of Justice of France and she recently said at a symposium in France that the best interests of the child was a 'soft' concept, but fortunately we do have some instruments such as the 1993 Hague Convention which is very helpful to us because it allows us to better define this concept.

Review of the operation of the 1993 Hague Convention: a global perspective
William Duncan, Deputy Secretary General, The Hague Conference on Private International Law

May I begin by thanking very warmly the European Commission and the Council of Europe for organising this very, very important meeting and indeed for giving the Hague Conference to join in the discussions on IA. I'm going to give you a very brief and broad introduction to the 1993 convention, I'll remind you what was happening at the time the HC was negotiated, what its objectives were and that will lead on to more specific presentations by others.

Let me take you back to how the situation was in the 1980s when we began negotiating the convention. It was a rather black picture for IA and we had a lot of problems to confront. IA was increasing in its extent, large numbers of children were being adopted in that period from South America, from Eastern Europe and indeed from other countries, but the situation if I can paint the dark side first was that the system was not working with BIC in the primary position. That was the first problem and of course that is the first principle with the UN Convention on the Rights of the Child that within the adoption process the child's rights and interests must be paramount. The biological families' rights were not always being respected in the practice of IA.

At the worst end we had abductions, sale and trafficking children as well as improper financial gain, sometimes of a very large nature, sometimes of a very small nature by officials involved in the process. We had many cases where IAs were not being recognised, cases where children were

moving from one country to another on the basis of adoption and then finding that their status was not recognised in the receiving country. We had hundreds of children in an illegal limbo. We had a lack of co-operation, a lack of realisation that to properly regulate IA you do need co-operation between the sending and receiving countries. At that time what was happening was that individual states were bringing in their own controls, their own legislation and trying to do it alone. And that of course is good, it's important, but not enough.

And then we had, as you know, unauthorised intermediaries operating in different countries, all kinds of people, including lawyers. We had a good basic framework of principles in the UN Convention on the Rights of the Child, Article 21, contains the basic rules, but the problem is that we didn't have a practical framework into which to effectively implement those rules.

And adoptive parents were being exploited, and one should not forget this, they were being subjected to often long and frustrating procedures to unpredictable expenses and often paying huge amounts of money. They were often being given inaccurate information about the child that they were adopting, sometimes this was inaccurate medical information, and sometimes it was about things like the age of the child and so on. And many were being left in a state of uncertainty about the legitimacy of the adoption they had organised. For some this continues to be a problem, but we must never forget that the child is the centre of the IA process the adoptive parents also have interests and reasonable expectations, and one of those is that that the adoption they conclude should be safe, should be legitimate, and should not be in danger of being set aside for whatever reason.

That was the background and the other thing to remember about that time were an increasing number of children being held in institutional care in various countries and there was a huge concern that these children would have no opportunity for a family life within their countries of origin and there was a concern that all options should be looked at in the case of these children, including the option of IA.

So along came the HC and the objectives were to address some of these problems. The HC was brought in not to promote IA, nor to frustrate IA. What it's there to do is to regulate IA where it occurs. It does not say to states engaged in IA that you must engage, or that you must not. What it says is if you engage in IA you must engage in these procedures and these safeguards.

So at the centre of the HC is the child's rights and interests, the HC introduces safeguards and a harmonised procedure, based on the co-operation of the two states concerned, based on the basis that the two have a shared responsibility. Neither can go it alone.

The convention attempts to suppress the abuses that sometimes surround IA, including suppression of improper financial gain. It deals with the problem of recognition by saying that the adoption that has been concluded under the HC is entitled to automatic recognition in all contracting states. And it gives, we think, prospective adopters greater clarity, greater transparency and greater predictability.

Just looking at the current status of the convention, there are now 81 contracting states, more of those being states of origins than receiving states, something that gives us in the Hague a great deal of satisfaction. When the convention was negotiated we were very careful to ensure that the countries of origin were well represented and they were. I think the fact that the convention meets the requirements and the expectations of both sets of countries is evidenced by the fact that it has been ratified by sets of countries on a very wild scale.

In addition to the 81 states we have a further 3 who have signed but not yet ratified the Convention. Ireland is the last of the European Community states which is about to come into the convention. I know that the legislation is going through parliament at the moment.

Probably some of you know there's the UN Committee on the Rights of the Child frequently calls upon states that have not yet come into the convention to ratify it, i.e. they have confirmed the HC as the proper basis on which states should co-operate in this area. We are very glad that we have a very good relationship with Unicef who have also made it quite clear that in their view the convention is the right way for countries to go and work indeed in many countries together with Unicef to ensure that the Convention is implemented effectively, as will be talked about later.

On the map the orange is where the HC has been either signed or ratified. You notice the gaps there and they are worrying. The Russian Federation is one of the gaps. We would like Russia to think more carefully about the potential advantages of coming into the convention. We know what their concerns are, most of which can be answered, but any country that engages in IA, and I know that the numbers of children being adopted from Russia are going down, no matter how small the number I think would do well to consider the advantages of having a proper system of regulation. The other area that you'll note straight away where there are large gaps is Africa. I think we have 12 countries in Africa in the convention, but many that are not. You look at that map and countries like Ethiopia which is one of the largest countries of origin with the number of children going out, and it is extremely worrying that situation is, I won't say completely unregulated, because of course the Ethiopian authorities do their best, but frankly it cannot be properly regulated without a form of co-operation provided by the HC between Ethiopia and the receiving countries. So we're hoping to do work

on that. We're doing a lot of work with African countries at the moment and we hope to see that change a little bit.

Just quickly some challenges in implementing the convention effectively. We have found that is of course a need for capacity building in countries of origin. These countries, by definition almost, are poorer countries, often they have weak administrations and they need support to build up effective central authorities, to build up effective controls and so on.

Let me explain some of the challenges, going through them very quickly. Getting the countries of origin to put in place really effective stable central authorities, professionalized central authorities, can be a problem. Getting countries of origin to place IA within the context of a broader policy of child care and protection in order to ensure that the domestic possibilities for the child are first exhausted can be a challenge. Controlling intermediaries, regulating accredited bodies, managing pressure from abroad, which can sometimes be a very daunting thing which receiving countries need to know and need to help countries of origin with. Eliminating unnecessary bureaucracy, e.g. from the perspective of prospective adopters there is, in many countries of origin, too much unnecessary bureaucracy. The HC was not designed to do that. Where controls are needed this is for the protection of the child, not to create just pointless obstacles. Training of key players, e.g. those in central authorities and social workers. In many countries the judiciary plays a crucial role in the training of judges. Closing back doors. Unfortunately sometimes people are very inventive in the ways they find to circumvent regulations in this area and it's necessary for countries of origin to always be aware of these possibilities.

Challenges for receiving countries, the importance of working with and supporting the efforts of countries of origin is tremendously important, managing the expectations of prospective adopters, I know this is a major problem in many countries, I know in my home country of Ireland this is a particular problem, even in France it's an issue, understanding the post adoption concerns of countries of origin is important, why they are so keen to follow up on adoptions that have occurred. Sometimes there is a resistance in receiving countries to doing this and I think we have to understand why the countries of origin take this approach.

And lastly for receiving countries, please help with the programmes for capacity building and training in the different countries of origin, some of which will be described in more detail later.

Getting more states on board. It's important for the adoption community as a whole to join in the efforts of getting states like the Russian Federation, like Vietnam, like Ethiopia, into the convention.

That's my outline and I'll conclude by saying this, that having worked in this area for many, many years, because I worked on the area of adoption in Ireland before joining the Hague Conference, and I'm sure this will reflect your own views, the institution of IA reveals, in some ways, the best and the worst aspects of the human character. It's a world occupied by both villains and heroes. The villains are the ones who view the adoption process as a business, where supply and demand create opportunities for exploitation and profit, but the heroes are those adoptive parents who open their homes and their hearts to a child with often very special needs which cannot be met in the child's country of origin.

Now we cannot create through law a perfect world and the HC on IA, like all human instruments, has its failings, it's not a panacea, and it can at best provide a framework for progress, towards a world in which the villains are frustrated, and the heroes are supported, and a world in which all children have the opportunity, as the UN Convention on the Rights of the Child in its preamble said, either to grow up in their own country, or if that's not possible in another country, in a family environment of happiness, love and understanding.

How the 1993 Hague Convention helps to protect the best interests of children in inter-country adoption

Jenny Degeling, Secretary, The Hague Conference on Private International Law

Since the theme of this conference is ensuring the BIC in adoption I wanted to focus very specifically on how I think that the HC on IA can achieve that purpose. In my presentation I'm going to talk about the protective purposes of the convention, how the convention can protect the parties to the adoption, all of the parties, and then some of the specific safeguards in the convention. So when I'm talking about those things I want you to think of them all as ways in which the BIC will be protected.

You heard earlier that the concept of BIC is a somewhat vague, flexible concept. And often people do not know what it means. So what I'm trying to do is to give some meaning to that term and I want you to think of mechanisms and suggestions I put forward as different ways to support the BIC in adoption.

First of all the protective purposes of the convention are fourfold

- There are minimum standards in this the convention and that means that every country is entitled to add additional requirements for its own particular circumstances which will protect the interests of children depending on the situation in that country.
- The convention requires that adoptions be made in the BIC and everything I will say is directed towards what does that mean.

- The HC requires that safeguards be developed for protection against abduction, sale and trafficking in children. Again this is a requirement, stated in the convention, it is up to every country to decide how those implementing measures must be incorporated. It is absolutely pointless to say that the convention will apply and then not have any implementing measures that go to protect children against those sorts of abuses.
- Finally the convention reinforces and expands Article 21 of the UN Convention on the Rights of the Child, so for those countries which are not party to the HC they are still bound by the principles of the UN convention.

Those principles are taken directly into the HC. Therefore, in our view, there is absolutely no excuse for any country not to be applying those principles I've just outlined which are also in the UN convention.

In addition to that at special commission meetings of the Hague IA convention we have made recommendations that the principles of the HC be applied in all cases of adoption with non-convention countries, and those are recommendations that were agreed to by all countries. So I'm saying that because I know in reality there's a bit of a double standard applying that some countries are more inclined to be careful with convention countries and sometimes they are less concerned with what may be happening behind the scenes in non-convention countries.

The second part of my presentation is about protecting the parties to the convention, and by that I mean the child, the adopting parents and the birth parents. And again there are provisions in the convention that are directed towards that. Of course the main one about protecting the child is about ensuring that the BIC are always given the highest consideration and every country must be taking actions that continue towards that. One of the main ways of protecting a child in IA is to apply the subsidiarity principle which is requiring that you investigate the child's background before any inclination towards declaring a child adoptable. Children do come into a child protection system who are not automatically adoptable, some are separated from their families, sometimes accidentally or by circumstances, or deliberately. The abuses around this are extreme and so there needs to be a proper investigation of the children's background, the subsidiarity principle should be applied, national solutions sought, before IA is considered.

The professional matching of the child with the adopting family is also an important safeguard.

Secondly, the birth parents. How are they protected? Sometimes they are really overlooked in the process, and this is an area where the subsidiarity principle, when properly applied, will be protecting those parents because part of that principle is to try to preserve the birth family, to reintegrate into the family if at all possible, and if that isn't

possible then adoption may be a solution. There should also be measures to protect the birth family against baby buying and selling, and other pressures to give up their child. I know that there are very many poor parents who are under tremendous pressure either financial inducements or other coercion to give up their children for adoption.

In addition the consent of the birth parents to the adoption must be sought, this is required by the convention, and in addition they must understand, they must be counselled to understand the effects of their decision.

Thirdly, the adopting parents, it's in their interests and that of the child they will be adopting that those adopting parents are properly evaluated for their capacity to adopt. Many adoptive parents do come into the adoption process with the best of intentions, a wish to help a child who they feel is in need of adoption, but sometimes a good feeling is not sufficient. Sometimes they need special skills. Parents who are going to adopt special needs children need special skills themselves. They must be evaluated properly to ensure they have the capacity to adopt a particular child. And then they must be given support throughout the process to do so.

The third part of what I want to see revolves around the actual safeguards in the convention itself, you don't always think of things that I'm going to mention here as safeguards, but please think of them as such and as measures will protect the children who are going to be adopted.

Each country, not just the country of origin, including receiving country should give full effect to the best interests principle. The second safeguard is that the child's background should be verified accurately to ensure that he or she is genuinely adoptable. The third safeguard is that there must be the effective financial regulation of the IA, again this requires the co-operation of both states, receiving state and the country of origin. Fourth safeguard is that adoption agencies which are going to be involved in an adoption under the convention must be accredited according to the convention standards and preferably by higher standards in each country as well. There's another safeguard which is very important safeguard which is in Article 17, and this is a point at which both countries should verify that the adoption procedure has been followed up to that point. And then lastly of course any additional safeguards may be applied.

So, coming back to the beginning of my list:

- To give full effect to the best interests principle – I've already mentioned the relevance of the subsidiarity principle, ensuring that the child is genuinely adoptable. In addition, information about the child must be preserved, both for the benefit of the adopting parents, for the future of that child who may come looking for its origins at some point. All information that can be

gathered should be preserved. Matching with the best adoptive parents possible.

- Verifying the child's background – to ensure that he or she is genuinely adoptable. This is really a very important step, it's in Article 4 of the convention and there is a great deal of effort required behind that simple statement in the convention, that the child should be adoptable. A country of origin has this responsibility and it must set up a proper system with transparent criteria and an effective decision making process to ensure that a child is going to be genuinely adoptable. Because too many cases occur where children come into an orphanage, there may be unscrupulous dealings going on and the child who has a family is being declared adoptable because that is money into the hands of orphanage directors in some countries.
- Financial regulation of IA – This has already been referred to but I want to emphasise that because so much of this is happening in the country of origin it does not mean that it is the responsibility only of the country of origin. These are shared responsibilities, the demand is coming from receiving countries so a great deal of responsibility rests with the receiving countries to make sure that improper gain and profiteering, and selling/buying of children for the adoption market, I don't like to use that word but that's what it is in many cases, is going to be stopped. Transparency of costs through co-operation between countries, knowing what the real costs are, and the additional costs are obviously being extorted from vulnerable parents, they must be brought out and stopped. And in addition there must be criminal penalties who engage in those activities are punished.
- Regulation of adoption agencies through the accreditation process – you know very well what's required here but I want to mention that these adoption agencies must be reminded that they are performing some of the convention obligations that have been imposed on the central authorities, so functions are delegated to the adoption agencies and they must play their role in upholding the convention obligations and functions. They are responsible for those things.
- As in Article 17, this is a pivotal point in the adoption procedure; it's the point at which both countries must agree that an adoption may proceed. It is the last point at which you can stop an adoption if you become aware there has been some abuse of procedure, and both countries must play their full role in reviewing the procedure up to that point and not giving agreement to allow an adoption to proceed if it's not safe to do so.

I want to conclude by saying that, as Mr. Duncan has recalled, many bodies have agreed that the HC is the appropriate legal framework, it has the safeguards, it has the protection, but it will not have any effect so ever unless each country implements those safeguards and protections effectively. The convention is only as good as the way in which it is implemented in each and every country.

Thank you.

The role and responsibilities of receiving countries: the importance of the inter-country adoption technical assistance programme

Laura Martinez Mora, Coordinator Technical Assistance Programme, The Hague Conference on Private International Law

In my presentation this morning I will unfortunately not be able to avoid repeating some of the principles that have been set forth by previous speakers, but they are extremely important principles in this Convention so they do bear repetition. Let me begin by saying that the convention lays down the legal framework for co-operation between the authorities of the receiving countries and the countries of origin, as has already been stated. This convention is known as the 1993 Convention on Inter-country Adoption but one tends to forget that this is also a convention intended to protect children, which is the most important. This means co-operation in the field of Inter-country Adoption. In this type of co-operation you will find the fact that both countries, the country of origin and the receiving country, share the responsibility of ensuring safeguards to protect the best interests of the child, the birth family and the adopting family.

Now, one way of making sure that this co-operation will be done in the best possible manner of exercising co-responsibility is what is known as shared responsibility. This means that the country of origin will be working hand in hand with the child, the child's biological family, and the receiving country will be working with the prospective adopters. And at one point the countries will come into contact as to how to proceed in the best interests of the child and in order to guarantee everyone's interest. Let me give you some examples as to how this particular co-responsibility principle is actually put into practice involving mostly the responsibility of the receiving country.

One of the very first things to know is that the receiving country has to take on itself more responsibilities concerning the adoption process. Very often it's said that the country of origin has to work with the child and the biological family, and the receiving country only intervene when matching is actually made with the child, as soon as the prospective adoptive parents come to know the child, well, this is not true. Co-operation has to start right from the very beginning of the process and how could this be done?

There are a variety of ways. First way, take into account real needs for adoption in the country of origin, whether that need does exist. Some countries may have a rough time, they're in the throes of a social crisis, they encounter all kinds of problems, so why is it then that in a particular country X there are 5,000 children up for adoption, and in another country undergoing the same crisis there are no children up for adoption at all or very few? The situation is just as difficult so you may start wondering whether there is a certain amount of pressure that is exerted on the families of origin. Moreover, when prospective adopters come

into the country and add pressure, this creates a certain amount of problems.

One should abstain totally from exerting pressure on the countries of origin to have them put up children for adoption. This is a very difficult subject, in the Hague Conference, in my area of work, we try to be very objective because in the majority of receiving countries people get married much later in life, have children later, at times they can't have children at all then they decide to adopt, they exert pressure. People want a family, they want to start a family and so you have to make sure that, as a governmental authority, you help in avoiding such pressure being exerted. This is done by controlling the applications and by having the necessary controlling bodies coming into the picture as well.

So the first thing is to see what the country of origin actually does need, and the second is that everything pertaining to adoption in the country of origin has been clearly specified. Yesterday we discussed who could adopt and who should not be able to adopt but it's not so much a matter of who can and who cannot, really what we need to see is if domestic adoption is possible, taking into account the needs and wishes of the child.

Obviously, the prospective adoptive parents are very vulnerable people. These are people who've suffered sterility, some have had medically assisted attempts at reproduction that have failed, they are exhausted and they feel frustrated, they have suffered, so they need to be assisted. If they do not have counselling and clear explanations of why they have to wait then their behaviour can be harmful rather than helpful, not that they are going to be criminal, but they may want to expedite procedure in the country of origin, they may want to select a child and they need counselling to avoid all this malpractice.

Another thing that's been enshrined in the Hague Convention, and it's also stated in the code of best practices, is the need to take into account the reasonable needs of the country of origin as regards the post-adoption monitoring reports and I underline: "reasonable".

Other responsibility of the receiving countries is making sure that all the financial aspects of Inter-country Adoption are well monitored, they must identify costs, regulate costs, also make sure that the licensed agencies or accredited bodies work properly and are kept under constant supervision. This is an area where receiving countries have tremendous responsibility.

Something that happens in many of the receiving countries is the effort to put an end to private adoptions. Under the HC these are adoptions not carried out by a central authority or a registered body. There is also another category known as independent adoptions where adopters are coached in the receiving country, but they go in the

country of origin without any assistance. That type of adoption is not compatible with the rules of adoption in the convention. They should be terminated. Unfortunately, the majority of adoptions at the present time are independent or private adoptions. It is very difficult to change things but one must constantly try and explain why.

Well the convention is intended to protect children, and any measure intended to protect children means that at least a third subject should participate to process in order to protect the best interests of the child. If the safeguard is to make sure that there is no complete severance between the birth family and the child, just so as to make the child adoptable, this is the kind of thing you have to make sure will never happen, so you need professional supervision and this is why it is important that there is no abuse in the severance of this tie, which is often the case with private adopting agencies.

It happens sometimes that the receiving countries apply correctly the Hague Convention, protecting the best interests of the child, but, when they work with other countries that are not parties of the HC, they do not apply these guarantees and safeguards. At the last meeting of the special committee on the 1993 Hague Convention, we realised that it was necessary to guarantee the same safeguards for those countries which are party to the HC as well as for those which are not party to the HC.

Now the last point of responsibility for the receiving country, in my opinion, one that is very difficult to implement, is to try to help the systems established to provide care for children. Yesterday one of the specialists talked about this, we talk so much about adopting, but really it's about the protection of the birth family, to see how best to do things without hurting people. It's all about that, really, developing a mechanism to protect children, but the problem is obviously that this is not necessarily going to lead to IA. It's already easier said than done, that already some countries of origin have come to realise that development assistance is necessary for them to eventually be able to put up a child for adoption. It's a very difficult balance to reach in these countries between the need for ensuring good protection, perhaps finding a home through DA, and Inter-country adoption. All of the domestic remedies have to be exhausted before the decision is finally taken that the child is adoptable in an inter-country process. It's obvious that the country of origin cannot do all of this by itself. It does need the support of receiving countries to put an end to change the situation.

And this is why the standing bureau has set up a technical assistance programme, in order to boost this protection of children, and to ensure that the HC is fully implemented in certain countries. The HC aims to protect children, it's not a matter of promoting adoption or not. But only to allow such adoptions as are considered strictly necessary. The programme aims to assist countries that wish to accede to

the convention, or that may have acceded or ratified but find it difficult to implement it and need assistance with this. You've already heard about the two pilot countries with which we are working, Cambodia and Guatemala, for some years already trying to help them out to improve their situation.

To conclude, in order to be able to implement this technical assistance programme, there's one thing that's very, very important and that's that the countries of origins themselves should ask for this assistance, you cannot go to these countries and impose assistance on them if they don't want it, if they're not willing to accept it, if they don't think they need it, they don't think it's in their interests to change. The very first thing is to make sure that the country of origin realises it does want to change and that it needs assistance.

Then, if I can summarize very quickly, the first thing that we do is to give them legal assistance, i.e. we help them go through the whole process of acceding to and ratifying the convention, of changing the national law in order to adapt it to the Hague Convention and also giving them the necessary capacity building so that they adapt the situation to the HC and the rights of the child. Once the legal setup is there, this enables the whole structure to change.

Once you have the legal framework and you know who will be doing what, who has what responsibility, then you're going to start training the necessary players, judges, agencies, central authorities. So, all of this obviously means a great deal. We work with UNICEF, International Social Service and Non-governmental Organisations, as we cannot deal alone with all this. The situation changes according to the country. But what is important also is to set up working parties between countries of origin and receiving countries. We bring them together and we see how to get the best possible results. We also work with other experts from the countries of origin and also independent experts.

To conclude, on our website, (www.hcch.net), there is a dedicated area for Inter-country Adoption, and gives all kinds of practical advice about the technical assistance programme. There is also an explanatory report which is much more legal but does explain article by article how the convention should be interpreted.

Jean-Paul Monchau

I think that in that very brief space of time we've been able to have a very good look at 1993 HC. We have to remember first and foremost that this is a convention on the protection of the child but also co-operation concerning Inter-country Adoption. It seems to me that the fact that 81 countries have now ratified the convention means that we have now reached a critical mass. When it comes to the geopolitical situation of IA, if I may use this expression, there's a very important date which is April 2008 when

the United States implemented the convention. When it comes to the number of IAs, the United States is really one of the largest players, almost as large as all the other receiving countries together, even if the number of IAs is now becoming lower. So really USA it is a big player here, and we know very well indeed that for a number of different political reasons what happens in the USA does have repercussions in other countries too. This is very important.

We've also spoken about shared responsibility between country of origin and receiving country. The receiving countries do everything that they can to encourage countries of origin to ratify the HC, it's something that we do and perhaps we can give some examples. An important country of origin is Vietnam.

At the beginning of 2008 most countries represented in Hanoi took steps to get the Vietnamese to take on board the HC and, as a result, in Vietnam a calendar was finally drawn up. They looked at the new law on adoption and moved towards ratification of the HC. Now, it's quite correct that this was not the first time that they said this, but this is what international action means, repeatedly putting on pressure and creating the conditions to make it possible finally to obtain an objective.

In Cambodia, where adoptions are basically stopped, there are only some Italian and French cases remaining there, but we don't see any new cases in Cambodia. For a couple of months now with the Permanent Bureau of the Hague Conference on Private International Law, we have set-up an international working group, including the Cambodians, and we put pressure on Phnom Penh to vote its new adoption law. This country has ratified the HC, but they do not implement it.

So we have members of the HC who are there pushing other countries to either ratify the convention or put it into effective application.

I could give you other examples of common action. In Haiti, a French initiative made it possible for a new adoption law to be tabled in parliament, meaning that in two or three years that could come into force.

The final subject, one that is important to me, I wouldn't hide that from you in my capacity as representative of the French Central Authority, is that we need to eliminate private adoptions. We have work to do here because those adoptions really do undermine the work that we do with receiving countries etc, and as the head of the French central authority, one of our objectives is to work in this area because whatever you do, whatever you say, parents who want to arrange their own adoption will never be able to get in contact with accredited bodies. Sometimes things just don't happen in a way that people don't see, there's a lot of silence, there. And money is never absent. In the HC

framework we have to make sure that we work in that area too towards the same objectives.

A lot of countries, such as Ethiopia for example, haven't ratified the HC but say that adoptions have to go via authorised bodies. When you have that sort of case coming up, that sort of opportunity, then it's something you do have to seize.

General discussion

Claire Gibault, former Member of the European Parliament, France

I have a question for Ms Martinez Mora, I was interested in everything that you were saying there when it came to talking about requirements for the country of origin and not putting pressure on those countries and not harming national pride. Do we really have to say nothing if we find there are scandalous things happening? I wonder what you think about that. Obviously we have to be diplomatic but what you gave me the impression that you were thinking more about the interests of the country of origin rather than the best interests of the child. When it comes to what you said, Ambassador, I agree with what you said about these private adoptions and the need perhaps to curtail them, but the problem is that money is not always involved even in the case of independent adoptions. That's something that I've seen myself.

Laura Martinez Mora

Perhaps I didn't express myself clearly because I didn't really take enough time in order to develop this idea. I was speaking about the real adoption needs in the country of origin; these needs have to be clarified. How many adoptable, truly adoptable children are in that country? And when I spoke about the requirements what I meant is not to allow these countries to do just anything. These are requirements that have to be legal requirements that have to be stated in the legislation that has been enacted by that country, but also by the receiving countries because there are some countries that may not want to work with some countries of origin because they feel that they do not have the necessary legal framework, and these conditions have to be respected.

The idea is to make sure that there are sufficient conditions, requirements and safeguards, legal safeguards in the country of origin to promote and to foster and to protect the BIC and avoid abuse. It is true, there may be abuse in some countries, but you need to have all the receiving countries to agree that there is a situation of abuse in that particular country of origin, and they need to be told why things have to change, why it would be in their own interests to change things. What is important however is that the receiving country should not be exerting pressure itself, alone. It's important that all countries get together and get things changed. For example with Guatemala, if only one country wants to change things, it won't get anywhere and Guatemala will resent this as interfering

in its domestic affairs. So it is much better getting all the receiving countries together to effect change.

Jean-Paul Monchau

Let me mention money, among the risks for families going down the adoption path independently. Whereas if you go via an officially accredited body, they do know what the dangers are. They know where the orphanages are, what the legislation is in that particular country and that is the reason why it's so much better to go via the official adoption agencies. I'm not by any means stigmatising private and independent adoptions, but this is what I meant.

Arun Dohle, Germany

We do research cases of child trafficking with respect to accredited bodies in both sending and receiving countries, just the example of Romania, and of India, they had both implemented the HC. We find gross adoption abuses there up to the extent of kidnapping, falsified paperwork and being sent to European countries, U.S. and Australia. I would like to highlight and ask the question, how can we deal with these abuses if we allow these accredited bodies to charge adoptive parents 15,000 – 20,000 euros? Which always goes under project heads and other creative ways to the country of origin, which is 5 – 10 times the normal income of a person working there.

There is mention of improper financial gain but this is not defined. So what we see is, despite the HC being implemented, still IA is favoured, waiting lists are for IA parents, and children are recruited. So I don't know how we tackle this with these conventions. Hence the conventions make a smokescreen, give a secure feeling but actually don't do much on the ground to protect the children. And to protect their families, because the children have a right to stay with their families. The number of real orphans is much lower. I've just been to Ethiopia for three weeks and I was shocked to see how children are recruited for IAs by agencies who work in receiving countries where the HC is being implemented. I've just come back from India and I'm always shocked to deal with cases of U.S. adoptions under the HC where children have been deported back. So there are a huge number of issues which I feel are not addressed by the conventions.

Jean-Paul Monchau

Thank you for your comments, but of course nobody's perfect, no situation is perfect. What is essential is that there should be a desire to correct all of this abuse.

Tina Friedrich, free-lance journalist, Austria

My questions also concern money because you, Ambassador, said that private adoptions are more open to financial abuse but then you said that you want to enforce private adoptions. How do you support this argument? Then, a question for Mr Duncan. You mentioned improper gain, but how is this defined?

Jean-Paul Monchau

I'm afraid I never said I was favourable to private adoptions, I said the exact opposite. Perhaps it was a translation problem. But I really believe that we do have to avoid private adoptions.

William Duncan

In relation to improper financial gain, that's a very important question. What it means is different things in different contexts. It was impossible when the convention was being negotiated to go into the detail that is needed but I think it is generally accepted that those who are properly engaged in the adoption process, whether it be social workers, lawyers, or whatever are entitled to charge what, in their professions, would be regarded as reasonable fees. And one of the difficulties here is that we don't always have transparency. The key to this area is transparency, and when agencies are being accredited one of the most important things is that their financial operations should be looked at and there should be a demand of absolute transparency in relation to the fees that they charge, and all the preparatory aspects of their work. I can't really say more than that other than that the accreditation process is crucial as part of ensuring that improper financial gains are not made. The introduction of criminal penalties is crucial as well. With transparency, once we know what is being charged, why it's being charged we can generally tell in the context of a country and a particular profession whether it's improper or not.

Thomas Klippstein, German Ministry of Justice

I'd like to thank the people from the Hague Conference for the excellent portrayal of the convention here and thanks also for the information that more international co-operation is required between the convention parties. This is the sort of thing that I would agree with. I have two questions, related to the future of the HC. Do you see any real shortcomings in the convention, e.g. things that will be discussed in 2010? We will have a special meeting on the convention. Secondly, the HC has now worldwide recognition, do you therefore see any need for us at a European level to set up some sort of agency to deal with the management, macro or micro, of the HC, either internally or externally?

William Duncan

Are there any shortcomings? As I said earlier, all human instruments are imperfect, but most of the shortcomings we see are in the way the HC is implemented or not implemented. I do have to admit that there is a problem in relation to ensuring compliance with convention

obligations. Like all HCs there isn't a centralised police force or bodies that have powers of investigation. If we're informed about a particular problem our powers within the permanent bureau are limited, we don't have the right to go into a country and investigate. We can simply talk to them and say: "Can we help?" along with other States. It may well be that we need to look at different mechanisms particularly to respond in situations where there seem to be serious abuses occurring. One questioner stated that he had concerns about certain happenings in India. Now it would be nice to have a situation in which one could, where a prima facie case is made out about abuses of the HC, that we could begin some kind of investigation. It would have to be in co-operation with the particular country concerned.

We have a general review of the convention coming up next year and we want to hear from all of you who know of abuses that are occurring, we want to know from you what is happening, so I would invite you and anyone else who is concerned about abuses in particular countries to please write to us, in the permanent bureau with your concerns.

Elizabeth Canavan, Principal Officer, Office of the Minister for Children and Youth Affairs, Ireland

Just to begin to say that Ireland has not yet ratified the HC and as a receiving country that has some considerable embarrassment as Mr Duncan negotiated, as part of devising the convention, on behalf of Ireland. We have a highly regulated adoption system, a less regulated IA system, and it is very challenging now to move to the HC which attempts to regulate in a much greater way the process for Irish applicants. I should preface my remarks by saying that in Ireland we believe that our applicants are very genuine and well motivated and they're also very frustrated by a system in which the waiting times are long, which is also the case in other countries.

We are currently going through an extremely difficult process in trying to bring our domestic law through the Houses of our Parliament and there is tremendous pressure to dilute the standard we are attempting to achieve. And I suppose partly that is because of a concern that many of the main countries that Irish applicants adopt from are not party to the HC and of course this means that unless we can negotiate bilateral agreements with them that means that Irish applicants will have to look for alternative countries. And I suppose, having worked in this area for about 10 years on and off, what strikes me most of all in this debate we're having in Ireland is who is speaking for children who are being adopted and this debate is not really being handled in a very balanced way, which is frustrating. So this is why this meeting is very important I believe.

I think one of the issues when I've heard some of the questions that have been asked about how we could better improve this connection between countries and certainly I would say that one of the issues we have in Ireland is that not only are we receiving pressure from prospective

adopters, who in fairness maybe don't have access to all of the information available to us in the department and various offices, but there is also pressure coming from other receiving countries because in fact they continue to operate in particular ways and in particular countries. So applicants say: 'But why are you setting such a high standard, such and such a country doesn't set this standard?' But I do think there have been some good co-operations and we have been involved in the efforts in Vietnam and that has been very effective, but that has been ad hoc and really depended on the personalities of individuals on the ground there. So, like the last speaker, I wonder if there is some way that we can develop a code of practice which allows countries of origin and receiving countries to raise their concerns in a way that can be properly processed to conclusion, to our satisfaction, rather than depending on very ad hoc arrangements.

Marco Griffini, President of Amici dei Bambini, Italian accredited body, Italy

I'd like to ask a question about the profile of the accredited bodies. Ms Martinez said this morning that the Hague Conference is carrying out an initiative to work together with the countries of origin, Guatemala and Cambodia were mentioned. As we know, these two countries are following the indications which have been laid down by the HC and, with reference to the indication that you provided. I'd like to have a rough idea of the number of accredited bodies involved, e.g. numbers per country, is there a quota per country, which is the situation for Italy. There have been indications that not more than two organisations per country have been authorised to deal with this. My question is this, has any information been provided with regard to the profile of the accredited bodies i.e. what these authorised bodies should be like? Because it seems to me that no work has been done along these lines. We are seeing a rather contradictory situation here, e.g. we believed that accredited bodies cannot carry out IAs without at the same time carrying out international co-operation activities to ensure that the idea of subsidiarity is applied. In practise, I can't go along to a country as an authorised body, and taking away a child without having set up all the initiatives to make sure that the child can stay in the country. But today we're seeing that this Hague Conference principle is no longer accepted by all countries of origin concerned.

A Brazilian State, for instance, has clearly said to us that we have only to deal with adoptions and we are not anymore allowed to work in child protection projects. Is this possible? What are we supposed to do, be simply agencies for international adoptions or are we non-governmental organisations dealing with international cooperation as well?

Jean-Paul Monchau

I think that the discussion you want will be happening as part of the review in 2010.

Laura Martinez Mora

So far, really it's the technical assistance programme on Guatemala and the first phase of the pilot project that has been taken into consideration. The HC has made a certain number of recommendations, which it's then up to the country to see what's best for them. The idea is first of all to see who the children who cannot be adopted in Guatemala are. Those do therefore need to be put up for IA and for these a two-year pilot programme has been devised, to try things out little by little, slowly, gradually, to see how in a country where there has been tremendous abuse and so many problems, finally IA can be put on the right track. One of the things we have done is ask the central authorities of the receiving countries to get in touch with the central authority of Guatemala. There are two questions here, one for the country itself and one for the officially accredited adoptive body, which should be a properly licensed agency that has got experience of this kind of things, experience with special needs children because most of the Guatemalan children can be considered in that category. This is the project that has been developed so far, though it needs to be developed further. One of the things that we do know is that obviously you want to work with officially accredited bodies, this goes without saying. However, you have some that are really accredited and some that are accredited to a lesser extent. Not everyone is equal in this field as some have much more professional experience than others, and that's another thing to be sorted out.

And your second point is difficult to answer with just a few words. This is a highly intricate issue, the relation between protection of the child and the birth family, and on the other IA. What is definitely clear to us is that if a country wishes to engage in international co-operation of a humanitarian nature, it cannot simply be giving out assistance with one hand and with the other saying, 'Sorry, but you have to give me children in exchange for this assistance.' It's difficult to keep the two things distinct, easy to say but difficult out there in the field. And this is one of the things we're discussing in the guide of good practices and at the next special committee, to have this tricky, dicey, difficult relationship. This is why it is so difficult to guarantee IA with a full set of safeguards and completely complied with principle of subsidiarity. Very difficult to do so we're discussing that.

Jean-Paul Monchau

It might be a good thing if the Special Commission next year would deal with this particular question of the participation of those officially accredited bodies in any co-operation action. I usually make a distinction between what I call institutional co-operation, e.g. in France we co-operate with States of origin and we're ready to review some projects of assistance for children who are deprived of families which is what we are doing at the present time in Cambodia. However, we do not want to enter into a co-operation agreement directly with orphanages, because

it's very important that we make it clear that one thing is helping children to remain within their families and another one is working with orphanages because that could immediately be interpreted as getting IA in through the back door.

Now, it's a difficult subject to deal with, because some officially accredited bodies also have worked as NGOs specialised in childcare. So, you need to give priority to an ethical approach, but there still need to be rules. The next Special Commission should be taken a long serious look at the subject.

Daniela Bacchetta, Vice President of the Italian Central Authority on Inter-country Adoption, Italy

I would like to point out that this morning we have all said that things could be improved, but nonetheless, without the Hague Convention, we would not be able to have good adoptions in general, because co-ordinated work is essential. The Hague Convention is a very special instrument of International Private Law dealing with an important social issue, and it is evolving. Today, and I refer myself to Ms Martinez Mora and Mr Griffini, we have made this gesture, one hand is giving and one hand is taking, but in Italy we say instead that there are two hands giving, one for help implementing the principle of subsidiarity and the other to give a family to children through adoptions. This should be our way of thinking.

Session VI - The right to a family in the international legal framework and in practice

Chair – Melita Cavallo, President of the Juvenile Court in Rome, former President of the Italian Central Authority for International Adoption, Italy

I'm very happy to be the moderator for this discussion on a subject I've been interested in throughout my career. The discussion today is aimed at dealing with the contradictions between the international conventions and the national laws which aim to protecting the child and the child's right to have a family. We will tackle also the issue of development of children kept in institutions over a long time, because they are suffering there, they suffer from material deprivation but also from deprivation of warmth and love. The international conventions establish a framework to guarantee a family for these children, in the their country of origin if possible or otherwise with an adoptive family in another country. If the child cannot return to the biological family, then the receiving country and country of origin should ensure that the best interests of the child are

guaranteed in the adoption process. Bulgaria and Romania will tell us something about this.

The right to a family: analysis of the existing legal framework

Isabelle Lammerant, Expert on adoption and children's rights, Espace adoption, Geneva, and Lecturer at Fribourg University, Switzerland

When I was told about the subject that the organizers of this conference would have proposed to me, I was immediately interested and I should like to thank them for asking me to come. The right to a family. Who has a right to a family? Is it the child who's supposed to have been abandoned? Under the Preamble of the Convention of the Rights of the Child, practitioners would immediately claim for the right to a family for every child, maybe too quickly. Or is it the prospective adoptive parents who are so keen on having a child and probably think that they have a right to a child, i.e. the right to a family themselves. Is it really a paradox to place on the same footing children who are deprived of a family and are vulnerable and prospective adopters who usually do have a good standard of living and are socially successful, but sterile?

This paradox is fraught with meaning because, in spite of the fact that we want to act like demi-gods and find a family for both of them, legally, from the point of human rights, the right to a family simply does not exist. This may be disheartening but it's very important to avoid falling into traps by trying to find at all costs children for prospective adoptive parents. But also another trap would be to think that the only solution is adoption, particularly IA for children who are deprived of families.

Why is it that there is no such thing as the right to a family when we'd all love that right to exist?

Firstly, in the ethics of law, no one can claim to have a right which denies another human being because then you would be turning him or her into an instrument, an object. Nobody has the right to another human being. What is it that Article 8 of the European Convention on Human Rights actually deals with? This is not the right to a family but the respect to privacy of family life, which is not the same thing, as many Court decisions have reiterated. In *EB v. France* the Court found that Article 8 does not guarantee the right to start a family or the right to adopt. The right to respect family life does not only protect the desire to start a family, it only applies to an already existing family.

First of all, in the birth family, even when the child is placed outside that family, there is a right to respect of family life, which must be guaranteed positively by countries, but also the respect of family life within the adoptive family. But adoption itself is considered, by the European Court of Human Rights in the recent decision *X v. Croatia*, to be a serious interference with the respect of the family life of the birth family, particularly if carried out without its consent.

So, when is adoption justified in the best interests of the child? In other words, what happens from the point of view of human rights when the family ties are broken? Because this is the situation which mostly raise our concern, that of children “forgotten” in institutions, in every country. It is for these children, certainly, that the idea of the right to a family has originated.

Instead of dreaming of an impossible right, I propose you to consider the clear principles of the Convention on the Rights of the child, that are also stated under the case law of the European Court of Human Rights and the 1993 Hague Convention.

Article 7: the child has, from birth and as far as possible, the right to know and be cared for by his or her parents. This is another paradox indeed: the right... “as far as possible”.

Article 9: the State Parties shall respect the right of the child who is separated from one or both parents and to maintain personal relations and direct contact with them, except if it is contrary to the child’s best interests. Another right, but submitted to the best interests of the child.

Article 20: any child who is temporarily or permanently deprived of his or her family environment is entitled to special protection and assistance from the State, which could be in the form of adoption, a foster family, kafala in Islamic States, or, if necessary, placement in suitable institution for the care of children. When choosing among these various solutions, one has to take into account the need for continuity in the education of the child, as well as ethnic origin, religion, language and culture.

Article 21: IA can be considered an alternative means of providing care for the child if the child cannot be placed in a foster or adoptive family or cannot in any suitable manner be cared for in the child’s country of origin.

And the very important Article 25: a child that has been placed in an institution has the right to a periodic review of all the circumstances relevant to his or her placement.

So the Convention on the Rights of the Child supplements and explains the right to respect for family life under the European Convention for Human Rights. And in this framework I see a right which is not really explicitly stated as such in the Convention on the Rights of the Child. However, implicitly it does appear and it is a right which is increasingly recognised internationally and probably is the closest right to a right to a family, a right to permanency planning; a possibility for the child separated by his /her family to understand that there is some kind of future ahead, preferably within a family.

Indeed, the right not to be forgotten in an institution, the right therefore to having work undertaken as soon as he’s placed, or before, in an institution, with the participation

of the child and birth family, in order to debate firstly the possibility of bringing that child back into the birth family... And should that turn out to be impossible, then that right implies that a permanent solution must be found so as not to place that child in one institution after another, a sort of permanent chaos.

So you can see how all of this is extremely delicate, and one must be careful because some children are very often traumatised by the past, they’ve been through repeated separations and therefore integrating that child into a family can turn out to be extremely risky. So the best solution could be institutional care but of a family type. And for all children who do need a family and are capable of integrating within that family then the State is under an obligation of finding a suitable family, without it becoming the right of the child, because for older children, those with siblings, and those of ill health it is hard to find a substitute family. For them a “family type” institution could be advisable and also for the children who are still able to keep some ties with their biological families. But this does not have systematic priority over adoption, because other children without proper biological parents need a family, a father and a mother all life long, they need the security of family, preferably in their home countries but if it is not possible in another country.

To sum up, the right to a family from the viewpoint of human rights does not exist as such, however, children, including those in institutional care, do have the right of respect for their own family life. But when these links are considered to be insufficient or harmful for the children, they do have a right to be placed as soon as possible in a suitable family environment so they will have a future. Therefore, the State is under the positive obligation of finding the right balance between these two rights of the child.

So let’s not try to over simplify things, or be swayed by one particular solution, for instance national adoption, inter-country adoption, foster care or family type institution, because this would be to the detriment of a global policy, taking into account all the possible solutions. Because, by giving preference to only one solution, we forget necessarily some children.

To conclude, what can we do in Europe in order to promote the best interests of the children placed in institutions, both European and non-European, in the framework of the international cooperation? First of all, let’s give our authorities a clear mandate and provide them with an effective autonomy so that they will not fall into the trap of pressure placed upon them. Their mission should be focused on the interests of the child, rather than pleasing adults and find an appropriate solution for every child on a case by case basis. We have to make sure that in every one of our countries all solutions to protect the child are being taking into account, and exchange good working practices, have common standards.

Finally, where IA is concerned, we have to refuse competition among receiving countries and pressure on countries of origin, because that is one of the major causes for serious breaches of the children's rights in the world.

I thank you for your attention to my thinking on the right to a family, based on my legal research, but also on two decades of practise with adopters, children, parents and countries of origin.

Melita Cavallo

I am a judge and I would say that a right does exist when the right holder can exert it. The minors cannot exert their right personally, but in every country there are courts, prosecutors, guardians, who are able to exert the children's rights on their behalf. And this is the first right of the children.

Long-term institutional placement and foster care and the best interests of the child

Violeta Stan, Paediatrician, specialised in child and adolescent psychiatry and neurology, Senior Lecturer at the University of Medicine of Timisoara, Romania

(sang a Romanian lullaby to open the presentation) A baby alone does not exist. This means a baby should be looking up at their parent, in somebody's arms, and I start my speech looking to your right hemisphere which is sensitive to sounds, to emotion, to be cared for, and I will pass to the left hemisphere because I'm a child neurologist, to feel why I am telling that children under two are at risk of harm if they don't have this human presence in order to grow. In your brain you have genes, but only 50% are genes, the other 50% is environment. So what we have to offer to our children in terms of mental health, professional help, is this kind of personal care, looking after the emotional needs of the child.

I come from 20 years experience in Romania and I am telling you that the first idea in medical discipline is "*primum non nocere*", first don't do harm, and then you will cure things. So I was part of an international group looking at children in institutions. In 2003, a project conducted under the auspices of the European Commission's Daphne Programme surveyed 33 European countries to map the number and characteristics of children less than 3 years old in institutional care for more than three months without a parent. It was a question of how children were looked after in institutions in Europe, without human warmth, without human interaction, without simulating the capacity to react to curved lines, facial expression, human figure, human voice, human touch, and that's the problem of children in institutions. The results from the questionnaire to the Ministries of Health showed that 23,099 young children (11 per 10,000) in under three years were institutionalised in European countries, that's the reality, that's fact.

Research demonstrated that what happens is that under stress the human being reacts in three ways: fight, flight

and freeze. The child cannot fight, cannot fly but can freeze. Babies are stressed from the birth and then we pass them from one institution to another, from one placement to another etc and so they have development delay, they lose some neurons before the age of two, before the language, because in the non-verbal communication we help them deal with stress and emotion. So, putting them in institutions whose staff is not aware of these needs, the right of children for human interaction, the need for the presence of others, is harming for the child development.

What is important here is the sense of being cared for, not only the care that you need. It is not only a matter of food; it is not a digestive tube that we have in front of us, is a human being that needs human presence in order to develop brain.

We looked therefore at the de-institutionalisation of children. We made recommendations and you can find them in the leaflet of Daphne Programme on the dedicated website so I will not insist on this. I would like to speak about how we do this de-institutionalisation because yesterday I spoke about children left in a maternity ward without birth certificates, without legal identity still late in 90s. Now we have this problem solved in many countries, thank to the help of UNICEF. I deal with this project called "the house with open window" which I set up in Romania in the most impoverished region, in the mining area of the valley of Geou, where there are only human resources, but people has knowledge and we organise also a kind of "university for parents". We teach them, foster parents, adoptive parents, professionals from different levels, on what the needs of children are, and this completed my small project with five children.

Why 'house with open window'? Because those children need to be protected, to have the intimacy of family life, but the windows should be open so that everyone can look in, and the children can look out and make their choices, we are giving them the dignity to make choices, to choose their breakfast plate, for instance etc. This needs to be given in care, the respect for the child to choose, we know we have to give this early with care intervention. The project house was a research action project, we use attachment theory and the last discovery from MRI, we look at it, what areas of the brain are functioning when you look at your own child's picture and a child that is loved, part of a loving family. There are different parts of a brain activated when a professional looks at the child and a parent looks at the child. So not only we speak to the child. A child speaks to our brains, so there are connections. And now: transition. How will a child go from one place to another? How we prepare the transition for this child?

If we realise that for a human baby under six months the permanent caregiver is the secure base of attachment, we have to pay attention to how he or she will exercise the detachment to another person. So what we put on our

children today it's what we will have tomorrow. A child who is secure and whose rights are respected will know how to respect our wishes and desires. Professionals should listen to all those needs: in the type of institution I propose there is a supplementary family for children without legal identity based on attachment theory when one person takes care of one child and they have special care. And they have two children with disabilities, who are difficult to adopt, and they have three children without disability, and they have access to clothes and everything they need, so that when a foster or adoptive parent come, then the child is ready to go ahead and is prepared for the next step. Our recommendation to prepare children for moving from an institution to the community is that the foster or adoptive parent should be assessed prior to any move in a new placement as to how they understand these children, the special needs of this child and should be supported by the staff.

I would stress the importance of transition of objects, personal photo and diary of a child. And you see in the back of the photo depressing views of mining areas, all the closed mines and unemployment there, but the mother is happy with the child in her arms. If those children are visible to the community in alternative structures, more than those which t can be supported by NGOs, the community will solidarize around them and the neighbourhood will take care of them. So even in that community we can find parents for those children. A foster family was well-prepared to take care of a maximum of five children and will make the lives of those children much better than is possible in a huge institution, and better than would have been hoped.

We need to learn in a systematic and careful way to listen to unheard voices of children first, and than the voices of all the members of the triad (adoptee, adoptive parents, and birth parents) at every stage of life in order to outline developmental tasks for each member of the triad and make appropriate recommendations. This will help those in adoption circle, as well as the professional, to better understand both the problems encountered by the past and challenges that will follow in the life of the child, and by extension that of the triad.

Even if foster care is certainly a better solution for a child than institutionalisation, foster care cannot be a long-term solution because the child needs a permanent solution, a permanent family, a permanent caregiver. Indeed, foster families could change and therefore adoption could be a better solution. With this understanding we can begin to address more effectively the problems and make appropriate changes so that all members in the adoption cycle will benefit, with a primordial focus on the child's developmental needs, so that we, as practitioners and decision makers, do not do more harm than good through our intervention or lack of it.

At West Timisoara University we have a project, a grant, to research what's happened with adoptees at an early age who are now about 15 years old, they are teenagers. The project is called 'Successful factors in national adoptions' and it is a part of an international initiative specialising in attachment disorder, coordinated by Lausanne University. We will compare our Romanian adoptees, 150 families, to teenagers adopted in Canada. With the same validated international tools, we will look at the issues of attachment, of the behaviour of children towards their peers, in school, with their teachers, their parents, towards the community, their success in their community. Because I have a granddaughter, because I'm a grandmother, and the one in the middle is an adopted girl from the US where she was born, I feel proud that we are here thinking of the future of our children in Europe.

Melita Cavallo

Thank you for your clear explanations. I would just like to see the special needs of children be recognised, by everyone working with them, the social services, teachers, judges, lawyers, prosecutors.

Preventing abuses in adoption procedures: suggestions and best practices

Marlene Hofstetter, Terre des Hommes, Head of International Adoption Sector, Switzerland

I was intending to talk to you a little bit about abuses and perhaps solutions which we might apply to avoid those abuses. But before I start I would just like to look at adoptions broadly, why we have adoptions and why some children are proposed for Inter-country Adoptions.

There's been a drop in figures over the past couple of years. There are a number of reasons why this is the case. But it's true that firstly there has been important raising of awareness in countries of origin. It's become clear that putting children in institutions is not a long-term solution and has to be something that is just transitory. It was then necessary to create a future for these children outside institutions and orphanages. Thus States have looked for alternatives, in particular returning children to their birth families, host families and domestic adoptions. The UN Convention on the Rights of the Child and the Hague Convention have contributed greatly to this awareness raising.

The awareness of the needs of children in institutions and the emerging of a middle class, able to afford to take on another child, has increased the number of domestic adoptions. In India, for example, when I started to work there 20 years ago, no one talked about DA. Since then, 75% of abandoned children have been adopted within India. So these children have been taken out of IA. It is clear that India has started by adopting young children who are in good health. And that's why older, sick children or children with a handicap are more available for IA. But that still means that there are children in institutions. Very often this is because the birth family does not give its consent to

adoption, even if they don't care about the child. And also because the authorities are quite lax and they don't take decisions on the child's future, or it's just because the child is older, sick, or disabled, so people don't want to adopt those children internationally.

Now there are also a lot of differences in the way in which things work in different countries. I'm going to focus mainly on how things work in receiving countries. There are many differences in the way Central Authorities work. Some of these do not hide that their objective is to increase the number of children that are adoptable and made them available to potential adopters, on the basis of the wishes of the adopters. This puts a great deal of pressure on countries of origin and propagates the wrong idea that there is a right to adopt.

Moreover, the competences and the set-up of the Central authorities differ very much from country to country. In many countries, there is no effective preventive control of International Adoptions, or this control operates only once the prospective adopters have met the child (matching) and started to develop attachment with him/her. I'd also like to draw your attention to a number of abuses in countries of origin, mainly countries which are not members of the Hague Convention. More and more frequently we find that there are fraudulent adoptions taking place, where the biological parents have not given their consent to the adoption.

A certain number of cases, 58 in fact, were found in Nepal, but we know that this type of abuse exists in other countries such as Haiti and Ethiopia. In Nepal a lot of children are put into institutions by poor parents so that they can have an education, then one day the parents find out that the child has been adopted abroad, on the basis of false papers saying that the child is an orphan.

Even if these parents don't ask for the children to be brought back, they do ask for information about those children. In many cases Central Authorities are able to identify the adopters via institutions in Nepal or elsewhere. But both Central Authorities and the authorised adoption agencies don't want to contact the adoptive parents in order not to disturb the child's development.

I believe that this is unfair. Firstly, the child has a right to know that he has a birth mother or father, that they are worried about him, that they want to know about him. The refusals here indicate that people don't want to acknowledge or look at fraudulent or illegal adoptions. Now, if the Central Authorities admit that such things cannot continue then they would have to address those problems in the interests of the child and the convention. It is necessary therefore to have a better monitoring or even bans on IA from certain countries, but a lot of these countries will not take these decisions unless they are subject to great external pressure (Guatemala). We have certain countries

that continue IA which are illegal or fraudulent and they've got no interest in stopping that practice, so we've got to take action here, the receiving countries have got to have a common policy so that we know exactly what to do in the case of illegal or fraudulent adoptions.

It's important for the political and administrative authorities to send out clear messages, to create a sense of responsibility among people, media, practitioners, as regards the profile and the number of children that really do need to be adopted internationally rather than just closing their eyes to abuses in certain countries. When it comes to diplomatic authorities in countries of origin, they should be given the job of monitoring adoptions from those countries and identifying bad practises, trafficking of children or violation of their rights.

Countries of origin that have not ratified the Hague Convention are those in which the risks are greatest. The Hague Convention offers important guarantees to children in contracting states but not to children in non-contracting states. And a lot of Inter-country Adoptions come from the latter case. Vietnam, Haiti, Guatemala, Nepal, Ethiopia have been identified as countries at risk; nonetheless the receiving countries are not checking out, with more accuracy, the adoptions carried out with these States which are not parties to the Hague Convention. There you find that there are more private adoptions which take place without the adoptability of a child being checked, with the help of consultants, lawyers, directors of nurseries. Sometimes false documents are produced to show that these children are abandoned or orphans. Unfortunately, the laws and procedures of the receiving countries often do not respect Article 29 of the convention, which forbids contact between adopting parents and children before the adoptability of the child has been verified. As a consequence, there is discrimination for some children coming from non-contracting states because, in their case, receiving states accept slimmed down procedures and reduced guarantees.

Partnerships with countries of origin: in exercising their mission, the Central Authorities of receiving countries develop partnerships with countries of origin, either via the Hague Convention, or via bilateral agreements, or by setting up administrative co-operation. Funding is offered in certain cases by Central Authorities and accredited adoption bodies to increase the system of child protection, in order to ensure that proper structures are set up in the countries of origin.

Sometimes we find that there is open or hidden pressure on the authorities in the country of origin to provide adoptable children. These must be, preferably, young and in good health. We have also a high number of accredited adoption bodies which compete with one another in the same countries of origin. Too often receiving countries propose potential parents whose profile does not correspond

neither to the profile or the number of the children available. That's why some countries of origin have reduced the number of applications and tighten up the criteria applicable.

To take into account the best interests of the child, the following measures should be taken:

- With each country of origin a dialogue needs to be set up concerning the number and profile of children requiring IA.
- This is something that the countries of origin have to feed into a proper adoption policy aimed at the delivery of a realistic number of certificates of eligibility for prospective adoptive parents. This would make it possible to avoid unrealistic adoptions projects which could encourage, moreover, child trafficking.
- A responsible policy for accredited adoption bodies is needed; their number should not foster competition between them or pressure on countries of origin.

This morning we already talked about private adoption but I want to add something on this subject, because it is via private adoptions that the majority of abuses take place. This happens when parents use their own funds, go to a non-convention state, without using an authorised agency, and carry out the adoption themselves. With the convention countries there is at least a legal and ethic framework meaning that the parents would have to go through the Central Authority and an authorised agency so there are certain safeguards there. But private adoption is potentially the cause of the most abusive practises in IA: selection of children made by the adopters, pressure on birth parents, corruption, false documents, procedural irregularities, children being abducted etc.

This type of adoption slows down the setting up of proper and responsible adoption policies, making it possible for children to go back to their biological families, develop national adoption or foster care. The financial stakes are often enormous and this is why there is certain resistance to IA in non-convention countries, without mentioning the other economic spin-offs of this (adoption "tourism"). If we are to act to protect the best interests of the child, then we should restrict or ban use of private adoption, as Mr Monchau said earlier this morning. In exceptional cases, where private adoptions would be authorised, there would have to be a central authority, working together with the consular authorities in the country of origin, that check out the viability of the adoption application and the adoptability of the child.

I will not talk about the authorised adoption agencies even if it is clear that there are certain problems if you have 50 – 70 of these adoption agencies authorised in a country. It's also very difficult to check out how they work, to monitor them, to see what charges they make in the country of origin. There too, European level co-ordination would be required and in particular we'd have to have better monitoring of the authorised adoption agencies.

And then: funding. Well, as we know, everything turns on money here. It is necessary to distinguish between legitimate costs which are charged by professionals for their services, the procedural fees and those unjustified costs which certain people are looking for. There are some countries of origin where state control is patchy, where you find that lawyers and other people ask for very large payments in advance and then offer children to the people who are able to offer the most. It's possible, for example, with money to get procedures speeded up etc. There are certain host countries that try to regulate the costs of IA, especially the fees of the adoption agencies paid by prospective adopters, but sometimes it's very difficult to check out exactly what has been paid on the spot and very often checks are insufficient. The verification of private adoption fees is even more unreliable.

In the receiving countries, and I'm talking about Europe now because that's where we are, we need to have greater co-ordination between Central Authorities. I think that this meeting here has made it possible for us to see a little bit about what's happening in different countries and we can perhaps, via this meeting, agree on certain things regarding procedure amongst ourselves.

Melita Cavallo

I think that all States, that is receiving states and the States of origin as well, need to fight against illegal adoptions. To be more specific, when I was a judge in Naples I gave back children to the country of origin because there was proof that there had been a fraudulent adoption. This was before the Hague Convention came into force, but the couple was deemed responsible, they had to bear the costs of returning the children to Brazil.

The experience of Romania **Edmond McLoughney, Country** **Representative, Unicef Romania**

I am going to speak on the situation in Romania regarding adoption. As of June 2009 there were just over 44,000 children in family- type services in Romania, 21,000 of these were in foster care and 23,000 in residential type care. Just over 2,050 were placed with a guardian. Most of those in residential care are older and many have special needs.

It is UNICEF's views that, in recent years in particular, substantial progress has been achieved through, for example, the massive development of foster-care and a gradual closure of larger institutions. New legislation in Romania, that has been enacted to back up policy decisions, is to be welcomed. One notable example is the prohibition of institutionalisation of children under two years old, which is a courageous response to research findings showing the harmful long-term effects of such placements.

Prevention is also improving. As of June 2009, just under 39,000 children benefited from prevention services, around 15,000 were in day care centres, and just over 23,000 were benefiting from counselling services and/or other types of prevention, which was an increase of 4,000 over the previous year.

The number of abandoned children in medical facilities, meaning maternity and paediatric hospitals, dropped substantially as well from 5,130 in 2003 to 1,317 in 2008. In the first half of 2009, 704 cases of abandonment of children were registered. Out of these 704 cases, 396 were abandoned in maternities, 225 in paediatric hospital and 83 in other medical units. Of the 704, 565 have been discharged at this time, 40% reintegrated into the natural families, and 46% placed in foster care. The others were placed in extended families, in residential care, emergency centres and other public care facilities.

Domestic Adoption has been fairly constant since 1999 and the total number of cases each year is around 1200 - 1400. The new legislation on adoption has been in effect since 2005. It regulates aspects which were not regulated by previous legislation, such as the procedure and situations in which a child can be adopted, (i.e. individualised protection plan, providing DA as final), and such as the Court's decision regarding the initiation of the domestic adoption procedure.

The Romanian office for adoption is concerned about constantly improving the quality of the national adoption system and services and is currently working on introducing changes to enhance the capacity of professionals working in national and de-centralised institutions responsible for adoption services, and also in amending legal provisions which would contribute to speeding up the adoption process and increasing the number of national adoptions. In fact, within the next week or so, the Romanian office for adoption is going to publish on its website the new draft legislation on adoption which will be up for public debate and consideration before going through to the next step.

Regarding International Adoption, I will outline just a short history on that in Romania. Following what is recognised, after 1989, as the abuses, a moratorium on IA was enforced in 1991 and 1992. In 1994 Romania ratified the Hague Convention which entered into force in May of 1995. A moratorium was again introduced from 2001 until 2004, and the new law of 2005 imposed a *de facto* moratorium. The situation at the moment is that there is no IA except in the case of relatives, up to the third degree. It used to be just grandparents that might be resident abroad but this was expanded earlier this year allowing aunts and uncles to adopt from outside the country. As a result of the 2005 law for the protection and promotion of child rights, there are currently virtually no IAs in Romania. IAs peaked in 2000 with over 3,000 cases, and since 2005 there have only been

two IAs approved, based on the new legal provisions. It was concerns about how IA was developing in Central and Eastern Europe and in the Commonwealth of Independent States (CIS) that sparked UNICEF's first initiatives on this issue at the beginning of the 1990s, first in Romania, then in Albania. In both countries, UNICEF was involved in proposing and facilitating initial reforms designed to combat serious problems that has been identified in the way that adoptions were being carried out.

Consistent with the aim of its overall mandate- bringing about conditions whereby all children can be properly cared for by their families, or, where necessary, others in their country of origin- UNICEF sees IA as one of a range of protection options, of last resort though, which may be open to children, and for individual children who cannot be placed in a permanent family setting in their country of origin. The fact that IA fulfils only two of the three principles of decisions regarding long-term care solutions for children, namely family based and domestic, means that it has to be considered "subsidiary" to any solution that corresponds to all three guiding principles, such as domestic adoption and other permanent forms of family based alternative care, in-country.

The active and systematic implementation of this "subsidiarity rule" is key to ensuring respect for children's rights in this sphere, as are robust efforts to prevent abandonment and relinquishment, and to promote the reintegration of children into their families under appropriate conditions. In fact, and in line with the Convention on the Rights of the Child, UNICEF recognises the practice of IA and persistently advocates and provides assistance, if necessary, for ensuring the rigorous application of international standards when the IA of a child is contemplated or takes place.

The question is sometimes asked "*With so many Romanian children in public care, and continuing high rates of child abandonment, how can the decision to ban IAs be justified?*" The short answer is: because, although many problems obviously remain in Romania, as elsewhere, responses continue to be consistently improving. As is the case in many other countries the Romanian authorities have, for various reasons, decided that adoption of children abroad was not an appropriate element of child protection policy at the time when the law on adoption was approved in 2004.

UNICEF fully understands that there was a need to clamp down firmly on recourse to IA, all the more so in light of the irregularities which persisted, and also of the positive developments in the country itself in recent years. UNICEF therefore accepts that virtual closure of the inter-country adoption from Romania, may have seemed to constitute the only workable option in the circumstances, in line with the aims of the overall reform of the child welfare and protection system in the country.

UNICEF foresaw, in 2005, that, at some point in the future, Romania might decide to review, aspects of its outlook and policy on inter-country adoption. UNICEF is obviously aware of various initiatives outside Romania, since the IA ban was introduced, seeking a reconsideration of adoptions from the country, for example the European Parliament Resolution *"Towards an EU strategy for the rights of the child"*, adopted in January 2008 and calling for consideration of the possibility for devising a Community instrument on adoptions, that improves the preparation and processing of IAs. It is also noted that in June 2009 the Committee on the Convention on the Rights of the Child has recommended that the Romanian authorities "withdraw the existing moratorium".

In UNICEF's view it is clear that Romania's need for recourse to IA has been declining rapidly and the country is now in a position to reconsider its position towards IA, based on thorough evidence based analysis. This would imply a comprehensive assessment of the impact and prospects for developments in the area of children's rights after almost five years of implementation of the entire legislative package, including both legislation on the promotion and protection of children's rights and the law on adoption. Until such an evaluation will be performed, efforts to prevent abandonment and relinquishment must be pursued and further strengthened, as must efforts directed to ensuring suitable alternative care and DA for children who are unable to live with their parents.

It is up to the competent authorities to judge, on the basis of hard data, whether current care conditions, for each and every child are "suitable" and, if not, whether IA might be in their best interests. Reopening IA possibilities for some children would of course require strict adherence by all concerned- both within and outside Romania- to the letter and the spirit of the Hague Convention. This implies, amongst other things, a system in place that is purely "child-driven", that effectively precludes any incitement to release a child for IA, and that insures that no influence is brought to bear by foreign governments, agencies or individuals over who might be adopted and in what numbers. The development of any such system would also require considerable preparations, especially bearing in mind the problems of the past.

In the meantime, UNICEF will continue working with the Government of Romania to strengthen the child-care system and intensify efforts for the prevention of abandonment. This includes, among other measures, promotion of Baby Friendly Hospitals (BFHs), 21 of which are due to be certified as having reached the required WHO/ UNICEF standards by the end of this year. The Baby Friendly >Hospital practice of putting the baby to the mother's breast within half an hour of birth has proven to be extremely effective in preventing abandonment. We don't have actual numbers on this, but I know that the first hospital to apply these practices said that they had

'no abandonments' last year, down from 15 the previous year. We look forward to continuing our partnership with the Government in this and other areas to strengthen the implementation on the Convention on the Rights of the Child.

Melita Cavallo

I'd like to say to UNICEF, to Romania, to everybody here, that in Italy, since 2004, there are about 4,300 Romanian children each year who are denounced to the Public Prosecutor because they've committed small offences or even crimes. Some of them go into prison or social centres. I ask myself: how many of them could have been rescued through adoption in Italy and elsewhere? These children are exploited in Italy by Romanian adults. What will happen to these children? What is their future, their life plan? Some of them are very young, seven or eight years old; most of them are maybe 14, 15, so they are adolescent, teenagers. Romania should think about what can be done for these 4,000 children each year who are just running around, because they've left the institutions. In Italy we cannot do much for them, no miracle solutions.

The experience of Bulgaria

Krassimira Natan, Lawyer, Bulgaria

I'm going to talk about the right to a family in the Bulgarian legal framework and also in practice, as it is quite important to know how this right is applied. In Bulgaria there are a number of legislative acts which implement the international legislation in this area. I refer of course to the UN Convention on the Rights of the Child which was ratified in Bulgaria and has been in force since 1991. I would also mention the Hague Convention on Inter-country adoption entered into force in 2002.

The Bulgarian legal framework for child protection is based mainly on the Law on Child Protection. The Family Code defines the legal instrument of adoption. Article 4 of the Law on Child Protection stipulates the order of measures for protecting children at risk of abandonment. In fact, all these measures should provide for the right to a family, but the first measure on the list is the support to the birth parents in order to avoid abandonment. If this turns out to be impossible, however, we move onto the second measure, which is placement with relatives/ extended family. However, this may turn out to be impossible as well and, in this case, we move on to measure number three, adoption. This is not defined as international or domestic, but it is important to say that we stick to the subsidiarity principle also. It's quite important for Bulgarian primary and secondary legislation in the area.

Of course the best interests of the child come first. The right of the child to a family is also regulated and recognised and protected by the Bulgarian State. Secondly, adoption is recognised and legally defined as a measure that protects children from abandonment. Thirdly, IA is subsidiary to DA.

So, that is the theory but let me explain what happens in practice. At a glance, the legislation seems to be quite good. Yet for the practice, and for the purposes of clarity, I will divide the period since the entry into force of the Hague Convention to the present day into two parts.

Firstly, we have the period from September 2003 to July 2007. What is typical of this period is that the legal framework for adoption was there, the right to a family was guaranteed by law and yet the government actually attempted to reduce the number of adoptions artificially or restrict this altogether. I can illustrate this statement by giving you some actual data. This is data from the registers for DA. As of January 2005 there were about 2,000 children. In January 2006 the number grew to 2,266. On the first of January 2008 it was about 2,500. For this three year period the protection measure of DA was applied by means of Court decisions. It was applied to 642 children in 2005, 634 children in 2007, and 708 children in 2008.

Now the protection measure of International Adoption was applied respectively to 108 children in 2005, 103 children in 2006, and 81 consents on 85 children in 2007. It is obvious that the number of DAs is fairly constant at an average of more than 630 adoptions per year, yet in the case of IA we see a constant decrease. In respect to DAs, we see that unfortunately parents are not too willing to adopt Roma children, or children with problems. In such cases IA would have been suitable but as a measure IA was not used very much.

This created a lot of tension and the general public felt it necessary to oppose the blatant contradiction between the given right and the impossibility to exercise it, so the media started to exert pressure against this politics. There were a number of documentaries and stories about abandoned children published in the press. On the whole, there was the claim that IA is part of Bulgaria's legislation and therefore it should be applied. The accredited bodies authorised to act as intermediaries in IA, they encountered a number of problems, they could hardly do their job during this period, but they met, they talked, and they decided to set up their own NGO, which would unite Bulgarian NGOs working in the area.

The idea was to be able to exert pressure on the State so most of the accredited organisations are now members of this NGO. There is also one branch of a foreign organisation now represented, this is Amici dei Bambini. The organisation is called AOMO.

As a result of this action, in July 2007, the leading team at the Ministry of Justice in Bulgaria was replaced. Obviously the Ministry of Justice is Bulgaria's Central Authority in this case.

The new team was ready to change policies in the area of IA, so it started to work quite actively but it had to cope

with a negative legacy of their predecessors. It was a difficult situation because they started from some serious violation of the rights of children to enjoy a family environment. There were a few children's names entered into the registers but actually they couldn't be adopted due to various hurdles. Of course, prospective adoptive parents are quite important as they are the resource that make it possible for the state to fulfil its duty in guaranteeing the right to a family, but actually many of these prospective parents were discouraged from becoming prospective adopters of Bulgarian children and as a result the Bulgarian Commission for International Adoptions on IA could not work very efficiently, in fact lots of proposals for adoption were made but prospective adopters felt discouraged, some of them lost interest after all.

In fact, the only positive consequence was the awakening of civil society and its will to fight for the protection of the rights of abandoned children. However, as the Ministry of Justice had a new team, it started to change its policies. So gradually, after 1 December 2007, the Ministry of Justice started to expand an open and transparent environment for participants in IA procedures. It speeded up procedures by introducing deadlines for the different stages, it introduced open and clear criteria for selection of suitable adopters. Also the Ministry replaced the members of the Commission for International Adoptions and increased the frequency of its meetings. It adopted the principle of examining applications of prospective adopters in the order in which they were made. Also the children registered for adoption were examined in chronological order. Something quite important, are the special measures introduced for children with special needs or older than seven years of age.

The Ministry created conditions for much better co-operation with accredited organisations for IA (AOMO). There were a number of meetings and participation in working groups. I will mention here the main principles of co-operation. The Ministry of Justice agreed to publish on its website all the results of the different meetings, and with all the characteristics, age, and the number of the family assigned to the child. On the other hand, The accredited organisations can exert a control on the State, which had three directions: the state policy, the legal framework, and implementation of relevant administrative practices.

In particular, with regard to existing administrative practices this collaboration led to enhancement of trust between the two parties, the accredited organisations and the central body. In many cases we relied on long-term practice and when we needed to solve a problem we were able to speed up the solution without having to wait for the 30 day period which is a mandatory deadline for administrative responses. On the other hand, the central authority supervised the accredited organisations with the aim of establishing good practices and regulating the processes depending on the level of development of society.

What were the areas of co-operation with the legal system? The first area was the close co-operation with regard the preparation of a draft of the new Family Code and new implementing regulations. The second area concerns the setting up new policies concerning children in Bulgaria, for instance, the policy of procedures regarding children with special needs and adolescents, or older children. The red tape was reduced between the central bodies and accredited organisations and we triggered work on taking care of children who are not adoptable, either through DA or IA, because they are older or because they have serious health problems.

What we would like to see, and what we are working towards, is to establish an individualised approach to every child, to determine their status and to select the best appropriate prospective adopters. And our last field of co-operation is to limit the amount paid for adoption procedures in order to avoid unreasonable financial gain for accredited organisations.

What were the results achieved in the process of co-operation? The first result is that the increased number of proposals coming from the Bulgarian Commission for IA concerning the children entered in the Register. The second result was the adoption of a new Family Code, in force from 1 October this year. I can give you some numbers: for instance, in 2009 we had 178 consents to adoption out of 189 children in the Register for IAs.

There are still some pending issues, the outstanding problems. What we would like to see as accredited organisations in order to protect the best interests of the child is to classify the children entered in the Register for IAs according to their age and health status, so families who want to adopt children with special needs would be quickly informed and children that have a greater need of a family would be able to be adopted abroad. We have further requirements with regard to transparency and we would like to see more information published on the website of the Ministry of Justice. We would like to have more delegated rights and responsibilities by the central body which would facilitate the achievement of optimal results because one of the problems of the central body is the lack of human resources. And another area we would like to work on is enlarging the policy for children who are not adoptable.

And the last thing I would like to mention is that we are working towards the establishment of a broad social network between institutions, accredited organisations and the State with the aim of achieving a better protection of the best interests of the child.

Melita Cavallo

Bulgaria has indeed done so many things; it could be considered a model. I would like to point out that the rapporteur said that civil society has apparently woken up, and the press, the media, have a very important role in

getting awareness around, particularly everything connected with adoption. Involving the community, is a very important thing because everything which has to do with adoption is linked to the culture and the responsibility of the community.

General discussion

Marco Cappellari, President of Amici dell'Adozione, Italy

I am an adoptive parent and represent an association of adoptive families in Italy. I would like to make a love declaration, if I may and this is going to be my contribution to today's discussion. Let me take you to a few years ago when my wife and I wanted a child. We were physically unable to have a child and we decided to adopt and submitted ourselves to a very lengthy process, because in Italy all of this is very strict and very demanding, and so destiny took us to Romania. (He shows the picture of the day he met his adoptive daughter) Why am I showing this picture? Just to remind you that nothing is more important of a child's smile. And this is a declaration of love not just for my daughter but also to Romania, because Romania gave me the opportunity of being a father, and a declaration of love to the mother that abandoned that child and therefore made it possible for her to become my daughter, and therefore a declaration of love to this Romanian born daughter of mine to whom I have devoted my life, together with that of my wife. As Dr McLoughney said before, since 2004 Romania closed the doors for IA, it completely interrupted IA and since then adoptive families throughout the world have been living through the tragedy of this, that more than 43,000 children can see no solution. I would like to say: placements are only temporary and adoptive family is forever. We obviously agree that it should be preferable to give priority to DA, but when that isn't possible, so IAs should be considered. Finally, I want to thank the Director of the Romanian Office for Adoption, Mr. Panait, because I have read somewhere in the press that a bill is being prepared at the present time in Romania to resume IAs. Thank you for your courage and wisdom which will help abandoned Romanian children.

Joan Hansink, United Adoptees International, Netherlands

I have a question for Lammerant and Hofstetter. This conference is about regulation and legislation of adoption but what I miss as a topic at this conference is the step before adoption. I mean the EU has an obligation, has promised to the citizens social protection and I was wondering why we don't put more money, energy and attention into alternative forms of assistance for children and their parents? This discussion should be about parenting and not about adoption as a solution. First of all I'm not against adoption, but nowadays it's too easy. As long as we have adoption, governments fail to set up their child protection systems because adoption is a solution and also brings money in.

The next question is, there was an article in September of the LA Times and it was about 2,000 children from China who were stolen and the Chinese government admitted this happened. For example, we all know about the case of Madeline McCann, what if she is found with a Korean family, going to school, very attached to her new family. Does she have to return to her birth parents? And if so, do those 2,000 children in China have to go back to their birth families?

Isabelle Lammerant

In answer to the first part of your question with regard to obligation of States with regard to prevention, prevention of children being abandoned and then children in placement. I believe it's worth thinking about this but, if we're talking about Europe, the European Court of Human Rights stressed the fact that States have positive obligations. That means they need to take measures, take steps to protect family life, so this should be an effective protection of family life for children who have been placed outside their birth families. We should do everything possible to try to return the child to its family of origin and during placement maintain links with the family of origin. States have often been condemned by the Court of Human Rights for violation of these obligations they have to take. The question of implementing these obligations is one where we can look closely at our practices in each European State and not only in the non-European States.

Marlene Hofstetter

I think it's always very difficult to find solutions, particularly in very poor countries. If I take the example of Nepal, in order to progress the cause of the return of the children to the birth families, we'd have to do away with half the institutions. You'd have to support families through positive measures, promote adoption, kinship, foster care which doesn't exist at all, and this is something right at the beginning of its development. I think we really have to set everything up, we have to invent everything in some of these countries. Now, with regard to the 2,000 Chinese children and their being returned, well, it depends how long it takes, because there is a certain time limit within which time an adoption can be challenged. But these are very legal matters and we can't really give an answer for China because every country has its own legal system.

Anneke Vinke, Researcher, The Adoption Triangle Research Centre at Leiden University, Netherlands

I've been privileged to be in Romania and have a question for McLoughney and Stan. Could you elaborate on the fact that permanent foster care is not considered an option because, as far as I'm aware, there is no strong scientific evidence that permanent foster care should be harmful to a child. If it's a matter of views, then we should discuss it. Also I would suggest that if we do comparative studies, it would have been very helpful to add children within permanent foster care. Also in addition to the studies on Romanian and Canadian Das, it would be useful to include

wider data, in Holland for example the wider longitudinal studies or those made in England, then we could come somewhere in comparing. Then, finally the question I've been having the whole conference is 'whose problems are we solving here?'. We should be solving problems of children whose last resort is adoption. For them we need strong parents. Unfortunately there will always be more parents than children in need of adoption and currently my last information on Romania was that for each DA still two families are waiting. If this information is correct, and it comes from a former Secretary of State, there would be no need of reopening Romanian IA. And I would ask you to reconsider it because we can develop the current system and should only reopen as a last resort.

Edmond McLoughney

Taking the last part, indeed for the last 5-6 years there are two registered adoptive parents for every child available. One of the purposes of the new legislation that's going to be posted next week on the website of the national office for adoption is to speed up adoption and get more children adopted. It's been 1200 – 1400 per year, so the purpose is to speed up the process and increase the numbers. Obviously IA should be a last resort. The first thing that has to be done is to improve and strengthen the DA system and this is being done.

Violeta Stan

I never said what is the type of support that has to be given to the child, neuro-biologically the child needs to have someone permanent to create the attachment. That is clear, specific, a neuro-biological Nobel prize studied children abandoned at birth and adopted at two and that's already far too late. So, my approach is that you need a stable family environment for a child, for that child's development, and keep that child out of an institution. At the age of two it is already too late. In Romania for instance when you become a parent the mother gets leave for two years which is essential, to be close to the child for the first two years. And the conclusion of a study in 33 countries where they found children in an institution under the age of two for more than six months without an adult being next to them constantly, well there's a code of good practice to take children out of institutions, you saw pictures from this study. The idea is to share happiness, but also to share unhappiness through some kind of adult person who is going to be with the child and showing care and love for that particular child.

Melita Cavallo

The foster family must help the family of origin where the minor should go back, which should always be the intention, the foster family is only there for the transitional period. Adoption happens when the family of origin does not exist or it is totally inadequate. That's completely different, you cannot give a minor to a foster family and then consider that as a permanent solution.

Mircea Oprist, Romanian journalist

I have questions for Cavallo and McLoughney. Are you are aware of all those children in Italy whose mothers got together in an organisation Madre Coraggio and there are so many cases in the Italian courts where the Romanian children are not given back to their families. Do you know anything about this?

Melita Cavallo

All the children who I have seen as judge for minors were usually abandoned by both parents. I haven't come across these cases but I will ask my colleagues to look into these cases you are talking about.

Mircea Oprist

Are you aware from the press, public opinion, whatever sources you have, about children being trafficked from Romania in the past illegally?

Edmond McLoughney

Yes, there is a trafficking problem, but that's totally separate to the adoption issue.

Marco Arisi, President of A.M.O.Onlus, Italy

I am an Italian adoptive parent, I have adopted two Romanian children and I would like to thank Dr Cavallo because of what she said that we have to try to train public opinion, but that also means you've got to train journalists I was brought along to a situation in Romanian TV where it was suggested that children were stolen and I was accused of being involved in the trafficking of organs. I work for an organisation, 76,000 interventions for children in Romania in distress. We are trying to work with journalists to stop picking on people in that way.

Maurizio Mazzoni, Coordinamento**Coppie adottive Bulgaria, Italy**

I'm an Italian adoptive parent as well I am self-taught because there is no training or support or back-up service for adoptive parents. I want to thank Dr Stan because she laid out what the problems are. My experience after adoption is that I had to face up to this kind of problem Dr Stan has described. The role of the adoptive parents should be recognised, protected. I am an engineer, I deal with mechanical equipment, I am not expert in this area and didn't have any help. My Bulgarian child of Roma descent was abandoned at birth, was adopted two years ago and I had to face all the problems of dealing with the learning difficulties of losing semantic memory, well these are true difficulty which we meet in these children who've been abandoned in an institution for two years. They have serious learning difficulties, and this is a kind of situation of limbo and children do not deserve to be treated in that way, but we also need some help and some backup.

Melita Cavallo

Let me ask you, Mr Duncan, would it not be possible to have some type of European adoption amongst European

Union Member States which would be a sort of "light adoption" where the minors could immediately adopt the nationality of the receiving country and also keeping his/her nationality of origin? At the age of 18 then he/she could choose the nationality of his own country or the one of the receiving country. The minor should also be able to keep up links with his/her country of origin and not totally deprived of that link. When I was Head of the Italian Central Authority for International Adoption, I asked some other central authorities in European countries and many of them said perhaps something like this can be done. I think this option should be explored, because the countries of origin may accept this type of adoption. I believe this could become an alternative, a good alternative for countries that don't want to lose their children forever. In other words, the child can be adopted, taken out of the country of origin to another European country and at 18 he/she can choose his/her definitive nationality.

Session VII - Towards a European Adoption Policy?

Chair – Salla Saastamoinen, Head of Civil Justice Unit, Directorate General Justice, Freedom and Security, European Commission

Actually we have discussed already national and international adoption, and also European adoption, in a certain sense, because we have to give credit to the Council of Europe as a promoter of a European adoption policy. During this last session we will look a bit more at the situation in the European Union as a specific area of the Council of Europe Member States.

Thinking ahead of the present situation: is a European adoption policy desirable?**Claire Gibault, former Member of the European Parliament, France**

I will not at all read what I have prepared because in fact what I want to do is to react to everything I've heard since yesterday because my position has evolved accordingly. First of all, obviously, thanks to the European Commission for inviting me here. Let me make one thing clear. I am not speaking as a French person but as a European citizen and I have no lessons to give to any other European country. Let me hasten to add that I greatly appreciate the quality of the presentations we've heard so far, because we haven't had any extreme caricatures, controversial, unrealistic presentations, but pragmatic contributions.

Everyone has recognised, with a great deal of humility, that no situation is perfect, that there is no way in which we can completely eradicate destitution, abandonment, and that legislation and love cannot solve everything. The only thing we do know is that IA should remain side by side with NA, foster families, or help to return to the country of origin

according to the case, IA should remain one of the alternatives to give children who are abandoned or orphaned a framework in which that child can develop and can have a future. In my capacity as European Member of Parliament the last legislature, together with Jean-Marie Cavada, who was the chair of the Commission on Civil Liberties, we fought a great deal against a virulent movement against IA led by a European MEP, and later with the Vice-Presidents of the Commission, Mr. Frattini and Mr. Barrot I went even further into this.

Now obviously IA is not yet within the competence of the European Union (EU), but protecting children is, and this is the reason why I struggle in favour for a common European space for adoption, in other words an adoption that would not be considered as a proper IA, and there is much work to be done in this particular area.

Now that the Lisbon Treaty has just been ratified, we're going to have a President of Europe, a Minister of Foreign Affairs for Europe, we're all working towards building a so-called European identity, favouring obviously the free movement of students, artists, workers, we have a common area of judicial co-operation. We're all in favour of respecting cultural and religious diversity, so the time has come to see what we can do about a common European space on adoption.

Given the lack of a European adoption policy and faced with a proliferation of international legislation in the matter, it is absolutely essential to develop co-operation amongst the administrations of the EU Member States. So as to have mutual recognition of the adoption decisions because it is only the member states who can ultimately guarantee the values and the rules governing IA.

And if there is an area where the EU has its "raison d'être" is indeed this one.

So, how to improve adoptions within Europe?

Ms Boer Boquicchio, Jean Marie Cavada, and myself, have already answered what to do about Europe and adoption because in 2008 we published a declaration on international adoption. Let me re-state some of the things that we said there:

- that every child must have an identity at birth
- we must have a code of good practice, which would make it possible to simplify adoption procedures and also cut down the time taken to process applications, and this in the best interests of the child.

In order to create mutual trust amongst European Member States, countries of origin must be kept informed of each child's progress by the receiving country so that they can ensure that the right of the child to know his/her origin is being respected. Member States must be helped to cope with the disarray of all abandoned and orphaned children

by facilitating the integration of children into the family of another European whenever a domestic solution is no longer possible, as advocated by the Convention for the Rights of the Child and always recall that, amongst the criteria for acceding to the EU, there is the respect of fundamental rights, and indeed the charter of rights of the child is part and parcel of all that.

All of us here must continue endeavouring to ensure that legislations in force are adapted until such a time as Europe becomes a common space for adoption and the most vulnerable children, whatever their ethnic origin, or whatever their religion, that they all can aspire to having a family, the biological one when it is possible, an adoptive family when the family of origin is inadequate.

I always say that you can pass judgement on the quality of a democracy, and I say this for France as well, by the way you deal with the most vulnerable people, people in asylums, psychiatric hospitals, those in prison, the elderly, the sick, and as long as vulnerable children are not fully cared for then, I don't think that politicians are doing what they really ought to be doing.

And before concluding, let me go back to the case of Romania, because this is a particular case on which I've worked a great deal whilst I was an MEP and I keep abreast of developments here. Let me draw your attention to a phenomenon and one which has taken on more and more importance, which is the consequence of recent policies on adoption. Many abandoned and orphaned children are now coming of age 18, no longer cared for by institutions and therefore no longer in the statistics, so this is why the number of abandoned children is going down, even though the phenomenon of abandonment has increased. What is even more alarming is that this figure does not take into account the tremendous listlessness of these children whose parents have left them alone, having migrated to Western Europe in search of a job. There are some 90,000 according to Romanian authorities, 350,000 children according to UNICEF, and the institutions don't know how to cope with this. Even if these young adults cannot be considered "disabled", they are very vulnerable teenagers, they don't have a family to rely on and they don't have any serious professional qualifications; they have no home. So how long can we keep our eyes shut since we turn fundamental rights into one of our priorities?

But let us not forget that the very first right of a child is the right to a family and so we should encourage European countries such as Romania and Bulgaria to undertake steps in the right direction and assist them, in solving, as soon as possible, the difficulties they encounter in reintegrating international adoption in their child protection system.

My very last words will be those of my son José I adopted some 20 years ago. He wrote a short text for me to read out to you. He said "*I never had a childhood, or rather, an*

early childhood. I was born at the age of two and a half on a Lomé beach in Togo after my eyes crossed yours on the steps to my orphanage, and I immediately understood that I had an anchorage, a point of reference, a bridge to the real world and that I could for the rest of my life rely upon you”.

The results of the study carried out by the European Parliament

Raffaella Pregliasco, Istituto degli Innocenti, Italy

Firstly, I want to thank the Council of Europe and the European Commission for giving us the opportunity to present this report that was awarded to the Istituto degli Innocenti from the European Parliament. The Istituto degli Innocenti realised this report with the collaboration of many European experts and ChildonEurope Network, with is a network of national observatories and centres.

The main purpose of this report was to provide an updated comparative vision in the field of IA at European level, in particular following an inter-disciplinary perspective able to give adequate consideration to both social and legal aspects involved. In particular, the research showed different levels of analysis. At the international level, we have a documentary analysis that is aimed to give us a statistical profile of the phenomenon in the EU countries and then a review of European instruments. At national level, we have a comparative national survey that we have realized through the study of national legislative frameworks.

The study lead to some concrete proposals for intervention at a European Union level and of national policy makers, as well as representatives of civil society, directed to harmonise the different national rules and experiences and to create a European adoption system.

For that purpose a network of 27 experts with specific knowledge on the subject, coming from most of the EU countries, was entrusted with collecting the documents from different Member States and drawing the national reports using a questionnaire drafted to help them finalising their work, by harmonising their qualitative and quantitative information. For the statistical profile of the phenomenon within Europe, the enquiry made it possible to underline that European receiving states accounted for over 40% of worldwide IAs in 2004, the year for which we were able to find comparable data.

In the same year, the 9 EU Member States identified as countries of origin provided 3.3% of children sent for IA. All of these States of origin send primarily to other European countries. On the other hand, most children being adopted internationally in Europe by the receiving Member States are from non-European countries and only Cyprus, Malta, and Italy had more than 10% of their IAs from other EU states.

Moreover, the analysis put in evidence some general trends of the phenomenon that show an initial rise in IAs

from 1998 – 2004, and subsequent fall during the years 2004 – 2007. In particular, it could be underlined that the number of IAs worldwide grew substantially from the mid 50s reaching a peak of 45,000 in 2004, and in the next three years the numbers fell to 37,000, similar to the level in 2001. Three EU states, France, Spain and Italy, have been amongst the top 5 receiving countries for the last 15 years.

Whilst the data collected are interesting and helps us with an adequate framework of the statistical phenomenon within EU countries, it is important that all the EU countries take steps to encourage the keeping of accurate records of children sent or received with more detail than is found in most returns. An immediate step could be to support the current efforts made by the Hague Conference to develop a common pattern of returns from all contracting states.

For what concerns the psycho-social and policy aspects, in the report legislative choices taken at both international and national level have been viewed together with practices following the domestic experiences to verify if and to which extent the declarations of principle, the interpretation and the application of legal rules are reflected in concrete measures adapted to the need of individual situations.

In particular, it has to be underlined that the preparation work with prospective adoptive children is still scarcely developed in most European countries of origin, if compared with the preparation of prospective adoptive parents. Most countries of origin have knowledge of the importance of these preparation services for children, but they often lack the knowledge or resources to prepare the child for adoption in an adequate way taking into account issues of child development.

Moreover, with respect to matching, it seems there is still not a common set of clear criteria or guidelines available for matching issues and procedures. From the child's best interests perspective, it should be recommended that psychological expertise by clinical psychology, or experts on child development, is used to guarantee good matching. More research is needed on which decision rules are used in practice and how adequate the rules are. Finally, concerning the psycho-social aspects, we noticed that the number of special needs adoptions grew substantially in the most recent years and probably they will continue to grow in the future. However, at the moment there is no consensus about special measures or policies in the European countries even if some countries have experience of protocols or campaigns to better prepare prospective adopters for special needs adoptions. So it should be concluded that special needs adoption deserves more attention, now and in the future, and efforts should be combined to improve the awareness, the knowledge, and practices.

Finally, for what concerns the normative and legislative aspects, taken into account in the research, a detailed

national policies analysis has been carried out with the specific aim to find unifying elements in the legislation in place and the main questions at stake within the different EU countries with regard to adoption procedures. Special attention has been given in particular to the rules about competent authorities, those regulating the adopters and the adopted children's requirements and rights, models of adoption, the measures to react to the phenomenon of abuse etc.

It is to be underlined that the differences made in the report among EU states experiences make it clear how deep some divergences are. And these differences can be extremely sharp, both procedural aspects and national practices and services present intense diversities. And the role played by national legislators, courts or competent administrative authorities is still a core one.

For what concerns recommendations that we could give, as researchers, to the European Parliament, we can say first that, when all persons involved in an adoption are EU citizens, unitary conditions should be considered to ensure direct recognition of the adoption decision made in another EU country whether or not the other has ratified the 1993 Hague Adoption Convention, on condition however that its principle are accepted and that the best interests of the child have been duly respected.

So, to conclude, what we can say is that we must improve resources to ratify international conventions, trying to enact new pieces of national legislation and to create new monitoring mechanisms. The most appropriate first instrument to achieve this result could be, for example, a specific European Parliament Resolution with a view to create a European working group of experts working in this field. We could say that at this point it is not necessary to think about a European adoption strictly speaking, but for a sort of Europeanisation of adoption law in the broad sense that it could guarantee at least a common frame of reference between all the EU Member States.

The results of the study carried out by the European Commission

Patrizia de Luca, Team Leader, Civil Justice Unit, Directorate General Justice, Freedom and Security, European Commission

Good afternoon, Ladies and Gentlemen, I should like to start with a few words about the background to the European Commission's study, in other words, why the European Commission decided to carry out a study on adoption procedures in the Member States of the EU.

Protecting children's rights is one of the EU's top priorities, as stated in Article 3 of the Treaty on EU, the new Treaty on the European Union which enters into force today. This aim is also recognized in Article 24 of the Charter of Fundamental Rights of the EU, which states that *'in all actions relating to children, whether taken by public*

authorities or private institutions, the child's best interests must be a primary consideration'.

Already in July 2006 the Commission presented a Communication *"Towards an EU Strategy on the Rights of the Child"*, which proposes a comprehensive strategy to safeguard children's rights effectively in all EU policies and to support Member States' efforts in this field.

One of the rights that children have is to be brought up in a family environment, as clearly stated in the preamble to the United Nations Convention on the Rights of the Child. Hence, adoption is part of the picture.

If the EU wishes to protect and promote children's rights, it must pay more attention to the issue of adoption. However, at present, there is no common policy in this field. Indeed adoption is specifically excluded from the scope of Council Regulation Brussels IIa which relates to issues of parental responsibility, visiting rights and child abduction.

We can, however, count on an important international legal framework for adoption: the 1993 Hague Convention and the Council of Europe Conventions, in particular the revised one. We have also to consider the United Nations Convention on the Rights of the Child and its principle of subsidiarity that has sometimes lent itself to uncertain interpretations. We can now affirm that, as recalled by the UNICEF in the 2007 statement on Inter-country Adoption that IA may indeed be the best solution for individual children who cannot be placed in a permanent family setting in their countries of origin. Institutionalization should be considered as a 'last resort' solution for a child without parental care. The principle of subsidiarity - and here I am quoting the Hague Conference on Private International Law- must be applied realistically. The Hague Convention refers to *"possibilities"* for placement of a child in the State of origin. It does not require that all possibilities be exhausted. This would be unrealistic; it would place an unnecessary burden on authorities; and it may delay indefinitely the possibility of finding a permanent family home abroad for the child. The principle of the best interests of the child is the overriding principle in the Convention, not subsidiarity.

Moreover, we should not forget that the Convention on the Rights of the Child is of a universal nature and therefore must also take into account the point of view of countries, Islamic for example, which do not recognize the institution of adoption, or specific cases where children are separated from their parents by war or natural disasters.

That said, we have to apply these general principles of the international convention to the specific context of the EU. We cannot deny that the EU has its own particular background and that adoption between Member States does not have the same implications as adoption involving third countries. The EU is an integrated area with no internal borders. Member States of the EU share common

values. They are working together to establish a common area of justice, freedom and security based on the principle of mutual trust. Closer cooperation on adoption between the Member States might be regarded as one of the inevitable consequences of the free movement of citizens and the gradual emergence of a European judicial culture built on the diversity of legal systems, the promotion of citizens' rights and unity through European law.

According to a recent Eurobarometer survey, most citizens want the EU to take an active role with respect to adoption between Member States. The figures vary from one Member State to another, with the highest figures in France, 85%, and in Italy, 87 %. Nevertheless, on average, the number of citizens in favour of EU action in this field is very high, 76 %.

Moreover, in recent years, the European Commission has received several complaints from citizens and associations on the issue of adoption between Member States explicitly asking for action on the matter. One of those citizens is here today to tell us about her experience.

So, briefly, the content of the study: we asked our contractor to produce a comparative analysis of the legislation in the 27 Member States, and to identify practical difficulties and problems encountered in this area by European citizens, and finally to identify possible solutions to these problems.

The study is divided into a legal analysis and an empirical analysis. The empirical analysis includes, for instance, the number of decisions on domestic or IA, the average length of the adoption procedure, the role of advisory services and family mediation in the adoption procedures etc.

Moreover, a survey was conducted, based on 500 interviews with lawyers, judges, social workers, adopted persons, associations of adoptive parents, and policy-makers at national and European level.

I will stay short on the legal analysis as my colleague Raffaella Pregliasco has already given an overview. In general, I can say that: the analysis of the legislation has identified a vast set of national solutions, sometimes presenting a high degree of difference one from the other.

Concerning, for instance, the role of the Central Authorities and accredited bodies, we have 15 countries which have both, but the division of competencies between the Central Authorities and accredited bodies is very different.

The provisions with regard to the prospective adoptive parents are very different, their age or civil status (single person, married couple-heterosexual or same sex couple). Regarding the adoptability of the child, most EU Member States require the consent of the biological parents. Only Italy requires the state of abandonment of the child.

One problem which has been raised with the European Commission is the lack of recognition of adoption decisions between Member States. Theoretically, if a State is a member of the Hague Conference on Inter- country Adoption, foreign adoption orders should be recognized automatically. In practice, this is not always the case as is borne out by the complaints submitted by citizens to the EC.

The problem of recognition: I would like to invite the representative of the Central Authority of the French Community in Belgium to explain this kind of problem to us in more detail during the next discussion.

Concerning the empirical analysis, the survey was conducted among adopted persons, people seeking to adopt, representatives of the competent authorities in each country (Ministries, judges and administrative authorities). The survey shows there is an interest for Union action, the need for training courses in order to prepare prospective adoptive parents for the realities of IA, there are complaints of lack of training for all staff representatives at all levels of the adoption procedure. There are critics to private adoption, as it is seen as a means of circumventing the provisions against child trafficking. A post-adoption service is also requested in those countries where such follow-up does not exist. The cost of adoption, excessive bureaucracy, the duration of the procedure, and the disparity of case law, and incomplete or incorrect information about the child, especially regarding his health condition, are other shortcomings mentioned by the interviewees.

Let me finish with an overview of the policy options. What can the European Union do to solve the problems identified in the study? There are a certain number of possible policy options to be taken by the European Commission which are more or less feasible in the current circumstances. For instance, the creation of a European adoption agency, a kind of super central authority, whose task it would be to coordinate adoption procedures in Europe. This option could ensure equal treatment for all European citizens and the possibility to collect all relevant data. This solution would probably allow for a certain harmonization of rules. The disadvantage of this solution is the time required to set up a new agency and the costs involved. Moreover, in family law matters the unanimity of all Member States in the legislative procedure is required.

Secondly, recognition of certificates of eligibility of prospective adoptive parents and recognition of adoption decisions in all Member States. This could be done via direct recognition or by means of a simplified procedure.

Thirdly, the creation of EU common adoption certificates. Rather than having simple recognition, one solution might be to create common adoption certificates, for the eligibility of the parents, for example, or the recognition of adoption decrees issued in other Member States. A single

European procedure could be developed for the delivery of the certificates. Selected parents would then be eligible to adopt throughout Europe without the need for further recognition.

4. Register of children awaiting adoption. This should be a European register of children awaiting adoption, listing children eligible for adoption at the European level. All these children would then have an equal opportunity to find a family in Europe.

5. The definition of the child's right to a family. Although this core principle is sometimes not uniformly interpreted at international level it should definitely be so at European level. By making the child's right to a family an absolute principle it would always be possible to act in the child's best interest, giving clear preference to the possibility of European adoption over institutionalization or long-term foster care in the child's country of origin. A shared interpretation of the principle of subsidiarity would be most welcome.

6. Harmonisation of national legislation on the basis of the existing Conventions. The Member States of the EU could be encouraged to harmonize their legislation, at least on a number of specific issues. The correct implementation of the Hague Convention and the ratification of the 2008 Council of Europe Convention could play also an important role in this respect.

The last possibility, of course, is to do nothing, apart from general adherence to the principles stated in the international Conventions. However, personally I think that this option does not seem appropriate because the majority of European citizens want the European Union to intervene and the current situation undermines some of their fundamental rights.

Experience of an adoptive parent: the lack of recognition of adoption decisions as an obstacle to the free movement of persons in the European Union

Brigitta Toth, mother of an adopted child, United Kingdom

We are very pleased to see that Patrizia reflected on lots of the issues which we came across through our experience so the legislators are aware of what is needed across Europe.

As we heard this morning, the importance of Hague Convention on Inter-country Adoption is clear, however it does not cover all scenarios and therefore it is essential that non-HC Adoption policies in individual countries are constantly reviewed and updated, and this was also mentioned by Claire Gibault earlier. Additionally, I am not sure whether the experience we faced is unique to the UK or the same problems exist elsewhere in Europe.

I am a Hungarian citizen. I have lived in London for 13 years. My husband is British. Toby, our adopted son, is the son of my cousin. I am a very happy adoptive parent with a very bitter experience and memory of the process.

In January 2008, my cousin in Hungary was to give birth and decided to relinquish her unborn child for adoption. Fortunately, by that time, we had started the UK Domestic Adoption process, by choice and not due to infertility; therefore we weren't desperate or upset as previously prospective adopters were referred to. Our assessment/home study was almost complete. But we had to change the process from domestic to Inter-Country and we were told that it was impossible to complete the assessment and be ready for Toby's adoption before the baby's birth.

In March, to prevent Toby from being put into care and to keep him within the extended family, we decided to go to Hungary to adopt him. We sought legal advice in UK prior to his birth and we were suggested NOT to do a HC adoption. The only way to proceed with that was to move back to Hungary, where I'm still a citizen, to be allowed to go through a Hungarian kinship adoption process as a single mother with a supportive statement of my husband.

Toby was born on 21 March. We travelled to Hungary one week later and went through all the various checks that were prepared before our arrival, to be able to pick Toby up from hospital. The initial paperwork, the birth mother's statement and consent and our statements, had to be officially registered and then the baby was released from hospital. At 10 days old, on 31 March, we started a fairly normal family life. We had weekly visit from the social workers, health visitors and had health check-ups every two weeks, additionally to the initial 'home assessment' done by social services. Reports were sent to the local Child Protection Agency who also visited us and filed their reports. All legal requirements completed in accordance with Hungarian adoption legislation.

In the first four weeks I was acting as the legal guardian for the child, then further statements were taken and the Guardianship Order was replaced with an Adoption placement, followed by the final Adoption Order in early June. During the process, the birth mother was given several opportunities to change her mind if she wanted to do so. Hungarian social services encouraged us to live a normal family life and no further visits or intervention was necessary.

The UK experience unfortunately was not straightforward. Since our assessment was not complete I had to fly back several times to be able to finish the UK process and there we were recommended as prospective inter-country adopters by an adoption panel. Then they made a recommendation and a further body issued the actual approval.... This however was still not valid until the UK Central Authority (DCSF) checked, what exactly in our case

is unknown, and four months later issued the necessary 'Certificate of Eligibility' to adopt'.

By then Toby was with us for 4 – 5 months. Adoption panel was in May in the UK, Certificate was issued in September, after four months. It was already addressed yesterday and today how every day and month is too long for a child in need to wait. Toby was issued a passport and a new Hungarian birth certificate which stated me as the mother. I became the only legal representative and mother under Hungarian Law.

From June to September 2008, we were forced to stay in Hungary, as UK authority did not allow Toby and me to enter the UK. That is a clear example of how one State issued eligibility and this was not recognized by another Member State.

I risked my home, my job, accumulated debt paying for a second life in Hungary, because we were never warned how costly and luxurious a European IA is considered to be, and our life as a complete family was greatly compromised because my husband had to stay working in the UK whilst I was in Hungary with our child.

This restriction of freedom of movement fairly violated the Amsterdam Treaty. This whole saga should have been avoided. Under normal circumstances a child is allowed to travel with his / her parent as soon as an EU passport is issued in their name. UK immigration law states that visa is NOT required, even for an adopted child, however the Certificate of Eligibility is necessary when entering the UK. This could have been avoided with a European wide recognized certificate. A child who is adopted, and a parent who adopted him lose their freedom of movement rights when attempting to enter into the UK.

September 2008 to October 2009 - UK authority (DCSF) finally issued a "Certificate of Eligibility" allowing Toby and I to return to the UK. But Toby was not allowed to travel back to UK without my husband coming to pick us up.

Although we followed non-HC adoption, the procedure the DCSF (Department for Children Schools and Families) followed was in accordance to those rules. They sent documents to the responsible Hungarian Ministry, and they wanted the Hungarian Ministry to give me and Toby permission to travel to the UK without my husband. The Hungarian ministry was simply not willing to comment on this since they do not have the power to restrict a mother and child's EU freedom of movement. Later, the UK court was also considering to track down the birth mother for a new consent, nineteen months after her original was given, although the Hungarian proceedings were completed.

Then DCSF forced me to re-adopt Toby in the UK with continuous social worker visits and intervention. Full legal adoption of Toby in UK finally recognised by UK High Court

on 4th November 2009. The HC adoption was not suitable for us because Toby would have gone into care until the relevant paperwork was completed. How is that in the best interests of the child? Authorities in the State of origin and in the receiving country must exchange completed assessment of adopters and the child before adoption. This was according to Article 17 and 29. One assessment and approval should be valid across Europe and adoption orders should be mutually recognized.

The Problem - UK only recognises foreign adoption from "the designated list" such as all Commonwealth countries, including countries like Zimbabwe, Malawi, Sri Lanka, Tonga, Nigeria, most of them are not signatories of the HC adoption. U.K. also recognizes adoption from other countries, including France, Germany, Italy, Sweden, Austria, but does not recognise adoptions from all former Eastern bloc countries, such as Hungary, Poland, Czech Republic, Slovakia.

This list is 'currently' being reviewed under the provisions of the Adoption and Children Act 2002. But this is the message on the UK IA website for at least two years now. It is apparent that the 2004 Accession countries (Eastern Bloc) are not on this list. Personally I find it difficult to imagine that the 'membership criteria' did not cover legal obligations related to Family law. If a divorce is valid across the EU why isn't an adoption order?

Conclusions - Current UK legislation is not in the best interests of the child. The current present process is unfair, unclear, difficult to navigate and expensive.

I personally considered adopting Roma children from Hungary who are not wanted in the context of national adoptions, as mentioned by Maria Herczog. However, the costs and the bad experience with the UK IA process prevent me from doing so. There are always children in need for a home and there are always people waiting to be allowed to adopt. What is going wrong, where and when?

If an IVF treatment is subsidised and widely available through the National Health Services across Europe than why Inter-country, cross-European adoption is treated as a luxury (GBP 8-10 Thousand in the case of Hungary). In fact, we were constantly asked and pestered why we want to adopt when we can have IVF. Surely this is not the right approach when somebody just decides they want to give a home to a child.

In Europe 2009 there are families who are connected to different Member States by relatives. These relatives should have the possibility to be informed and accommodate a child of a family member should they decide to do so. The HC of adoption has no subsection for 'kinship- adoption'. This needs attention.

It is in the best interests of the child to stay within the extended family, i.e. family members abroad or to be kept within the country.

If the UK identifies a child in need of placement they search for extended family (sometimes even world-wide) and fast-track placement should they find someone suitable and willing to take this child in. This is not possible for Europeans within the current scope of the HC adoption.

We would like to see an EU centralised agency or a working group to be set up, to advise adopters, oversee and unify processes across Europe and prepare a mutual recognition process to be implemented.

General discussion

Thomas Klippstein, German Ministry of Justice

I'd like to thank the Commission and the Council of Europe for having set up this meeting and giving us the opportunity to communicate amongst us. I've seen a lot of similarities but there are some very great differences between the different countries. We've seen different representatives from different agencies and different countries saying that they had a different relationship with adoption law, some saying that adoption is a way of protecting children's rights, others see it as an opportunity to engage in family planning.

We've got two studies presented to us. I would like those studies to be published as soon as possible because they do create a great deal of information for discussion. Not just of people concerned but to legislators and this is something I'd like to present to our parliamentary committees as quickly as possible. We have nothing against a horizontal policy to protect children. All policies should protect the child where this is possible. When it comes to a possible European adoption law we are a bit reticent. We think the Hague Convention has proved its worth but we think it needs to be implemented fully and improved and it's something that we've all been wanting to do for several years ie we want as many of the countries signed up as possible. Above and beyond that, we are certainly open to any measures that would be below the level of the law, a common frame of on adoption for Europe, for instance, is something that we could support.

I am in the working party which looks at other measures for adoption. The problem is that we are not completely convinced that it really does represent progress including an extra level of the law in this field. I have two questions. When does the Commission or the European Parliament think that we'll be able to access these studies? Secondly, when will there be concrete follow-up to those studies? What will it look like? Is this something that will be put before the European Parliament soon? Will there be resolutions adopted? And will the Commission be putting into operation proposals from the studies and making its

own proposals for the action plan under the Stockholm programme?

Béatrice Bertrand, Central Authority of the French Community, Belgium

In Belgium we have to face up the problems of many European citizens living in Belgium and spending some time there, this must happen in other countries too, but in view of the length of adoption procedures, we have to face the difficulty of someone who has started the procedure for adoption in one country and then has to move into other countries more than once. We find that it would be useful to set up a working party with regard to possible equivalences of certificates of eligibility for adoption as far as the safeguards are respected in the country of residence, which is the country whose law is applicable under the Hague Convention. It is in fact the country of residence which has to provide guarantees for people living in that country, even if sometimes prospective adopters may have started procedures in their own country of nationality, contrary to the HC, but this is accepted by some countries. We think it would be very useful to set up a working party on that subject in order to simplify some procedures, the purpose being to respect the best interests of the child and only having guarantees with regard to minimum standards, because we know that some countries are much more strict than others with regard to compulsory preparation of adopters and with regard to the issue of certificates of eligibility. We should do this very soon, I believe.

Matthew Thorpe, UK, Head of International Family Justice for England and Wales

My intervention is directed to Ms Toth. I want to make it plain that we have a very sophisticated legislative adoption system, in England and Wales, recently reformed, but of course there are always cases that can expose the weakness in the general system. If Ms Toth would be so kind to submit a memorandum of the difficulties she has encountered, I will get the international committee and the official working group concerned with international family law to look at the case and to see whether we couldn't make positive proposals for maybe extending the list of designated countries.

Salla Saastamoinen

I can reply on when the studies will be available. I understand that the study of the European Parliament is already available on the website of the European Parliament, and the study launched by us will be on the Commission website after the conference, as soon as possible.

On your second question on what kind of follow-up to the study, I can reply for the European Commission, our follow up for the study is this conference. The study was launched a couple of years ago. We wanted to use this conference to have a discussion to hear what is going on. For next steps I do not have any information.

Ciprian Buhusi, Romania Office for Adoption

Here we are talking about adoption. We are talking about the status of the child in adoption and today we received some data about children who lived on the streets, but this has nothing to do with adoption, that's quite a different matter indeed. We also have children of parents who've gone abroad to work and the children have been left home alone, but again that has nothing to do with adoption, you see each time we talk about adoption, when we talk about Romania we see these things clearly. You have to talk about adoptable children. The important thing here is the role of the children and the families. Well Romania is only one of those countries in which those children can be adopted.

William Duncan

I have three brief comments. The first is to point out that the Hague Convention does contain within it some flexibility, which allows groupings of States to reach agreements with a view to improving the operation of the convention and their arrangements. You'll find that in Article 39 (2). So for any group and not just the European Union, any regional grouping of States that feel that they can improve some of the procedures within the convention themselves, then there is the freedom to do so. Second point concerns what has been said about, what appears to be a problem within Europe, in some cases adoptions that have been concluded under the Hague Convention and where a certificate under Article 23 has been issued declaring that the adoption is in conformity with the convention, apparently from what I hear some of those adoptions are not being recognised. Now, this is a serious problem because the automatic recognition of adoptions made under the convention is a pillar of the HC. If it is not being respected, then the first thing to do is to find out why not. States only have one situation in which they may refuse an adoption concluded under the convention and that is where it is manifestly contrary to their public policy taking account of the interests of the child. And I would simply say this; non-recognition of an adoption is not a good sanction for dealing with breaches of the adoption process. So there is a real worry if that is happening, but the solution is not necessarily to go for an alternative system of recognition, it's to mend what is happening in relation to the Hague. The third point I would make is in relation to Ms Toth's tragic case, and first I want to give you my sympathies to have been caught up in this dreadful bureaucratic mess. I can understand the huge frustrations. The only thing I would say, because I don't know enough about the case, just from what you have said to me and to the audience today, I would simply plea, please do not judge the HC on the basis of which it appears to me that the Hague procedures may not have been properly applied. That's all I wanted to say, it would be improper for me to comment further.

Brigitta Toth

I would never judge the Hague Convention because I think it's a very good starting point, but, as you previously

mentioned, it's not a perfect world and we all have to work together on improving it.

Maria Mirabella Arisi, Italy

I am Mirabella and I come from Romania. I was adopted by an Italian family when I was 14 years old. I want to stand up and say, I know about the situation with the orphanages in Romania and I know what it means living in a family. Therefore I'm coming here now to tell you about the situation of children who are living in orphanages. I came back after 5 years, back to Romania, because I wanted to see exactly what the situation was, to see if it's changed now. Well, I realised that the situation of orphanages is exactly what it was when I left. Those children whom I had left behind in the orphanage, I met them again and of course they're bigger now and they've grown up, but they were crying and saying *'Please, please, Mira, do something for us, please find us a family to go to, please!'* Now here I'm coming to you today because I want to tell you what those children want. They want to be adopted. They want to have a possibility of living and to have a peaceful life. I want to say today I am trying to help these poor creatures because they are almost like being wiped out. They almost don't exist, I got many promises by politicians, but these children today, they are still living in the orphanages. I am trying to be their spokesperson, but nobody hears me. Today I just want to remind you of what they have to say. I'd like to speak on their behalf because they have no means to be heard except through the words I'm addressing to you today. I think we should try to give them a family; we should listen to what they have to say because these children are asking for a family.

Session VIII - Conclusions and Recommendations

General Rapporteur – Rosemary Horgan, Solicitor, Member of Working Party which drafted the revised Convention of Adoption, Ireland

First of all I would like to express my thanks to the European Commission and the Council of Europe for organising this event because it has been wonderful to hear the exchange of views over the last two days here in Strasbourg.

Speakers have referred to a number of legally binding instruments adopted at both national and international level safeguarding the rights of the child during the adoption process in order to ensure the best interests of the child. Particular attention was paid to the revised European Convention on Adoption of the Council of Europe, as well as to the 1993 Hague Conference on Inter-country Adoption, in highlighting good practices which help to ensure the rights of children during this sensitive and emotional process. They noted that those instruments are "adoption-neutral": they neither encourage nor discourage adoption.

The hierarchy of choices available for the care of children must respect the rights of the child. However, when adoption proceedings take place, they should always be in the best interests of the child.

Participants unanimously agreed that accession to and ratification of both of these international instruments should be strongly encouraged. When ratified, they should be effectively and scrupulously implemented and monitored to set minimum standards for the further development of national legislation and policies.

Only three ratifications are needed now for the revised European Convention on the Adoption of Children to enter into force, and we certainly hope that this instrument will be a binding one sooner rather than later.

A number of participants have indicated that they are in the process of promulgating national legislation to implement both conventions, to ensure the best interests of the child are safeguarded. The revised Adoption Convention should even now have a resonance in national courts and has been referenced in adoption cases coming before the European Court of Human Rights, as we've heard.

The importance of the role of both governmental and non-governmental institutions promoting children's rights and governmental monitoring mechanisms cannot be over-emphasized. These institutions have a vital role in issuing guidelines for implementation of adoption policies and procedures for professionals working with this area, in accordance with relevant international norms. Clear processes and procedures should minimise unnecessary bureaucracy.

International co-operation needs to be further developed to promote the exchange of information and experiences, to identify good practices, to support best practice standards setting, and effective implementation, and to promote the development of national integrated strategies to develop and combat all forms of child trafficking. The Council of Europe and the European Commission could play a crucial role for the benefit of national forums following insights gained from this correspondence and indeed build upon and publish research already undertaken.

All professionals, in particular judges, psychologists, social workers and lawyers who become involved with the child in contact with the judicial system should receive appropriate information and opportunities for training in appropriate methods for interviewing a child.

The issue of child adoption needs to be de-politicised by giving paramount consideration to the best interests of children, rather than the political sensitivities of sending or receiving countries. Whether residential care, foster care, national or IA is the best solution for an individual

child in need of a home, must depend on the specific facts presented in each case.

A mature child's consent to adoption is now necessary. The interpretation of the child's wishes and best interests should be facilitated through child psychologists and other qualified professionals. It is vitally important that the children's views are duly taken into account in all adoption proceedings. The awareness of all professionals working in this area should be raised in this respect. A multi-disciplinary inter-action between the professionals involved, including judges, lawyers, social workers, psychologists and others in the area must be encouraged in order to give practical substance to the concept of BIC, their right to be heard and to articulate their views. Information conveyed to the child should be age appropriate, and their psychological needs taken into account. There may be a role to appoint a guardian for the child in this regard. We have heard the encouraging experiences of members of the judiciary who consider it necessary to hear the child directly before making a decision on adoption.

Participants noted divergence in practice and procedures on the requirement of consent of unmarried fathers, notwithstanding the case-law of the European Court of Human Rights. A lively debate on possibility of joint adoption for same sex couples also highlighted a divergence of views on this issue. The revised Convention remains flexible on the topic. Everybody agreed that the best interests of the child should, once again, be the paramount interest, guiding every decision on adoption. Every effort should be made to avoid discrimination, including discrimination based on ethnicity or disability of children.

The severance of ties of filiation arising from full adoption brings into sharp focus the rights of siblings, parents and grandparents. The question was raised as to whether this represents a disproportionate effect of adoption and as the discussion from the floor developed it became clear that these issues may need to be further developed.

The right to know one's origins and the importance of that to adopted persons became very clear through the testimony of several adopted persons. A number of persons spoke with great emotion about their personal experiences, which were very powerful and persuasive. The human need to complete their life stories and quest for identity was perceived as important to their psychological wellbeing.

Questions surrounding the collection and storage of data, and data protection, might need to be reconsidered in the coming years.

Participants are particularly grateful to the two judges of the European Court of Human Rights for their insights into the jurisprudence of the court on adoption.

It should be born in mind that the revised Adoption Convention is an instrument of harmonisation, setting minimum standards; one would hope and expect indeed that state parties would continue to improve and raise national standards over time.

Work continues on other international conventions promoting the rights of children and recalibrating the rights of children and of adults. The focus of the Hague Convention is to provide a framework for the process of Inter-country Adoption, which is aimed at protecting the best interests of the child by establishing a system for co-operation between contracting countries to prevent the abduction, sale and the trafficking of children. This gives practical expression to the international standards set out in the UN Convention on the Rights of the Child. States of origin and receiving states participated in formulating the convention to ensure that the best adoption procedures are acceptable to all contracting states. The Convention, like all legal instruments, is a framework document and by definition incomplete and imperfect. Co-operation and transparency are the key ingredients to improving its implementation. State parties must be vigilant in adherence to Convention obligations. Participants were encouraged to take an active part in the review process of this Convention scheduled for 2010.

Every country which engages in Inter-country Adoption should become a State party to the Hague Conference because it embodies best practices, standards for regulating IA thereby protecting the rights of children in adoption situations. All States which are parties to the Convention should, when dealing with non-contracting States, apply, as far as possible, the safeguards and procedures set out in the HC.

The co-operative framework of the Hague Convention is based on an agreed division of responsibilities between States of origin and receiving States. The best interests of children in IA are safeguarded by a number of principles:

- establishing specific safeguards to ensure the adoptability of the child;
- ensuring that due consideration has been given to alternative, permanent forms of care for the child in the country of origin
- ensuring that the necessary consents have been knowingly and freely given, after counselling,
- regulating the financial aspects of the adoption
- accrediting and authorising adoption agencies
- verifying the Convention procedures are followed.

Receiving States must ensure that adoptive parents are eligible and suitable to adopt and that they have been appropriately counselled and that the child is allowed to enter and permanently reside in the State.

Responsibilities of receiving States and States of origin are not mutually exclusive, as they share responsibility for

developing the safeguards and procedures protecting the best interests of the child. Receiving States should avoid placing pressure on States of origin and should help states of origin to improve their child protections systems.

Central Authorities have both national and international aspects to their functions with general and case-specific elements. Attention is drawn to the Inter-country Adoption Technical Assistance Programme co-ordinated by the Hague conference which assists Contracting states in developing the infrastructure and procedures required to meet international standards. Regulation through bi-lateral agreements may be a step in the right direction. However, there was general consensus that the 1993 HC is the gold standard.

Co-operation and standardisation between Central Authorities is important and must be supported through training courses, exchange of best practices etc. Central authorities may require financial support from the European Union. In accordance with the fundamental principles of the freedom of movement within the European Union, it is important that there should be mutual recognition of certificates of eligibility and suitability of prospective adoptive parents and publication and circulation of adoption decisions.

Finally, if I could announce two birthdays today. Firstly Ms Patrizia De Luca, and secondly the Lisbon Treaty.

Final remarks

Salla Saastamoinen

It is not an easy task to make a concise overview on the two days of intense discussions but I think that this one was quite a fair account of what has been discussed for these days, so thank you very much, Ms Horgan.

This and others papers from the presentations will be available after the conference on the Council of Europe website. From my side and the side of the European Commission few final remarks before handing the floor to Director Jan Kleissen.

The entry into force, today, of the Treaty of Lisbon reinforces the importance of the principles included in the Charter of the Fundamental Rights of the Union. A first consideration is that the promotion and the protection of the rights of the child must continue to be a priority in all Commission and European Union actions. In particular, in the matter of adoption, the best interests of the child should be the primary concern. The European Union will continue its action to prevent child trafficking and improper financial gain in adoption procedures. On the other hand, the right of the child to a family life should be recognized without hesitations at the European level.

We consider it essential to promote largely the accession to the 1993 Hague Convention on Inter-country Adoption. Already 26 out of the 27 Union Member States are parties to the Convention; and we would urge the remaining one to accede also. Furthermore, we have included the 1993 Convention to the international framework that is important for the candidate countries of the European Union. And finally, we promote that Convention also for the third countries in our external relations in order to rely on a common international legal framework. So this is our constant policy.

It is clear that not only the accession to this Convention is important, but the fact that it has to be properly implemented. This consideration has a special importance for the Member States of the Union, whose legislation on adoption shows intense diversities, as we have heard.

The European Union, since 2007 a full Member of the Hague Conference on Private International Law, can play in this regard a coordination role, even though the Union itself is not a party to the Convention.

Also the cooperation between Central Authorities of the Member States throughout every step of the adoption proceedings should be supported by the Union, by financing training courses and facilitating the exchange of best practices within our financing instruments and financial programmes.

In the context of the Union, an economic and politically integrated area without internal borders, which is developing into an area of freedom, justice and security, where the citizens enjoy the freedom of movement and have the possibility to live and work in other Member States, also the principle of subsidiarity in adoption procedures could be interpreted in a uniform and consistent way, meaning that, when the biological family unity cannot be preserved and the adoption of the child in his or her country of origin is not possible, International Adoption should be considered, in the light of the UNICEF position, the best solution on a case by case basis to allow the child to grow up in a permanent family environment.

As the complete harmonization of the substantive laws on adoption is currently not a realistic option, we encourage the ratification by our members by the revised Council of Europe Convention on Adoption. It offers a common set of principles to be respected by Member States in their legislation and practices concerning adoption. In this context we welcome the great example and progress by Spain and the Netherlands yesterday by the signature of the European Convention.

The respect of the fundamental principle of the freedom of movement within the Union calls also for an EU action ensuring free circulation of the adoption decisions concerning EU citizens' free circulation, adopted or not.

Adoption decrees issued by national Courts or administrative bodies should circulate freely in Europe. Also the mutual recognition of certificates of eligibility or suitability for prospective adoptive parents could be taken into account in order not to harm the freedom of movement of the European citizens.

I thank you for all for your important contribution through the discussions in this Conference. These feed into considerations on how to effectively promote the best interests of the child in the Union.

**Jan Kleijssen, Director of Standard-Setting,
Directorate General of Human Rights
and Legal Affairs, Council of Europe**

I had the pleasure to address about a third of you last night whilst waiting for the other two-thirds that unfortunately did not make it in time to the reception and I would like to apologise for the logistical difficulties. But I understand that you did finally make it and also had a chance to enjoy the Christmas market.

As the last speaker of the conference, I think I have to obey at least three commandments, namely that I shall not repeat the excellent conclusions of the general rapporteur, that I shall not be too long and that I shall not forget to thank anyone. So I will try to be guided by the best interests of the conference participants.

The conference, as you will have seen from the list of participants, was very much what current jargon would describe as a multi-stakeholder event. We had often very senior level representatives from international organisations, national authorities, the legal profession, academia, civil society and last, but certainly not least, those with personal experience of the subject first-hand. I would like to thank all of them, in particular, I must say, the last category because I realise how difficult it can be, it must be, to speak about one's emotions and personal experience instead of speaking about an academic or professional subject. So I very much admire those that were willing and able to share with us the experiences they went through, sometimes very painful, very difficult, because they were particularly enlightening, because that's, ultimately, what all this discussion is about, real people.

I would like also, of course, to thank the interpreters who enabled us to work in seven languages. Very, very many thanks to them.

For us, the trigger for this conference, as you will have gathered, was the adoption by our Council of ministers of the revised European Convention on the Adoption of Children. The formal signature last night by two additional States gave an extra cache to that theme.

We are very happy that the European Court of Human Rights has already referred to the text as a common

European standard and we hope that when coming home all of you will encourage, where possible, your authorities to follow suit. We will, as was already said, make the conclusions of this conference widely available and I would strongly encourage you to do the same.

Next year, just to let you know what we'll be doing, the Council of Europe will start work on a comprehensive legal instrument dealing with the rights of children and parental responsibilities, very much building on the issues we were discussing during this conference.

It is also clear from one day's discussion on national adoptions, and another day on international adoptions, that there are many common questions that were raised and we will consider, together with our partners, the creation of an inter-agency working group or contact to see how we can together progress on these issues that are of interest to both NA and IA.

Once more, I'd like to thank Salla and the European Commission, for their support in making this joint event possible, and all the participants who came to Strasbourg and of course, everyone who was a panellist or chair. I wish you all a safe trip home, stay in touch and hope to see you again soon.

Conference close

Appendix I

Abbreviations

BIC – best interests of the child

CoE – Council of Europe

EU – European Union

HC – Hague Convention

IA – international adoption

NA – DA national/ domestic adoption

NGO – non-governmental organisation

Annexes

Annex 1: European Convention on the Adoption of Children

Annex 2: Convention on protection of children and
co-operation in respect of intercountry adoption

Annex 3: Written contributions from the speakers

Annex 4: Conclusions

Annex 5: Final list of participants



ANNEX 1

EUROPEAN CONVENTION ON THE ADOPTION OF CHILDREN



Council of Europe Treaty Series - No. 202

European Convention on the Adoption of Children (Revised)

Strasbourg, 27.XI.2008

Preamble

The member States of the Council of Europe and the other signatories hereto,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage;

Considering that, although the institution of the adoption of children exists in the law of all member States of the Council of Europe, differing views as to the principles which should govern adoption and differences in adoption procedures and in the legal consequences of adoption remain in these countries;

Taking into account the United Nations Convention on the Rights of the Child, of 20 November 1989, and in particular its Article 21;

Taking into account The Hague Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Inter-country Adoption;

Noting the content of Recommendation 1443 (2000) of the Parliamentary Assembly of the Council of Europe on "International adoption: respecting children's rights", and the Council of Europe's White Paper on principles concerning the establishment and legal consequences of parentage;

Recognising that some of the provisions of the 1967 European Convention on the Adoption of Children (ETS No. 58) are outdated and contrary to the case-law of the European Court of Human Rights;

Recognising that the involvement of children in family proceedings affecting them has been improved by the European Convention of 25 January 1996 on the Exercise of Children's Rights (ETS No. 160) and by the case-law of the European Court of Human Rights;

Considering that the acceptance of common revised principles and practices with respect to the adoption of children, taking into account the relevant developments in this area during the last decades, would help to reduce the difficulties caused by the differences in national laws and at the same time promote the interests of children who are adopted;

Being convinced of the need for a revised Council of Europe international instrument on adoption of children providing an effective complement in particular to the 1993 Hague Convention;

Recognising that the best interests of the child shall be of paramount consideration,

Have agreed as follows:

Part I – Scope of the Convention and application of its principles**Article 1 – Scope of the Convention**

- 1 This Convention applies to the adoption of a child who, at the time when the adopter applies to adopt him or her, has not attained the age of 18, is not and has not been married, is not in and has not entered into a registered partnership and has not reached majority.
- 2 This Convention covers only legal institutions of adoption which create a permanent child-parent relationship.

Article 2 – Application of principles

Each State Party shall adopt such legislative or other measures as may be necessary to ensure the conformity of its law with the provisions of this Convention and shall notify the Secretary General of the Council of Europe of the measures taken for that purpose.

Part II – General principles**Article 3 – Validity of an adoption**

An adoption shall be valid only if it is granted by a court or an administrative authority (hereinafter the “competent authority”).

Article 4 – Granting of an adoption

- 1 The competent authority shall not grant an adoption unless it is satisfied that the adoption will be in the best interests of the child.
- 2 In each case the competent authority shall pay particular attention to the importance of the adoption providing the child with a stable and harmonious home.

Article 5 – Consents to an adoption

- 1 Subject to paragraphs 2 to 5 of this article, an adoption shall not be granted unless at least the following consents to the adoption have been given and not withdrawn:
 - a the consent of the mother and the father; or if there is neither father nor mother to consent, the consent of any person or body who is entitled to consent in their place;
 - b the consent of the child considered by law as having sufficient understanding; a child shall be considered as having sufficient understanding on attaining an age which shall be prescribed by law and shall not be more than 14 years;
 - c the consent of the spouse or registered partner of the adopter.

- 2 The persons whose consent is required for adoption must have been counselled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin. The consent must have been given freely, in the required legal form, and expressed or evidenced in writing.
- 3 The competent authority shall not dispense with the consent or overrule the refusal to consent of any person or body mentioned in paragraph 1 save on exceptional grounds determined by law. However, the consent of a child who suffers from a disability preventing the expression of a valid consent may be dispensed with.
- 4 If the father or mother is not a holder of parental responsibility in respect of the child, or at least of the right to consent to an adoption, the law may provide that it shall not be necessary to obtain his or her consent.
- 5 A mother's consent to the adoption of her child shall be valid when it is given at such time after the birth of the child, not being less than six weeks, as may be prescribed by law, or, if no such time has been prescribed, at such time as, in the opinion of the competent authority, will have enabled her to recover sufficiently from the effects of giving birth to the child.
- 6 For the purposes of this Convention "father" and "mother" mean the persons who according to law are the parents of the child.

Article 6 – Consultation of the child

If the child's consent is not necessary according to Article 5, paragraphs 1 and 3, he or she shall, as far as possible, be consulted and his or her views and wishes shall be taken into account having regard to his or her degree of maturity. Such consultation may be dispensed with if it would be manifestly contrary to the child's best interests.

Article 7 – Conditions for adoption

- 1 The law shall permit a child to be adopted:
 - a by two persons of different sex
 - i who are married to each other, or
 - ii where such an institution exists, have entered into a registered partnership together;
 - b by one person.
- 2 States are free to extend the scope of this Convention to same-sex couples who are married to each other or who have entered into a registered partnership together. They are also free to extend the scope of this Convention to different-sex couples and same-sex couples who are living together in a stable relationship.

Article 8 – Possibility of a subsequent adoption

The law shall not permit an adopted child to be adopted on a subsequent occasion save in one or more of the following circumstances:

- a where the child is adopted by the spouse or registered partner of the adopter;
- b where the former adopter has died;
- c where the adoption has been annulled;
- d where the former adoption has come or thereby comes to an end;
- e where the subsequent adoption is justified on serious grounds and the former adoption cannot in law be brought to an end.

Article 9 – Minimum age of the adopter

- 1 A child may be adopted only if the adopter has attained the minimum age prescribed by law for this purpose, this minimum age being neither less than 18 nor more than 30 years. There shall be an appropriate age difference between the adopter and the child, having regard to the best interests of the child, preferably a difference of at least 16 years.
- 2 The law may, however, permit the requirement as to the minimum age or the age difference to be waived in the best interests of the child:
 - a when the adopter is the spouse or registered partner of the child's father or mother; or
 - b by reason of exceptional circumstances.

Article 10 – Preliminary enquiries

- 1 The competent authority shall not grant an adoption until appropriate enquiries have been made concerning the adopter, the child and his or her family. During such enquiries and thereafter, data may only be collected, processed and communicated according to the rules relating to professional confidentiality and personal data protection.
- 2 The enquiries, to the extent appropriate in each case, shall concern, as far as possible and *inter alia*, the following matters:
 - a the personality, health and social environment of the adopter, particulars of his or her home and household and his or her ability to bring up the child;
 - b why the adopter wishes to adopt the child;
 - c where only one of two spouses or registered partners applies to adopt the child, why the other does not join in the application;

- d the mutual suitability of the child and the adopter, and the length of time that the child has been in his or her care;
 - e the personality, health and social environment of the child and, subject to any limitations imposed by law, his or her background and civil status;
 - f the ethnic, religious and cultural background of the adopter and of the child.
- 3 These enquiries shall be entrusted to a person or body recognised for that purpose by law or by a competent authority. They shall, as far as practicable, be made by social workers who are qualified in this field as a result of either their training or their experience.
 - 4 The provisions of this article shall not affect the power or duty of the competent authority to obtain any information or evidence, whether or not within the scope of these enquiries, which it considers likely to be of assistance.
 - 5 Enquiries relating to the suitability to adopt and the eligibility of the adopter, the circumstances and the motives of the persons concerned and the appropriateness of the placement of the child shall be made before the child is entrusted with a view to adoption to the care of the prospective adopter.

Article 11 – Effects of an adoption

- 1 Upon adoption a child shall become a full member of the family of the adopter(s) and shall have in regard to the adopter(s) and his, her or their family the same rights and obligations as a child of the adopter(s) whose parentage is legally established. The adopter(s) shall have parental responsibility for the child. The adoption shall terminate the legal relationship between the child and his or her father, mother and family of origin.
- 2 Nevertheless, the spouse or partner, whether registered or not, of the adopter shall retain his or her rights and obligations in respect of the adopted child if the latter is his or her child, unless the law otherwise provides.
- 3 As regards the termination of the legal relationship between the child and his or her family of origin, States Parties may make exceptions in respect of matters such as the surname of the child and impediments to marriage or to entering into a registered partnership.
- 4 States Parties may make provision for other forms of adoption having more limited effects than those stated in the preceding paragraphs of this article.

Article 12 – Nationality of the adopted child

- 1 States Parties shall facilitate the acquisition of their nationality by a child adopted by one of their nationals.
- 2 Loss of nationality which could result from an adoption shall be conditional upon possession or acquisition of another nationality.

Article 13 – Prohibition of restrictions

- 1 The number of children who may be adopted by the same adopter shall not be restricted by law.
- 2 A person who has or is able to have a child shall not on that account be prohibited by law from adopting a child.

Article 14 – Revocation and annulment of an adoption

- 1 An adoption may be revoked or annulled only by decision of the competent authority. The best interests of the child shall always be the paramount consideration.
- 2 An adoption may be revoked only on serious grounds permitted by law before the child reaches the age of majority.
- 3 An application for annulment must be made within a period prescribed by law.

Article 15 – Request for information from another State Party

When the enquiries made pursuant to Articles 4 and 10 of this Convention relate to a person who lives or has lived in the territory of another State Party, that State Party shall, if a request for information is made, promptly endeavour to secure that the information requested is provided. Each State shall designate a national authority to which a request for information shall be addressed.

Article 16 – Proceedings to establish parentage

In the case of pending proceedings for the establishment of paternity, or, where such a procedure exists, for the establishment of maternity, instituted by the putative biological father or mother, adoption proceedings shall, where appropriate, be suspended to await the results of the parentage proceedings. The competent authorities shall act expeditiously in such parentage proceedings.

Article 17 – Prohibition of improper gain

No one shall derive any improper financial or other gain from an activity relating to the adoption of a child.

Article 18 – More favourable conditions

States Parties shall retain the option of adopting provisions more favourable to the adopted child.

Article 19 – Probationary period

States Parties are free to require that the child has been in the care of the adopter before adoption is granted for a period long enough to enable a reasonable estimate to be made by the competent authority as to their future relations if the adoption were granted. In this context the best interests of the child shall be the paramount consideration.

Article 20 – Counselling and post-adoption services

The public authorities shall ensure the promotion and proper functioning of adoption counselling and post-adoption services to provide help and advice to prospective adopters, adopters and adopted children.

Article 21 – Training

States Parties shall ensure that social workers dealing with adoption are appropriately trained in the social and legal aspects of adoption.

Article 22 – Access to and disclosure of information

- 1 Provision may be made to enable an adoption to be completed without disclosing the identity of the adopter to the child's family of origin.
- 2 Provision shall be made to require or permit adoption proceedings to take place *in camera*.
- 3 The adopted child shall have access to information held by the competent authorities concerning his or her origins. Where his or her parents of origin have a legal right not to disclose their identity, it shall remain open to the competent authority, to the extent permitted by law, to determine whether to override that right and disclose identifying information, having regard to the circumstances and to the respective rights of the child and his or her parents of origin. Appropriate guidance may be given to an adopted child not having reached the age of majority.
- 4 The adopter and the adopted child shall be able to obtain a document which contains extracts from the public records attesting the date and place of birth of the adopted child, but not expressly revealing the fact of adoption or the identity of his or her parents of origin. States Parties may choose not to apply this provision to the other forms of adoption mentioned in Article 11, paragraph 4, of this Convention.
- 5 Having regard to a person's right to know about his or her identity and origin, relevant information regarding an adoption shall be collected and retained for at least 50 years after the adoption becomes final.
- 6 Public records shall be kept and, in any event, their contents reproduced in such a way as to prevent persons who do not have a legitimate interest from learning whether a person was adopted or not, and if this information is disclosed, the identity of his or her parents of origin.

Part III – Final clauses**Article 23 – Effects of the Convention**

- 1 This Convention shall replace, as regards its States Parties, the European Convention on the Adoption of Children, which was open for signature on 24 April 1967.

- 2 In relations between a Party to the present Convention and a Party to the 1967 Convention which has not ratified the present Convention, Article 14 of the 1967 Convention shall continue to apply.

Article 24 – Signature, ratification and entry into force

- 1 This Convention shall be open for signature by the member States of the Council of Europe and the non-member States which have participated in its elaboration.
- 2 The Convention is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.
- 3 This Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date on which three signatories have expressed their consent to be bound by the Convention in accordance with the provisions of paragraph 2 of this article.
- 4 In respect of any State mentioned in paragraph 1, which subsequently expresses its consent to be bound by it, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of its instrument of ratification, acceptance or approval.

Article 25 – Accession

- 1 After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may, after consultation of the Parties, invite any State not a member of the Council of Europe and not having participated in its elaboration to accede to this Convention by a decision taken by the majority provided for in Article 20.d of the Statute of the Council of Europe, and by unanimous vote of the representatives of the States Parties entitled to sit on the Committee of Ministers.
- 2 In respect of any acceding State, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of deposit of the instrument of accession with the Secretary General of the Council of Europe.

Article 26 – Territorial application

- 1 Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Convention shall apply.
- 2 Any State Party may, at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territory specified in the declaration and for whose international relations it is responsible or on whose behalf it is authorised to give undertakings. In respect of such territory, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of such declaration by the Secretary General.

- 3 Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General of the Council of Europe. The withdrawal shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

Article 27 – Reservations

- 1 No reservations may be made to this Convention except in respect of the provisions of Article 5, paragraph 1.b, Article 7, paragraphs 1.a.ii and 1.b, and Article 22, paragraph 3.
- 2 Any reservation made by a State in pursuance of paragraph 1 shall be formulated at the time of signature or upon the deposit of its instrument of ratification, acceptance, approval or accession.
- 3 Any State may wholly or partly withdraw a reservation it has made in accordance with paragraph 1 by means of a declaration addressed to the Secretary General of the Council of Europe which shall become effective as from the date of its receipt.

Article 28 – Notification of competent authorities

Each State Party shall notify the Secretary General of the Council of Europe of the name and address of the authority to which requests under Article 15 may be addressed.

Article 29 – Denunciation

- 1 Any State Party may, at any time, denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.
- 2 Such denunciation shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of the notification by the Secretary General.

Article 30 – Notifications

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe, the non-member States which have participated in the elaboration of this Convention, any State Party and any State which has been invited to accede to this Convention, of:

- a any signature;
- b any deposit of an instrument of ratification, acceptance, approval or accession;
- c any date of entry into force of this Convention in accordance with Article 24 thereof;
- d any notification received in pursuance of the provisions of Article 2;

- e any declaration received in pursuance of the provisions of paragraph 2 of Article 7 and paragraphs 2 and 3 of Article 26;
- f any reservation and withdrawal of reservations made in pursuance of the provisions of Article 27;
- g any notification received in pursuance of the provisions of Article 28;
- h any notification received in pursuance of the provisions of Article 29 and the date on which denunciation takes effect;
- i any other act, notification or communication relating to this Convention.

In witness whereof, the undersigned, being duly authorised thereto, have signed this Convention.

Done at Strasbourg, this 27th day of November 2008, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe, to the non-member States which have participated in the elaboration of the Convention and to any State invited to accede to this Convention.

Convention européenne
en matière d'adoption
des enfants
(révisée)

Strasbourg, 27.XI.2008

Préambule

Les Etats membres du Conseil de l'Europe et les autres signataires de la présente Convention,

Considérant que le but du Conseil de l'Europe est de réaliser une union plus étroite entre ses membres afin de sauvegarder et de promouvoir les idéaux et les principes qui sont leur patrimoine commun ;

Considérant que, bien que l'institution de l'adoption des enfants existe dans la législation de tous les Etats membres du Conseil de l'Europe, il y a encore dans ces pays des vues divergentes sur les principes qui devraient régir l'adoption, ainsi que des différences quant à la procédure d'adoption et aux effets juridiques de l'adoption ;

Tenant compte de la Convention des Nations Unies relative aux droits de l'enfant du 20 novembre 1989 et, en particulier, de son article 21 ;

Tenant compte de la Convention de La Haye du 29 mai 1993 sur la protection des enfants et la coopération en matière d'adoption internationale ;

Prenant note de la Recommandation 1443 (2000) de l'Assemblée parlementaire du Conseil de l'Europe intitulée «Pour un respect des droits de l'enfant dans l'adoption internationale» et du Livre blanc du Conseil de l'Europe sur les principes relatifs à l'établissement et aux conséquences juridiques du lien de filiation ;

Reconnaissant que certaines dispositions de la Convention européenne en matière d'adoption des enfants de 1967 (STE n° 58) sont dépassées et incompatibles avec la jurisprudence de la Cour européenne des Droits de l'Homme ;

Reconnaissant que la Convention européenne du 25 janvier 1996 sur l'exercice des droits des enfants (STE n° 160) et la jurisprudence de la Cour européenne des Droits de l'Homme ont apporté des améliorations relatives à la participation de l'enfant aux procédures familiales qui le concernent ;

Considérant que l'acceptation de principes et pratiques révisés communs en ce qui concerne l'adoption des enfants, qui prendraient en compte les évolutions intervenues dans ce domaine au cours des dernières décennies, contribuerait à aplanir les difficultés causées par les différences entre leurs droits internes et, en même temps, à promouvoir l'intérêt des enfants qui sont adoptés ;

Convaincus de la nécessité d'un instrument international révisé sur l'adoption des enfants du Conseil de l'Europe qui viendrait notamment utilement compléter la Convention de La Haye de 1993 ;

Reconnaissant que l'intérêt supérieur de l'enfant doit toujours primer sur toute autre considération,

Sont convenus de ce qui suit :

Titre I – Champ d’application de la Convention et mise en œuvre de ses principes**Article 1 – Champ d’application de la Convention**

- 1 La présente Convention concerne l’adoption d’un enfant qui, au moment où l’adoptant demande à l’adopter, n’a pas atteint l’âge de 18 ans, n’est pas ou n’a pas été marié, n’a pas ou n’avait pas contracté un partenariat enregistré et n’a pas atteint la majorité.
- 2 La présente Convention ne vise que les institutions juridiques de l’adoption qui établissent un lien de filiation.

Article 2 – Mise en œuvre des principes

Chaque Etat Partie adopte les mesures législatives ou autres qui se révèlent nécessaires pour assurer la conformité de sa législation aux dispositions de la présente Convention et notifie au Secrétaire Général du Conseil de l’Europe les mesures prises à cette fin.

Titre II – Principes généraux**Article 3 – Validité de l’adoption**

L’adoption n’est valable que si elle est prononcée par un tribunal ou une autorité administrative (ci-après l’« autorité compétente »).

Article 4 – Prononcé de l’adoption

- 1 L’autorité compétente ne prononce l’adoption que si elle a acquis la conviction que l’adoption est conforme à l’intérêt supérieur de l’enfant.
- 2 Dans chaque cas, l’autorité compétente attache une importance particulière à ce que l’adoption apporte à l’enfant un foyer stable et harmonieux.

Article 5 – Consentements à l’adoption

- 1 Sous réserve des paragraphes 2 à 5 du présent article, l’adoption n’est prononcée que si au moins les consentements suivants ont été donnés et n’ont pas été retirés :
 - a le consentement de la mère et du père; ou, s’il n’y a ni père ni mère qui puisse consentir, le consentement de toute personne ou de tout organisme qui est habilité à consentir à la place des parents ;
 - b le consentement de l’enfant considéré par la législation comme ayant un discernement suffisant; un enfant est considéré comme ayant un discernement suffisant lorsqu’il a atteint l’âge prévu par la loi, qui ne doit pas dépasser 14 ans ;
 - c le consentement du conjoint ou du partenaire enregistré de l’adoptant.

- 2 Les personnes dont le consentement est requis pour l'adoption doivent être entourées des conseils nécessaires et dûment informées sur les conséquences de leur consentement, en particulier sur le maintien ou la rupture, en raison d'une adoption, des liens de droit entre l'enfant et sa famille d'origine. Ce consentement doit être donné librement dans la forme légale requise, et doit être donné ou constaté par écrit.
- 3 L'autorité compétente ne peut se dispenser du consentement ou passer outre le refus de consentement de l'une des personnes ou de l'un des organismes visés au paragraphe 1, sinon pour des motifs exceptionnels déterminés par la législation. Toutefois, il est permis de se dispenser du consentement d'un enfant atteint d'un handicap qui l'empêche d'exprimer un consentement valable.
- 4 Si le père ou la mère n'est pas titulaire de la responsabilité parentale envers l'enfant, ou en tout cas du droit de consentir à l'adoption, la législation peut prévoir que son consentement ne sera pas requis.
- 5 Le consentement de la mère à l'adoption de son enfant n'est valable que lorsqu'il est donné après la naissance, à l'expiration du délai prescrit par la législation, qui ne doit pas être inférieur à six semaines ou, s'il n'est pas spécifié de délai, au moment où, de l'avis de l'autorité compétente, la mère aura pu se remettre suffisamment des suites de l'accouchement.
- 6 Dans la présente Convention, on entend par «père» et «mère» les personnes qui, au sens de la législation, sont les parents de l'enfant.

Article 6 – Consultation de l'enfant

Si, en vertu de l'article 5, paragraphes 1 et 3, il n'est pas nécessaire de recueillir le consentement de l'enfant, celui-ci est consulté dans la mesure du possible et son avis et ses souhaits sont pris en considération eu égard à son degré de maturité. Il est possible de se dispenser de cette consultation si elle apparaît manifestement contraire à l'intérêt supérieur de l'enfant.

Article 7 – Conditions de l'adoption

- 1 La législation permet l'adoption d'un enfant :
 - a par deux personnes de sexe différent
 - i qui sont mariées ensemble ou,
 - ii lorsqu'une telle institution existe, qui ont contracté un partenariat enregistré ;
 - b par une seule personne.
- 2 Les Etats ont la possibilité d'étendre la portée de la présente Convention aux couples homosexuels mariés ou qui ont contracté un partenariat enregistré ensemble. Ils ont également la possibilité d'étendre la portée de la présente Convention aux couples hétérosexuels et homosexuels qui vivent ensemble dans le cadre d'une relation stable.

Article 8 – Possibilité d’une nouvelle adoption

La législation ne permet une nouvelle adoption d’un enfant déjà adopté que dans l’un ou plusieurs des cas suivants :

- a lorsqu’il s’agit d’un enfant adoptif du conjoint ou du partenaire enregistré de l’adoptant ;
- b lorsque le précédent adoptant est décédé ;
- c lorsque la précédente adoption est annulée ;
- d lorsque la précédente adoption a pris fin ou prend ainsi fin ;
- e lorsque la nouvelle adoption est justifiée par des motifs graves et que la législation ne permet pas de faire cesser la précédente adoption.

Article 9 – Age minimum de l’adoptant

- 1 Un enfant ne peut être adopté que si l’adoptant a atteint l’âge minimum prescrit par la législation à cette fin, cet âge minimum n’étant ni inférieur à 18 ans ni supérieur à 30 ans. Il doit exister une différence d’âge appropriée entre l’adoptant et l’enfant, eu égard à l’intérêt supérieur de l’enfant, cette différence devant de préférence être d’au moins 16 ans.
- 2 Toutefois, la législation peut prévoir la possibilité de déroger à la condition de l’âge minimum ou de la différence d’âge eu égard à l’intérêt supérieur de l’enfant :
 - a si l’adoptant est le conjoint ou le partenaire enregistré du père ou de la mère de l’enfant ; ou
 - b en raison de circonstances exceptionnelles.

Article 10 – Enquêtes préalables

- 1 L’autorité compétente ne prononce une adoption qu’après la réalisation des enquêtes appropriées concernant l’adoptant, l’enfant et sa famille. Au cours de ces enquêtes et par la suite, les données ne peuvent être collectées, traitées et communiquées que dans le respect des règles relatives au secret professionnel et à la protection des données à caractère personnel.
- 2 Les enquêtes, dans la mesure appropriée à chaque cas, portent autant que possible et entre autres sur les éléments suivants :
 - a la personnalité, la santé et l’environnement social de l’adoptant, sa vie de famille et l’installation de son foyer, son aptitude à élever l’enfant ;
 - b les motifs pour lesquels l’adoptant souhaite adopter l’enfant ;
 - c les motifs pour lesquels, lorsque seulement l’un des deux époux ou partenaires enregistré(e)s demande à adopter l’enfant, l’autre ne s’associe pas à la demande ;

- d l'adaptation réciproque de l'enfant et de l'adoptant, et la période pendant laquelle l'enfant a été confié à ses soins ;
 - e la personnalité, la santé et l'environnement social, ainsi que, sous réserve de restrictions légales, le milieu familial et l'état civil de l'enfant ;
 - f les origines ethnique, religieuse et culturelle de l'adoptant et de l'enfant.
- 3 Ces enquêtes sont confiées à une personne ou à un organisme reconnu ou agréé à cet effet par la législation ou par une autorité compétente. Elles sont, autant que possible, effectuées par des travailleurs sociaux qualifiés en ce domaine, de par leur formation ou leur expérience.
- 4 Les dispositions du présent article n'affectent en rien le pouvoir ou l'obligation qu'a l'autorité compétente de se procurer tous renseignements ou preuves, entrant ou non dans le champ de ces enquêtes, et qu'elle considère comme pouvant être utiles.
- 5 L'enquête relative à la capacité légale et à l'aptitude à adopter, à la situation et aux motivations des personnes concernées et au bien-fondé du placement de l'enfant est effectuée avant que ce dernier soit confié en vue de l'adoption aux soins du futur adoptant.

Article 11 – Effets de l'adoption

- 1 Lors de l'adoption, l'enfant devient membre à part entière de la famille de l'adoptant ou des adoptants et a, à l'égard de l'adoptant ou des adoptants et à l'égard de sa ou de leur famille, les mêmes droits et obligations que ceux d'un enfant de l'adoptant ou des adoptants dont la filiation est légalement établie. L'adoptant ou les adoptants assument la responsabilité parentale vis-à-vis de l'enfant. L'adoption met fin au lien juridique existant entre l'enfant et ses père, mère et famille d'origine.
- 2 Néanmoins, le conjoint, le partenaire enregistré ou le concubin de l'adoptant conserve ses droits et obligations envers l'enfant adopté si celui-ci est son enfant, à moins que la législation n'y déroge.
- 3 En ce qui concerne la rupture du lien juridique existant entre l'enfant et sa famille d'origine, les Etats Parties peuvent prévoir des exceptions pour des questions telles que le nom de famille de l'enfant, les empêchements au mariage ou à la conclusion d'un partenariat enregistré.
- 4 Les Etats Parties peuvent prévoir des dispositions relatives à d'autres formes d'adoption ayant des effets plus limités que ceux mentionnés aux paragraphes précédents du présent article.

Article 12 – Nationalité de l'enfant adopté

- 1 Les Etats Parties facilitent l'acquisition de leur nationalité par un enfant adopté par l'un de leurs ressortissants.
- 2 La perte de nationalité qui pourrait résulter de l'adoption est subordonnée à la possession ou à l'acquisition d'une autre nationalité.

Article 13 – Prohibition de restrictions

- 1 Le nombre d'enfants que peut adopter un même adoptant n'est pas limité par la législation.
- 2 La législation ne peut interdire à une personne d'adopter un enfant au motif qu'elle a ou pourrait avoir un enfant.

Article 14 – Révocation et annulation d'une adoption

- 1 L'adoption ne peut être révoquée ou annulée que par décision de l'autorité compétente. L'intérêt supérieur de l'enfant doit toujours primer sur toute autre considération.
- 2 Avant que l'enfant ait atteint la majorité, la révocation de l'adoption ne peut intervenir que pour des motifs graves prévus par la législation.
- 3 La demande en annulation doit être déposée dans un délai fixé par la législation.

Article 15 – Demande d'informations d'un autre Etat Partie

Lorsque l'enquête effectuée en application des articles 4 et 10 de la présente Convention se rapporte à une personne qui réside ou a résidé sur le territoire d'un autre Etat Partie, cet Etat Partie s'efforce de faire en sorte que les informations qui lui ont été demandées soient fournies sans délai. Chaque Etat désigne une autorité nationale auprès de laquelle une demande d'informations est adressée.

Article 16 – Procédures d'établissement de la filiation

Dans le cas où une procédure d'établissement de la paternité ou, lorsqu'elle existe, une procédure d'établissement de la maternité a été engagée par le père ou la mère biologiques présumés, la procédure d'adoption est, lorsque cela est justifié, suspendue en attendant l'issue de la procédure d'établissement de la filiation. Les autorités compétentes agissent avec célérité dans le cadre de la procédure d'établissement de la filiation.

Article 17 – Prohibition d'un gain matériel indu

Nul ne peut tirer indûment un gain financier ou autre d'une activité en relation avec l'adoption d'un enfant.

Article 18 – Dispositions plus favorables

Les Etats Parties conservent la faculté d'adopter des dispositions plus favorables à l'enfant adopté.

Article 19 – Période probatoire

Les Etats Parties ont toute latitude pour exiger que l'enfant soit confié aux soins de l'adoptant pendant une période suffisamment longue avant le prononcé de l'adoption afin que l'autorité compétente puisse raisonnablement apprécier les relations qui s'établiraient entre eux si l'adoption était prononcée. A cet égard, l'intérêt supérieur de l'enfant doit primer sur toute autre considération.

Article 20 – Services de conseils et de suivi en matière d'adoption

Les pouvoirs publics veillent à la promotion et au bon fonctionnement de services de conseils et de suivi en matière d'adoption, chargés d'aider et de guider les futurs adoptants, les adoptants et les enfants adoptés.

Article 21 – Formation

Les Etats Parties veillent à ce que les travailleurs sociaux qui traitent de l'adoption reçoivent une formation appropriée concernant les aspects sociaux et juridiques de l'adoption.

Article 22 – Accès aux informations et modalités de leur communication

- 1 Des dispositions peuvent être prises pour qu'une adoption puisse, le cas échéant, avoir lieu sans que soit révélée à la famille d'origine de l'enfant l'identité de l'adoptant.
- 2 Des dispositions sont prises pour exiger ou autoriser que la procédure d'adoption se déroule à huis clos.
- 3 L'enfant adopté a accès aux informations détenues par les autorités compétentes concernant ses origines. Lorsque ses parents d'origine ont le droit de ne pas divulguer leur identité, une autorité compétente doit avoir la possibilité, dans la mesure où la loi le permet, de déterminer s'il convient d'écarter ce droit et de communiquer des informations sur l'identité, au regard des circonstances et des droits respectifs de l'enfant et de ses parents d'origine. Un enfant adopté n'ayant pas encore atteint l'âge de la majorité peut recevoir des conseils appropriés.
- 4 L'adoptant et l'enfant adopté peuvent obtenir des documents contenant des extraits de registres publics attestant la date et le lieu de naissance de l'enfant adopté, mais qui ne révèlent pas expressément l'adoption, ni l'identité de ses parents d'origine. Les Etats Parties peuvent choisir de ne pas appliquer cette disposition aux autres formes d'adoption mentionnées au paragraphe 4 de l'article 11 de la présente Convention.
- 5 Eu égard au droit d'une personne de connaître son identité et ses origines, les informations pertinentes relatives à une adoption sont recueillies et conservées pendant au moins cinquante ans après que celle-ci est devenue définitive.
- 6 Les registres publics sont tenus ou, à tout le moins, leurs contenus reproduits, de telle manière que les personnes qui n'y ont pas un intérêt légitime ne puissent apprendre l'adoption d'une personne ou, si celle-ci est connue, l'identité de ses parents d'origine.

Titre III – Clauses finales**Article 23 – Effets de la Convention**

- 1 La présente Convention remplace, pour les Etats qui y sont Parties, la Convention européenne en matière d'adoption des enfants, ouverte à la signature le 24 avril 1967.

- 2 Dans les relations entre une Partie à la présente Convention et une Partie à la Convention de 1967 qui n'a pas ratifié la présente Convention, l'article 14 de la Convention de 1967 continue de s'appliquer.

Article 24 – Signature, ratification et entrée en vigueur

- 1 La présente Convention est ouverte à la signature des Etats membres du Conseil de l'Europe et des Etats non membres qui ont participé à son élaboration.
- 2 La Convention est soumise à ratification, acceptation ou approbation. Les instruments de ratification, d'acceptation ou d'approbation seront déposés près le Secrétaire Général du Conseil de l'Europe.
- 3 La présente Convention entrera en vigueur le premier jour du mois suivant l'expiration d'une période de trois mois après la date à laquelle trois signataires auront expressément accepté d'être liés par la Convention, conformément aux dispositions du paragraphe 2 du présent article.
- 4 Pour tout Etat visé au paragraphe 1, qui, par la suite, acceptera expressément d'être lié par la Convention, celle-ci entrera en vigueur le premier jour du mois qui suit l'expiration d'une période de trois mois après la date du dépôt de l'instrument de ratification, d'acceptation ou d'approbation.

Article 25 – Adhésion

- 1 Après l'entrée en vigueur de la présente Convention, le Comité des Ministres du Conseil de l'Europe peut, après consultation des Parties, inviter tout Etat non membre du Conseil de l'Europe n'ayant pas participé à son élaboration à y adhérer, par une décision prise à la majorité prévue à l'article 20.d du Statut du Conseil de l'Europe, et à l'unanimité des représentants des Etats Parties ayant le droit de siéger au Comité des Ministres.
- 2 Pour tout Etat adhérent, la Convention entrera en vigueur le premier jour du mois qui suit l'expiration d'une période de trois mois après la date du dépôt de l'instrument d'adhésion près le Secrétaire Général du Conseil de l'Europe.

Article 26 – Application territoriale

- 1 Tout Etat peut, au moment de la signature ou au moment du dépôt de son instrument de ratification, d'acceptation, d'approbation ou d'adhésion, désigner le ou les territoires auxquels s'appliquera la présente Convention.
- 2 Tout Etat Partie peut ultérieurement, à tout moment, par une déclaration adressée au Secrétaire Général du Conseil de l'Europe, étendre l'application de la présente Convention à tout autre territoire désigné dans la déclaration et dont il assure les relations internationales ou au nom duquel il est autorisé à prendre des engagements. La Convention entrera en vigueur à l'égard de ce territoire le premier jour du mois qui suit l'expiration d'une période de trois mois après la date de réception de la déclaration par le Secrétaire Général.

- 3 Toute déclaration faite en vertu des deux paragraphes précédents peut être retirée, en ce qui concerne tout territoire désigné dans cette déclaration, par notification adressée au Secrétaire Général du Conseil de l'Europe. Le retrait prendra effet le premier jour du mois qui suit l'expiration d'une période de trois mois après la date de réception de cette notification par le Secrétaire Général.

Article 27 – Réserves

- 1 Aucune réserve n'est admise à l'égard de la présente Convention sauf en ce qui concerne les dispositions de l'article 5, paragraphe 1, alinéa b, de l'article 7, paragraphe 1, alinéas a.ii et b, et de l'article 22, paragraphe 3.
- 2 Toute réserve faite par un Etat en vertu du paragraphe 1 sera formulée au moment de la signature ou du dépôt de son instrument de ratification, d'acceptation, d'approbation ou d'adhésion.
- 3 Tout Etat peut retirer en tout ou en partie une réserve formulée par lui conformément au paragraphe 1 au moyen d'une déclaration adressée au Secrétaire Général du Conseil de l'Europe qui prendra effet à la date de sa réception.

Article 28 – Notification des autorités compétentes

Chaque Etat Partie notifie au Secrétaire Général du Conseil de l'Europe les nom et adresse de l'autorité à laquelle peuvent être transmises les demandes formulées en vertu de l'article 15.

Article 29 – Dénonciation

- 1 Tout Etat Partie peut, à tout moment, dénoncer la présente Convention en adressant une notification au Secrétaire Général du Conseil de l'Europe.
- 2 Cette dénonciation prendra effet le premier jour du mois qui suit l'expiration d'une période de trois mois après la date de réception de la notification par le Secrétaire Général.

Article 30 – Notifications

Le Secrétaire Général du Conseil de l'Europe notifiera aux Etats membres du Conseil de l'Europe, aux Etats non membres qui ont participé à l'élaboration de la présente Convention, à tout Etat Partie et à tout Etat invité à adhérer à la présente Convention :

- a toute signature ;
- b tout dépôt d'instrument de ratification, d'acceptation, d'approbation ou d'adhésion ;
- c toute date d'entrée en vigueur de la présente Convention conformément à son article 24 ;
- d toute notification reçue en application des dispositions de l'article 2 ;

-
- e toute déclaration reçue en application des dispositions du paragraphe 2 de l'article 7 et des paragraphes 2 et 3 de l'article 26;
 - f toute réserve et tout retrait de réserve faits en application des dispositions de l'article 27 ;
 - g toute notification reçue en application des dispositions de l'article 28 ;
 - h toute notification reçue en application des dispositions de l'article 29 ainsi que la date à laquelle la dénonciation prend effet;
 - i tout autre acte, notification ou communication ayant trait à la présente Convention.

En foi de quoi, les soussignés, dûment autorisés à cet effet, ont signé la présente Convention.

Fait à Strasbourg, le 27 novembre 2008, en français et en anglais, les deux textes faisant également foi, en un seul exemplaire qui sera déposé dans les archives du Conseil de l'Europe. Le Secrétaire Général du Conseil de l'Europe en communiquera copie certifiée conforme à chacun des Etats membres du Conseil de l'Europe, aux Etats non membres qui ont participé à l'élaboration de la présente Convention et à tout autre Etat invité à adhérer à la présente Convention.

ANNEX 2

CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION

CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION

(Concluded 29 May 1993)

(Entered into force 1 May 1995)

The States signatory to the present Convention,
Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,
Recalling that each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin,
Recognizing that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin,
Convinced of the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children,
Desiring to establish common provisions to this effect, taking into account the principles set forth in international instruments, in particular the United Nations Convention on the Rights of the Child, of 20 November 1989, and the United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (General Assembly Resolution 41/85, of 3 December 1986),
Have agreed upon the following provisions –

CHAPTER I – SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are –

- a) to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as 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.

Article 2

- (1) The Convention shall apply where a child habitually resident in one Contracting State ("the State of origin") has been, is being, or is to be moved to another Contracting State ("the receiving State") either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin.
- (2) The Convention covers only adoptions which create a permanent parent-child relationship.

Article 3

The Convention ceases to apply if the agreements mentioned in Article 17, sub-paragraph c, have not been given before the child attains the age of eighteen years.

CHAPTER II – REQUIREMENTS FOR INTERCOUNTRY ADOPTIONS

Article 4

An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin –

a) have established that the child is adoptable;

b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests;

c) have ensured that

(1) the persons, institutions and authorities whose consent is necessary for adoption, have been counselled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin,

(2) such persons, institutions and authorities have given their consent freely, in the required legal form, and expressed or evidenced in writing,

(3) the consents have not been induced by payment or compensation of any kind and have not been withdrawn, and

(4) the consent of the mother, where required, has been given only after the birth of the child; and

d) have ensured, having regard to the age and degree of maturity of the child, that

(1) he or she has been counselled and duly informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required,

(2) consideration has been given to the child's wishes and opinions,

(3) the child's consent to the adoption, where such consent is required, has been given freely, in the required legal form, and expressed or evidenced in writing, and

(4) such consent has not been induced by payment or compensation of any kind.

Article 5

An adoption within the scope of the Convention shall take place only if the competent authorities of the receiving State –

a) have determined that the prospective adoptive parents are eligible and suited to adopt;

b) have ensured that the prospective adoptive parents have been counselled as may be necessary; and

c) have determined that the child is or will be authorized to enter and reside permanently in that State.

CHAPTER III – CENTRAL AUTHORITIES AND ACCREDITED BODIES

Article 6

(1) A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

(2) Federal States, States with more than one system of law or States having autonomous territorial units shall be free to appoint more than one Central Authority and to specify the territorial or personal extent of their functions. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

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

(2) They shall take directly all appropriate measures to –

a) provide information as to the laws of their States concerning adoption and other general information, such as statistics and standard forms;

b) keep one another informed about the operation of the Convention and, as far as possible, eliminate any obstacles to its application.

Article 8

Central Authorities shall take, directly or through public authorities, all appropriate measures to prevent improper

financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention.

Article 9

Central Authorities shall take, directly or through public authorities or other bodies duly accredited in their State, all appropriate measures, in particular to –

- a) collect, preserve and exchange information about the situation of the child and the prospective adoptive parents, so far as is necessary to complete the adoption;
- b) facilitate, follow and expedite proceedings with a view to obtaining the adoption;
- c) promote the development of adoption counselling and post-adoption services in their States;
- d) provide each other with general evaluation reports about experience with intercountry adoption;
- e) reply, in so far as is permitted by the law of their State, to justified requests from other Central Authorities or public authorities for information about a particular adoption situation.

Article 10

Accreditation shall only be granted to and maintained by bodies demonstrating their competence to carry out properly the tasks with which they may be entrusted.

Article 11

An accredited body shall –

- a) pursue only non-profit objectives according to such conditions and within such limits as may be established by the competent authorities of the State of accreditation;
- b) be directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of intercountry adoption; and
- c) be subject to supervision by competent authorities of that State as to its composition, operation and financial situation.

Article 12

A body accredited in one Contracting State may act in another Contracting State only if the competent authorities of both States have authorized it to do so.

Article 13

The designation of the Central Authorities and, where appropriate, the extent of their functions, as well as the names and addresses of the accredited bodies shall be communicated by each Contracting State to the Permanent Bureau of the Hague Conference on Private International Law.

CHAPTER IV – PROCEDURAL REQUIREMENTS IN INTERCOUNTRY ADOPTION

Article 14

Persons habitually resident in a Contracting State, who wish to adopt a child habitually resident in another Contracting State, shall apply to the Central Authority in the State of their habitual residence.

Article 15

(1) If the Central Authority of the receiving State is satisfied that the applicants are eligible and suited to adopt, it shall prepare a report including information about their identity, eligibility and suitability to adopt, background, family and medical history, social environment, reasons for adoption, ability to undertake an intercountry adoption, as well as the characteristics of the children for whom they would be qualified to care.

(2) It shall transmit the report to the Central Authority of the State of origin.

Article 16

- (1) If the Central Authority of the State of origin is satisfied that the child is adoptable, it shall –
- a)* prepare a report including information about his or her identity, adoptability, background, social environment, family history, medical history including that of the child's family, and any special needs of the child;
 - b)* give due consideration to the child's upbringing and to his or her ethnic, religious and cultural background;
 - c)* ensure that consents have been obtained in accordance with Article 4; and
 - d)* determine, on the basis in particular of the reports relating to the child and the prospective adoptive parents, whether the envisaged placement is in the best interests of the child.
- (2) It shall transmit to the Central Authority of the receiving State its report on the child, proof that the necessary consents have been obtained and the reasons for its determination on the placement, taking care not to reveal the identity of the mother and the father if, in the State of origin, these identities may not be disclosed.

Article 17

Any decision in the State of origin that a child should be entrusted to prospective adoptive parents may only be made if –

- a)* the Central Authority of that State has ensured that the prospective adoptive parents agree;
- b)* the Central Authority of the receiving State has approved such decision, where such approval is required by the law of that State or by the Central Authority of the State of origin;
- c)* the Central Authorities of both States have agreed that the adoption may proceed; and
- d)* it has been determined, in accordance with Article 5, that the prospective adoptive parents are eligible and suited to adopt and that the child is or will be authorized to enter and reside permanently in the receiving State.

Article 18

The Central Authorities of both States shall take all necessary steps to obtain permission for the child to leave the State of origin and to enter and reside permanently in the receiving State.

Article 19

- (1) The transfer of the child to the receiving State may only be carried out if the requirements of Article 17 have been satisfied.
- (2) The Central Authorities of both States shall ensure that this transfer takes place in secure and appropriate circumstances and, if possible, in the company of the adoptive or prospective adoptive parents.
- (3) If the transfer of the child does not take place, the reports referred to in Articles 15 and 16 are to be sent back to the authorities who forwarded them.

Article 20

The Central Authorities shall keep each other informed about the adoption process and the measures taken to complete it, as well as about the progress of the placement if a probationary period is required.

Article 21

- (1) Where the adoption is to take place after the transfer of the child to the receiving State and it appears to the Central Authority of that State that the continued placement of the child with the prospective adoptive parents is not in the child's best interests, such Central Authority shall take the measures necessary to protect the child, in particular –
- a)* to cause the child to be withdrawn from the prospective adoptive parents and to arrange temporary care;
 - b)* in consultation with the Central Authority of the State of origin, to arrange without delay a new placement of the child with a view to adoption or, if this is not appropriate, to arrange alternative long-term care; an adoption shall not take place until the Central Authority of the State of origin has been duly informed concerning the new prospective adoptive parents;
 - c)* as a last resort, to arrange the return of the child, if his or her interests so require.

(2) Having regard in particular to the age and degree of maturity of the child, he or she shall be consulted and, where appropriate, his or her consent obtained in relation to measures to be taken under this Article.

Article 22

(1) The functions of a Central Authority under this Chapter may be performed by public authorities or by bodies accredited under Chapter III, to the extent permitted by the law of its State.

(2) Any Contracting State may declare to the depositary of the Convention that the functions of the Central Authority under Articles 15 to 21 may be performed in that State, to the extent permitted by the law and subject to the supervision of the competent authorities of that State, also by bodies or persons who –

a) meet the requirements of integrity, professional competence, experience and accountability of that State; and
b) are qualified by their ethical standards and by training or experience to work in the field of intercountry adoption.

(3) A Contracting State which makes the declaration provided for in paragraph 2 shall keep the Permanent Bureau of the Hague Conference on Private International Law informed of the names and addresses of these bodies and persons.

(4) Any Contracting State may declare to the depositary of the Convention that adoptions of children habitually resident in its territory may only take place if the functions of the Central Authorities are performed in accordance with paragraph 1.

(5) Notwithstanding any declaration made under paragraph 2, the reports provided for in Articles 15 and 16 shall, in every case, be prepared under the responsibility of the Central Authority or other authorities or bodies in accordance with paragraph 1.

CHAPTER V – RECOGNITION AND EFFECTS OF THE ADOPTION

Article 23

(1) An adoption certified by the competent authority of the State of the adoption as having been made in accordance with the Convention shall be recognized by operation of law in the other Contracting States. The certificate shall specify when and by whom the agreements under Article 17, sub-paragraph *c)*, were given.

(2) Each Contracting State shall, at the time of signature, ratification, acceptance, approval or accession, notify the depositary of the Convention of the identity and the functions of the authority or the authorities which, in that State, are competent to make the certification. It shall also notify the depositary of any modification in the designation of these authorities.

Article 24

The recognition of an adoption may be refused in a Contracting State only if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child.

Article 25

Any Contracting State may declare to the depositary of the Convention that it will not be bound under this Convention to recognize adoptions made in accordance with an agreement concluded by application of Article 39, paragraph 2.

Article 26

(1) The recognition of an adoption includes recognition of

a) the legal parent-child relationship between the child and his or her adoptive parents;

b) parental responsibility of the adoptive parents for the child;

c) the termination of a pre-existing legal relationship between the child and his or her mother and father, if the adoption has this effect in the Contracting State where it was made.

(2) 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.

(3) The preceding paragraphs shall not prejudice the application of any provision more favourable for the child, in force in the Contracting State which recognizes the adoption.

Article 27

(1) Where an adoption granted in the State of origin does not have the effect of terminating a pre-existing legal parent-child relationship, it may, in the receiving State which recognizes the adoption under the Convention, be converted into an adoption having such an effect –

a) if the law of the receiving State so permits; and

b) if the consents referred to in Article 4, sub-paragraphs *c* and *d*, have been or are given for the purpose of such an adoption.

(2) Article 23 applies to the decision converting the adoption.

CHAPTER VI – GENERAL PROVISIONS

Article 28

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.

Article 29

There shall be no contact between the prospective adoptive parents and the child's parents or any other person who has care of the child until the requirements of Article 4, sub-paragraphs *a)* to *c)*, and Article 5, sub-paragraph *a)*, have been met, unless the adoption takes place within a family or unless the contact is in compliance with the conditions established by the competent authority of the State of origin.

Article 30

(1) The competent authorities of a Contracting State shall ensure that information held by them concerning the child's origin, in particular information concerning the identity of his or her parents, as well as the medical history, is preserved.

(2) They shall ensure that the child or his or her representative has access to such information, under appropriate guidance, in so far as is permitted by the law of that State.

Article 31

Without prejudice to Article 30, personal data gathered or transmitted under the Convention, especially data referred to in Articles 15 and 16, shall be used only for the purposes for which they were gathered or transmitted.

Article 32

(1) No one shall derive improper financial or other gain from an activity related to an intercountry adoption.

(2) Only costs and expenses, including reasonable professional fees of persons involved in the adoption, may be charged or paid.

(3) The directors, administrators and employees of bodies involved in an adoption shall not receive remuneration which is unreasonably high in relation to services rendered.

Article 33

A competent authority which finds that any provision of the Convention has not been respected or that there is a serious risk that it may not be respected, shall immediately inform the Central Authority of its State. This Central Authority shall be responsible for ensuring that appropriate measures are taken.

Article 34

If the competent authority of the State of destination of a document so requests, a translation certified as being in conformity with the original must be furnished. Unless otherwise provided, the costs of such translation are to be borne by the prospective adoptive parents.

Article 35

The competent authorities of the Contracting States shall act expeditiously in the process of adoption.

Article 36

In relation to a State which has two or more systems of law with regard to adoption applicable in different territorial units –

- a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;
- b) any reference to the law of that State shall be construed as referring to the law in force in the relevant territorial unit;
- c) any reference to the competent authorities or to the public authorities of that State shall be construed as referring to those authorized to act in the relevant territorial unit;
- d) any reference to the accredited bodies of that State shall be construed as referring to bodies accredited in the relevant territorial unit.

Article 37

In relation to a State which with regard to adoption has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 38

A State within which different territorial units have their own rules of law in respect of adoption shall not be bound to apply the Convention where a State with a unified system of law would not be bound to do so.

Article 39

(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.

Article 40

No reservation to the Convention shall be permitted.

Article 41

The Convention shall apply in every case where an application pursuant to Article 14 has been received after the Convention has entered into force in the receiving State and the State of origin.

Article 42

The Secretary General of the Hague Conference on Private International Law shall at regular intervals convene a Special Commission in order to review the practical operation of the Convention.

CHAPTER VII – FINAL CLAUSES

Article 43

(1) The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Seventeenth Session and by the other States which participated in that Session.

(2) It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 44

(1) Any other State may accede to the Convention after it has entered into force in accordance with Article 46, paragraph 1.

(2) The instrument of accession shall be deposited with the depositary.

(3) Such accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in the six months after the receipt of the notification referred to in sub-paragraph *b*) of Article 48. Such an objection may also be raised by States at the time when they ratify, accept or approve the Convention after an accession. Any such objection shall be notified to the depositary.

Article 45

(1) If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in the Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

(2) Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.

(3) If a State makes no declaration under this Article, the Convention is to extend to all territorial units of that State.

Article 46

(1) The Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the third instrument of ratification, acceptance or approval referred to in Article 43.

(2) Thereafter the Convention shall enter into force –

a) for each State ratifying, accepting or approving it subsequently, or acceding to it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;

b) for a territorial unit to which the Convention has been extended in conformity with Article 45, on the first day of the month following the expiration of three months after the notification referred to in that Article.

Article 47

(1) A State Party to the Convention may denounce it by a notification in writing addressed to the depositary.

(2) The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

Article 48

The depositary shall notify the States Members of the Hague Conference on Private International Law, the other States which participated in the Seventeenth Session and the States which have acceded in accordance with Article 44, of the following –

a) the signatures, ratifications, acceptances and approvals referred to in Article 43;

b) the accessions and objections raised to accessions referred to in Article 44;

- c) the date on which the Convention enters into force in accordance with Article 46;
- d) the declarations and designations referred to in Articles 22, 23, 25 and 45;
- e) the agreements referred to in Article 39;
- f) the denunciations referred to in Article 47.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

Done at The Hague, on the 29th day of May 1993, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Seventeenth Session and to each of the other States which participated in that Session.

33. CONVENTION SUR LA PROTECTION DES ENFANTS ET LA COOPÉRATION EN MATIÈRE D'ADOPTION INTERNATIONALE

(Conclue le 29 mai 1993)

Les Etats signataires de la présente Convention,
Reconnaissant que, pour l'épanouissement harmonieux de sa personnalité, l'enfant doit grandir dans un milieu familial, dans un climat de bonheur, d'amour et de compréhension,
Rappelant que chaque Etat devrait prendre, par priorité, des mesures appropriées pour permettre le maintien de l'enfant dans sa famille d'origine,
Reconnaissant que l'adoption internationale peut présenter l'avantage de donner une famille permanente à l'enfant pour lequel une famille appropriée ne peut être trouvée dans son Etat d'origine,
Convaincus de la nécessité de prévoir des mesures pour garantir que les adoptions internationales aient lieu dans l'intérêt supérieur de l'enfant et le respect de ses droits fondamentaux, ainsi que pour prévenir l'enlèvement, la vente ou la traite d'enfants,
Désirant établir à cet effet des dispositions communes qui tiennent compte des principes reconnus par les instruments internationaux, notamment par la *Convention des Nations Unies sur les droits de l'enfant*, du 20 novembre 1989, et par la Déclaration des Nations Unies sur les principes sociaux et juridiques applicables à la protection et au bien-être des enfants, envisagés surtout sous l'angle des pratiques en matière d'adoption et de placement familial sur les plans national et international (Résolution de l'Assemblée générale 41/85, du 3 décembre 1986),
Sont convenus des dispositions suivantes :

CHAPITRE I – CHAMP D'APPLICATION DE LA CONVENTION

Article premier

La présente Convention a pour objet :

- a) d'établir des garanties pour que les adoptions internationales aient lieu dans l'intérêt supérieur de l'enfant et dans le respect des droits fondamentaux qui lui sont reconnus en droit international ;
- b) d'instaurer un système de coopération entre les Etats contractants pour assurer le respect de ces garanties et prévenir ainsi l'enlèvement, la vente ou la traite d'enfants ;
- c) d'assurer la reconnaissance dans les Etats contractants des adoptions réalisées selon la Convention.

Article 2

1. La Convention s'applique lorsqu'un enfant résidant habituellement dans un Etat contractant (« l'Etat d'origine ») a été, est ou doit être déplacé vers un autre Etat contractant (« l'Etat d'accueil »), soit après son adoption dans l'Etat d'origine par des époux ou une personne résidant habituellement dans l'Etat d'accueil, soit en vue d'une telle adoption dans l'Etat d'accueil ou dans l'Etat d'origine.
2. La Convention ne vise que les adoptions établissant un lien de filiation.

Article 3

La Convention cesse de s'appliquer si les acceptations visées à l'article 17, lettre c), n'ont pas été données avant que l'enfant n'ait atteint l'âge de dix-huit ans.

CHAPITRE II – CONDITIONS DES ADOPTIONS INTERNATIONALES

Article 4

Les adoptions visées par la Convention ne peuvent avoir lieu que si les autorités compétentes de l'Etat d'origine :

- a) ont établi que l'enfant est adoptable ;
- b) ont constaté, après avoir dûment examiné les possibilités de placement de l'enfant dans son Etat d'origine, qu'une adoption internationale répond à l'intérêt supérieur de l'enfant ;
- c) se sont assurées
 - 1) que les personnes, institutions et autorités dont le consentement est requis pour l'adoption ont été entourées des conseils nécessaires et dûment informées sur les conséquences de leur consentement, en particulier sur le maintien ou la rupture, en raison d'une adoption, des liens de droit entre l'enfant et sa famille d'origine,
 - 2) que celles-ci ont donné librement leur consentement dans les formes légales requises, et que ce consentement a été donné ou constaté par écrit,
 - 3) que les consentements n'ont pas été obtenus moyennant paiement ou contrepartie d'aucune sorte et qu'ils n'ont pas été retirés, et
 - 4) que le consentement de la mère, s'il est requis, n'a été donné qu'après la naissance de l'enfant ; et
- d) se sont assurées, eu égard à l'âge et à la maturité de l'enfant,
 - 1) que celui-ci a été entouré de conseils et dûment informé sur les conséquences de l'adoption et de son consentement à l'adoption, si celui-ci est requis,
 - 2) que les souhaits et avis de l'enfant ont été pris en considération,
 - 3) que le consentement de l'enfant à l'adoption, lorsqu'il est requis, a été donné librement, dans les formes légales requises, et que son consentement a été donné ou constaté par écrit, et
 - 4) que ce consentement n'a pas été obtenu moyennant paiement ou contrepartie d'aucune sorte.

Article 5

Les adoptions visées par la Convention ne peuvent avoir lieu que si les autorités compétentes de l'Etat d'accueil :

- a) ont constaté que les futurs parents adoptifs sont qualifiés et aptes à adopter ;
- b) se sont assurées que les futurs parents adoptifs ont été entourés des conseils nécessaires ; et
- c) ont constaté que l'enfant est ou sera autorisé à entrer et à séjourner de façon permanente dans cet Etat.

CHAPITRE III – AUTORITES CENTRALES ET ORGANISMES AGREES

Article 6

1. Chaque Etat contractant désigne une Autorité centrale chargée de satisfaire aux obligations qui lui sont imposées par la Convention.
2. Un Etat fédéral, un Etat dans lequel plusieurs systèmes de droit sont en vigueur ou un Etat ayant des unités territoriales autonomes est libre de désigner plus d'une Autorité centrale et de spécifier l'étendue territoriale ou personnelle de leurs fonctions. L'Etat qui fait usage de cette faculté désigne l'Autorité centrale à laquelle toute communication peut être adressée en vue de sa transmission à l'Autorité centrale compétente au sein de cet Etat.

Article 7

1. Les Autorités centrales doivent coopérer entre elles et promouvoir une collaboration entre les autorités compétentes de leurs Etats pour assurer la protection des enfants et réaliser les autres objectifs de la Convention.
2. Elles prennent directement toutes mesures appropriées pour :
 - a) fournir des informations sur la législation de leurs Etats en matière d'adoption et d'autres informations générales, telles que des statistiques et formules types ;

b) s'informer mutuellement sur le fonctionnement de la Convention et, dans la mesure du possible, lever les obstacles à son application.

Article 8

Les Autorités centrales prennent, soit directement, soit avec le concours d'autorités publiques, toutes mesures appropriées pour prévenir les gains matériels indus à l'occasion d'une adoption et empêcher toute pratique contraire aux objectifs de la Convention.

Article 9

Les Autorités centrales prennent, soit directement, soit avec le concours d'autorités publiques ou d'organismes dûment agréés dans leur Etat, toutes mesures appropriées, notamment pour :

- a) rassembler, conserver et échanger des informations relatives à la situation de l'enfant et des futurs parents adoptifs, dans la mesure nécessaire à la réalisation de l'adoption ;
- b) faciliter, suivre et activer la procédure en vue de l'adoption ;
- c) promouvoir dans leurs Etats le développement de services de conseils pour l'adoption et pour le suivi de l'adoption ;
- d) échanger des rapports généraux d'évaluation sur les expériences en matière d'adoption internationale ;
- e) répondre, dans la mesure permise par la loi de leur Etat, aux demandes motivées d'informations sur une situation particulière d'adoption formulées par d'autres Autorités centrales ou par des autorités publiques.

Article 10

Peuvent seuls bénéficier de l'agrément et le conserver les organismes qui démontrent leur aptitude à remplir correctement les missions qui pourraient leur être confiées.

Article 11

Un organisme agréé doit :

- a) poursuivre uniquement des buts non lucratifs dans les conditions et limites fixées par les autorités compétentes de l'Etat d'agrément ;
- b) être dirigé et géré par des personnes qualifiées par leur intégrité morale et leur formation ou expérience pour agir dans le domaine de l'adoption internationale ; et
- c) être soumis à la surveillance d'autorités compétentes de cet Etat pour sa composition, son fonctionnement et sa situation financière.

Article 12

Un organisme agréé dans un Etat contractant ne pourra agir dans un autre Etat contractant que si les autorités compétentes des deux Etats l'ont autorisé.

Article 13

La désignation des Autorités centrales et, le cas échéant, l'étendue de leurs fonctions, ainsi que le nom et l'adresse des organismes agréés, sont communiqués par chaque Etat contractant au Bureau Permanent de la Conférence de La Haye de droit international privé.

Article 14

Les personnes résidant habituellement dans un Etat contractant, qui désirent adopter un enfant dont la résidence habituelle est située dans un autre Etat contractant, doivent s'adresser à l'Autorité centrale de l'Etat de leur résidence habituelle.

Article 15

1. Si l'Autorité centrale de l'Etat d'accueil considère que les requérants sont qualifiés et aptes à adopter, elle établit un rapport contenant des renseignements sur leur identité, leur capacité légale et leur aptitude à adopter, leur situation personnelle, familiale et médicale, leur milieu social, les motifs qui les animent, leur aptitude à assumer une adoption internationale, ainsi que sur les enfants qu'ils seraient aptes à prendre en charge.
2. Elle transmet le rapport à l'Autorité centrale de l'Etat d'origine.

Article 16

1. Si l'Autorité centrale de l'Etat d'origine considère que l'enfant est adoptable,
 - a) elle établit un rapport contenant des renseignements sur l'identité de l'enfant, son adoptabilité, son milieu social, son évolution personnelle et familiale, son passé médical et celui de sa famille, ainsi que sur ses besoins particuliers ;
 - b) elle tient dûment compte des conditions d'éducation de l'enfant, ainsi que de son origine ethnique, religieuse et culturelle ;
 - c) elle s'assure que les consentements visés à l'article 4 ont été obtenus ; et
 - d) elle constate, en se fondant notamment sur les rapports concernant l'enfant et les futurs parents adoptifs, que le placement envisagé est dans l'intérêt supérieur de l'enfant.
2. Elle transmet à l'Autorité centrale de l'Etat d'accueil son rapport sur l'enfant, la preuve des consentements requis et les motifs de son constat sur le placement, en veillant à ne pas révéler l'identité de la mère et du père, si, dans l'Etat d'origine, cette identité ne peut pas être divulguée.

Article 17

- Toute décision de confier un enfant à des futurs parents adoptifs ne peut être prise dans l'Etat d'origine que
- a) si l'Autorité centrale de cet Etat s'est assurée de l'accord des futurs parents adoptifs ;
 - b) si l'Autorité centrale de l'Etat d'accueil a approuvé cette décision, lorsque la loi de cet Etat ou l'Autorité centrale de l'Etat d'origine le requiert ;
 - c) si les Autorités centrales des deux Etats ont accepté que la procédure en vue de l'adoption se poursuive ; et
 - d) s'il a été constaté conformément à l'article 5 que les futurs parents adoptifs sont qualifiés et aptes à adopter et que l'enfant est ou sera autorisé à entrer et à séjourner de façon permanente dans l'Etat d'accueil.

Article 18

Les Autorités centrales des deux Etats prennent toutes mesures utiles pour que l'enfant reçoive l'autorisation de sortie de l'Etat d'origine, ainsi que celle d'entrée et de séjour permanent dans l'Etat d'accueil.

Article 19

1. Le déplacement de l'enfant vers l'Etat d'accueil ne peut avoir lieu que si les conditions de l'article 17 ont été remplies.
2. Les Autorités centrales des deux Etats veillent à ce que ce déplacement s'effectue en toute sécurité, dans des conditions appropriées et, si possible, en compagnie des parents adoptifs ou des futurs parents adoptifs.
3. Si ce déplacement n'a pas lieu, les rapports visés aux articles 15 et 16 sont renvoyés aux autorités expéditrices.

Article 20

Les Autorités centrales se tiennent informées sur la procédure d'adoption et les mesures prises pour la mener à terme, ainsi que sur le déroulement de la période probatoire, lorsque celle-ci est requise.

Article 21

1. Lorsque l'adoption doit avoir lieu après le déplacement de l'enfant dans l'Etat d'accueil et que l'Autorité centrale de cet Etat considère que le maintien de l'enfant dans la famille d'accueil n'est plus de son intérêt supérieur, cette Autorité prend les mesures utiles à la protection de l'enfant, en vue notamment :
 - a) de retirer l'enfant aux personnes qui désiraient l'adopter et d'en prendre soin provisoirement ;
 - b) en consultation avec l'Autorité centrale de l'Etat d'origine, d'assurer sans délai un nouveau placement de l'enfant en vue de son adoption ou, à défaut, une prise en charge alternative durable ; une adoption ne peut avoir lieu que si l'Autorité centrale de l'Etat d'origine a été dûment informée sur les nouveaux parents adoptifs ;
 - c) en dernier ressort, d'assurer le retour de l'enfant, si son intérêt l'exige.
2. Eu égard notamment à l'âge et à la maturité de l'enfant, celui-ci sera consulté et, le cas échéant, son consentement obtenu sur les mesures à prendre conformément au présent article.

Article 22

1. Les fonctions conférées à l'Autorité centrale par le présent chapitre peuvent être exercées par des autorités publiques ou par des organismes agréés conformément au chapitre III, dans la mesure prévue par la loi de son Etat.
2. Un Etat contractant peut déclarer auprès du depositaire de la Convention que les fonctions conférées à l'Autorité centrale par les articles 15 à 21 peuvent aussi être exercées dans cet Etat, dans la mesure prévue par la loi et sous le contrôle des autorités compétentes de cet Etat, par des organismes ou personnes qui :
 - a) remplissent les conditions de moralité, de compétence professionnelle, d'expérience et de responsabilité requises par cet Etat ; et
 - b) sont qualifiées par leur intégrité morale et leur formation ou expérience pour agir dans le domaine de l'adoption internationale.
3. L'Etat contractant qui fait la déclaration visée au paragraphe 2 informe régulièrement le Bureau Permanent de la Conférence de La Haye de droit international privé des noms et adresses de ces organismes et personnes.
4. Un Etat contractant peut déclarer auprès du depositaire de la Convention que les adoptions d'enfants dont la résidence habituelle est située sur son territoire ne peuvent avoir lieu que si les fonctions conférées aux Autorités centrales sont exercées conformément au paragraphe premier.
5. Nonobstant toute déclaration effectuée conformément au paragraphe 2, les rapports prévus aux articles 15 et 16 sont, dans tous les cas, établis sous la responsabilité de l'Autorité centrale ou d'autres autorités ou organismes, conformément au paragraphe premier.

Article 23

1. Une adoption certifiée conforme à la Convention par l'autorité compétente de l'Etat contractant où elle a eu lieu est reconnue de plein droit dans les autres Etats contractants. Le certificat indique quand et par qui les acceptations visées à l'article 17, lettre c), ont été données.
2. Tout Etat contractant, au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, notifiera au dépositaire de la Convention l'identité et les fonctions de l'autorité ou des autorités qui, dans cet Etat, sont compétentes pour délivrer le certificat. Il lui notifiera aussi toute modification dans la désignation de ces autorités.

Article 24

La reconnaissance d'une adoption ne peut être refusée dans un Etat contractant que si l'adoption est manifestement contraire à son ordre public, compte tenu de l'intérêt supérieur de l'enfant.

Article 25

Tout Etat contractant peut déclarer au dépositaire de la Convention qu'il ne sera pas tenu de reconnaître en vertu de celle-ci les adoptions faites conformément à un accord conclu en application de l'article 39, paragraphe 2.

Article 26

1. La reconnaissance de l'adoption comporte celle
 - a) du lien de filiation entre l'enfant et ses parents adoptifs ;
 - b) de la responsabilité parentale des parents adoptifs à l'égard de l'enfant ;
 - c) de la rupture du lien préexistant de filiation entre l'enfant et sa mère et son père, si l'adoption produit cet effet dans l'Etat contractant où elle a eu lieu.
2. Si l'adoption a pour effet de rompre le lien préexistant de filiation, l'enfant jouit, dans l'Etat d'accueil et dans tout autre Etat contractant où l'adoption est reconnue, des droits équivalents à ceux résultant d'une adoption produisant cet effet dans chacun de ces Etats.
3. Les paragraphes précédents ne portent pas atteinte à l'application de toute disposition plus favorable à l'enfant, en vigueur dans l'Etat contractant qui reconnaît l'adoption.

Article 27

1. Lorsqu'une adoption faite dans l'Etat d'origine n'a pas pour effet de rompre le lien préexistant de filiation, elle peut, dans l'Etat d'accueil qui reconnaît l'adoption conformément à la Convention, être convertie en une adoption produisant cet effet,
 - a) si le droit de l'Etat d'accueil le permet ; et
 - b) si les consentements visés à l'article 4, lettres c) et d), ont été ou sont donnés en vue d'une telle adoption.
2. L'article 23 s'applique à la décision de conversion.

CHAPITRE VI – DISPOSITIONS GENERALES

Article 28

La Convention ne déroge pas aux lois de l'Etat d'origine qui requièrent que l'adoption d'un enfant résidant habituellement dans cet Etat doive avoir lieu dans cet Etat ou qui interdisent le placement de l'enfant dans l'Etat d'accueil ou son déplacement vers cet Etat avant son adoption.

Article 29

Aucun contact entre les futurs parents adoptifs et les parents de l'enfant ou toute autre personne qui a la garde de celui-ci ne peut avoir lieu tant que les dispositions de l'article 4, lettres a) à c), et de l'article 5, lettre a), n'ont pas été respectées, sauf si l'adoption a lieu entre membres d'une même famille ou si les conditions fixées par l'autorité compétente de l'Etat d'origine sont remplies.

Article 30

1. Les autorités compétentes d'un Etat contractant veillent à conserver les informations qu'elles détiennent sur les origines de l'enfant, notamment celles relatives à l'identité de sa mère et de son père, ainsi que les données sur le passé médical de l'enfant et de sa famille.
2. Elles assurent l'accès de l'enfant ou de son représentant à ces informations, avec les conseils appropriés, dans la mesure permise par la loi de leur Etat.

Article 31

Sous réserve de l'article 30, les données personnelles rassemblées ou transmises conformément à la Convention, en particulier celles visées aux articles 15 et 16, ne peuvent être utilisées à d'autres fins que celles pour lesquelles elles ont été rassemblées ou transmises.

Article 32

1. Nul ne peut tirer un gain matériel indu en raison d'une intervention à l'occasion d'une adoption internationale.
2. Seuls peuvent être demandés et payés les frais et dépenses, y compris les honoraires raisonnables des personnes qui sont intervenues dans l'adoption.
3. Les dirigeants, administrateurs et employés d'organismes intervenant dans une adoption ne peuvent recevoir une rémunération disproportionnée par rapport aux services rendus.

Article 33

Toute autorité compétente qui constate qu'une des dispositions de la Convention a été méconnue ou risque manifestement de l'être en informe aussitôt l'Autorité centrale de l'Etat dont elle relève. Cette Autorité centrale a la responsabilité de veiller à ce que les mesures utiles soient prises.

Article 34

Si l'autorité compétente de l'Etat destinataire d'un document le requiert, une traduction certifiée conforme doit être produite. Sauf dispense, les frais de traduction sont à la charge des futurs parents adoptifs.

Article 35

Les autorités compétentes des Etats contractants agissent rapidement dans les procédures d'adoption.

Article 36

Au regard d'un Etat qui connaît, en matière d'adoption, deux ou plusieurs systèmes de droit applicables dans des unités territoriales différentes :

- a) toute référence à la résidence habituelle dans cet Etat vise la résidence habituelle dans une unité territoriale de cet Etat ;
- b) toute référence à la loi de cet Etat vise la loi en vigueur dans l'unité territoriale concernée ;
- c) toute référence aux autorités compétentes ou aux autorités publiques de cet Etat vise les autorités habilitées à agir dans l'unité territoriale concernée ;
- d) toute référence aux organismes agréés de cet Etat vise les organismes agréés dans l'unité territoriale concernée.

Article 37

Au regard d'un Etat qui connaît, en matière d'adoption, deux ou plusieurs systèmes de droit applicables à des catégories différentes de personnes, toute référence à la loi de cet Etat vise le système de droit désigné par le droit de celui-ci.

Article 38

Un Etat dans lequel différentes unités territoriales ont leurs propres règles de droit en matière d'adoption ne sera pas tenu d'appliquer la Convention lorsqu'un Etat dont le système de droit est unifié ne serait pas tenu de l'appliquer.

Article 39

1. La Convention ne déroge pas aux instruments internationaux auxquels des Etats contractants sont Parties et qui contiennent des dispositions sur les matières réglées par la présente Convention, à moins qu'une déclaration contraire ne soit faite par les Etats liés par de tels instruments.

2. Tout Etat contractant pourra conclure avec un ou plusieurs autres Etats contractants des accords en vue de favoriser l'application de la Convention dans leurs rapports réciproques. Ces accords ne pourront déroger qu'aux dispositions des articles 14 à 16 et 18 à 21. Les Etats qui auront conclu de tels accords en transmettront une copie au dépositaire de la Convention.

Article 40

Aucune réserve à la Convention n'est admise.

Article 41

La Convention s'applique chaque fois qu'une demande visée à l'article 14 a été reçue après l'entrée en vigueur de la Convention dans l'Etat d'accueil et l'Etat d'origine.

Article 42

Le Secrétaire général de la Conférence de La Haye de droit international privé convoque périodiquement une Commission spéciale afin d'examiner le fonctionnement pratique de la Convention.

CHAPITRE VII – CLAUSES FINALES

Article 43

1. La Convention est ouverte à la signature des Etats qui étaient Membres de la Conférence de La Haye de droit international privé lors de sa Dix-septième session et des autres Etats qui ont participé à cette Session.
2. Elle sera ratifiée, acceptée ou approuvée et les instruments de ratification, d'acceptation ou d'approbation seront déposés auprès du Ministère des Affaires Etrangères du Royaume des Pays-Bas, dépositaire de la Convention.

Article 44

1. Tout autre Etat pourra adhérer à la Convention après son entrée en vigueur en vertu de l'article 46, paragraphe 1.
2. L'instrument d'adhésion sera déposé auprès du dépositaire.
3. L'adhésion n'aura d'effet que dans les rapports entre l'Etat adhérent et les Etats contractants qui n'auront pas élevé d'objection à son encontre dans les six mois après la réception de la notification prévue à l'article 48, lettre *b*). Une telle objection pourra également être élevée par tout Etat au moment d'une ratification, acceptation ou approbation de la Convention, ultérieure à l'adhésion. Ces objections seront notifiées au dépositaire.

Article 45

1. Un Etat qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent aux matières régies par cette Convention pourra, au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, déclarer que la présente Convention s'appliquera à toutes ses unités territoriales ou seulement à l'une ou à plusieurs d'entre elles, et pourra à tout moment modifier cette déclaration en faisant une nouvelle déclaration.
2. Ces déclarations seront notifiées au dépositaire et indiqueront expressément les unités territoriales auxquelles la Convention s'applique.
3. Si un Etat ne fait pas de déclaration en vertu du présent article, la Convention s'appliquera à l'ensemble du territoire de cet Etat.

Article 46

1. La Convention entrera en vigueur le premier jour du mois suivant l'expiration d'une période de trois mois après le dépôt du troisième instrument de ratification, d'acceptation ou d'approbation prévu par l'article 43.
2. Par la suite, la Convention entrera en vigueur :
 - a) pour chaque Etat ratifiant, acceptant ou approuvant postérieurement, ou adhérent, le premier jour du mois suivant l'expiration d'une période de trois mois après le dépôt de son instrument de ratification, d'acceptation, d'approbation ou d'adhésion ;
 - b) pour les unités territoriales auxquelles la Convention a été étendue conformément à l'article 45, le premier jour du mois suivant l'expiration d'une période de trois mois après la notification visée dans cet article.

Article 47

1. Tout Etat Partie à la Convention pourra dénoncer celle-ci par une notification adressée par écrit au dépositaire.
2. La dénonciation prendra effet le premier jour du mois suivant l'expiration d'une période de douze mois après la date de réception de la notification par le dépositaire. Lorsqu'une période plus longue pour la prise d'effet de la dénonciation est spécifiée dans la notification, la dénonciation prendra effet à l'expiration de la période en question après la date de réception de la notification.

Article 48

Le depositaire notifiera aux Etats membres de la Conférence de La Haye de droit international privé, aux autres Etats qui ont participé à la Dix-septième session, ainsi qu'aux Etats qui auront adhéré conformément aux dispositions de l'article 44 :

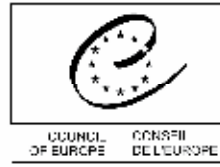
- a) les signatures, ratifications, acceptations et approbations visées à l'article 43 ;
- b) les adhésions et les objections aux adhésions visées à l'article 44 ;
- c) la date à laquelle la Convention entrera en vigueur conformément aux dispositions de l'article 46 ;
- d) les déclarations et les désignations mentionnées aux articles 22, 23, 25 et 45 ;
- e) les accords mentionnés à l'article 39 ;
- f) les dénonciations visées à l'article 47.

En foi de quoi, les soussignés, dûment autorisés, ont signé la présente Convention.

Fait à La Haye, le 29 mai 1993, en français et en anglais, les deux textes faisant également foi, en un seul exemplaire, qui sera déposé dans les archives du Gouvernement du Royaume des Pays-Bas et dont une copie certifiée conforme sera remise, par la voie diplomatique, à chacun des Etats membres de la Conférence de La Haye de droit international privé lors de la Dix-septième session, ainsi qu'à chacun des autres Etats ayant participé à cette Session.

ANNEX 3

WRITTEN CONTRIBUTIONS FROM THE SPEAKERS



**Speech by Maud de Boer-Buquicchio,
Deputy Secretary General of the Council of Europe
Joint Council of Europe and European Commission Conference on
"Challenges in adoption procedures in Europe:
ensuring the best interests of the child",
Strasbourg, 30 November 2009**

Embargo until delivery / check against delivery

"Hello, would you like to adopt me?"

That is what a little boy called Mondo would ask the people he met.

"There were people who would have liked to because Mondo seemed a nice little boy, with his bright-eyed, round face. But it was difficult. They could not just adopt him like that, straightaway" writes French author Jean-Marie Gustave Le Clézio, the winner of the 2008 Nobel Prize for Literature, in his story Mondo.

Le Clézio was right not to reduce adopting a child to the result of a mere whim, whether on the part of the adoptive parents or of the child.

As he so rightly expressed, you cannot adopt “just like that, straightaway”. There are rules to be complied with and responsibilities towards the child.

That is precisely the reason why we are here today: to have an exchange of views on these rules and responsibilities and on how our societies can best provide a loving family to the high number of children who, like Mondo, are without parental care.

Let me be clear. There is no right to adoption for parents looking for children. There is however a right of the child to a family. The prime objective of adoption should therefore be to give a child a family and not to give a family a child. The child’s best interest should be the primary concern for both the adoptive parents and the bodies in charge of adoption.

The Council of Europe has been addressing adoption issues since the early 1960s. We started in 1967, with our first Convention on Adoption. It influenced the domestic law of Contracting States in Western Europe through a minimum of essential principles of adoption practice.

Since 1967, important social and legal changes have taken place in Europe. The notion of the family is not the same today as it was back then. Our societies have changed. So we sat down and revised our convention in 2008 in order to address these changes. The UN Convention on the Rights of the Child, whose 20th anniversary was celebrated last week, was our guiding light. The best interests of the child became the backbone of the revised convention. The child, the main actor in the adoption arena, was given a voice in the adoption procedure: his/her consent became in any event necessary as of the age of 14. Another important feature in this respect is the possibility for the adopted child to have access to his/her identity.

During the revision process, we could not go as far as we would have liked to on a number of sensitive and controversial issues. But I am convinced that the revised Convention improves substantially the procedure for child adoption. It makes it more transparent, efficient and, most importantly, resistant to abuse.

One of the sessions today will focus on adults in the adoption process and who can adopt. A major improvement brought by the revised Convention is the requirement of the consent of both of the mother and the father of the child to the adoption. Another improvement, optional though, for Contracting Parties, is the possibility to apply the Convention to same-sex couples who

are living together in a stable relationship. I am sure that each of us in this room has a different idea of what a child's best interest is in that context. In many countries, children are removed from their families because they are poor, illiterate, homeless. In many countries, same sex couples are not allowed to adopt, whereas singles can. I am convinced that the discussions on this topic will be lively and fruitful and this is exactly the role of the Council of Europe: to advance human rights by overcoming the obstacles created by different approaches, opinions and legal systems.

Let me share with you my personal conviction in that regard. I believe that there are many things that social services and society can give to a child: education, health, care, food. There is however something that children rarely get from institutions but should always get from their parents and this is love, protection and respect. And that is not exclusive to married, rich or educated mothers and fathers.

Ladies and gentlemen,

The Convention has been signed by eleven States and we are expecting two more signatures today. I trust that ratifications will follow shortly. Children without parental care need a solid national and international legal framework which excludes any risk of abuse or even trafficking.

A solid legal framework for adoption at national level paves the way for a stronger legal framework for inter-country adoption.

Tomorrow, we will focus on inter-country adoption. I should like to share a personal experience with you in that respect. Some years ago, I was invited to take part in a televised debate for a major television channel in France. When asked what I thought about French nationals adopting child victims of the Tsunami, I favoured the approach of exhausting all suitable solutions within the country, indeed the community, of origin before considering inter-country adoption. The day after the debate, I started receiving messages from colleagues and French citizens expressing their agreement or disagreement with my views. Amongst those messages was an extremely aggressive and anonymous letter from a person who had adopted a child from abroad and who accused me of depriving children from abroad of suitable homes and loving families.

Let me explain again: in many cases, legislation alone cannot determine the best interests of each individual child in each specific situation. That is why, in my opinion, decisions on children's future must be based upon the widest possible choice of options, if their best interests are to be fully respected. Children like Mondo deprived of family homes deserve no less than this. The

Council of Europe considers inter-country adoption as a valid option, particularly when it offers a permanent family environment to children that otherwise would face long-term placement in institutions. Provided, and I insist, that the best interests of the child is respected and that international conventions are implemented.

Finally, I should like to underline the co-operation between the Council of Europe, the European Commission, the Hague Conference as well as the United Nations. My special thanks go to the European Commission for their generous support in the organisation of this Conference. I firmly believe that on such a sensitive issue as adoption, with such a direct impact on the lives of so many children, it is essential that our message is the same: that the interests of the child always come first.

Ladies and gentlemen, the Council of Europe is very committed to the protection of children's rights. May this Conference add a new stone to the building of a Europe for and with children.

I thank you for your attention.

Madame la Vice-secrétaire Générale,

Mesdames et messieurs,

Je voudrais également vous souhaiter à tous, au nom de la Commission européenne, la bienvenue dans ce prestigieux hémicycle du Conseil de l'Europe, qui nous accueille aujourd'hui.

Je suis très honoré d'ouvrir, en compagnie de Madame la Secrétaire Générale cette importante conférence :

- importante par les thèmes qui y seront traités ;
- importante aussi par la signature en marge des travaux, à la fin de cette journée, de la Convention européenne révisée en matière d'adoption des enfants.

Je suis particulièrement heureux de constater l'immense intérêt que cette conférence a suscité parmi les Etats membres, les associations et les citoyens.

Je ne peux m'abstenir de citer ici le travail accompli par la Conférence de La Haye de droit international privé et je voudrais remercier les collègues de La Haye pour le soutien et la collaboration qu'ils nous ont apportée dans l'organisation des travaux d'aujourd'hui et de demain.

La coopération entre le Conseil de l'Europe et l'Union européenne a acquis toujours plus d'importance au fil des ans, qui prend de nombreuses formes. L'organisation, chaque année, de la journée de la justice civile en est un exemple.

Cette coopération sera encore renforcée – je dirais même constitutionnalisée – par le traité de Lisbonne qui, comme on le sait, demande à l'Union européenne d'adhérer à la Convention européenne des droits de l'homme.

Le Traité de Lisbonne apporte aussi de nouveaux éléments importants pour la protection des droits de l'enfant :

- d'une part, il énumère explicitement la protection des droits de l'enfant comme l'un des objectifs de l'Union européenne,
- d'autre part il donne une force juridique contraignante à la Charte des droits fondamentaux laquelle, dans son article 24 , consacre les droits fondamentaux de l'enfant, droits fondamentaux qui sont directement inspirés de la Convention de New York.

La Charte ne fait, toutefois, que rendre visibles des droits fondamentaux – organisés autour de l'intérêt supérieur de l'enfant – qui sont déjà reconnus comme principes généraux de droit l'Union, qui doivent être respectés par les institutions européennes et par les Etats membres quand ils élaborent et appliquent le droit de l'Union. La Cour de justice des Communautés européennes l'a rappelé à diverses occasions, notamment dans un arrêt important dans lequel était en cause la validité de la directive relative à la réunification familiale.

Depuis quelques années déjà, l'Union européenne travaille à la protection des enfants dans tous les aspects de ses politiques.

C'est un objectif qui a trouvé une expression concrète dans la Communication de la Commission européenne de 2006, intitulée « vers une stratégie européenne des droits de l'enfant », qui a été suivie, en janvier 2008, d'une Résolution du Parlement européen portant sur le même sujet.

Cependant, il n'existe actuellement aucune politique de l'Union européenne en matière d'adoption.

Pour aucun des thèmes qui seront discutés au cours de ces deux jours, il n'existe de législation spécifique de l'Union mettant à la charge une quelconque obligation à la charge des Etats membres, à l'exception bien entendu – l'Union européenne étant une Union fondée sur le

respect du droit – de l'obligation générale attendue de chacun des Etats membres de respecter les droits fondamentaux des personnes.

Il ne m'appartient pas de prendre position sur la question de savoir si une politique de l'Union européenne en matière d'adoption, est ou non opportune.

Ce thème sera discuté demain. Les avis divergent : si le Parlement européen y semble favorable, en revanche, ni la Communication de la Commission de juin dernier suggérant un programme législatif pour le développement de l'espace de justice, liberté et sécurité pour les cinq ans à venir, ni le programme de Stockholm, qui sera adopté dans les jours qui viennent par le Conseil européen, ne contiennent d'élément en ce sens.

Même si l'adoption ne fait pas l'objet d'une politique législative de l'Union, elle est, cependant, un thème qui interfère avec nombre de politiques de l'Union, qu'il s'agisse par exemple de la lutte contre les discriminations, de l'immigration, de l'asile, de la réunification familiale, de la libre circulation des personnes au sein de l'Union ou, tout simplement, de la coopération judiciaire entre les autorités des Etats membres et de la reconnaissance des décisions nationales d'adoption.

Si l'Union veut – comme elle le proclame – protéger et promouvoir les droits des enfants, elle devra nécessairement prendre en compte la question de l'adoption, d'une façon ou d'une autre.

C'est pourquoi la Commission européenne et le Parlement européen ont voulu approfondir la question des adoptions intra-européennes, en menant des études comparatives afin d'avoir une vue d'ensemble de la situation actuelle.

Je suis convaincu que cette conférence et les échanges d'idées qu'elle va susciter constituera une étape essentielle vers la définition d'une approche commune européenne.

Il est primordial de travailler ensemble au niveau européen pour faciliter les comparaisons, la connaissance mutuelle et, au bout du compte, la confiance réciproque.

Je vous souhaite un bon travail, un grand succès pour cette conférence et vous remercie pour votre attention.

Challenges in Adoption Procedures in Europe: Ensuring the Best Interests of the Child

The Child's Legal Status in Adoption

By

**Professor N.V. LOWE, CARDIFF LAW SCHOOL
STRASBOURG, 30 NOVEMBER 2009**

Introduction

The subject of my presentation is the child's legal status in adoption. To put this discussion into context mention must first be made of the overall aim of the European Convention on the Adoption of Children (Revised) 2008 (CETS 202), namely¹

‘to harmonise the substantive law of member states by setting minimum rules on adoption. The Contracting Parties are of course free to go further by providing more favourable conditions than those set out in the revised Convention. The standards laid down in the proposed text of the new Convention go further than those contained in the 1967 Convention as they meet the requirements of modernity and are in line with the case-law of the European Court of Human Rights’.

The 2008 Convention is not yet in force though it has been signed by eleven States. When eventually it does come into force (the trigger being three ratifications),² it ‘shall replace, as regards its States Parties 1967, European Convention on the Adoption of Children.’³ The 1967 Convention had been ratified by 18 States, though it was denounced by Sweden in 2003, Norway in 2009 and the United Kingdom, save in connection with its application to Guernsey and Jersey, in 2005.

The Status Provisions of the 2008 Convention

The basic provisions under Article 11

The basic effect of adoption is spelt out by Article 11. Article 11(1) provides

‘Upon adoption a child shall become a full member of the adopter(s) family and shall have in regard to the adopter(s) and his, her or their family the same rights and obligations as a child of the adopter(s) whose parentage is legally

¹ *Council of Europe achievements in the field of law – Family Law and the Protection of Children* (Council of Europe, 2008) p 37.

² See Article 24(3).

³ Article 23(1). Though note Article 23(2) which provides that as between a Party to the 2008 Convention and a Party to the 1967 Convention that has not ratified the 2008 Convention, Article 14 of the 1967 Convention (which makes provision to the prompt response to requests for information) continues to apply.

established. The adopter(s) shall have parental responsibility for the child. The adoption shall terminate the legal relationship between the child and his or her father, mother and family of origin’.

This provision, which of course encapsulates what is generally understood to be the effect of a full adoption, is then subject to two qualifications, first, with regard to step-parent adoptions and secondly with respect to surnames and impediment to marriage etc.

With regard to the former, Article 11(2) provides that

‘the spouse or partner, *whether registered or not*, of the adopter shall retain his or her rights and obligations in respect of the adopted child if the latter is his or her child, unless the law otherwise provides’ [Emphasis added].

With regard to the latter, Article 11(3) allows States Parties to make exceptions to the legal severance effect of adoption

‘in respect of matters *such as* the surname of the child and impediments to marriage or to entering into a registered partnership’ [Emphasis added].

Finally, Article 11(4) permits States Parties to ‘make provision for other forms of adoption having a more limited effect’ than a full adoption. In other words, it permits States to continue to make provision for so-called simple adoptions which do not sever the pre-existing legal relationship between the child and his/her family of origin which is provided for (in addition to full adoptions) in Belgium, France, Luxembourg and Portugal for example.

A comparison of Article 11 of the 2008 Convention with Article 10 of the 1967 Convention

Article 11 is intended to replace Article 10 of the 1967 Convention and thereby to provide a modern statement about the effects of adoption. In this respect, the most obvious change is the elimination of any reference to children born in lawful wedlock (22 of the 23 States responding to the Working Party on Adoption’s questionnaire clearly indicated their support for such a removal)⁴ or to their legitimacy or illegitimacy.

Article 10 of the 1967 Convention states

‘1. Adoption confers on the adopter in respect of the adopted person the rights and obligations of every kind that a child born in lawful wedlock has in respect of his mother or father’.

While in respect of step-parent adoption, Article 10(2) concludes

⁴ See Appendix II to the *Draft Final Report on Proposals for the Revision of the European Convention on the Adoption of Children (ETS 058)* CJ-FA-GTI (2004) 1.

‘Nevertheless, the law may provide that the spouse of the adopter retains his rights and obligations in respect of the adopted person if the latter is his legitimate, illegitimate or adopted child.’

In contrast, as we have seen, the 2008 Convention provides for an adopted child becoming a full member of the adoptive family, the adopters acquiring parental responsibility and for the termination of the legal relationship between the child and family of origin. While in relation to step-parent adoptions, provision is made not just for spouses but also for their partners (whether registered or not)⁵ to retain their original rights and obligations in relation to any child of theirs.⁶

In my view, this modernisation by the 2008 Convention is to be welcomed. There are, however, more subtle or, at any rate, less obvious changes that might at least give pause for thought. For example, whereas the 1967 Convention makes certain specific provision in relation to maintenance, property rights and succession, the 2008 Convention makes no express reference. Secondly, whereas Article 10(3) of the 1967 Convention provides that as ‘a general rule, means shall be provided to enable the adopted person to acquire the surname of the adopter either in substitution for, or in addition to, his own’, the 2008 Convention simply states that in relation to the child’s surname, States may make exceptions to the severance rule. I will return to each of these points in due course.

The severance principle

As already mentioned, Article 11(1) provides a commendable modern definition of a full adoption including its severance of the legal relationship between the child and his father, mother and family of origin.⁷ But while it does indeed encapsulate the common European position, it is not beyond argument that the complete severance of legal ties with the whole family is a disproportionate effect of adoption. Is it either necessary or justified for example, automatically to end the legal relationship between birth siblings or with grandparents? Indeed, in the latter case, German law provides⁸ that in the case of a step-parent adoption following the death of one parent, the parents of the deceased parent remain in law the grandparents of the adopted child.⁹ One may go further and speculate whether the automatic severance of the legal relationship between siblings in particular would survive a human rights challenge under Article 8

⁵ Presumably, this should be read with reference to Article 8(2) which, controversially as it has proved, permits States to allow, inter alia, adoptions by registered partners and ‘different sex couples and same sex couples *who are living together in a stable relationship*’ (emphasis added).

⁶ For example, a child is biologically that parent’s child or a child adopted by that parent.

⁷ As a matter of fact, the reference to ‘mother and father’ may already be dated inasmuch as UK law, for example, now makes provision for the female partner of the mother of a child conceived by assisted reproductive methods to be designated as a ‘parent’ and therefore separate from a ‘mother’, see ss 42-44 of the Human Fertilisation and Embryology Act 2008. Under a not dissimilar development in Norway, by way of an amendment to their Biotechnology Act such female partners are given ‘co-mother’ status. Of course a ‘purposive interpretation’ would apply under Article 11(1) to such parents or ‘co-mothers’.

⁸ Authority to be supplied.

⁹ Not only is this result not provided for in the 2008 Convention, it may be that the other set of grandparents *would* retain their legal relationship. See below.

of the European Convention on Human Rights.¹⁰ In relation to grandparents, given that it could well be argued that the impact of Article 11(2) is that if in a step-parent adoption the birth parent retains his/her rights and obligations, the parents of that parent remain in law the legal grandparents,¹¹ the other grandparents would seem to have a strong case to argue unfair discrimination contrary to Article 14 taken in conjunction with Article 68.

Step-parent adoptions

Reflecting the modern trend,¹² Article 11(2) does not oblige States to terminate the rights and obligations of the child's parent if the child is adopted by that parent's spouse or partner (whether registered or not).¹³ This is a modern version of Article 10(2) of the 1967 Convention. As already discussed, welcome though this provision is, it is one that brings in its wake some consequential issues.

Surnames and prohibited degrees of marriage

As previously mentioned, instead of providing, as the 1967 Convention does, for a general rule that adopted persons acquire the surname of their adopters, the 2008 Convention provides for the opposite, namely, to permit States to make an exception to the severance rule, in respect of the adopted child's surname. As the Explanatory Report to the 2008 Convention put it¹⁴, 'the automatic acquisition of the adopter's surname is not an absolute rule'. This change was thought better to reflect the fact that some competent authorities can in special circumstances permit the child to take a name other than the adopters, while in other States the adopter is allowed to choose the child's surname while in yet others a child adopted by a woman does not necessarily acquire her name.¹⁵ Article 11(3) is accordingly deliberately less prescriptive than Article 10(3) of the 1967 Convention. Nevertheless, there is relatively little substantive difference in effect between the two provisions.

The freedom to provide that notwithstanding adoption the blood tie between the adopted child and certain categories of members of the family origin may continue to be an impediment to marriage or registered partnership is a new provision.¹⁶ It is also a sensible provision given that in the case of consanguinity, the prohibition is based on eugenic and moral grounds and affinity on social, protection and moral grounds.

¹⁰ A point first raised by the author in 'English Adoption Law: Past, Present and Future' in *Cross-Currents – Family Law and Policy in the US and England* (eds S Katz, J Eekelaar and M Maclean, OUP, 2000) 307 at 337-338.

¹¹ This would seem more clearly the position under English law since under the Adoption and Children Act 2002, ss 46(3)(b) and 51(2), in effect the adoption is made in favour of the step-parent without prejudice to the birth parent's legal relationship with the child.

¹² As discussed at n 11 above, English law for example, does not now require in step-parent adoptions the birth parents to adopt his or her own child [add ref to Scotland etc]. Note also the comments R Horgan and F Martin 'The European Convention on Adoption 2008: Progressing the Children's Rights Polemic' [2008] IFL 155 at 161.

¹³ For the meaning of 'partner', see n 5 above.

¹⁴ CJ-FA [reference to be completed].

¹⁵ Interestingly the same differences were noted in the Explanatory Notes to the 1967 Convention.

¹⁶ England and Wales, for example, have long had such a provision, see now the Adoption and Children Act 2002, s 74(1)(a).

Whether Article 11(3) should also have expressly mentioned, in this regard, incest, can be debated, but as Article 11(3) is only meant to provide examples (see below), States are free to make appropriate provision in any event.¹⁷

As previously intimated, Article 11(3) only specifies two specific instances of the acquisition of a surname and the impediments to marriage or registered partnership by way of examples. It does not preclude other derogations being made to the severance principle, and in particular the continuation of certain financial obligations of parents of origin. Indeed, earlier versions of Article 11(3) expressly included the continuation of maintenance obligations (the Working Party had in mind the retention of an obligation on a subsidiary basis if the adopter was unable to comply with his or her maintenance obligations towards the adopted child).¹⁸

Indeed, this reference was only removed at the final stages of the Plenary Meeting of the Committee of Experts on Family Law concerned to give final approval to the draft in November 2006.¹⁹

This absence of reference to maintenance is in distinction to the 1967 Convention which by Article 10(2) provides

‘the law may preserve the obligation of the parents to maintain (in the sense of *l’obligation d’entretenir* and *l’obligation alimentaire*) or set up in life or provide a dowry for the adopted person if the adopter does not discharge any such obligation’.

Where the line might be drawn between derogations from the severance principle within the meaning of Article 11(3) and having different forms of adoption (other than full adoptions within the meaning of Article 11(1)), as permitted by Article 11(4),²⁰ is a moot point. A good example of this dilemma would be the continuation of succession rights notwithstanding the adoption (as was originally provided for under English law).²¹ Would this remain as Article 11(1) full adoption? Presumably it would, upon the basis that legal parentage was irrevocably transferred to the adopters such that the child can be said to be fully integrated with them. As is discussed below, unlike the 1967 Convention, the 2008 Convention makes no mention of succession.

¹⁷ In England and Wales, for example, provision is made for the crime of incest to continue to relate to the child’s birth relationship but, curiously, not to adoptive relatives, see the Adoption and Children Act 2002, s 74(1)(b).

¹⁸ See earlier versions of the Explanatory Report e.g. the comments to what was then Article 10(3), in para 59(c) of CJ-FA-GTI (2006) 9.

¹⁹ Compare CJ-FA-GTI (2006) 1 Rev 6 (November 16, 2006), with CJ-FA-GTI (2006) 1 Rev 7, (17 November 2006).

²⁰ As the Explanatory Report makes clear, Article 11(4) is intended to cater for ‘simple adoptions’.

²¹ Under the Adoption of Children Act 1926, s 5(2). This position was changed by the Adoption of Children Act 1949, ss 9 and 10.

Property, succession etc

As part of its policy to modernise the 1967 Convention, the 2008 Convention makes no reference to such issues as property and succession rights.²² Instead, reliance has to be had on the general position provided for by Article 11(1), namely, that the adopted child has the same rights and obligations as a child of the adopter(s) whose parentage is legally established, while, conversely, the adopter(s) have parental responsibility (not defined by the Convention) for the child. Having already commented that the main object of Art 11 ‘is to ensure that an adopted child is treated *from every standpoint* like a child of the adopter and his or her family’ (emphasis added), the Explanatory Report explains that these

‘rights and obligations are not confined to a single category, such as personal, as opposed to economic, rights and obligations’.

In short, it is intended that with respect to property, succession, pensions, insurance and maintenance, an adopted child should be treated like any other child born into the family.

Whether it is sensible to deal with such potentially important issues in this way can be debated. One might have thought that at least some discussion of these points in the Explanatory Report was warranted.

Nationality

In contrast to the policy of silence with regard to property and succession etc, the issue of nationality is expressly provided for. Indeed a separate Article altogether, Article 12, is devoted to the subject. Essentially replicating Article 11 of the 1967 Convention, though drafted so as to bring it into line with the 1997 European Convention on Nationality (ETS No 166), Article 12(1) provides, simply,

‘State Parties shall facilitate the acquisition of their nationality by a child adopted by one of their nationals’.

The Explanatory Report points out that the above provision is not limited to adoptions taking place in the country of which the adopter is a national and that it is consistent with Article 6(4) of the 1997 Nationality Convention.

Article 12(2), which is a repetition of Article 11(2) of the 1967 Convention, again simply provides

‘Loss of nationality which could result from an adoption shall be conditional upon possession or acquisition of another nationality’.

²² See CJ-FA-GTI (2006) 6, para 29. Article 10(4) and (5) of the 1967 Convention essentially seek to equalise the position between the adopted child and the child born in lawful wedlock.

As the Explanatory Report says, Article 12(2) ‘takes account of the general rule that statelessness is to be avoided wherever possible and also of the fact that it is clearly in the best interests of the child that he or she should not become a stateless person’.²³

Although this author would have preferred Article 12 to have been expressed in terms of citizenship rather than nationality, this provision seems otherwise perfectly reasonable.

The adopted child’s access to and disclosure of birth records

Underlining the general right of a child ‘to know and be cared by his or her parents’ conferred by Article 7(1) of the United Nations Convention on the Rights of the Child and taking into account Principle 28 of the White Paper on Parentage²⁴ which states that the ‘interest of a child as regards information on his or her biological origin should be duly taken into account in law’, Article 22(3) of the 2008 Convention states

‘The adopted child shall have access to information held by competent authorities concerning his or her origins. Where those parents have a legal right not to disclose their identity, it shall remain open to a competent authority, to the extent permitted by law, to determine whether that right shall be overridden and identifying information be disclosed, having regard to the circumstances and to the respective rights of the child and his or her parents of origin. Appropriate guidance may be given to an adopted child not having reached the age of majority’.

Augmenting this provision and thereby guaranteeing the effectiveness of the right to information, Article 22(5) provides that the information should be kept for 50 years, since according to the Explanatory Report ‘people often start searching for this type of information in their 40s’.

Reflecting the growing awareness of the importance of knowing one’s identity, Article 22(3) considerably expands upon the equivalent provision, Article 20(3), of the 1967 Convention which simply provides that the ‘adopter and adopted person shall be able to obtain a document which contains extracts from public records attesting the fact, date and place of birth of the adopted person, but not expressly revealing the fact of adoption or the identity of his former parents’.²⁵

As the Explanatory Report to the 2008 Convention says, while Article 22(3) recognises the right of adopted children to know their origins, it does not provide an absolute right since a balance has to be struck between the rights of a child in this respect and the right (where it exists - the Report had particularly in mind *Odièvre v France*²⁶ in which the French practice of permitting mothers to give birth anonymously was not found to be in breach of the European Convention on Human

²³ The same comments are made in the Explanatory Report of the 1967 Convention.

²⁴ The White Paper *On Principles Concerning the Establishment and Legal Consequences of Parentage* CJ-FA (2001) 16 Rev.

²⁵ Note the extremely terse comment in the Explanatory Report to the 1967 Convention at para 58 that the purpose of the Article ‘is to avoid difficulties which may arise from... publicity or adoption proceedings or public records relating to adoption’.

²⁶ (App No 42326) 98, [2003] 1 FCR 621.

Rights) of parents of origin to remain anonymous. Nevertheless, it will be noted that even then the competent authority can override the right to anonymity.

Although, as just mentioned, the Working Party specifically had in mind the French position regarding ‘anonymous’ mothers (a similar position exists in Italy), there is in fact a more fundamental divide between, broadly, East and West Europe, with specific regard to adoption. Whereas in the latter, and particularly the United Kingdom, the adoption process has become steadily more open²⁷ and indeed in the UK adopted children have a virtual right²⁸ to access to their original birth certificate and thus the ability to trace their birth parents,²⁹ in the East, adoption very much remains a secretive process. In Russia, for example, Article 139 of the Family Code expressly prohibits judges, state officials and private individuals from breaching the secrecy of adoption against the adoptive parents’ will. Furthermore, adopters are neither obliged nor encouraged to inform the child of their origins. In Romania, the law guarantees the confidentiality of data identifying the adopted child or, where appropriate, the adopted family, as well as the identity of the birth parents.³⁰

Faced with these fundamental differences, Article 22(3) is surprisingly, though given the importance to the child of knowing his or her identity, perfectly justifiably, robust.³¹ It is to be welcomed. The only query one might raise is whether the retention period of 50 years for keeping the information is sufficient.³²

Revocation and annulment of adoption

It is a fundamental characteristic of full adoptions that not only do they sever the pre-existing legal relationships but also that the orders are in general irrevocable. In other words, they are complete and permanent transfers of legal parentage. Nevertheless, many jurisdictions do allow for some limited exceptions to the irrevocability of adoption orders. This is recognised by Article 14 of the 2008 Convention, which states

- ‘1. An adoption may be revoked or annulled by decision of the competent authority. The best interests of the child shall always be the paramount consideration.
2. An adoption may be revoked only on serious grounds permitted by law before the child reaches the age of majority.

²⁷ See the discussion in Lowe and Douglas, *Bromley’s Family Law* (10th edn, 2007) 825-826.

²⁸ See the Adoption and Children Act 2002, s 60 and Sch 2. The adopted child’s right of access to his or her birth certificate is not absolute, the court retaining a direction to prohibit access on, for example, public safety grounds, see *R v Registrar-General ex p Smith* [1991] 2 QB 393 and s 60(s) of the 2002 Act, discussed by Lowe and Douglas, *op cit* n 27 at 866.

²⁹ Controversially this right when introduced in England and Wales was introduced with retrospective effect in 1975.

³⁰ Law 273/2004, Art 2.

³¹ In fact there was much debate on exactly how the balance between the child’s right to information and the rights of the parents to privacy should be struck. The European Parliamentary Assembly’s attempt to tilt the balance more in the child’s favour was rejected by the European Committee on Legal Co-operation, see Horgan and Martin, *op cit* n 12 at 162.

³² In England and Wales the period is 75 years.

3. An application for annulment must be made within a period prescribed by law.’

While a similar allowance is made by the 1967 Convention, Article 13 is worded differently:³³

- ‘1. Before an adopted person comes of age the adoption may be revoked only by a decision of a judicial or administrative authority on serious grounds, and only if the revocation on that ground is permitted by law.
2. The preceding paragraph shall not affect the case of:
 - a. an adoption which is null and void;
 - b. an adoption coming to an end where the adopted person becomes the legitimated child of the adopter.’

According to the Explanatory Report to the 2008 Convention, the 1967 Convention’s provisions dealing with annulment were thought to be vague and in need of tightening up. It might also be noted that by Article 14 (1), the 2008 Convention makes general provision that *both* revocation and annulment can only be granted by a competent authority and that in both instances that power is subject to the child’s – best interests – being paramount – test (query whether that should be the test? – see below).

On the other hand, under both Conventions revocation is only permitted on ‘serious grounds’, as allowed by law, during the adopted child’s minority. As both Explanatory Reports emphasise, revocation is a serious issue and a grave step to take and must therefore be surrounded by very explicit guarantees in law and in its implementation. Both also stress that it is not intended by these provisions to oblige States that do not already do so, to make provision for revocation in their domestic law.

So far as annulments are concerned, Article 14 (3) of the 2008 Convention is intended³⁴ to lay down strict conditions regarding the application for an annulment, which must be filed within time limits prescribed by law. States parties must therefore determine those time limits and are free to add further conditions. It might also be noted that unlike the 1967 Convention, the 2008 Convention makes no reference to an adoption coming to an end when the adopted person becomes the legitimated person of the adopter.³⁵

While some limited exceptions to the irrevocability of adoption can be justified, they clearly have to be kept within strict bounds. In that respect, both Conventions seem to strike the right balance though many will feel that the 2008 Convention is more clearly worded. Even so it is not beyond criticism. For example, is it right that

³³ The final wording of Article 14 as approved at the 118th Session of the Committee of Ministers (7 May 2008) is also different from the version recommended and approved at the November 6th 2006 Plenary Session of the Committee of Experts on Family Law.

³⁴ See the Explanatory Report.

³⁵ This is the only statutory ground for revocation in English law, see the Adoption and Children act 2002, s 55.

revocation and particularly annulments must always be in the child's best interests?³⁶ Secondly, who can say with confidence what the difference is between revocation and annulment. For example, how should the English practice in exceptional circumstances of setting adoptions aside be classified?³⁷ It would have been helpful if the Explanatory Report gave some examples. Furthermore, it is not clear whether under either Convention it is intended to limit revocations to being possible *only* during the adopted child's minority. Finally, might not the 2008 Convention have been bolder and prescribed the time limits in Article 14 (3) rather than leave it to national law?

³⁶ For example, if the adopter falls outside the prescribed age (see Article 9), the adoption should surely be void regardless of the child's interests.

³⁷ See the cases discussed by Lowe and Douglas, *op cit* n 27 at 868.

**Les enjeux dans les procédures d'adoption en Europe : garantir l'intérêt
supérieur de l'enfant**

Conseil de l'Europe, Strasbourg, 30 novembre 2009

***La jurisprudence de la Cour européenne des droits de l'homme en
matière d'adoption***

par Isabelle Berro-Lefèvre,

Juge à la Cour européenne des droits de l'homme

Permettez-moi tout d'abord de remercier les organisateurs d'avoir invité la Cour européenne des droits de l'homme, que j'ai l'honneur de représenter, à participer à cette conférence.

En matière de droits familiaux, pour la Cour, l'intérêt supérieur de l'enfant (qui ne figure pas dans la Convention) se révèle un critère déterminant, voire dominant, dans l'appréciation de toute situation concernant les enfants. Le meilleur exemple étant qu'il a été implicitement inclus dans les buts légitimes qui peuvent justifier des atteintes aux droits des parents sur leurs enfants (Johansen c. Norvège, 7 août 1996). Pour autant, il est très difficile de définir cette notion, puisqu'elle est essentiellement factuelle, commande une approche au cas par cas, et qui entre souvent en concurrence avec d'autres critères qui ont aussi une valeur.

L'adoption est un exemple de la confrontation des ces intérêts, où sont mis en présence les intérêts des parents d'origine, des parents adoptants, de l'adopté, de la société.

Autrefois conçue comme un moyen de perpétuer un nom ou de transmettre une fortune, cette institution a été progressivement orientée dans le sens de l'intérêt exclusif des enfants dépourvus de famille. Désormais, elle répond d'abord au besoin de donner à l'enfant une famille de substitution à titre

définitif et permanent, lorsque sa famille d'origine fait défaut ou lorsqu'elle ne peut assumer son développement. L'adoption permet donc de donner une famille à un enfant et non un enfant à une famille, comme la Cour l'a souvent rappelé dans ses arrêts.

Chaque adoption est donc la rencontre de deux histoires : celle d'un enfant déjà né, parfois déjà grand, qui n'a pas ou plus de famille susceptible de le prendre en charge, et celle de parents ou futurs parents qui souhaitent profondément accueillir pour toute leur vie un ou plusieurs enfants, en les entourant de toute l'affection nécessaire.

En rapprochant ces deux attentes, l'adoption répond aux besoins de l'enfant privé de famille en lui permettant d'en retrouver une, afin qu'il grandisse et s'épanouisse comme adulte.

Besoins de l'enfant et/ou besoins de l'adulte ? Peut-on pour autant considérer qu'il existe un droit d'adopter qui serait garanti par l'article 8 de la Convention européenne des droits de l'homme, un droit au désir d'enfant qui serait placé au même niveau que les droits de l'enfant eux-mêmes ? Quelle est la place de l'enfant face au désir des parents adoptifs ? C'est ce que nous verrons dans une première partie.

Envisager l'adoption exclusivement en lien avec deux acteurs, l'adopté et l'adoptant c'est oublier souvent l'existence d'une troisième histoire, celle de l'auteur d'origine, qui bénéficie, également du droit au respect de sa vie privée et familiale garanti par l'article 8 de la Convention. C'est la dimension triangulaire de l'adoption, notion chère à Isabelle Lallemant, qui dans son ouvrage « L'adoption et les droits de l'homme en droit comparé » met parfaitement en lumière la difficulté de reconnaître le rôle de chaque acteur dans cette relation tripartite très particulière.

Je vous propose donc d'examiner, dans un deuxième temps, face à l'intérêt traditionnellement accordé aux adoptants, quelle place est réservée, dans la jurisprudence de la Convention, aux auteurs d'origine.

I - L'adoption, une relation protégée entre enfant et parents adoptifs

Saisies à plusieurs reprises de requêtes dénonçant les obstacles à l'adoption rencontrés par des personnes désireuses de recueillir un enfant, la Commission puis la Cour ont affirmé que la Convention ne garantit pas, en tant que tel, un droit d'adopter (Di Lazzaro c. Italie, décision de la Commission du 10 juillet 1997, Fretté c. France du 26 mai 2002), ni le simple désir de fonder une famille. La Cour a constaté par ailleurs que le droit d'adopter n'est pas davantage octroyé par d'autres instruments internationaux, telle la Convention relative aux droits de l'enfant de 1989 ou la Convention de la Haye sur la protection des enfants et la coopération en matière d'adoption internationale de 1993. Dès lors, l'article 8 de la Convention n'est pas applicable aux phases préliminaires à l'adoption, à défaut d'existence d'une vie familiale au sens de la jurisprudence de la Cour.

Confrontée dans l'arrêt Fretté c. France (précité) à la question de l'agrément d'une personne célibataire homosexuelle candidate à l'adoption, la Cour, après avoir rappelé ces principes, va constater que le droit interne reconnaissait le droit d'adopter à tout célibataire, lequel tombe sous l'empire de l'article 8 de la Convention. Elle estime que l'article 14 (interdiction de la discrimination) pouvait alors être invoqué, si la mise en œuvre de cette faculté révélait une différence de traitement reposant sur l'orientation sexuelle du requérant.

Ce point de vue a été contesté par trois des sept juges de la Cour dans leur opinion partiellement concordante de l'affaire Fretté, qui, pour conclure à l'inapplicabilité de la Convention, avait insisté sur le fait que celle-ci ne consacrait pas un droit à l'enfant, et ne protégeait pas le désir de fonder une famille : la seule possibilité de demander l'adoption ne fonde pas un droit à l'obtenir.

L'arrêt E.B contre France du 22 janvier 2008 va plus loin que l'arrêt Fretté (tant sur l'applicabilité de l'article 8 de la Convention que sur le fond du litige

d'ailleurs), et certains commentateurs se sont demandé si l'on n'assistait pas à une insertion progressive de l'adoption dans le champ de la Convention. Se référant une nouvelle fois aux principes posés dans sa jurisprudence antérieure, la Cour considère de façon très claire que le droit d'accès à l'adoption est un droit additionnel que l'Etat français a volontairement décidé de protéger, et qui relève du champ de la vie privée. Disant cela, elle revient sur sa position adoptée dans *Fretté*, selon laquelle le refus d'agrément opposé à un homosexuel ne porte pas atteinte au droit du requérant au libre développement et épanouissement de sa personnalité et n'attente pas en soi à sa vie privée. Une porte semble désormais ouverte quant aux requêtes concernant les phases préliminaires à l'adoption introduites par des requérants invoquant une discrimination.

La juge Mularoni, dans son opinion dissidente rappelle que la notion de vie privée a été interprétée très largement par la Cour, celle-ci allant jusqu'à protéger le droit au respect de la décision d'avoir un enfant ou de ne pas en avoir (*Evans c. R.U* du 10 avril 2007 et *Dickson c. R.U* du 4 décembre 2007, même s'il s'agissait dans ces affaires de la décision de conception d'un enfant biologique). Elle se demande alors si le moment n'est pas venu de reconnaître que la possibilité de demander à adopter un enfant entre dans le champ d'application de l'article 8. Ce qui aurait pour conséquence de ne plus déclarer irrecevables pour incompatibilité *ratione materiae* avec la Convention toutes les requêtes introduites par des personnes ayant un droit reconnu par la loi nationale de demander à adopter un enfant. La question reste ouverte, et je ne doute pas que la Cour y sera de nouveau rapidement confrontée, compte tenu du nombre croissant de demandes d'adoption en Europe.

De l'accès au droit d'adopter à l'adoption il n'y a qu'un pas pourrait penser certains, au nom de l'interprétation évolutive de la Convention par les juges européens à la lumière des conditions de vie actuelles.

En ce qui me concerne, ce pas me semble difficile à faire, tant il est vrai qu'il ne saurait à mon sens y avoir de droit à l'enfant, droit qui réduit celui-ci à un objet et non à une personne, et qui servirait de moyen à la satisfaction des

droits et besoins d'un adulte. Cette conception de l'enfant objet de droit est particulièrement dangereuse, et radicalement contraire à l'évolution affirmée et reconnue des droits de l'enfant. Permettez-moi de citer l'expression de la Cour constitutionnelle luxembourgeoise : « l'adoption n'est pas un droit naturel de la personne humaine et de la famille ».

Si la Cour écarte donc classiquement l'existence d'une vie familiale, dont la mise en œuvre présuppose l'existence d'une famille, s'agissant des phases préliminaires à l'adoption, une fois l'adoption prononcée, le lien qui en résulte fait l'objet d'une protection attentive de la Cour.

On peut même dire qu'elle a interprété très largement de la notion de vie familiale, dès lors par exemple que dans l'affaire *Pini et Bertani c Roumanie* du 22 juin 2004, la Cour va considérer que le jugement d'adoption est en lui-même constitutif d'une vie familiale. Dans cette affaire, les parents adoptifs italiens, invoquant notamment l'article 8 et leur droit au respect de leur vie familiale, se plaignaient de la non exécution par les autorités roumaines de la décision d'adoption, en raison de l'opposition véhémente des fillettes adoptées alors âgées de 9 ans, qui souhaitaient demeurer en Roumanie dans le centre où elles avaient toujours vécu. La Cour va admettre l'applicabilité de l'article 8 à des relations – pourtant jusque là purement légales– entre les parents adoptifs et les fillettes malgré l'absence de cohabitation ou de liens de facto suffisamment étroits entre les requérants et leur filles adoptives.

De même, le refus de donner l'exequatur à un jugement d'adoption rendu à l'étranger, au motif que le droit interne limitait le recours à l'adoption aux seuls couples mariés, constitue pour la Cour, une atteinte disproportionnée au droit à la vie familiale de l'enfant et de sa mère (*Wagner c. Luxembourg*, 28 juin 2007). C'est ici encore une affirmation de l'importance de la reconnaissance de liens familiaux qui préexistaient de facto entre les requérantes du fait du jugement d'adoption, la Cour considérant que tenant compte de l'intérêt supérieur de l'enfant, qui doit toujours primer, les juges luxembourgeois ne pouvait raisonnablement passer outre au statut juridique créé valablement à l'étranger et correspondant à une vie familiale au sens de l'article 8 de la

Convention, et faire prévaloir les règles de conflit de loi luxembourgeoises sur la réalité sociale et sur la situation des personnes concernées.

C'est également cette absence de prise en compte des réalités tant biologiques que sociales qui a valu à la Suisse d'être condamnée en 2007 dans l'affaire Emonet. La Cour va reprocher à l'Etat d'avoir appliqué de façon mécanique et aveugle des dispositions du droit suisse sur l'adoption conjointe, ayant en l'espèce entraîné la rupture du lien de filiation entre une mère et sa fille, majeure et handicapée, du fait de l'adoption de celle-ci par le concubin de la mère. L'Etat a donc omis de garantir aux requérants le respect de leur vie familiale auquel il pouvait prétendre en vertu de la Convention.

L'étendue de la protection de la vie familiale s'étend jusque dans les effets de l'adoption en matière successorale, réaffirmée dans l'arrêt Pla et Puncernau c. Andorre du 13 juillet 2004, où les juridictions andorranes avaient jugé qu'en tant qu'enfant adopté, le requérant ne pouvait être considéré comme le fils d'un mariage légitime canonique et ne pouvait donc pas prétendre à la succession de sa grand-mère. Affaire sensible, dans un contexte de tradition juridique locale, touchant à l'interprétation d'un acte testamentaire, et mettant en opposition divers droits et intérêts concurrents. La Cour va néanmoins estimer que l'interprétation faite par la juridiction nationale apparaissait en flagrante contradiction avec les principes de la Convention, et notamment l'interdiction de la discrimination, rappelant de façon très claire qu'un enfant adoptif se trouve dans la même position juridique que s'il était l'enfant biologique de ses parents, et cela à tous égards.

Il est évident que la protection de la vie familiale invoquée par les parents adoptifs, sur laquelle la Cour semble veiller de façon rigoureuse, se voit dans ces affaires renforcée par la recherche systématique de l'intérêt supérieur de l'enfant, en ce qu'il constitue le fondement même à l'adoption, et même si l'on peut constater que ces intérêts sont, le plus souvent, mais pas toujours, convergents.

II - Les droits de l'enfant et de la famille d'origine dans l'adoption

Si la création d'une famille par voie d'adoption est subordonnée à l'intérêt de l'enfant, il n'en demeure pas moins que la Cour va au préalable vérifier si dans les faits l'adoption rencontre effectivement l'intérêt de l'adopté. Au-delà des différentes considérations susceptibles d'être prises en compte, besoins de l'enfant, avantages d'ordre moral et matériel susceptibles de lui être apportés par la famille d'adoption, il est une donnée plus obscure, j'allais presque dire plus gênante, notamment en matière d'adoption internationale, qui à mon sens dans l'appréhension globale de l'intérêt de l'adopté ne saurait être occultée : c'est l'existence de sa famille d'origine.

Car il ne faut jamais oublier que l'adoption met en présence, dans la plupart des cas, deux familles aux intérêts divergents, ayant chacune droit au respect de leur vie familiale garanti par l'article 8 de la Convention, et la Cour a été amenée à apprécier la légitimité des décisions conduisant à intégrer l'enfant dans la nouvelle famille et à couper les liens familiaux avec ses parents d'origine.

Dans chaque affaire, la Cour apprécie le bien fondé des mesures prises par les autorités nationales, sans pour autant substituer son jugement à celui des juridictions internes. Une certaine marge d'appréciation est ainsi reconnue aux Etats lorsqu'ils œuvrent pour le bien être de l'enfant et que les décisions sont prises dans son intérêt supérieur.

La Cour a toujours rappelé que l'intérêt de l'enfant présente un double aspect : d'un côté, l'article 8 ne peut pas autoriser un parent, à prendre des mesures qui sont préjudiciables à la santé ou au développement de l'enfant. Mais d'un autre côté, il est tout aussi clair que l'intérêt de l'enfant est, que le lien entre lui et sa famille soit maintenu, sauf dans les cas extrêmes. Briser un tel lien, revient à couper l'enfant de ses racines, et peut être considéré comme une forme de maltraitance sociale. La place de l'enfant se trouve donc bien, en principe, au sein de sa famille d'origine, et son intérêt

commande donc que seules des circonstances tout à fait exceptionnelles puissent conduire à la rupture du lien familial.

Dès lors, si l'absence de vie familiale entre un enfant et un parent semble pouvoir justifier que l'autorité prononce une adoption nonobstant le consentement de ce dernier, encore faut-il que cette absence de vie familiale soit effective, c'est à dire qu'elle résulte d'un véritable désintérêt du parent à l'égard de son enfant, et non de la volonté de l'autre de les séparer.

Dans l'arrêt *Keegan c. RU* du 26 mai 1994, la Cour a condamné les autorités irlandaises pour avoir placé un enfant en vue de son adoption à l'insu et sans le consentement de son père biologique non marié qui en sollicitait la tutelle. Ce placement avait eu pour conséquence la création d'un lien entre l'enfant et les adoptants potentiels, puis une décision d'adoption.

Mais parfois, le passage du temps cristallise la situation, et l'appréciation de la réalité de la vie familiale entre un enfant et ses parents biologiques et de l'équilibre entre les intérêts de chacun peut s'avérer plus délicate.

Ainsi dans une affaire *Söderbäck c. Suède* du 28 octobre 1998, un père se plaignait que la décision de permettre, sans son consentement, l'adoption de sa fille par le mari de la mère, emportait violation de son droit au respect de la vie familiale. La Cour va au contraire considérer que l'intérêt de l'enfant était d'être intégré dans la famille qui l'avait élevé jusqu'alors, c'est-à-dire avec sa mère et son père adoptif.

La nécessité de stabiliser, aussi bien juridiquement que psychologiquement, l'enfant dans une famille d'accueil a été également visée par un arrêt du 10 janvier 2008, *Kearns c. France*, s'agissant du délai de rétractation du consentement à l'adoption d'une durée 2 mois accordé par la loi française pour réclamer la restitution de l'enfant. Pour la Cour, dans la mise en balance d'intérêts inconciliables, l'intérêt de l'enfant doit primer, et commande qu'il puisse bénéficier rapidement de relations affectives stables au sein d'une nouvelle famille et qu'il s'inscrive dans une filiation. Elle a donc conclu dans cette affaire, à la non violation de l'article 8 de la Convention.

Un dernier mot sur la parole de l'enfant dans le processus d'adoption, l'affaire Pini et Bertani déjà citée réaffirme que lorsque l'enfant a atteint la maturité nécessaire pour s'exprimer et consentir à son adoption, son opinion revêt un poids certain, puisqu'une opposition consciente de sa part rendrait improbable qu'il puisse s'intégrer d'une manière harmonieuse dans la nouvelle famille adoptive.

Conclusion

Il m'est impossible, dans le temps qui m'est imparti, de traiter de toutes les questions, sensibles et complexes ayant trait au sujet qui nous occupe aujourd'hui, j'ai seulement voulu vous donner un court aperçu des situations auxquelles la Cour est confrontée s'agissant de trancher entre des intérêts souvent éminemment divergents. Il est certain que placé au centre d'un double conflit, entre la famille par le sang et la famille adoptive, l'enfant, lui, ne pourra que difficilement trouver son intérêt.

C'est la raison pour laquelle le rôle de chaque intervenant, des autorités, des juridictions nationales, des Etats, et aussi de la Cour doit, me semble-t-il, essentiellement tendre à assurer le respect de chacun, l'enfant d'abord, bien sûr, mais pas seulement ; je suis convaincue que le respect de l'enfant adopté implique nécessairement celui de sa famille adoptive, et de sa famille d'origine.

Je vous remercie.



CONSULTATION AND CONSENT OF CHILD IN ADOPTION

CHALLENGES IN ADOPTION PROCEDURES IN EUROPE: ENSURING THE BEST INTERESTS OF THE CHILD

JOINT COUNCIL OF EUROPE AND EUROPEAN COMMISSION CONFERENCE

STRASBOURG, FRANCE

30 NOVEMBER AND 1 DECEMBER, 2009

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INTERNATIONAL SOCIAL SERVICE

The International Social Service (ISS) is an international non-governmental and non-profit organisation established in 1924, which includes the General Secretariat, a network of 14 national branches, 5 affiliated bureaus and correspondents in over 100 countries. It offers its assistance to individuals and families who face personal or social problems linked to migration or international displacement. The services provided by ISS's network touch upon the protection of unaccompanied minors, neglected and abandoned children, child protection, adoption, family search, reunification and repatriation, legal assistance and individual counselling. All these activities are based on the international conventions related to family and child protection.

Proven dedication to children's rights

The International Social Service created the International Reference Centre (ISS/IRC) as a division of the General Secretariat in order to promote better respect of the best interests and the rights of children which is dedicated to the ratification and implementation of international conventions relating to the rights of these children. In this spirit, it promotes the exchange of experiences and a worldwide collaboration between professionals of governmental, intergovernmental and non-governmental organisations. The ISS/IRC therefore has strong institutional experience and knowledge of the CRC and other international standards relevant to the protection of the rights of the child at international and regional levels. See <http://www.iss-ssi.org/2009/index.php?id=14>

Proven experience in legislative reform

The ISS/IRC is accustomed to working in partnerships with international organisations such as UNICEF, European Union, Governments and other national entities to undertake country missions to provide technical support for legal reform on child protection procedures. In recent years, the ISS/IRC has participated in several assessment missions on behalf of UNICEF and other international organizations in Rwanda, Ukraine, Cyprus, Moldova, Azerbaijan, Romania, Kazakhstan, Kyrgyzstan and Vietnam, focussing on child protection. The objective of these missions was to assess the legal framework and practices governing the child protection system in these countries, and to provide stakeholders with recommendations to improve the level of protection granted to children, in accordance with the legal tradition and system. Special focus was placed on possible law reforms consistent with international standards with UNICEF being responsible for the follow up. Expert technical legal support for countries in the process of law reform has been given to countries such as Guinea, Nepal and Luxembourg.

Since its creation in 1924, the ISS has also been actively contributing to the development of international instruments relevant to the protection of children and families, including the 1956 United Nations Convention on the Recovery Abroad of Maintenance, the 1993 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. Currently, ISS is co-convenor of the NGO Group in charge of the Draft United Nations Guidelines for the Alternative Care of Children and was part of the group of experts in charge of drafting the Guidelines.

Proven experience in training and capacity building

The ISS/IRC is well versed in provided training and conferences in countries such as India, Japan, Romania, Peru, Chile, Mexico, Guatemala, Iceland, France, Turkey, Spain, South Africa and Czech Republic. The ISS/IRC has considerable experience in preparing information and training materials and practical capacity-building tools designed to support practitioners, in particular in countries in transition or developing countries, such as its Monthly Review and its series of over 50 Factsheets. Together, they offer updated information on developments in the child protection sector as well as practice-focused guidelines designed to promote a rights-based and ethical approach in the daily practice of professionals.

INTRODUCTION TO CONSULTATION AND CONSENT OF CHILD IN ADOPTION

International law requires that the child be consulted in decisions that affect him/her. There are very few decisions, of more importance to a child than where s/he should live, with whom and when a filiation tie should be permanently made. International law does not give children the sovereign decision making authority but rather it reinforces the notion that they should be given the opportunity to participate in important decisions such as when an adoption order should be made.

In today's short presentation, we would like to briefly provide an overview of the international legal framework addressing the topic of the 'consultation and consent of the child in adoption'. Secondly, we will discuss how this international framework is then translated into national context of various countries within the European region, providing a brief commentary on certain legal aspects that aim to provide safeguards to this consultation principle.

Thirdly, we will then spend some time discussing how the various principles pan out in practice recognising that good laws are the only first step in adequately protecting the right of the child to be consulted in the adoption decision. Specifically, we will discuss how to explore the views of the child, obtain the (non)consent of the child and incorporate the child's view in the final decision. The third section will be presented by my colleague Cécile Maurin in French as we wanted to make sure that our presentation was truly European.

PART 1: INTERNATIONAL AND REGIONAL FRAMEWORK – RIGHT OF THE CHILD TO BE CONSULTED

1.1 The UN Convention on the Rights of the Child 1989 (UNCRC)

The participation principle is considered one of the four core principles of the CRC, alongside the best interest principle, non discrimination and the right to life, survival and development. Article 12 UNCRC is dedicated to the principle of the child's right to participate in decisions affecting him.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

In May 2009 the Committee adopted General Comment 12 which aims to strengthen the understanding of article 12. The other objectives of the General Comment are to elaborate the scope of legislation, policy and practice as well as highlight positive approaches with respect to the latter. The Committee recognises that the right to be heard can be broadly conceptualised as 'participation', although the word itself is not mentioned in article 12.

General comment 12 addresses participation in the context of separation from parents and alternative care in paragraphs 53 and 54. For example, the Committee recommends that '*the child's views are solicited and considered, including decisions regarding placement in foster care or homes, development of care plans and their review, and visits with parents and family.*'

The participation of the child in the context of adoption and *kafalah* are dealt with in paragraphs 55 and 56 of General Comment 12. The Committee emphasises that when a child is to be placed in either of these situations, their best interests must be the primary consideration. The Committee further '*urges all States parties to inform the child, if possible, about the effects of adoption, kafalah or other placement, and to ensure by legislation that the views of the child are heard.*'

Source: <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>

1.2 The Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (THC-93)

Although today's presentation focuses on national adoptions, it is worth noting that article 4(d)(2)THC-93 makes it a requirement that 'consideration has been given to the child's wishes and opinions' in the context of intercountry adoptions.

Source: http://www.hcch.net/index_en.php?act=text.display&tid=45

1.3 Guidelines for the Alternative Care of Children at UNGA (NY)²

The rights of the child to participate are also clearly elucidated in the Guidelines for the Alternative Care of Children. On June 17, the Human Rights Council (HRC) adopted by consensus a procedural resolution submitting the "Guidelines for the Alternative Care of Children" to the United Nations General Assembly (UNGA) for consideration with a view to their adoption on the 20th anniversary of the Convention on the Rights of the Child in November this year. The procedural HRC resolution and the Guidelines in all 6 languages are available at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/11/L.13. On 20 November 2009, the General Assembly formally welcomed the Guidelines.

The Guidelines elaborate rights in the UNCRC which itself favours permanent solutions for family care (art 20 and 21). The Guidelines address the steps from when a child will be in need of alternative care, prevention mechanisms and the development of domestic solutions to cater for the child. The text does not apply directly to adoptions as this not 'alternative care.' Adoption is a permanent family where a filiation tie is created and therefore once a child is adopted, family laws will apply. Nevertheless the principles within the Guidelines will apply to children who will eventually be adopted given that there is usually a time lag between being declared 'adoptable' and being adopted. Children in this limbo period will benefit from the guidelines.

The right of the child to participate is dispersed throughout the Guidelines and is promoted as one its underpinning principles as outlined in paragraph 6. That is all decisions in the context of Alternative Care 'should respect fully the child's right to be consulted and to have his/her views duly taken into account in accordance with his/her evolving capacities...'.

- Children should be fully consulted about decisions regarding their removal or reintegration (par 39)
- Children should be involved with the assessment team who decide whether the reintegration of the child in the family is possible (par 48)
- Determination of most appropriate form of care should involve the child at all stages (par 56)
- Children should be provided with all the necessary information about the alternative care options to make an informed decision (par 63)
- Children may request that other important persons in the child's life be consulted (par 64).
- Children should be fully involved in regular and thorough reviews of the appropriateness of his/her temporary care arrangement (par 66)
- Process of identifying and assessing care practices in developing policies should include children (par 74)
- All carers should promote and encourage children to develop and exercise informed choices (par 93)
- Children in care should have access to a known, effective and impartial mechanism whereby they can notify concerns regarding their treatment or conditions of placement. Young people with previous care experience should be involved in this process, due weight being given to their opinions (par 98)
- In designating an individual vested with both the legal right and responsibility to make daily decisions, this individual must consult with the child so that the child's views are taken into account by decision-making authorities (par 103)
- Children in care should be able to participate in the inspections of their agencies, facilities and professionals providing care (par 127, par 129)
- Children leaving care should be encouraged to take part in the planning of after-care life (par 131).

² The ISS is the co-convenor of the NGO Working Group on the Alternative Care of Children with SOS Children's Villages. Its role in this regard can be found on our website <http://www.iss-ssi.org/2009/index.php?id=25>

1.4 European Convention on the adoption of children (revised), 7 May 2008 (ECAC)

Since the 1960s, considerable changes have taken place in Europe, due particularly to the evolution of Family Law, the proliferation of different forms of unions between individuals and the strengthening of the legal and social status of the child. The ECAC is an update of the provisions of the 1967 Convention. The most noteworthy innovation of the ECAC is, undoubtedly, the fact that it takes into account the best interests of the child at every stage of the adoption process. By recalling this principle throughout the text, more specific provisions have been envisaged in order to have concrete implementation including the requirement have the child's consent to adoption, so long as he has sufficient discernment and he has reached the minimum age specified by law. The Convention, moreover, dictates that the child must be consulted regarding his own adoption to the maximum extent possible, and his wishes must be taken into consideration in accordance with his level of maturity.

Article 5 – Consents to an adoption

1. Subject to paragraphs 2 to 5 of this article, an adoption shall not be granted unless at least the following consents to the adoption have been given and not withdrawn:

- a. the consent of the mother and the father; or if there is neither father nor mother to consent, the consent of any person or body who is entitled to consent in their place;
- b. the consent of the child considered by law as having sufficient understanding; a child shall be considered as having sufficient understanding on attaining an age which shall be prescribed by law and shall not be more than 14 years;
- c. the consent of the spouse or registered partner of the adopter.

2. The persons whose consent is required for adoption must have been counselled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin. The consent must have been given freely, in the required legal form, and expressed or evidenced in writing.

Article 6 – Consultation of the child

If the child's consent is not necessary according to Article 5, paragraphs 1 and 3, he or she shall, as far as possible, be consulted and his or her views and wishes shall be taken into account having regard to his or her degree of maturity. Such consultation may be dispensed with if it would be manifestly contrary to the child's best interests.

Sources: *European Convention on the adoption of children (revised)*, CM(2008)13 final 14 May 2008, 118th Session of the Committee of Ministers, Strasbourg, 7 May 2008, [https://wcd.coe.int/ViewDoc.jsp?Ref=CM\(2008\)13&Language=lanEnglish&Ver=final&Site=CM&BackColorInter=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75](https://wcd.coe.int/ViewDoc.jsp?Ref=CM(2008)13&Language=lanEnglish&Ver=final&Site=CM&BackColorInter=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75); Explanatory report to the European Convention on the adoption of children (revised), CM(2008)13 addendum 28 March 2008, 118th Session of the Committee of Ministers, Strasbourg, 7 May 2008, [https://wcd.coe.int/ViewDoc.jsp?Ref=CM\(2008\)13&Language=lanEnglish&Ver=add&Site=CM&BackColorInter=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75](https://wcd.coe.int/ViewDoc.jsp?Ref=CM(2008)13&Language=lanEnglish&Ver=add&Site=CM&BackColorInter=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75)

PART 2: NATIONAL LEGAL FRAMEWORK DIRECTED AT RESPECTING THE RIGHT OF THE CHILD TO BE CONSULTED AND GIVE HIS/HER CONSENT TO THE ADOPTION

2.1 An examination of National Legal Frameworks

The requirements of international standards can be summarised as follows, having regard of course to the age and maturity of the child:

- Child should be consulted about his/her placement options which can include kinship care, foster care etc of which adoption is only one option (article 6 ECAC)
- Once adoption is chosen as the placement option that it is in the best interests of the child, *prima facie*, the child's (non)consent should be obtained (article 5 ECAC)

In this second part, we identify how these international standards are translated into national legislation. Based on the ISS archives (which we endeavour our best to keep updated), we undertook some brief research on the national legislative frameworks of countries in the European region of which a palette is available in the document. Whilst we will not cite each country, we will make some key observations about the laws.

What we found was that the first aspect requiring that children are systematically consulted about their placement options was not included in all child protection frameworks. Nevertheless, Norway provides one good example of how this situation can be rectified as its Children's Act requires that 'when the child reaches the age of 7, it shall be allowed to voice its view before any decisions are made about the child's personal situation', which of course would include where and with whom the child will live.

As for the second aspect, having an obligation to have the child's consent, we were pleasantly surprised that of all the countries in the European region had a reference. Most countries have a reference to a minimum age for when the child's consent is compulsory, ranging from 10 to 15 years, although in our view 15 is rather high. Whilst a minimum age is beneficial, we believe that it is important that the laws should have certain flexibility to include the consent of younger children who are mature enough. In this regard, other countries do not specify a minimum age but have an obligation to include the child's consent based on the maturity of the child (Greece).

In addition to having a minimum age, the ISS/IRC has observed a number of characteristics which we believe; helps give fuller meaning to the right of the child to be consulted in the adoption procedure, thus providing additional procedural safeguards:

- Before consent is given, relevant professionals must explain the effects of adoption and provide Guidance (eg: Iceland)
- Consent must be given personally (eg: Italy etc)
- Requirement that consent is verified by a tribunal or Government body (eg: Latvia). This ensures that an independent and ideally professional assessment of the child's consent has been made
- Consent must be provided without the presence of the prospective adoptive parents. This ensures that the child is able to freely provide his/her consent without the pressure of potentially hurting the feelings of PAPs.

We further note that in some countries that the consent can be dispensed with if the child has been living with the family (eg: Armenia, Azerbaijan, Moldova etc). Whilst we understand that this provision would allow for the expedition of adoption procedures, we believe it is important that children are nevertheless consulted about the permanency of the placement. Unfortunately we can not always automatically assume that each and every placement is suitable. We can, however, concede that there are some cases where the child's consent would not be required (eg: unable to express wishes due to mental state).

At this juncture, the ISS/IRC would like to emphasise the importance of having comprehensive laws by including the aspects that we have just mentioned. However, such laws must not only be given lip service but genuine efforts must be made to include the child in the adoption process. In addition, professionals should be trained to work with children in obtaining such information. The final decision

makers, whether it is judicial or administrative should also be equipped to cater for the child's views. In this regard, my colleague Cécile Maurin will now provide a few practical tools of how this participation principle can be implemented in practice.

2.2 Examples of national legislative frameworks³

Albania

If the child to be adopted is 10 years old or more it is essential to have his consent (art.54 Family Code 1982)

Armenia

Consent of a child above 10 is necessary for his/her adoption, unless the child lived in the family of the adopter before the latter had submitted his application for adoption and considers him/her as a parent. Only in this case, adoption can be realized without child's consent (art.121 Family Code 2004).

Azerbaijan

The consent of the child is required in cases of the adoption of children aged 10 years or older (art. 124.5 Family Code 1999). If a child was living in the family of the person wishing to adopt him before the adoption application is submitted and regards that person as his parent, the adoption may proceed without the child's consent (art. 124.6 Family Code 1999).

Bulgaria

Consent of the person to be adopted is required if he/she has accomplished 14 years of age (Family Code 2003).

Cyprus

The consent of the person to be adopted, if his age or spiritual capability permits that, is required (article 4c Adoption Law of 1995)

France

Adoption is permitted only in favor of children under fifteen years of age, having been accepted in the home of the adopter(s) for at least six months. However, if the child is older than fifteen and has been received before having reached such age by persons not fulfilling the legal conditions for adoption, or if the child was the subject of a simple adoption before having reached such age, full adoption can be requested, if its conditions are fulfilled, during the minority of the child and the two years after he or she has reached majority. If over thirteen, the adopted person must consent personally to his or her full adoption (art 345 Civil code 1997)

Georgia

The consent of the child is required in cases of the adoption of children aged 10 years or older. If a child was living in the family of the person wishing to adopt him before the adoption application is submitted and regards that person as his parent, the adoption may proceed without the child's consent (arts. 1251-1256 Civil Code 1997).

Germany

The consent of the child is required for an adoption. The consent of a child who lacks competency to enter legal transactions, or is less than fourteen years of age, may only be given by his legal representative. Otherwise the child may give the consent only personally; he requires therefore the assent of his legal representative (§ 1746 German Civil Code Bürgerliches Gesetzbuch (bgb))

Greece

The minor who is adopted also consents in person before the court, provided that he is over 12 years of age, unless he is mentally incapable. In every case considering the minor's maturity, the court must also hear his opinion (article 1555 Civil Code).

Iceland

An individual who has reached 12 years of age may not be adopted without his or her consent, provided that his or her mental state is not such as to prevent the expression of a valid consent or if it is deemed questionable to seek his or her approval due to his or her interests.

Before a child consents to an adoption in accordance with paragraph 1, a discussion shall be had with him or her on behalf of the relevant Child Welfare Committee and guidance on adoption and its legal effects shall be provided.

If the child who is to be adopted is younger than 12 years of age, his or her opinion to the prospective adoption shall be sought, as described in paragraph 2, if it is deemed possible, taking into consideration the child's age and maturity. (Art 6, Adoption Act No. 130/1999)

Adoption

Italy

Adoption of minors in state of adoptability is permitted if in conformity with the following articles:

³ We have endeavoured our best to ensure that our references are as up to date as possible. However, given the ever changing nature of legislation, we accept the possibility of laws being superseded.

If the minor is over 14 years of age, adoption can be defined only if the minor has personally given his assent; this will be necessary also if the minor reaches the age of 14 during the course of the proceedings. ... If the child in state of adoptability is over 12, the child must be heard personally; if under 12 years of age, the child must be heard if appropriate, except if the hearing is considered prejudicial to the minor (Art 7 Law 184, 4 May 1983)

Il minore, il quale ha compiuto gli anni quattordici, non può essere adottato se non presta personalmente il proprio consenso, che deve essere manifestato anche quando il minore compia l'età predetta nel corso del procedimento. Il consenso dato può comunque essere revocato sino alla pronuncia definitiva dell'adozione. (Art 7, Law No.149, 28 March 2001)

Latvia

In case that the child is less than 12 years of age, an orphan's court shall clarify his or her opinion by listening to the child at his or her place of residence. The consent of the adoptee is obligatory if the child is older than twelve years (Art. 169, 2, Civil Law and Arts. 5.3 and 10 Procedures of Adoption).

Lithuania

If the child to be adopted is ten years of age or older, their written consent is required to be adopted (art. 3.215 Civil Code).

Luxembourg

If the child is more than 15 years old, he must consent personally to the adoption (art 356, Civil Code, 2002)

Macedonia

Consent of the child is required if he/she is over 12 years of age (art 23, Family Law 2004)

Malta

An adoption decree shall not be made when the person to be adopted has attained the age of fourteen years, except with his consent (art 115, Civil Code)

Moldova

The consent of the child to his/her adoption is necessary as soon as the child reaches the age of 10, except if he/she has been living with the adopters without knowing they were not his/her biological parents (art. 127 Family Code).

Norway

As and when the child becomes able to form its own point of view on matters that concern it, the parents shall listen to the child's opinion before making a decision on the child's personal situation. Attention shall be paid to the opinion of the child, depending on the age and maturity of the child. The same applies to other persons with whom the child lives or who are involved with the child.

When the child reaches the age of 7, it shall be allowed to voice its view before any decisions are made about the child's personal situation, including which of the parents it is to live with. When the child reaches the age of 12, the child's opinion shall carry significant weight. (Section 31, Children's Act 1981)

A person who has reached 12 years of age may not be adopted without his or her consent (Act of 28 February 1986 No. 8 relating to adoption)

Poland

For there to be adoption, the consent of the adopted child is required if s/he has reached 13 years (Art. 118. Family Code)

Serbia

A child who is at least 10 and is capable to express his opinion must give his consent to be adopted (art. 98, Family Act)

Ukraine

The child should give his/her consent when s/he is 10 years old or more. (art. 104 Family Code). He/she gives it in a form consistent with his/her age. The child has to be previously informed about the legal consequences of adoption (art. 218 Family Code).

PART 3: IMPLEMENTATION OF CHILD'S RIGHT TO BE CONSULTED

Une fois ce tour d'horizon législatif réalisé, la question se pose du *comment faire* pour procéder à la consultation de l'enfant. Cette faculté n'est en effet pas instinctive et nécessite une formation et une connaissance spécifiques dont les acteurs impliqués dans le processus (travailleurs sociaux, juges, psychologues) devraient pouvoir bénéficier. Nous aimerions ici vous donner une brève liste d'éléments et de références pratiques qui participent de cette compétence souhaitée à l'heure de recueillir la parole de l'enfant, d'accueillir son consentement (ou non) à l'adoption et d'annoncer à l'enfant la décision finale.

3.1 Recueil de la parole de l'enfant

Le professionnel en charge de recueillir la parole de l'enfant se trouve face à un réel défi, celui de comprendre les souhaits de l'enfant et ses besoins réels et à la fois, de ne pas faire peser sur lui le poids de la décision finale qui sera prise à son égard. S'il ne fait aucun doute que l'enfant a le droit d'être entendu, pour rendre effectif ce droit plusieurs facteurs entrent en considération. Sur la base de divers ouvrages de référence dont notamment les Lignes directrices pour la détermination de l'intérêt supérieur de l'enfant publiées en 2008 par le Haut Commissariat des Nations Unies pour les Réfugiés⁴, nous vous proposons d'examiner certains d'entre eux.

3.1.1 Avoir une attitude d'écoute pleine et entière de l'enfant:

- **Disposer d'une connaissance suffisante sur les stades de développement de l'enfant, tant au niveau de son esprit que de son comportement, ainsi que de l'impact des situations de perte ou de maltraitance sur ce dernier.** Gillian Schofield, Professeur à l'école de travail social et des sciences psychosociales et Co-Directeur du Centre de Recherche sur l'enfant et la famille à l'Université anglaise d'East Anglia, Norwich, précise sur ce point que la compréhension de la théorie du développement aide à identifier les forces et les difficultés de l'enfant, à donner un sens à ses paroles et à ses comportements et permet ainsi à l'enfant de se sentir compétent et valorisé. Gillian Schofield propose à cet effet un outil nommé le « Developmental model » disponible à l'Association anglaise pour l'adoption et le placement familial BAAF⁵.

- **Développer une relation de confiance avec l'enfant :** cela signifie avoir une attitude empathique à son égard, l'écouter depuis ses propres représentations, marquées par ses expériences de vie souvent bien lourdes. Il est important d'accueillir l'enfant sans jugement par rapport à ses réactions face à certains événements ou situations.

La confiance passe aussi par la **confidentialité de l'entretien**. L'enfant doit être rassuré sur le fait qu'aucun de ses propos ne sera répété sans son accord préalable.

- **Permettre à l'enfant de se sentir autorisé à dire non ou à refuser de répondre à une question.** Il doit pouvoir être suffisamment à l'aise pour ne pas avoir peur de changer d'avis, de faire des erreurs ou de laisser certaines questions sans réponse.

-Instaurer une bonne communication avec l'enfant passe par la **prise en compte de ses compétences et ses capacités**, différentes, et non inférieures, à celles des adultes. Il conviendra sur ce point pour le professionnel de prendre de la distance par rapport à ses propres expériences de vie et ses éventuels préjugés concernant la communication adulte-enfant afin d'avoir une attitude la plus neutre possible. Des séances de supervision destinées aux professionnels interrogeant les enfants sont nécessaires à cet effet.

⁴ UNHCR Guidelines on Determining the Best Interests of the Child, p.57- 61, 2008. Disponible à l'adresse suivante: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=48480c342>

⁵ Adoption & Fostering, Volume 29, Number 1, p. 29-44, BAAF (British Agencies for Adoption and Fostering, <http://www.baaf.co.uk/>), 2005. Voir aussi, Child Protection - The Voice of the Child in Decision Making, SCHOFIELD Gillian et June Thoburn, Institute for Public Policy Research, 1996.

3.1.2 Créer un climat favorisant l'expression de l'enfant:

- Dans la mesure du possible, le **choix du lieu de l'entretien** devrait être laissé à l'enfant. Dans une étude menée par BAAF sur les meilleures pratiques relatives aux enfants séparés de leur famille d'origine en Europe⁶, un enfant de dix ans a exprimé sa préférence pour un entretien à l'extérieur, au contact de la nature, plutôt qu'enfermé dans une pièce sur une chaise. Il est recommandé par ailleurs d'employer un **ton de voix informel** pour mettre à l'aise l'enfant.

- **Préparer l'enfant à l'entretien.** Dans la même étude sus mentionnée, les enfants ont manifesté le besoin d'être informés au préalable sur la manière dont l'entretien allait se dérouler, par qui il allait être mené, quels sujets allaient être abordés et quel suivi il en sera donné.

- **Adapter la longueur de l'entretien au rythme de l'enfant** (certains nécessitent en effet plus de temps pour réfléchir et s'exprimer) ainsi qu'à son âge, sa maturité et ses conditions psychologiques. Pour réduire le stress que l'enfant peut vivre dans ce genre de situation, il est parfois souhaitable, dans la mesure du possible, de faire plusieurs entretiens de courte durée (2 à 3 entretiens) plutôt qu'un seul trop long. Il est préférable que les personnes qui s'entretiennent avec l'enfant ne changent pas, en vue de ne pas le perturber et de respecter le fait qu'il lui faut du temps pour entrer en confiance avec une personne qui lui est étrangère.

- **Utiliser un langage simple, approprié à l'âge de l'enfant.** Concernant les enfants très jeunes, les professionnels sont souvent moins à l'aise et nécessitent des outils adaptés. Alison Clark et June Statham, deux chercheuses anglaises dans le domaine de l'éducation et la famille ont exploré une méthodologie nommée « Mosaic approach » destinée à écouter les jeunes enfants. Cette méthodologie rassemble plusieurs outils verbaux et visuels aidant les jeunes enfants à exprimer leur point de vue. Ces outils incluent le recours à des caméras et à des activités participatives (construction commune d'objets symbolisant les souhaits de l'enfant concernant sa maison, famille etc). Ces activités visent à mettre en valeur les personnes, les lieux et les événements significatifs pour l'enfant, et lui permettre de partager ses opinions avec les adultes.⁷

- Dans le cas où un enfant a des difficultés à s'exprimer, il est possible de recourir à des **méthodes de questionnement spécifiques**. A cet effet, un outil nommé la question miracle⁸ a été adapté par la médiatrice familiale québécoise Lorraine Filion auprès des enfants sous le nom de « question magique ». Utilisé en matière de séparation/divorce des parents, cet outil convient aussi à la situation de l'enfant séparé de sa famille. Il consiste à permettre à l'enfant de se projeter dans un futur où tous ces problèmes seraient résolus, à quoi ressemblerait sa vie dans ce monde là ? Un guide pour les entretiens d'enfants proposant diverses techniques de questionnement est également proposé dans l'ouvrage « What Children can tell us » publié par l'Institut américain Erikson en 1992.⁹

- Enfin l'enfant peut parfois manifester le besoin que soit présente une personne en qui il a confiance. Dans de tel cas, il convient de veiller à ce que cette personne n'influence pas sa décision/son opinion.

⁶ *Exchanging Visions: Papers on best practice in Europe for children separated from their birth parents*, p. 71-77, BAAF, 1998.

⁷ *Adoption & Fostering*, Volume 29, Number 1, p. 45-56, BAAF, 2005.

⁸ *Services axés sur la famille. Une approche centrée sur la solution*, Insoo Kim Berg, Chapitre 6, p.92-97, Eres, 1998.

⁹ *What children can tell us. Eliciting, interpretation and evaluating critical information from children*, J. Garbarino, F. M.Scott and Faculty of the Erikson Institute, Chapter 9, Jossey-Bass Publisher, 1992.

3.1.3 Le professionnel en charge d'interroger l'enfant peut par ailleurs se trouver confronter à des situations délicates :

- Dans le cas de traumatisme vécu par l'enfant (révélation d'une situation d'abus ou de maltraitance, etc) : la personne responsable de l'entretien ne doit alors pas hésiter à faire recours à d'autres méthodes comme les jeux ou les contes préconisés notamment par l'ouvrage sus mentionné de l'Institut américain Erikson en 1992¹⁰, pour que l'enfant puisse exprimer ses expériences traumatiques. En cas de besoin, il convient de ne pas hésiter à faire appel à un expert (pédo-psychiatre, psychologue pour enfants, pédiatre).

- Dans les situations où l'enfant est en grande souffrance, le recours à des personnes significatives de son entourage peut aussi être envisagé. A cet effet il pourra lui être demandé, à travers un dessin ou la construction d'un arbre généalogique, de désigner les personnes en qui il a confiance et auprès desquelles il se sent rassuré.

3.2 Formulation par l'enfant de son consentement (ou non) à l'adoption

Une fois ce cadre général posé, l'enfant va se trouver dans les meilleures dispositions pour pouvoir s'exprimer librement. Afin qu'il puisse formuler à la fin de l'entretien son consentement (ou non) à l'adoption, d'autres ingrédients devront cependant être ajoutés :

- L'enfant doit être **informé de ce qu'est l'adoption**. A cet effet de nombreuses publications adaptées à l'âge de l'enfant peuvent être utilisées et sont disponibles au Centre de documentation du SSI/CIR¹¹. Il est important d'expliquer à l'enfant dans un langage simple et clair les conséquences que l'adoption aura sur sa vie (rupture des relations avec ses parents d'origine dans le cas d'une adoption plénière par exemple).

- En vue de **ne pas influencer l'enfant** dans le prononcé (ou non) de son consentement à l'adoption, toutes les options possibles doivent lui être présentées de manière objective. A savoir que va-t-il se passer dans le cas où il est adopté et, de même, dans le cas où il ne l'est pas ?

- Il est important que l'enfant puisse **poser toutes les questions qu'il souhaite sur ces nouveaux parents** et obtenir le maximum d'informations sur sa nouvelle famille (Où habitent-ils ? A quoi ressemblent-ils ? Ont-ils déjà des enfants ?). Sur ce point la fiche de formation du SSI/CIR sur la préparation de l'enfant fournit plusieurs pistes intéressantes.¹²

3.3 Prise en compte de l'avis de l'enfant dans la décision finale

- Quelque soit l'opinion de l'enfant, il est important de vérifier si cette dernière reflète ses véritables besoins. En effet, dans certains cas l'enfant peut refuser une adoption à cause de souvenirs douloureux qu'il peut avoir de sa séparation avec ses parents biologiques, il peut aussi être en colère d'avoir été abandonné par une famille ou encore avoir peur de vivre avec des personnes qu'il ne connaît pas. Dans la mesure du possible, le recours à des services de médiation ou des services sociaux peut être nécessaire pour déceler, avec l'enfant, les véritables besoins qui peuvent se cacher derrière ses émotions.

¹⁰ *What children can tell us. Eliciting, interpretation and evaluating critical information from children*, J. Garbarino, F. M. Scott and Faculty of the Erikson Institute, Chapter 8, Jossey-Bass Publisher, 1992. Disponible également en espagnol: *Lo que nos pueden decir los niños: Extraer, evaluar e interpretar la información infantil*, Centro de Publicaciones del Ministerio de Asuntos Sociales, 1993.

¹¹ *Exemples d'ouvrage :*

- *Information about adoption*, New South Wales Department of Community Services, Australia, 1996. This pamphlet is for children, teenagers and young adults who are thinking about being adopted.

- *Nina a été adoptée*, écrit par Dominique de Saint Mars et illustré par Serge Bloch, Editions Calligram, 1996. Livre extrait de la Collection « Ainsi va la vie ».

Pour d'autres exemples, consultez le Centre de documentation du SSI/CIR, <http://www.iss-ssi.org/library/>.

¹² *Preparing the Child for adoption*, Fiche thématique N°26 du SSI/CIR. Disponible à l'adresse suivante: <http://www.iss-ssi.org/2009/assets/files/thematic-facts-sheet/eng/26.Preparation%20of%20the%20child%20eng.pdf>

- Dès le début de l'entretien, il convient dès lors d'être clair avec l'enfant sur le fait que son opinion est importante et fait partie du processus de décision, cependant aucune garantie ne peut lui être donnée que la décision finale suivra son avis. Cette dernière va en effet se baser sur plusieurs avis (rapport du psychologue et du travailleur social, parents biologiques, etc) afin de trouver la solution la meilleure pour son bien être.

- Dans le cas où l'avis de l'enfant n'est pas suivi, prendre le temps de l'informer de la décision qui a été prise à son égard et de lui expliquer les raisons qui ont poussé à ne pas suivre son opinion est essentiel. Cette étape, pour laquelle les Lignes directrices pour la détermination de l'intérêt supérieur de l'enfant du HCR¹³ (p.77) fournissent des orientations pratiques, va pouvoir permettre d'obtenir l'adhésion de l'enfant au projet. Dans le sens inverse, de grandes chances existent pour qu'il le fasse échouer. En effet, le fait que l'enfant sente qu'une décision lui est imposée, parfois par surprise, sans qu'il puisse réagir et sans qu'aucune explication ne lui soit donnée, peut créer chez lui un sentiment de colère et d'injustice et susciter une attitude de résistance face notamment à sa nouvelle famille.

Pour plus d'informations et d'outils de référence sur ce thème, consultez le Centre de documentation du SSI/CIR en inscrivant le mot clé « Child opinion » : <http://www.iss-ssi.org/library/>. Consultez également les divers documents de l'UNICEF relatifs à la participation des enfants : http://www.unicef.org/adolescence/index_documents.html et [http://www.unicef.org/adolescence/cypguide/files/Child_and_Youth_Participation_Guide\(1\).pdf](http://www.unicef.org/adolescence/cypguide/files/Child_and_Youth_Participation_Guide(1).pdf).

PART 4. CONCLUSION

In this brief presentation, we aimed to provide you with a brief overview of the international framework requiring that a child be consulted in the adoption process and his/her consent should be obtained.

In the second part, we then examined how these international principles are translated into national laws. We used Norway as a good example, where the views of children as young as 7 are solicited before any decisions are made about the child's personal situation. We also noted that the requirement to have the child's consent is essential and that additional safeguards include relevant professionals explaining the effects of adoption, child being able to be personally heard, verification process etc

In the third part, we discussed how the international principles can then be implemented in practice. We highlighted issues to consider when, exploring the views of the child, process of obtaining the (non)consent of the child and incorporating the child's view in the final decision. We have tried to emphasise the need to ensure that the child is actively and genuinely consulted in the adoption process as means on ensuring the success of the creation of a filiation tie.

We have decided to leave you with this testimony of young person's view of how a practitioner effectively worked with him, actively listened to him and gave him the tools to 'make sense of his past and get some sense of direction'

She didn't preach to me. I could open up to her. She made my life like a road and said 'Right, let's walk down this road together and tell me what you come to.' It was then me that had to come to it and I could get there in my own time.¹⁴

¹³ UNHCR Guidelines on Determining the Best Interests of the Child, p.77. Disponible à l'adresse suivante: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=48480c342>

¹⁴ Adoption and Fostering, vol 29(1), Spring 2005, Special edition on listening to children, at 43

**CHALLENGES IN ADOPTION PROCEDURES IN EUROPE:
ENSURING THE BEST INTERESTS OF THE CHILD**

PRESENTATION

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The Consent of the Birth Parents to the Adoption

Introduction

The position of the birth parents of a child to be adopted is one of the most important and controversial aspects of any adoption process. This applies especially to the circumstances in which the need for their consent will be dispensed with. The issue of consent is addressed by Article 5 of the Revised European Convention on the Adoption of Children 2008, and its provisions reflect the fact that most forms of adoption ‘terminate the legal relationship’¹ between the child and his family.

According to Article 5, *inter alia*, the consent of the ‘mother and father’ of the child to be adopted is required before an adoption can be granted.² The need for consent should be dispensed with only ‘on exceptional grounds determined by law’.³ The consent of a parent without parental responsibility is not required under the Convention,⁴ although under the original 1967 Convention an unmarried father’s agreement was not required even if he had parental responsibility.⁵ It should be noted that Article 18 preserves states’ freedom to make provision ‘more favourable to the adopted child’, although if this provision were interpreted too broadly, it would deprive much of Article 5 of any effect.

I want to examine some aspects of Article 5, and I hope you will forgive me for doing so with particular reference to English Law. After introducing the English legislation, I will discuss the circumstances under which a court will dispense with the need for parental consent in England and Wales, and examine some of the procedural hurdles facing birth parents seeking to oppose adoption orders. I will then talk about the legal position of the parent (specifically the father) without parental responsibility, as regards consent to and knowledge of the adoption process.

¹ European Convention on the Adoption of Children (Revised) 2008, Article 11(1).

² *Ibid*, Article 5(1)(a). The consents must have been ‘given freely’: *ibid*, Article 5(2). Cf the English Adoption & Children Act 2002, s 52(5), which defines a relevant consent as one that is ‘given unconditionally and with full understanding of what is involved’. Consent must not have been withdrawn (European Convention on the Adoption of Children (Revised) 2008, Article 5(1)), and this issue is considered further below.

³ *Ibid*, Article 5(3). This provision has been cited by the European Court of Human Rights. See, *eg*, *Eski v Austria* (Application No 21949/03) [2007] 1 FLR 1650 [37].

⁴ European Convention on the Adoption of Children (Revised) 2008, Article 5(4).

⁵ European Convention on the Adoption of Children 1967, Article 5(1)(a).

England and Wales' Focus on Child Welfare

Domestic adoption in England and Wales is currently governed by the Adoption and Children Act 2002. The Act must be read in the context of the Government's policy that adoption should be used as a means of finding a permanent home for children who might otherwise 'drift' through compulsory care provided by the state.⁶ This reflects a general trend across Europe and beyond towards seeing adoption as a mechanism benefitting children rather than childless couples.⁷ But the UK Government's policy raised concerns about how the interests of biological parents could be safeguarded under the 2002 Act.⁸

It is significant that child welfare (or the best interests of the child) is declared to be the 'paramount' consideration in adoption decisions under the English 2002 Act.⁹ The Revised Adoption Convention also places emphasis on the best interests of the child.¹⁰ Nevertheless, Article 4 appears to regard welfare as a necessary, rather than a sufficient, condition for the making of an adoption order,¹¹ although Article 18 must again be taken into account. By contrast, the English Act creates a risk that child welfare will be regarded as a sufficient condition for an adoption order to be justified.

Previously, child welfare was merely the 'first' consideration under the English Adoption Act 1976.¹² The change introduced in the 2002 legislation ostensibly brought English Law into line with the UN Convention on the Rights of the Child.¹³ That said, the apparent compatibility is undermined by the fact that the House of Lords equated the words 'paramount' and 'sole' decades ago.¹⁴ This restrictive approach remains influential¹⁵ despite the jurisprudence of the European Court of Human Rights.¹⁶ The interpretation means that, in theory at least,¹⁷ the interests of the birth parents are considered only so far as that is consistent with the best interests of the child.

⁶ Secretary of State for Health, *Adoption: A New Approach* (Cm 5017, 2000). However, step-parent adoption is also significant. Twenty per cent of adoption orders in England and Wales in 2005 were made in favour of step-parents (Department for Constitutional Affairs, *Judicial Statistics Annual Report 2005* (Cm 6799, 2006), 71). The Adoption & Children Act 2002 introduced the concept of 'special guardianship' (inserting ss. 14A-14F into the Children Act 1989), which may reduce the number of step-parent adoptions. A special guardianship order confers parental responsibility upon the applicant and allows him to exercise it to the exclusion of other people. This could secure a step-parent's relationship with the child without severing the legal ties between the child and his biological parent.

⁷ I. Schwenzer, 'Tensions between Legal, Biological and Social Conceptions of Parentage' in I. Schwenzer (ed), *Tensions between Legal, Biological and Social Conceptions of Parentage* (Intersentia, 2007), 20.

⁸ See, eg, S. Harris-Short, 'New Legislation: The Adoption and Children Bill – A Fast Track to Failure?' (2001) 13 *Child and Family Law Quarterly* 405.

⁹ Adoption and Children Act 2002, s 1(2).

¹⁰ European Convention on the Adoption of Children (Revised) 2008, Article 4(1). Article 4(2) emphasises the 'importance of the adoption providing the child with a stable and harmonious home'.

¹¹ Article 4(1) provides that '[t]he competent authority shall *not* grant an adoption *unless* it is satisfied that the adoption will be in the best interests of the child' (my emphasis).

¹² Adoption Act 1976, s 6.

¹³ Article 21 of the UNCRC provides that the best interests of the child shall be the 'paramount' consideration in an adoption process.

¹⁴ *J v C* [1970] AC 668. The so-called 'paramountcy principle' is at the centre of much of English child law. See, in particular, section 1 of the Children Act 1989.

¹⁵ For academic criticism, see, eg, J Eekelaar, 'Beyond the Welfare Principle' (2002) 14 *Child & Family Law Quarterly* 237; S. Choudhury & H Fenwick, 'Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle under the Human Rights Act' (2005) 25 *Oxford Journal of Legal Studies* 453.

¹⁶ See, especially, *Johansen v Norway* (Application No 17383/90) (1997) 23 EHRR 33. For an account of the difficult relationship between the welfare principle and Article 8, see, eg, D. Bonner, H. Fenwick & S. Harris-Short, 'Judicial Approaches to the Human Rights Act' (2003) 52 *International & Comparative Law Quarterly* 549.

Dispensing with Parental Consent in England and Wales

Against this background, I want to consider the circumstances under which the requirement for consent to adoption, which applies to parents with parental responsibility¹⁸ and legal guardians,¹⁹ may be dispensed with under the 2002 Act. Two grounds are set out in the Act, and the decision on whether or not to dispense with consent is taken after it has been found that adoption would be in the best interests of the child.

The first ground on which consent can be dispensed with, uncontroversially, is where ‘the parent or guardian cannot be found or is incapable of giving consent’.²⁰ This corresponds to the first example of a valid ground provided in the Revised Adoption Convention’s Explanatory Report.²¹

The second ground is much more difficult, since it means that in England and Wales parental wishes can be overridden where ‘the welfare of the child requires the consent to be dispensed with’.²² Under the old Adoption Act 1976, if the relevant parent could be found and was capable of giving agreement,²³ it had to be shown that he was withholding consent ‘unreasonably’,²⁴ or had mistreated the child in some way.²⁵ The 2002 provisions have the potential to conflate the question whether adoption is in the best interests of the child and whether parental consent should be dispensed with, in substance setting down a single welfare-based test.²⁶

In my view, it is difficult for child welfare to constitute an ‘exceptional ground’ for the purposes of the Revised Convention, since welfare is evidently the most important factor in every adoption decision. The second example of a ground for dispensation set out in the Convention’s Explanatory Report is that consent is being refused ‘for reasons which may be regarded as a misuse of [the] right to do so’.²⁷ This is consistent with the grounds contained in the English Adoption Act 1976, and is arguably narrower than the general welfare-based ground contained in the 2002 Act.

It is possible that the circumstances in which a court could conceivably find that a child’s welfare required a dispensation would inevitably constitute ‘exceptional grounds’ for the purposes of the Revised Convention. But the lack of distinct circumstances in which parental consent can be dispensed with may increase the likelihood of such a finding.

¹⁷ For an argument that the welfare principle provides a ‘smokescreen’ behind which the real basis of a decision can be hidden, see H Reece, ‘The Paramountcy Principle: Consensus or Construct?’ (1996) 49 Current Legal Problems 267, 296–297.

¹⁸ Adoption and Children Act 2002, s 52(6).

¹⁹ *Ibid*, ss. 47(2), 47(4).

²⁰ *Ibid*, s 52(1)(a).

²¹ European Convention on the Adoption of Children (Revised): Explanatory Report, [34(a)].

²² Adoption and Children Act 2002, s 52(1)(b).

²³ Adoption Act 1976 s 16(2)(a).

²⁴ *Ibid*, s 16(2)(b).

²⁵ The mistreatment-based grounds were that the parent had ‘persistently’ failed without reasonable cause to discharge his parental responsibility (*Ibid*, s 16(2)(c)), and that he had abandoned, neglected, (s 16(2)(d)) or persistently (16(2)(e)) or seriously (16(2)(f)) ill-treated, the child.

²⁶ See, eg, A. Bainham, *Children: The Modern Law* (3rd ed Family Law, 2005), p. 295. In doing so, they risk violating what Professor Elizabeth Cooke has called the ‘central principle’ of UK child law that ‘a simple welfare test is...inadequate to justify the compulsory removal of children from their parents’: E Cooke, ‘Dispensing with parental consent to adoption - a choice of welfare tests’ (1997) 9 Child & Family Law Quarterly 259, 263.

²⁷ European Convention on the Adoption of Children (Revised): Explanatory Report, [34(b)].

Moreover, while it had been hoped that the use of the word ‘requires’ in the 2002 Act might result in a higher standard of welfare test being applied,²⁸ the Court of Appeal has refused to apply an ‘enhanced welfare test’.²⁹ It did emphasise the need to consider the child’s welfare throughout his life, reflecting an ‘extended meaning’³⁰ of welfare that was expressly written into the legislation for the first time.³¹ But this is unlikely to render welfare an ‘exceptional ground’ for the purposes of the Revised Convention.

Professor Kerry O’Halloran argues that in France and throughout much of the rest of Europe, ‘the adoption experience is virtually entirely a consensual process’.³² In England and Wales, by contrast, it seems that once adoption is considered to be in the best interests of the child, it will follow almost automatically that parental consent should be dispensed with.³³

Procedural Hurdles

The interests of the birth parents in England and Wales are further prejudiced by procedural requirements, so that the test for dispensing with consent is sometimes omitted at the final stage of the adoption process. The parents must apply for leave to oppose the making of a final adoption order where the child has been placed with prospective adopters by an adoption agency.³⁴ Thankfully, placement will occur without consent³⁵ only by court order³⁶ and where a threshold of ‘significant’ harm to the child has been passed.³⁷ This gives some protection to the interests of the parents, as does the requirement to satisfy the child welfare and dispensation tests at the placement order stage.³⁸ However, the parents must apply for leave in order to have a placement order revoked,³⁹ and the limited circumstances in which leave is granted significantly undermine this protection.

²⁸ L. Davis, ‘Adoption and Children Act 2002 – Some Concerns’ (2005) 35 Family Law 294.

²⁹ *SB v County Council* [2008] EWCA Civ 535, [127]. At the same time it opined that the word ‘requires’ has a ‘connotation of the imperative’ (*ibid*, [125]) and gives effect to the balancing exercise required following the case law of the European Court of Human Rights. This reasoning is somewhat unconvincing and inconsistent.

³⁰ *Re C (A Child) (Adoption: Duty of Local Authority)* [2007] EWCA Civ 1206, [2008] 1 FLR 1294, [18] (Arden LJ).

³¹ Adoption & Children Act 2002, s 1(4)(c). See also s 1(4)(f) on the need to consider the child’s relationship with relatives.

³² K. O’Halloran, *The Politics of Adoption: International Perspectives on Law Policy & Practice* (2nd ed Springer, 2009), 110. Similarly, in a summary covering several European jurisdictions and others, Professor Ingeborg Schwenzer concludes that the refusal of parental consent must positively ‘endanger’ the interests of the child before it can be dispensed with: I. Schwenzer, ‘Tensions between Legal, Biological and Social Conceptions of Parentage’ in I. Schwenzer (ed), *Tensions between Legal, Biological and Social Conceptions of Parentage* (Intersentia, 2007), 23.

³³ For further discussion of this issue, see S. Harris-Short, ‘Making and Breaking Family Life: Adoption, the State, and Human Rights’ (2008) 35 Journal of Law & Society 28, 36-38.

³⁴ Adoption & Children Act 2002, s 47(3), s 47(5).

³⁵ Placement can also occur with consent, in which case a placement order is not required: Adoption & Children Act 2002, s 19. A mother is unable to give a valid consent of any kind until six weeks after the child’s birth: Adoption & Children Act 2002, s 52(3). Cf European Convention on the Adoption of Children (Revised) 2008, Article 5(5). Placement with consent has been termed a ‘fast track’ adoption procedure: see, eg, *Re C (A Child) (Adoption: Duty of Local Authority)* [2007] EWCA Civ 1206, [2008] 1 FLR 1294, [9] (Arden LJ). The parents with parental responsibility can provide advance consent to the adoption order at the same time: Adoption & Children Act 2002, s 20.

³⁶ Adoption & Children Act 2002, s 18(1).

³⁷ Under section 21(2) of the Adoption & Children Act 2002, a placement order can be made if the child is already subject to compulsory state care or if the criteria for such care are met. These criteria, based on significant harm either currently or in the future, are defined in Children Act 1989, s 31(2). The relevant harm must be attributable to the parents’ failure to provide reasonable care or to control the child. A placement order can also be made where the child has no parent or guardian: Adoption & Children Act 2002, s 21(2)(c).

³⁸ Adoption & Children Act 2002, s 21(3).

³⁹ *Ibid*, s 24(2)(a).

In England and Wales, the withdrawal of consent is ineffective once an application for a final adoption order has been made,⁴⁰ and the leave of the court is required where the parents have given consent to placement⁴¹ or adoption⁴² and now wish to oppose the making of that order. Article 5(1) of the Revised Convention states that parental consent must not have been withdrawn before an adoption is allowed, although there is room for each state to determine its own procedure.⁴³ Indeed, the European Court of Human Rights has noted the diversity in provision for withdrawing consent across the contracting parties.⁴⁴

In England and Wales, where leave is required, it will be given only where the court is 'satisfied that there has been a change in circumstances' since either the original consent was given or the placement order was made.⁴⁵ The courts have thus far taken a restrictive approach, and emphasised that they retain a discretion on the question of leave even where a relevant change has been found.⁴⁶ Where leave is required and refused, the adoption is treated as being unopposed and there is no need even to dispense with consent. This is particularly problematic where the original placement for adoption occurred without parental consent.

Consent and the European Convention on Human Rights

The English provisions on parental consent to adoption and its related procedural hurdles are potentially open to challenge under Article 8 of the European Convention on Human Rights, which protects the right to respect for private and family life.⁴⁷ In *Görgülü v Germany* the European Court of Human Rights emphasised that the severance of family ties could be justified only in 'very exceptional circumstances'.⁴⁸

That said, the European Court's attitude to adoption has been described as 'rather ambiguous'.⁴⁹ Whether an adoption against parental wishes breaches Article 8 is highly dependent on the facts of the case.⁵⁰ The margin of appreciation allocated to states plays a pivotal role,⁵¹ and the extent of the child's relationship with the biological parent in question may be a crucial factor.⁵²

⁴⁰ *Ibid*, s 52(4).

⁴¹ *Ibid*, s 47(5).

⁴² *Ibid*, s 47(3).

⁴³ European Convention on the Adoption of Children (Revised): Explanatory Report, [28].

⁴⁴ *Kearns v France* (Application No 35991/04) [2008] 1 FLR 888, [77]. The margin of appreciation is therefore important: see *VS v Germany* (Application No 4261/02), (unreported) 22 May 2007 (ECtHR).

⁴⁵ Adoption & Children Act 2002, s 47(7) (on opposing a final order), s 24(3) (on revoking a placement order).

⁴⁶ While it refused to impose a requirement of a 'significant' change in the circumstances in *Re P (a child) (adoption order: leave to oppose making of adoption order)* ([2007] EWCA Civ 616), in *Re M (children) (placement order)* ([2007] EWCA Civ 1084) the Court of Appeal refused to grant a mother leave to revoke a placement order even though she had successfully addressed her difficulties with alcohol and drugs. It should be noted that the courts have adopted a different approach to the relevance of child welfare in leave decisions, depending on whether proceedings are being initiated, for technical reasons brought about by section 1(7) of the Adoption & Children Act 2002. This is evidenced by *Re M* and *Re P*.

⁴⁷ Some commentators find it difficult to square the notions of human rights and adoption at all. See, eg, A. Bainham, 'Arguments about Parentage' [2008] Cambridge Law Journal 322, 350.

⁴⁸ (Application No 74969/01) [2004] 1 FLR 894, [48]. See also *Johansen v Norway* (Application No 17383/90) (1997) 23 EHRR 33.

⁴⁹ J. Herring, *Family Law* (4th ed Pearson, 2009), 692.

⁵⁰ R. Bailey-Harris 'Case Reports: Adoption: Human Rights' (2007) 37 Family Law 481.

⁵¹ In *Eski v Austria*, for example, the majority concluded that 'the domestic courts were in a better position in striking a fair balance between the interests involved' in the adoption in question (Application No 21949/03) [2007] 1 FLR 1650, [42]), and found no violation of Article 8. See also *Söderbäck v Sweden* (Application No 24484/97) (2000) 29 EHRR 95; *Cheplev v Russia* (Application No 58077/00) (2008) 47 EHRR 37. The dissenting judges in *Eski*, on the other hand,

Whether or not the 2002 Act is compatible with the Convention on Human Rights, once an adoption agency in England and Wales becomes involved in a child's life,⁵³ the birth parents will have an undesirably difficult time if they seek, as many understandably do,⁵⁴ to oppose the adoption.

The Consent of the Unmarried Father without Parental Responsibility

I now want to examine the position of the unmarried father without parental responsibility (or 'PR'). He is protected by Article 5 of the Revised Convention only if he has been given 'the right to consent to an adoption' under the relevant domestic law.⁵⁵ This somewhat circular provision does little to safeguard his interests. Moreover, as a recent case dramatically demonstrated, his interests may be given equally little weight in the English context. The case of *Re C (A Child) (Adoption: Duty of Local Authority)*⁵⁶ concerned a mother who had become pregnant after a one-off sexual encounter, and made it clear that she wished the resulting child to be adopted shortly after birth. She kept the pregnancy secret from biological father, who did not have PR, and refused to identify him.⁵⁷ The Court of Appeal ordered the local authority charged with the child's care and eventual adoption not to take any steps to inform the father of the child's birth or adoption. The priority was to find a permanent home without any further delay, for the child, who was four months old by the time of the hearing.

The Revised Adoption Convention's Explanatory Report emphasises that the lack of a consent requirement relating to a parent without PR 'does not mean that such a parent should not be informed, as far as possible, of the adoption proceedings'.⁵⁸ In *Re C*, however, Arden LJ was to some extent influenced by the lack of a consent requirement relating to the father. She regarded the case as 'exceptional',⁵⁹ and it is unclear why she did so. It may have been a case where the mother did not disclose the pregnancy to the father simply because she wanted nothing further to do with him.

If the father in *Re C* had possessed parental responsibility, of course, his consent to the adoption would have *prima facie* been required. There is divergence across the legal systems in Europe on the circumstances in which a father may obtain PR,⁶⁰ with around half of the European jurisdictions automatically allocating it to both parents, regardless of their relationship.⁶¹

considered it fatal that the domestic court had overruled the applicant's lack of consent to his biological child's adoption by her step-father without seeking to achieve agreement between the parties.

⁵² J. Herring, *Family Law* (4th ed Pearson, 2009), 692-93.

⁵³ Where the child has not been placed by an adoption agency, for example because the adopter is a step-parent with whom the child already lives, leave to oppose the adoption is not required and the consent must either be provided or dispensed with under the principles outlined earlier: Adoption & Children Act 2002, ss. 47(2)(a), 47(2)(c).

⁵⁴ K. O'Halloran, *The Politics of Adoption: International Perspectives on Law Policy & Practice* (2nd ed Springer, 2009), 173.

⁵⁵ European Convention on the Adoption of Children (Revised) 2008, Article 5(4).

⁵⁶ [2007] EWCA Civ 1206. For a more detailed analysis of the case, see B Sloan, '*Re C (A Child) (Adoption: Duty of Local Authority)* – Welfare and the rights of the birth family in "fast track" adoption cases' (2009) 21 *Child & Family Law Quarterly* 87.

⁵⁷ It was likely that he could have been identified if independent enquiries were made.

⁵⁸ European Convention on the Adoption of Children (Revised): Explanatory Report [36].

⁵⁹ [2007] EWCA Civ 1206, [24].

⁶⁰ I. Schwenzer, 'Tensions between Legal, Biological and Social Conceptions of Parentage' in I. Schwenzer (ed), *Tensions between Legal, Biological and Social Conceptions of Parentage* (Intersentia, 2007) 12-13.

⁶¹ J.M. Scherpe, 'Establishing and Ending Parental Responsibility: A Comparative View' in R. Probert, S. Gilmore & J. Herring (eds), *Responsible Parents and Parental Responsibility* (Hart, 2009), 59. The Commission on European Family Law recommended such an approach in its Principles on Parental Responsibilities: K. Boele-Woeki *et al* (eds) *Principles of European Family Law Regarding Parental Responsibilities* (Intersentia, 2007), Principle 3:8.

In England and Wales, however, a biological father who is not married to the mother of a child does not currently obtain parental responsibility automatically. The most common way for him to obtain it is to be registered on the child's birth certificate.⁶² Most unmarried fathers in England and Wales are now so registered,⁶³ and reform is being undertaken to make such registration almost mandatory.⁶⁴ But for the time being, biological fathers like the one in *Re C* can be left ignorant of their child's adoption. This is generally objectionable and inconsistent with the position in Germany, another jurisdiction where PR is not allocated automatically.⁶⁵

The result in *Re C* was arguably mother-centred,⁶⁶ with potentially detrimental consequences for both the father and the child.⁶⁷ The lack of a consent requirement relating to some unmarried fathers both illustrates and perpetuates the idea that the relationships of such individuals with their biological children are presumed to be less important than those of birth mothers.⁶⁸ I would suggest that a more balanced approach between the rights of mothers, fathers and children is necessary.

Conclusion

Allow me to conclude. I have argued that the circumstances in which parental consent will be dispensed with and related procedural requirements may leave doubts as to English adoption law's compatibility with Article 5 of the Revised Convention on the Adoption of Children because of a disproportionate focus on child welfare, even if English Law can formally be saved by Article 18. But I have also highlighted an area where domestic law is more clearly in line with the Convention, and yet there is potential for injustice. Given the increasing numbers of children born outside of wedlock, perhaps it is time to give more recognition to the parent without parental responsibility in the adoption process, both domestically and on a European level.

⁶² Children Act 1989, s 4(1)(a). He may also enter a parental responsibility agreement with the mother (s 4(1)(b)) or have PR conferred upon him by court order (s 4(1)(c)).

⁶³ Only seven per cent of birth registrations are performed by one individual: Office for National Statistics & Department for Work & Pensions, *Joint birth registration: promoting parental responsibility* (Cm 7160, 2007), [2].

⁶⁴ Welfare Reform Act 2009, schedule 6. See also Department for Children, Schools & Families, *The Registration of Births (Parents Not Married And Not Acting Together) Regulations 2010: A Consultation* (2009).

⁶⁵ There, the consent to the adoption of the biological father is *prima facie* required even if he does not have PR, unless the mother fails to identify him such that he cannot be involved in the adoption procedure. See N. Dethloff & C. Ramser, 'Tensions between Legal, Biological and Social Conceptions of Parentage in German Law' in I. Schwenzer (ed), *Tensions between Legal, Biological and Social Conceptions of Parentage* (Intersentia, 2007), 205-07.

⁶⁶ This is in spite of Arden LJ's explicit intention of taking a 'child-centred' approach: [2007] EWCA 1206, [15]. The impression that the case was mother-centred is reinforced by Thorpe LJ in his judgment in *Re C*, since he discussed the French right to an anonymous birth. For an analysis of the French law, see, eg, N. Lefaucheur, 'The French "Tradition" of Anonymous Birth: The Lines of Argument' (2004) 18 International Journal of Law, Policy and the Family 319. See also *Kearns v France* (Application No 35991/04) [2008] 1 FLR 888 (ECtHR). Thorpe LJ also expressed his anxiety at the prospect that the court should 'exacerbate the mother's difficulties': [2007] EWCA Civ 1206, [80].

⁶⁷ It is worth pointing out that the result was potentially damaging for the child in *Re C*. In the course of the Court's haste to find her a permanent home, she lost what may have been her best chance to find out about her biological origins. That chance is considered particularly important in the light of Article 8 of the United Nations Convention on the Rights of the Child and now Article 22 of the European Convention on the Adoption of Children (Revised) 2008.

⁶⁸ The case law of the European Court of Human Rights on 'family life' for the purposes of Article 8 has not always improved matters in this regard: see, eg, *B v United Kingdom* (Application No 39067/97) [2000] 1 FLR 1. For a discussion of the recent case law of the European Court of Human Rights on this issue, see R. Horgan and F. Martin, 'The European Convention on Adoption 2008: Progressing the Children's Rights Polemic' [2008] International Family Law 155, 159-160.

Joint Council of Europe and European Commission Conference

CHALLENGES IN ADOPTION PROCEDURES IN EUROPE: ENSURING THE BEST INTERESTS OF THE CHILD

PRESENTATION

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Ukraine

Adoptive parents: changing the legal approaches - Ukrainian tendencies

In 1991, Ukraine proclaimed itself an independent state. The major changes resulting from this have become the foundation for the start-up process of establishing the new role of the child.

There are more than 9 million children in Ukraine. According to official statistics, more than 100,000 of them are deprived of parental care. In particular there are orphans (who do not have parents) and other children deprived of parental care (whose parents are alive). This represents approximately 1% of the total number of children in the country. This number increases by between 10,000 to 12,000 every year. Among them the number of orphans is relatively small with the majority of children (70%) being so-called “social orphans”, meaning their parents are still alive. Besides this, up to 6,000 to 7,000 parents are deprived of their parental rights every year. Nearly 2,000 children become orphans immediately after their birth because their parents abandon them.

Adoption is considered to be one of the most acceptable ways of caring for children. In recent times, the number of new laws concerning adoption have been enforced. The general order and conditions of adopting children deprived of parental care are defined by: the Family Code of Ukraine (2002) and laws “On Protection of the Childhood” (2001); “On Providing for Organizational and Legal Conditions of Social Protection of Orphans and Children Deprived of Parental Care” (2005); “On the Basis of Social Protection of Homeless Citizens and Neglected Children” (2005), etc.

During the process of amending the adoption legislation, one of the main questions was who had the right to become an adoptive parent and consequently which persons may not be eligible to adopt children.

During the time when Ukraine was part of the Soviet Union, the list of demands for adopters was minimalistic. According to the law, a person only needed to meet three requirements to adopt, these were:

- age of majority;
- legal capacity;
- being not deprived of parental rights.

Since the adoption of the new Ukrainian Constitution in 1996, the process of substantial changes has begun. The retrospective analysis of Family Law legislation shows the existence of two main tendencies in its development:

- the general elaboration of the rules concerning the determination of the person of the adoptive parent and impetuous enlargement of normative rules connected to the adoptive parent's characteristics (the figure of adoptive parent);
- raising the requirements of the adoption candidates.

In 1996, four legislative acts were adopted, stipulating new rules concerning adoptive parents.

Therefore, besides the basic requirements in these new legislative acts, new requirements have been established.

The new legislation stipulates seventeen new requirements for the candidature of adoptive parents. Almost all of them are invariable, meaning that they cannot be changed or ignored by the court in a particular case.

The nature of respective requirements is different. According to legislative analysis, the respective requirements can be classified in five groups as follows:

1. general personal characteristics of the adoptive parent;
2. attitude of the adoptive parent to the child and upbringing of children in general;
3. psychological and physical health of the adoptive parent;
4. financial situation of the adoptive parent;
5. ability to provide psychological and physical security for the child.

Therefore, the **following requirements and restrictions for candidates to become adoptive parents can be named:**

- A. *General personal characteristics of the adoptive parent. Adoptive parents cannot be:***
- persons less than 21 years old, except when the adopter is a relative of the child;
 - persons who are less than 15 years older than the child;
 - persons who are forty-five years older than the child;
 - same sex couples;
 - persons who are not married to each other. Nevertheless, if such persons live as a family, the court may permit them to adopt a child;
 - foreigners who are not married, except when the foreigner is a relative of the child.
- B. *Requirements to attitudes of the adoptive parent to the child and upbringing of children in general. Adoptive parents cannot be:***
- persons whose interests are contrary to those of the child;
 - persons deprived of parental rights if those rights were not updated;
 - persons who were adopters (guardianship, wardship, foster parents, parents and educators) of another child, but adoption was revoked or declared invalid (custody taken away, care or activities of a family or child in family-type homes) due to their own fault.
- C. *Requirements regarding psychological and physical health of the adoptive parent. Adoptive parents cannot be:***
- persons limited in capacity and declared incapable;
 - persons who are registered or require special treatment in a psychiatric establishment;
 - persons who are affected by a disease, included in the list approved by the Ministry of Health of Ukraine.
- D. *Requirements regarding the financial situation of the adoptive parent. Adoptive parents cannot be:***
- persons who have no permanent residence;
 - persons who have no permanent income.
- E. *Requirements regarding the ability to provide psychological and physical security to the child. Adoptive parents cannot be:***
- alcohol or drugs addicted persons;

- persons who are registered or require special treatment in psychiatric establishment;
- persons who were sentenced for crimes against: life and health, honour and dignity, sexual freedom and sexual integrity of a person, public safety, public order and morality and other crimes as stipulated in the Criminal Code of Ukraine.

Nevertheless, not all the legislative changes stipulating stricter requirements to the adoptive parents were indisputable. Some brought about strong arguments. Probably the most serious problems concerned the new rule inculcated into the Family Code in 2008 on the difference between the age of a child and adoptive parents.

In 2008, an amendment was made to Article 211 of the Family Code of Ukraine, which established that “the difference in age between the adopter and the child cannot be greater than forty-five years”.

Upon the enforcement of this amendment and the above-mentioned restriction, the Commissioner for Human Rights of Ukraine appealed on 5 August 2008, to the Constitutional Court of Ukraine with the constitutional appeal to recognise the unconstitutional character of the respective provisions.

The Commissioner emphasised that today in Ukraine about 103,000 orphans and children deprived of parental care are without family care. In 2007 only 3,434 were adopted. The Commissioner also stressed that instead of doing the maximum to enable adoption, the new Family Code of Ukraine had become an obstacle to the realisation of children's rights to education in the family circle.

In practice, this restriction means that 45-year-old men and women are prohibited from adopting new-born children, 46-year-olds from adopting children under 2 years, etc. However, it is generally accepted that adopters of this age are more responsible and morally ready for child-rearing under appropriate conditions. According to statistics, almost 130,000 women and men from 45 to 49 years of age have never been married and 174,000 of persons of this age are widows or widowers. Thus, the introduction of amendments to the Code prevents them from exercising this right.

It is widely known that the ex-counsellor of Germany, Gerhard Schroeder, has adopted two children from Russia. The age difference between the children and the adopter constitutes 56 and 61 years. According to Ukrainian legislation such adoption would have been impossible despite the fact that the adopter has all the preconditions to take the child into the family, and his wife falls within the stipulated age to adopt.

The Commissioner also considered it totally unacceptable that a situation where one spouse has the right to adopt, and the other one, through this legislative provision, does not have it, deprives both spouses of the right to create a family. Furthermore, if the difference between one spouse, a mother and child is under the age difference,

and the other spouse where the difference of age exceeds 45 years, the adoption becomes impossible, which hinders the full implementation of the family members of their rights and responsibilities.

Ignoring the arguments of the Commissioner for Human Rights, the Constitutional Court of Ukraine delivered a judgment on 3 February 2009 whereby the mentioned age restriction for adoptive parents was recognised constitutional. According to the Constitutional Court, the decision stipulating the requirements to the age difference between the adoptive parent and a child lies within the competence of the Parliament of Ukraine as the only legislative body. This competence is caused by the responsibility for the fate of orphans and children deprived of parental care according to principles of relations between parents and children established in the Constitution of Ukraine (Articles 51, 52).

It is important to mention that the judgment of the Constitutional Court was not delivered unanimously. Three of the eighteen Constitutional Court Judges made minority reports on this issue of not agreeing with the judgment of the Court.

Besides the establishment of the number of requirements, the legislation also stipulates the rules of *preference right for adoption*. They become topical when different persons want to adopt the same child. According to Article 213 of the Family Code, if several people wish to adopt the same child, preference for adoption is given to citizens of Ukraine:

- 1) in whose family the child is brought up;
- 2) where a spouse is the child's mother/father;
- 3) who adopts several children who are brothers and sisters;
- 4) who is a relative of the child.

Reasons for raising the requirements and elaboration

The fast enlargement of legislative prescriptions concerning the candidacy of adoptive person and the raising and the elaboration of requirements stipulated in the legislation for the adopters, have various reasons.

These reasons are of a positive and negative nature.

The *positive reasons* there can be named as follows:

1. Raising the requirements which the adopter has to meet is meant to guarantee the children's rights, provide child care, eliminate any possible threat to a child's life, one's mental or physical health when handing over the child to a new family.

2. The other positive factor is that Ukraine makes essential efforts to create legislation which would answer the needs of a modern democratic state. The Family legislation of Ukraine does not contain any discrimination norms and meets all the European standards. On 28 April 2009, Ukraine signed the revised European Convention on the adoption of children ETS-202 (Strasbourg 27 November 2008). On this point, the appraisal of the requirements for the candidacy of the adoptive persons meets the general tendencies of securing the best interest of the child.

However, there are some *negative factors* which influence the development of the legislation:

1. First of all, the political influence has to be mentioned. Politicians at different levels often speculate on the idea of giving the preference to national adoption rather than international adoption. Not taking into account the real needs of the child, they protest against international adoption using slogans such as “We won’t give up Ukrainian children to foreigners!” etc. This question becomes popular today, a few months before the upcoming presidential elections. This year, the new legislative draft has been passed to the Parliament in which the moratorium for international adoption is stipulated.
2. There is one more negative factor.

Upon the declaration of its independence, Ukraine began the opening-up process towards Europe. This had results also in the field of adoption. From the beginning of the 1990’s, foreigners from different countries began to apply for adoption of Ukrainian children. Some organisations and separate persons have also appeared, willing to render commercial services in the sphere of adoption.

Adoption in Ukraine can be accomplished exclusively by governmental agencies which have the respective competence. Any intermediary or commercial activity directed at adoption, guardianship, patronage or upbringing to families of the citizens of Ukraine, foreigners or people without citizenship is forbidden (Article 216, the Family Code of Ukraine). This is the reason why Ukraine has not ratified the 1993 Hague Convention on inter-country adoption. The inter-country adoption legislation of Ukraine does not coincide with Article 32 of the Convention, which foresees participation of private intermediary organisations in international adoption.

However, in practice the process of international adoption has a commercial nature. It is widely known that Ukraine has become the donor of international adoption. Thus many mediators offer their services in this process. The General Prosecutor of Ukraine has made repeated reports on the fact that the information on adoption has become a tool of trade. There were a few resonant cases connected to illegal international adoption. For example in 1992 a criminal investigation took place into

the case where 124 Ukrainian orphans were brought to the USA for medical treatment and 56 of them did not return and their whereabouts are unknown.

The Ukrainian society is very worried about such situations. Every instance of children's rights violation, especially connected with international adoption, has a wide resonance.

Financial interest of certain persons or organisations makes it difficult to confirm equity and transparency in the process of adoption.

Therefore, legislative restrictions and special requirements stipulated in respective acts on adoption are meant to secure the child's safety and social interests. Yet Ukraine is making great efforts to make legislative norms work in practice and guarantee the observance of children's rights.

To conclude, it can be stated that Ukraine is now experiencing a fast growth of quality legislation on adoption. First of all, the legal novelties concern the person of the adoptive parent. Implementation of new requirements which an adopter has to meet are the result of positive and negative reasons of an objective nature.

Accouchement secret et accès aux origines en France

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La question de l'accès aux origines personnelles est étroitement liée à celle de l'accouchement sous le secret, spécificité française, dont l'origine remonte à Saint Vincent de Paul, au XVIIIème siècle. L'instauration de « tour », sorte de tourniquet placé dans un mur d'hospice permettait de déposer, anonymement et en toute sécurité, un nourrisson, une cloche se mettant alors à sonner, qui permettait de récupérer immédiatement l'enfant.

Sous la Révolution française, la convention vota une disposition en 1793 prévoyant la prise en charge de frais liés à l'accouchement et ses suites et posant le principe selon lequel « le secret le plus inviolable sera conservé sur tout ce qui concerne la mère ».

Au début du XXème siècle, la pratique du « tour » est abandonnée au profit de bureaux ouverts où la mère pouvait remettre l'enfant anonymement et recevoir des informations. Le régime de Vichy régit l'accouchement anonyme en 1941. Cette législation, après avoir été abrogée à la libération, a été rétablie puis modifiée. Le secret pouvait même être demandé, par la mère comme par le père après la naissance, lors de la remise de l'enfant aux services sociaux.

Ce n'est qu'au début des années 90 que la question de l'accès aux origines a émergé dans le débat public. A la suite de témoignages d'enfants nés sous le secret, confrontés à l'impossibilité de connaître leur histoire, les raisons de leur abandon, mais aussi de ceux de certaines mères de naissance, des revendications ont vu le jour, qui ont donné lieu à différents travaux et rapports préconisant un assouplissement de la législation pour faciliter la connaissance des origines des personnes nées sous le secret.

Ainsi, une première loi, adoptée en 1996, a, restreint le champ du secret d'une part, en limitant la possibilité de demander le secret de l'identité aux enfants de moins d'un an et d'autre part, en disposant que le secret devait résulter d'une demande expresse. Par ailleurs, la loi organisait le principe de la réversibilité du secret : le parent de naissance pouvait faire connaître ultérieurement et à tout moment son identité, qui ne serait révélée qu'à l'enfant, à sa demande.

Enfin, pour la première fois, un texte envisageait la possibilité pour les parents de naissance, de laisser, lors de l'accouchement et la remise de l'enfant aux services sociaux, des renseignements non identifiants ne portant pas atteinte au secret de son identité.

La dernière étape du processus fut l'adoption de la loi du 22 janvier 2002 relative à l'accès aux origines des personnes adoptées et des pupilles de l'Etat, avec la mise en place du Conseil

national pour l'accès aux origines personnelles (CNAOP), chargé d'instruire les demandes des personnes nées sous le secret, en quête de leurs origines.

Cette importante réforme poursuivait deux objectifs : (I) l'assouplissement des dispositions relatives à l'accouchement secret, en favorisant le recueil de l'identité de la mère de naissance et (II) la centralisation des démarches et l'accompagnement des personnes en quête de leurs origines. L'équilibre de ce texte, adopté à l'unanimité à l'issue d'un important débat parlementaire, fait l'objet de questions et critiques de plus en plus nombreuses, qui incitent à s'interroger sur l'avenir de ce dispositif.

I L'accouchement secret : un droit pour la femme

L'accouchement secret, communément appelé accouchement sous « x », est régi par l'article L. 222-6 du Code de l'action et des familles. Il permet à toute **femme** de demander le secret de son identité lors de son admission à la maternité. Dans ce cas, aucune pièce d'identité n'est requise et l'acte de naissance établi dans les trois jours suivants la naissance ne fait aucune mention relative à l'identité de la mère.

La femme est alors informée par un professionnel formé spécifiquement à ces situations, sur toutes les conséquences juridiques de sa demande : ses droits vis-à-vis de l'enfant, les modalités de levée du secret, l'importance pour l'enfant de connaître ses origines et son histoire. Elle peut également bénéficier d'un accompagnement psychologique et social si elle le souhaite.

A cette occasion, elle est invitée à laisser, si elle l'accepte, des renseignements non identifiants relatifs à sa santé et celle du père, les origines de l'enfant et les circonstances de la naissance. Son identité peut être également recueillie sous pli fermé, qui ne sera ouvert que si l'enfant en fait la demande et si elle donne son accord à la levée du secret.

Le recueil de son identité n'est donc pas une obligation, contrairement à la plupart des législations européennes.

En 2007, 581 accouchements secrets ont été recensés.

Selon les premiers résultats d'une enquête en cours effectuée par l'Institut national d'études démographiques, il semble que :

- la moitié des femmes ayant bénéficié de ce dispositif ait laissé leur identité directement dans le dossier de l'enfant ou remis un pli fermé ;
- la moitié des femmes ont au moins laissé des renseignements non identifiants ;
- près d'un quart un objet pour l'enfant, 10 % une lettre ;
- seulement moins d'un quart de ses femmes ne laissent rien pour l'enfant.

L'**enfant** né sous le secret est alors en principe confié au service public de l'aide sociale à l'enfance. Pendant un délai de deux mois, la mère, ou le cas échéant, le père, peut demander à ce que l'enfant lui soit restitué sans autre formalité que d'avoir reconnu l'enfant.

Une fois ce délai de deux mois écoulé, l'enfant peut être placé dans une famille en vue de son adoption. Afin de sécuriser la situation de l'enfant et d'éviter tout conflit avec la famille de

naissance de l'enfant, le Code civil prévoit que ce placement interdit tout établissement de la filiation à l'égard des parents d'origine ainsi que toute restitution de l'enfant.

En revanche, l'accouchement secret ne fait pas obstacle aux droits du **père** de naissance, qui peut reconnaître l'enfant et demander à le prendre en charge. Cette question délicate a donné lieu à la fin des années 1990 à une divergence de jurisprudence, certaines juridictions admettant l'efficacité de cette reconnaissance, alors que d'autres estimaient qu'elle était sans effet direct, puisque concernant l'enfant d'une femme qui, selon la loi, n'a jamais accouché (CA Riom, 16 décembre 1997).

Depuis, la question a été tranchée par la Cour de cassation. Se fondant tant sur les dispositions de droit interne pertinentes que sur l'article 7 de la Convention Internationale des droits de l'Enfant, la juridiction suprême française a estimé que la reconnaissance était valable dès lors que le père avait identifié l'enfant avant son placement dans une famille en vue de son adoption.

Le père, pour faire valoir ses droits, doit non seulement avoir reconnu l'enfant mais également l'avoir identifié avant le placement dans une famille, ce qui peut s'avérer particulièrement complexe. Pour l'aider à identifier le bon enfant, le Code civil prévoit également que le père peut solliciter le concours du Procureur de la République qui pourra diligenter une enquête pour retrouver l'acte de naissance de l'enfant et y apposer sa reconnaissance, démarche indispensable pour pouvoir obtenir la restitution de l'enfant.

Les **enfants** nés sous le secret sont, en l'absence de demande de restitution dans les délais impartis, placés dans une famille en vue de leur adoption, dans un délai moyen d'environ trois mois après sa naissance. La question de l'accès à leurs origines peu alors se poser pour ces enfants, lorsqu'ils sont en âge de comprendre leur situation. Voyons donc dans quelles conditions l'accès aux origines est organisé en France.

II L'accès aux origines et à l'identité des parents de naissance : une faculté pour l'enfant

Le mécanisme prévu par la loi du 22 janvier 2002 ne concerne que les enfants pour lesquels la mère ou, pour certaines situations passées, les parents ont demandé la préservation du secret de leur identité. En effet, avant la loi de 2002, les parents, ensemble ou séparément, pouvaient demander le secret de leur identité après la naissance, lors de la remise de l'enfant aux services sociaux.

L'enfant, peut, dès lors qu'il a atteint l'âge de discernement, former une demande d'accès à ses origines. Le mécanisme institué n'est pas réciproque : la mère ne peut pas rechercher l'enfant ; si elle peut lever le secret, laisser une lettre, des objets, etc., ces pièces ne seront remises à l'enfant que s'il en fait la demande ; si l'enfant s'abstient d'engager de telles démarches, ces informations ne lui sont pas communiquées.

Les demandes sont centralisées par le Conseil national pour l'accès aux origines personnelles (CNAOP), qui peut également recevoir la déclaration de levée de secret formulée par la mère (ou le cas échéant le père, lorsque celui-ci avait demandé le secret de son identité après la naissance et l'établissement de la filiation) ainsi que celle par laquelle des membres de la famille de naissance de l'enfant se font connaître. L'enfant aura alors accès à leur identité s'il engage une recherche de ses origines.

Le CNAOP, institué par la réforme de 2002, a été mis en place de manière effective en septembre 2002. Ce conseil se compose de 17 membres, parmi lesquels des représentants des administrations, du monde associatif (droits des femmes, familles adoptives, pupilles de l'Etat, droit à la connaissance des origines), des magistrats, des autres personnalités qualifiées... Ce conseil peut formuler toute proposition relative à l'accès aux origines personnelles et est consulté sur toute proposition en la matière ; il prend toutes les décisions nécessaires à l'application de la loi et au traitement des dossiers individuels par des votes à la majorité des membres présents ou représentés.

Pour mener à bien sa tâche, le conseil est doté d'un secrétariat général permanent (environ 7 ou 8 personnes) chargé d'instruire les dossiers, de retrouver la mère de naissance, lorsque son identité ou des éléments identifiants permettent de la localiser, puis de la contacter, dans le respect de sa vie privée, pour savoir si elle accepte de lever le secret de son identité. Les membres du secrétariat général peuvent également conduire des médiations entre la femme et l'enfant qu'elle a mis au monde.

Le principe posé est donc que l'identité de la mère de naissance ne peut être révélé à l'enfant, et à lui seul, que si celle-ci y a expressément consenti. En cas de décès, cette identité est transmise à l'enfant qui en fait la demande, sauf si la mère avait demandé, lors d'une précédente demande de l'enfant, que ce secret soit préservé après son décès. Dans ce cas, l'enfant n'aura jamais accès à cette information.

La loi n'instaure donc pas un droit d'accès aux origines personnelles puisque :

- le recueil de l'identité de la mère n'est pas obligatoire ;
- la mère dispose d'un droit de veto à la communication de son identité, lorsque celle-ci est connue.

C'est donc une faculté qui est mise en place, et le CNAOP joue un rôle de facilitateur.

Pour l'instant, le dispositif s'applique aux naissances sous le secret intervenues avant l'entrée en vigueur de la loi de 2002, pour lesquelles le cadre légal comme les pratiques étaient différentes. Pendant longtemps, le secret de l'identité était le corollaire quasi systématique de l'abandon, sans qu'il y ait forcément demande expresse de secret. Par ailleurs, le champ du secret était beaucoup plus étendu, puisqu'il pouvait être demandé après la naissance par les deux parents.

Il convient de relever que le nombre de pupilles et adoptés qui engagent une démarche de rechercher leurs origines est faible, et serait de l'ordre d'environ 4% des personnes potentiellement concernées.

Ainsi, depuis son installation il y a maintenant 7 ans, le CNAOP a enregistré plus de 4000 dossiers (4239 exactement) et 3428 de ces dossiers ont fait l'objet d'un traitement dont la répartition s'effectue comme suit, par ordre d'importance :

Près de la moitié des dossiers (1646, soit 48 %) sont clos provisoirement en raison de l'impossibilité d'identifier et/ou de localiser le parent de naissance ;

Un gros tiers sont définitivement terminés (1177, soit 34,5 %) après communication de l'identité du parent de naissance ;

14 % (486) sont provisoirement clôturés en raison du refus de levée du secret opposé par le parent de naissance ;

Enfin, 3, 5 % des dossiers (119) sont terminés du fait du désistement ou décès du demandeur.

Ces résultats appellent les observations suivantes :

Dans un peu plus de la moitié des dossiers (52 %), l'un des parents de naissance (la mère dans l'immense majorité des cas) a pu être identifié, alors qu'à l'époque de la naissance, l'accouchement était anonyme.

On constate donc que cet anonymat ne faisait pas forcément obstacle en pratique au recueil de l'identité de la mère, dans le dossier de l'enfant ou le dossier hospitalier de la mère, ou que les éléments recueillis lors de la naissance étaient suffisants pour permettre son identification. A titre d'exemple, lorsque le dossier de l'enfant contient les prénoms, date et lieux de naissance de la mère, son identification est alors possible à partir de recherches effectuées dans les registres d'état civil de la commune de naissance de l'enfant.

Une fois l'identification certaine, le CNAOP dispose de prérogatives dérogatoires qui lui permettent de localiser les parents de naissance, notamment en consultant le registre de l'assurance maladie. Concrètement, le contact avec la mère de naissance est pris par téléphone, de manière discrète, en respectant la volonté de la femme et en lui laissant tout le temps nécessaire pour instaurer une relation de confiance propice à la levée du secret ou à l'acceptation de correspondre anonymement avec l'enfant, voire de le rencontrer.

En ne comptabilisant que les dossiers dans lesquels la mère de naissance a pu être retrouvée, il apparaît que dans 70 % des cas, son identité est communiquée à l'enfant, soit parce qu'elle a levé le secret, soit parce qu'elle est décédée, soit encore parce qu'après étude du dossier, il apparaît que le secret n'a pas été expressément demandé. Les refus ne concernent que 30 % de ces dossiers. Mais ce refus ne signifie pas forcément l'absence de toute réponse pour l'enfant, puisque près de 15 % de ces femmes acceptent soit un échange de courrier via le CNAOP, soit une rencontre anonyme en présence d'un professionnel du secrétariat général.

La mission du secrétariat général du CNAOP ne se limite donc pas à la gestion d'un service administratif de type particulier mais permet de mettre en œuvre une véritable communication entre la mère de naissance et l'enfant, encadrée par des professionnels.

III L'avenir : vers un accouchement dans la discrétion ?

Le dispositif adopté en 2002, a constitué un tournant essentiel dans la perception de ce qu'on appelle communément en France l'accouchement sous « X ».

Même si le nombre d'accouchements secrets a fortement diminué pour se situer autour de 500 à 600 cas annuels, ce sujet suscite toujours des débats passionnés, voire passionnels et des prises de positions tranchées et opposées, qui transcendent les clivages politiques traditionnels.

L'équilibre auquel la loi était parvenue en 2002 est précaire, car sur de telles questions de société, l'opinion publique comme la classe politique évoluent rapidement.

Aujourd'hui, alors que plusieurs pays s'interrogent sur la possibilité de créer ou revenir à un accouchement anonyme (notamment par l'instauration de « babbyklappe », version moderne du tour instauré par Saint Vincent de Paul), de plus en plus de voix s'élèvent pour critiquer ce dispositif, perçu comme insuffisant protecteur des droits de l'enfant.

Ainsi, ces trois dernières années, plusieurs propositions de loi ont été déposées, tendant à remplacer le mécanisme actuel par un accouchement dans la discrétion, dans lequel l'identité de la mère de naissance serait systématiquement recueillie lors de la naissance de l'enfant et conservée, sous pli fermé, dans son dossier. A sa majorité, cette identité serait communicable de plein droit à l'enfant qui en ferait la demande, sans que la mère de naissance puisse, comme c'est le cas actuellement, opposer son veto. Ces nouvelles orientations, largement portées par les associations de défense des personnes nées sous le secret, consacraient ainsi un véritable droit à l'accès aux origines personnelles.

Pour autant, aucune de ces propositions n'a été inscrite à l'ordre du jour du Parlement français. En effet, loi de susciter l'adhésion, l'accouchement dans la discrétion inquiète nombre de professionnels ainsi que les associations de défense des droits des femmes. Ces opposants estiment cette proposition dangereuse pour la femme, comme pour l'enfant. L'obligation de décliner leur identité et l'automatisme de la communication de celle-ci à l'enfant devenu majeur pourrait dissuader ces femmes, souvent dans des situations précaires, de se rendre à la maternité, préférant accoucher en dehors de toute structure médicale, malgré les risques pour leur santé et celle de l'enfant.

Pour d'autres, la reconnaissance d'un tel droit aux origines traduirait une conception biologisante de la filiation qui serait déstabilisante pour l'enfant.

En outre, certains reprochent également à l'accouchement secret de porter atteinte aux droits des membres de la famille de naissance de l'enfant, et en premier lieu à ceux du père. En effet, sa paternité ne peut être valablement établie que s'il a pu reconnaître et identifier l'enfant avant son placement dans une famille en vue de son adoption. Enfin, quelques affaires récentes et largement médiatisées ont montré que le choix de la mère avait pour effet de priver les grands parents de naissance de tout droit vis-à-vis de l'enfant, dès lors qu'aucun lien de parenté ne peut être juridiquement reconnu entre eux.

Si la jurisprudence, puis le législateur, ont tempéré l'effet de l'accouchement secret vis-à-vis du père, la question reste entière en cas de revendications des grands parents de naissance.

La question est délicate. Et quelle que soit l'option qui sera retenue, il conviendra de veiller à maintenir un équilibre entre les impératifs que sont la protection des droits de la mère, la sécurité qui doit lui être garantie, ainsi qu'à l'enfant lors de l'accouchement, les droits de ce dernier et la sécurisation de la filiation adoptive.

**CHALLENGES IN ADOPTION PROCEDURES IN EUROPE:
ENSURING THE BEST INTERESTS OF THE CHILD**

PRESENTATION

Dragoljub POPOVIĆ

Judge of the European Court of Human Rights
Strasbourg

Access to One's Origins as a Fundamental Right

1. Mater semper certa est

The old rule of Roman law, based on a biological fact of giving birth, does not seem to apply in our times; or at least it does not apply automatically. In spite of having given birth to a child, a mother may remain unknown in terms of law. An ancient tradition in France has survived to this day. In order to prevent infanticide and abortion the French legislation allows a mother to give birth anonymously and avoid being registered as such for legal and administrative purposes.

Only a few countries follow the French legislative pattern in this respect. Those are Italy and Luxembourg. On the other hand, there are countries in which the parents have a statutory obligation to register as such. Scandinavian countries can serve as examples.¹ The legislation in Scandinavia does not provide for giving birth anonymously.

There are also countries, like Belgium and Hungary, that allow mothers to give birth discreetly, although not completely anonymously. This is close to the practice taking place in some of the German Länder, where the so called "baby boxes" have been instituted, giving the opportunity to mothers to abandon the children they gave birth to and remain unknown.²

This overview shows that the comparative law is divergent on the subject. In some countries it is the right of the child that prevails, whereas in others the rights of women are favoured. The question therefore may arise: has a child a right to know who his/her mother was? Or in other words: is there a right of access to one's origins under the European Convention on Human Rights (hereinafter referred to as Convention)?

2. A Personal History (facts of the Odièvre case)

Our story goes back to the sixties of the last century and takes place in Paris. A man and a woman who were cohabiting already had a child when a second child was born to them during their relationship. The man was employed and worked for a modest monthly wage. He had also been married to another woman and had a child with her. He therefore declared himself incapable of taking on a new burden and sustaining another child. The mother, who was unemployed and was somehow given shelter by a lady whom she was helping at home, seemed to have no other choice but to go along with her partner's wishes. She abandoned her daughter and remained unknown to the child. The sole language of the administrative act she had to sign to achieve such a way out of her mischievous situation is quite expressive. It says: I abandon my child. I request that this birth be kept secret.³

More than thirty years later the abandoned child, who had meanwhile been adopted and besides her first name – Pascale, had a name of her family of adoption – Odièvre, began struggling to be granted access to

¹ Ch. Lux-Wesener, „Anonyme Geburt mit EMRK vereinbar / Der Fall Odièvre“, EuGRZ 2003, 557

² Lux-Wesener, *ibid.* 557-8; J. Marshall, „A Right to Personal Autonomy at the European Court of Human Rights“, EHRLR 3/2008, 351

³ *Odièvre v. France*, ECHR 2003-III paragraph 10

the truth and to learn her origins. She had lost her case in France before filing her application with the European Court of Human Rights (hereinafter referred to as ECHR or Court).

3. The Court's Approach

3.1. Private Life

The ECHR first dealt with the issue of applicability of Article 8 of the Convention. The Court's finding was that the circumstances in which a child is born form a part of

"a child's and subsequently the adult's private life guaranteed by Article 8 of the Convention".

Therefore the Court found Article 8 of the Convention applicable to the case.⁴ The case was given a Grand Chamber judgment.

3.2. Relevant Case-law

Although the Court found reasons for distinguishing the *Odièvre* case from two others, it found those relevant for the ruling in this particular case. The applicant in *Odièvre* was trying to trace her natural mother, who had expressly requested that information concerning her remain confidential. The two cases the Court cited as relevant points of reference because of their similarities to the *Odièvre* case were *Gaskin v. United Kingdom* and *Mikulić v. Croatia*.⁵

In *Gaskin* the applicant, who had been taken into care at a very young age, complained of the failure of the administration to grant him unimpeded access to information contained in his personal files. The Court found Article 8 of the Convention applicable to the case and ruled by eleven votes to six in favour of finding its violation. The applicant's interest to receive information on his childhood and early development was in conflict with the confidentiality of public records. The Court's ruling was that

"the interests of the individual seeking access to records relating to his private and family life must be secured when a contributor to the records either is not available or improperly refuses consent".⁶

The crucial circumstance in *Gaskin* was that the applicant's mother had passed away and could not give consent for the applicant's access to his personal files.⁷ The Court's ruling was that a system restraining access to personal files could comply with the Convention only

"if it provides that an independent authority finally decides whether access has to be granted in cases where a contributor fails to answer or withholds consent".⁸

The Court was right to compare the *Gaskin* case to *Odièvre*. In both cases the issue was whether the administration should be allowed to withhold data, contained in the public records.

The other case that the Court referred to was *Mikulić*, in which the issue was a duty of a member state to the Convention to enable an independent authority to determine the paternity claim speedily. The ECHR ruled for the applicant, finding violations of various articles of the Convention, and among those also a breach of Article 8. The applicant was a five year old girl complaining of the length of a paternity suit and lack of remedies to compel the alleged father to comply with a domestic court's order for a DNA test to be carried out.⁹

Both in *Gaskin* and in *Mikulić* the Court ruled in favour of the existence of an independent authority competent to have a say in case of disputes at the national level, so far as private life was concerned.

⁴ Ibid, paragraph 29

⁵ *Odièvre v. France*, paragraph 42; *Gaskin v. United Kingdom*, Judgments and Decisions A 160 (1989); *Mikulić v. Croatia*, ECHR 2002-I

⁶ *Gaskin v. United Kingdom*, paragraph 49.

⁷ For more on the facts of the case and the judgment see: A.W.Heringa and L.Zwaak, "Right to Respect for Privacy" in: P.van Dijk e.a. (eds.) *Theory and Practice of the European Convention on Human Rights*, Antwerpen – Oxford, 2006, 669

⁸ *Gaskin v. United Kingdom*, paragraph 49

⁹ More comments on the facts and the judgment in A.W.Heringa and L.Zwaak, op.cit. 670

3.3. Competing Interests

In the *Odièvre* case, it was quite clear that the interests of an unknown mother and her child were competing.¹⁰ The question was entrenched at the national level and according to the French legislation it was the mother whose interests were favoured. There have recently been certain improvements of the legislation in France, tending to encourage mothers to assume responsibility for their children, to afford children access to certain information and provide that the mother can waive confidentiality.¹¹ However, the French system remains faithful to its basic standpoint, being favourable to mothers and enabling them to be what in English is called X Women i.e. to give birth anonymously. The Court's attitude towards the competing interests was that

"the States must be allowed to determine the means which they consider to be best suited to achieve the aim of reconciling those interests".¹²

At this point two other issues inevitably arise. Those are the fair balance or proportionality and the margin of appreciation accorded to the state parties to the Convention.

3.4. Proportionality or fair balance

Proportionality, or striking the fair balance, is one of the tests that the Court frequently uses when rendering judgments. It appeared to be one of the most important issues in the *Odièvre* case, as well. The judgment was rendered in that case by ten votes to seven. The majority opinion was expressed in paragraph 49 of the judgment. There it was stated:

"The French legislation seeks to strike a balance and to ensure sufficient proportion between the competing interests."

That was one of the major points of disagreement among judges in this case. In their joint dissenting opinion, Judges Wildhaber, Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pelonpää firstly put forward the necessity of examining whether a fair balance has been struck between the competing interests. Their main finding was that the Court's task in this case was:

"to perform a 'balancing of interests' test and examine whether in the present case the French system struck a reasonable balance between the competing rights and interests".¹³

The dissenting judges were of the opinion that the French legislation hindered the fair balance test, because of providing for a mother's definitive refusal, which is binding on a child and leaving the latter without legal remedies to challenge the mother's decision. That is why the dissenting judges stated:

"As a result of the domestic law and practice, no balancing of interests was possible in the instant case, either in practice or in law. In practice, French law accepted that the mother's decision constituted an absolute defence to any requests for information by the applicant, irrespective of the reasons for or legitimacy of that decision."¹⁴

According to the dissenting judges' opinion the solution of the problem of striking a fair balance between the competing interests was to be found in the rule in *Gaskin*, which they exhaustively cited in paragraph 17 of the joint dissenting opinion. The kernel of the rule is that a system which makes access to records dependent on the consent of the contributor cannot be considered compatible with Article 8 of the Convention unless it properly secures individuals' interests. Those interests are properly secured if the system provides that an independent authority finally decides whether access has to be granted in cases where a contributor fails to answer or withholds consent.

3.5. Margin of Appreciation

Closely connected to the issue of proportionality is the one of the margin of appreciation of the member states of the Council of Europe, being parties to the Convention. That was also a matter of dispute between

¹⁰ V.Bonnet, "L'accouchement sous X et la Cour européenne des droits de l'homme (à propos de l'arrêt *Odièvre c. la France* du 13 février 2003) « , Rev.trim.dr.h. 58/2004, 419 ; J. Marshall, op.cit. 352

¹¹ *Odièvre v. France*, paragraph 38

¹² Ibid, paragraph 49

¹³ Joint dissenting opinion, paragraph 6

¹⁴ Ibid. paragraph 7

the majority and minority of judges in the Grand Chamber formation that gave the judgment in *Odièvre*. The majority opinion found place in paragraph 49 of the judgment:

“The Court considers that France has not overstepped the margin of appreciation which it must be afforded in view of the complex and sensitive nature of the issue of access to information about one’s origins, an issue that concerns the right to know one’s personal history, the choices of the natural parents, the existing family ties and the adoptive parents.”

The dissenting judges contested the majority approach. Their stance was that the French legislation could not satisfy the Convention standards, for the sake of several reasons. According to the legislation in force the mother was only invited to supply information; she could refuse to allow her identity to be disclosed, even after her death, and last but not least, there was no independent body vested with a power to order disclosure of the data preserved in the public records. Their conclusion was that:

“The initial imbalance is perpetuated, as the right to access to information about one’s personal origins ultimately remains within the mother’s sole discretion.”¹⁵

The majority, however, ruled in favour of France, finding its legislation compatible with the Convention, despite the fact that it favoured women’s rights to the detriment of those of children. The *Odièvre* judgment thus granted a margin of appreciation to France in respect of its legislation.

4. Subsequent Case-law

It is to be noted that the Court has not had an opportunity to reconsider its position on the subject. The judgment in *Odièvre* remains the leading case in the field and a remark should be made that it did not have too much echo in the Court’s case-law. However, although identical cases in which this precedent would be followed lack, there were some in which similar issues were raised.

Two cases are worth our attention. They are *Jäggi v. Switzerland* and *Phinikaridou v. Cyprus*.¹⁶ In *Jäggi* the applicant, who had been placed with a foster family, met his mother when he was 19. The mother told him that his father was a certain A.H. The latter refused to undergo tests to establish his paternity, for it had already been established by a judgment of a court of law rendered when the applicant was only nine years of age that A.H. was not his father.

After the death of A.H., the applicant brought proceedings requesting a DNA test to be performed on the mortal remains of A.H. The Federal Court of Switzerland dismissed the applicant’s claim on the grounds that the measure solicited by the applicant appeared to be excessive in view of the principle of proportionality.

The applicant complained before the ECHR that he had been unable to have a DNA test carried out on a deceased person in order to ascertain whether that person was his biological father. He allegedly suffered a violation of his rights under Article 8 of the Convention.

The Court found that the refusal to carry out the DNA tests affected the applicant’s private life. The peculiarity of this case consists in the fact that the recognition of biological paternity would have had no effect on the register of births, deaths and marriages. It appeared that the applicant’s intention was merely to learn the truth about his origin.

The Court found for the applicant and declared that there was a breach of Article 8 of the Convention. The Court’s reasoning was that

“the preservation of legal certainty cannot suffice in itself as a ground for depriving the applicant of the right to ascertain his parentage”.¹⁷

The Court thus referred to the judgment given at the domestic level in the paternity suit when the applicant was nine years of age as to the main source of legal certainty. In the Court’s view the right to know the truth prevailed over the reasons of legal certainty, as well as over the rights of third persons.

¹⁵ Joint dissenting opinion, paragraph 20

¹⁶ *Jäggi v. Switzerland*, app. no. 58757/00, a judgment of 13. July 2006; *Phinikaridou v. Cyprus*, app. no. 23890/02, a judgment of 20. March 2008

¹⁷ *Jäggi v. Switzerland*, paragraph 43

In the *Phinikaridou* case the applicant was abandoned by her biological mother, who had left her outside the house of a woman who gave her to Mrs Phinikaridou. The latter brought the applicant up. When the applicant was 52 years of age her biological mother, just before dying, revealed to the applicant her biological father's name. Shortly after the applicant introduced proceedings for the recognition of paternity. Her claim was time-barred according to the legislation in force. The applicant challenged constitutionality the piece of legislation providing on the time-limit.

The case was referred to the Supreme Court of Cyprus to rule on the constitutionality issue. The Supreme Court ruled that the legislation in force did not infringe constitutional provisions. The applicant filed a complaint with the ECHR, alleging that the statutory three-year limitation period had prevented her from instituting proceedings for the judicial recognition of paternity. She invoked Article 8 of the Convention.

The Court referred to its own rulings in *Odièvre*, *Gaskin*, *Mikulić* and *Jäggi*. The Court found for the applicant stating:

"She was deprived of this right [to bring proceedings, DP] even though she was in a situation where she had not had any realistic opportunity to go to court at an earlier stage."¹⁸

The Court's finding was that, because of the absolute nature of the time-limit provided for by the domestic legislation, a fair balance had not been struck between the different interests involved. As in many other cases the Court used here the proportionality test to reach its decision. The fair balance test was performed by the Court in order to confront a right to know one's origins with the presumed father's right in being protected from claims concerning facts that go back many years and those of third parties, e.g. the presumed father's family.¹⁹ In the Court's view, it was the right to learn one's origins that prevailed over other interests.

5. Conclusions

It seems to be clear enough that the conclusion of this rather short analysis should be that the right to know one's origins is guaranteed in the Law of the Convention, although it has not been mentioned as such in the Convention text. It has emerged in the European Human Rights Law as an outcome of a wide interpretation of the scope of the notion of private life.²⁰ Such a stance of the Court's which has been formulated in 2007, is a confirmation of the Court's previous attitudes expressed in 2003 (*Odièvre*) with a reference back to 1989 (*Gaskin*), clarified the ECHR position on the subject.

In 1989 the Court referred to a vital interest, protected by the Convention in receiving the information concerning childhood and one's early development.

As far as the wording is at stake, the Court seems to have overcome its previous timidity in its recent judgments. The Court's bolder expressions in favour of a right to know one's origin has found place in the *Jäggi* judgment as well. The Court stated in paragraph 37 of the judgment that the right to know one's parentage was a part of the right to identity, which formed an integral part of the notion of private life. In 2007 the Court summarised its position in *Phinikaridou* explaining the jurisprudential origin of the right to know one's history.

What remains for discussion is the margin of appreciation. The Court has so far ruled in favour of a possibility of providing for a mother's veto, or her right to withhold consent to a child's access to data, which is the rule in *Odièvre*. *Dicta* of certain judgments, which run counter to such an attitude, are not convincing enough to make one conclude that the Court's position in *Odièvre* has been overruled. It remains a rule.

A final remark should be made on what one might give the name of a policy in the noble sense of the word. Whether a child's interests should be favoured, or those of a mother, is a question to which social developments will give a proper answer. They have so far been divergent. It is not only a matter of different traditions existing in various countries, but also a subject of dispute of social strata and various classes of population, relying on their opinions and interests.

¹⁸ *Phinikaridou v. Cyprus*, paragraph 62

¹⁹ *Phinikaridou v. Cyprus*, paragraph 53

²⁰ Thus the Court *expressis verbis* in *Phinikaridou v. Cyprus*, paragraph 53

Access to one's origins from a psychological point of view

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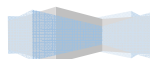
This presentation is only an approximation and not the actual experience of adoptees. That is because it reflects the viewpoint of a non adopted psychologist, even though I will try to convey what some adoptees experience. This talk also does not pretend to cover the situation of all adoptees, for adoption comes in many diverse forms, including open and closed, transracial and racially homogenous, adoption by single, divorced, married, homosexual, and step-parent adults, and adoption of infants and older children, to cite but a few. As my presentation unfolds, here are some the key words which structure the content: identity, lack of information and secrecy, loss, fantasy, bewilderment, search for one's origins, and fiction.

Let me start off with the concept of «identity» from a psychological perspective. The great psychologist Eric Erikson famously wrote that identity represents «a feeling of being at home in one's body, a sense of knowing where one is going, and an inner assuredness of anticipated recognition from those who count» (1959, p. 165). Grotevant (2000) underscores this definition with the clever assertion: «the essence of identity is self-in-context», at play at three levels of interaction that shape identity, those of self-reflection, family relationships, and wider social interaction.

Identity formation is a core developmental task for all children as they explore the boundaries of their physical self almost at birth, but also, from the very first instants of life, as they enter into a relational frame, essentially with their birthmother, these interactions as well becoming essential building blocks of one's identity. Identity, knowing who one is, where one is, who surrounds us, constitutes a crucial component of emotional security. As Miles (undated) points out, what is striking about one's identity is that you and I, non adopted persons, are able to answer the question «who am I?» through a fairly seamless process of reflection. Not quite the same thing for the adoptee because being adopted is a non-normative characteristic, so while adoptive status may exert a significant influence on the identity of an adopted adolescent, a non-adopted adolescent does not usually have any need to integrate the fact of not adopted into his or her identity. This is clearly different from the adopted child or adolescent who can only answer the question «who am I?» with some degree of investigation. This is quite a different task than to look at who one is, to not have a readily available answer within, which creates the need, sometimes an intense burning need to turn outwards and set out to get answers.

Getting answers often has more in common with a quest than simply retrieving information from willing sources. Professionals who work with adoptees know that, outside of the practice of open adoption, secrecy and lack of information are still fairly common hoops that the identity seeking adoptee must contend with and jump through. Secrecy and lack of information can literally be a maddening experience. Some years back, in Massachusetts, I treated a young man by the name of David who had killed his adoptive father and nearly

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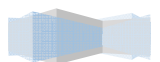


succeeded in killing his adoptive mother (Jaffé, 1997). His developmental history was fascinating. As the knowledge of his adoptive status gradually emerged at various cognitive stages of his childhood, and especially as he entered adolescence and actively sought answers, David's mental health had progressively deteriorated into an atypical psychotic state. Frustration and anger were his defining emotions and a feeling of being different in his core identity became a constant preoccupation. In fact, David developed unusual olfactory hallucinations and delusions that he gave away an unbearably bad odor that others were bound to notice and use as a pretext to distance themselves. However, even as David's mind disintegrated, the investigative quest for identity continued with sufficient goal-directedness and he randomly visited numerous adoption agencies, aggressively requiring baffled and scared front office staff to fill him in on the blanks of his identity and genealogy.

The human need to construct one's identity, to feel at home in one's body, pushes a majority of adoptees to embark on a restless search for answers about their origins. They will encounter many dead ends, starting with their adoptive parents who may not want to share information or, it is sometimes pointed out, for whom it is hurtful that their adoptive child searches for his or her origins because it implies a form of rejection of the new family they aspire to maintain. It is therefore vital for adoption staff to prepare adoptive parents during the pre-adoption stage so that they may anticipate their child's search for his or her origins. As stated, after adoption, almost all adoptive parents must deal with their child's persistent questions regarding his or her origin. And while some parents who feel secure enough to answer questions and facilitate can truly be cited as successful models of common sense, many adoptive parents struggle and fumble, for answering an adopted child's questions is indeed at the very least a most delicate process which must balance accompanying the child at various stages of his or her emotional and cognitive development, but also not go beyond an inflexion point after which the adoptive parents undermining the adoption graft, avoiding a forward-looking stance and being dragged down by guilt.

As the adopted child's keeps questioning and his or her search intensifies, and depending on the adoptee's developmental stage, there is a curious process that gets under way, intertwining the acknowledgement of loss, mourning and the active production of fantasy to make up for the various forms of loss and to compensate for the accompanying unpleasant emotions. That is because loss, to state the obvious, is a central experiential element that adoptees must mentally metabolize and accept, not only the loss of their genealogical continuity and the physical proximity of their birthparents, but also the sense of unquestioned belongingness they had enjoyed until then in their adoptive families, as well as, in the case of transracial adoption, the loss of cultural continuity. And to use a wonderful formula I am unsure of who to attribute to: "The shape and the extent of the loss is itself unknown". So, most often, after many questions and a frustrating quest, adoptees discover that they must contend with the reality that they know not what is lost of their history and of their identity.

The human mind does not accept blank zones readily and just like other social groups dealing with lack of information and secrecy, adoptees tend to fill the blanks and to generate fantasies about who they are and where they come from. For a long time, the psychoanalytic model was proficient in describing these fantasies, albeit somewhat simplistically... the adopted person's fantasizes about having a twin leading a different life somewhere, having been bought, stolen, kidnapped, abused, neglected, etc. In psychotherapy, the therapist often is viewed as a particularly ambivalent parental transference figure, mostly a fantasized birth parent, idealized but also despised for having created the adoptee's state of abandonment. Searching for one's origins could be described as the understanding of the trauma that has defined one's past. One



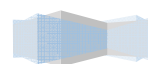
is what one has lost would be a fair way of summarizing. Once the mind is able to wrap itself around this terrible childhood experience, the adoptee could turn with some hope to his or her future life.

While the psychoanalytic approach must not be discarded, for indeed loss and trauma are unavoidable ingredients of practically all adoptions, and it still has great usefulness as a therapeutic method, the psychological field has evolved into a much more elaborate understanding of the sense of personal identity and of its components, this understanding taking into account the notion of personal narrative.

We are all constantly updating our personal narrative about what we see and hear, about who we are and how we relate to others, and so on. This constant flow of information that we are processing and archiving is part of our sense of agency, the feeling that we have some mastery over our environment, of ourselves in context. The fact of the matter is that your personal narrative, like mine, is simply highly subjective, even fictitious in that facts are undocumented, information is distorted and personalized. Homans (2006) suggests that, in some ways, adoptees and non adoptees are alike, in that in our personal narrative, all origins are inventions, neither recoverable nor verifiable. However, it is obvious that some origins have a truer ring to them and the more so when origins are known. But even when origins are not known, the line separating truth from fiction is often blurred. Indeed, a common experience among adoptees is to juggle with two origins, and the one that is obscured from reality is the one that generates the adoptees' greatest creative process.

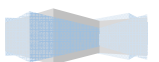
Many years ago, in 1964, Sants wrote a memorable scientific paper called "Genealogical bewilderment in children with substitute parents". His thesis was that not knowing one's origins could have a bewildering effect on children, induce a great state of confusion, and have a negative effect on the adoptee's personal growth. From a historical perspective, genealogical bewilderment really reflects the adoption practices in those dark days of secrecy aimed at constructing a family fiction that erased the very notion of adoption. Fortunately, adoption practices have evolved over the past few decades and it has become clear that adoptees must be provided with some of the factual elements that make up their history and can fuel their personal narrative. Because we have come full circle and we now know that the adoptee's compulsion to search for origins becomes a compulsion to create them (Homans (2006). Literal and factual information are like pieces of a puzzle, they serve to help map out what is not known, they help in constructing a childhood, and they support the creative narrative that adoptees must implement to hold on to a stable sense of self for the rest of their lives. After all, it is undeniable that adoption represents a psychological fiction despite any attempt to create a judicial reality.

In conclusion, given that retrieving some pieces, any pieces, of one's literal origin helps us all, but above all adoptees, generate a satisfactory personal narrative, it would be very ironic indeed if the child's best interest doctrine from a children's rights perspective somehow did not generate administrative and legal best practices preserving and providing access to information regarding personal origins and facilitating the journeys adoptive families and adoptees undertake if they so chose to search for their origins.



Bibliography

- Erikson, E. H. (1959). Identity and the life cycle: Selected papers. *Psychological Issues*. 1, 1-171.
- Grotevant, H. D., Dunbar, N., Kohler, J.K., & Lash Esau, A.M. (2000). Adoptive Identity: How Contexts Within and Beyond the Family Shape Developmental Pathways. *Family Relations*. 49 (4), 379-387
- Homans, M. (2006) Adoption narratives, trauma, and origins. *Narrative*. FindArticles.com. 27 Nov, 2009. http://findarticles.com/p/articles/mi_hb1455/is_1_14/ai_n29360375/
- Jaffé, Ph.D. (1997). Adoption and murder. In S. Redondo, V. Garrido, J. Pérez, & R. Barberet (Eds.). *Advances in Psychology and Law: International contributions* (p. 274-280). Berlin: De Gruyter.
- Miles, J. (undated). Unpublished student paper.
- Sants, H.J. (1964). Genealogical bewilderment in children with substitute parents. *British Medical Journal*, 37, 133-141.



**CHALLENGES IN ADOPTION PROCEDURES IN EUROPE:
ENSURING THE BEST INTERESTS OF THE CHILD**

PRESENTATION

Maria HERCZOG

Member of the UNCRC Committee

Adoption in UN Convention on the Rights of the Child and the adoption of Roma children in Hungary

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

Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child’s status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;.....” (Article 21 CRC on Adoption)

Rights of children in case of adoption are discussed in Article 21 recognizing the differences in legislation and practice of the State Parties. The best interests of children in all adoption arrangements and the minimum requirements for adoption procedures are clearly described. Preference is given to in-country – domestic - adoption so that inter-country adoption is only to be considered if the child cannot be suitably placed in his or her own country.

The Convention on the Rights of the Child is not considering adoption as desired, according to article 20 it is one of the possibilities to place children into families who otherwise are deprived from family care. The option of adoption has to be assessed very carefully by taking into consideration the emotional and bonding needs of children. At the same time, there are many other factors influencing the type of placement optimal for a given child. In any placement decision, the protocol and procedure should be properly regulated by all States to safeguard children’s rights. Assessment and decision making, preparation for adoption for both children and prospective adoptive parents has to be carefully designed to avoid any discrimination based on race, gender, age or special needs of the child.

The need of all children for a family and for security and permanency to ensure their emotional well-being is a common sense accepted and required in most of the countries.

“In adoption the best interests of the child must be “the paramount” consideration rather than simply “a primary” consideration as in article 3. The provision establishes that no other interests, whether economic, political, state security or those of the adopters, should take precedence over, or be considered equal to, the child’s.

The paramountcy principle should be clearly stated in law. Any regulation that fetters the principle could lead to a breach of the Convention – for example inflexible rules about the adopters, such as the setting of age limits, or about the child, for example only permitting adoption in cases where the child has been legally declared abandoned.”¹

The Committee has always looked at the legal framework regulating the adoption procedure, conditions and framework closely both in cases of domestic and inter-country adoption. According to the Convention, “competent authorities” has to be nominated to guarantee the best interest of the child by clear and transparent procedures ensuring that proper consents have been obtained and all relevant information considered both by judicial and professional bodies. Besides legal experts, different professionals have to be

¹ Implementation Handbook on the Convention of the Rights of the Child (Rachel Hodgkin and Peter Newell), UNICEF, London, 2007 pp.295

involved like social workers, psychologists, health professionals etc. according to the complexity of the cases. The decision on adoptability of a given child, the length of the preparation and legal procedure should be given appropriate time, but delays can cause harm to children and families involved. The social and health services are useful sources of support for all actors: child, biological and adoptive parents to provide among other things full reports to the authorities considering the adoption application.

In cases where biological families can not take proper care of their children, despite all forms of support provided, or are not willing to raise their children or are deemed by judicial process, adoption can be the best possible option. However, the proper informed consent for adoption is essential in all cases. There are different legal systems and requirements concerning those who have a primary responsibility for the upbringing of the child but other family members – siblings, grandparents etc. – has to be taken into consideration especially if the children after the adoption will not have opportunities to have regular contact with them. In these cases, the decision should be based on considering all aspects and guarantee the paramount interest of the child. Priority must be given to adoption by relatives in their country of residence and if needed all forms of support – including financial aid – should be provided to them.

The Committee has emphasized the importance of the child's views in Article 12, although in case of adoption it is not specifically mentioned, according to the evolving capacities of the child it has to be taken into consideration. Their consent is not necessarily required, it depends on the case, but they have a right to be heard and tell their opinion in all matters concerning them. Adopted children have the right to be told they are adopted and to know about their biological parents, if they so wish: however, legislation widely differ in different countries concerning the age limit and forms of access to information. Keeping accurate and accessible records of the adoption and other documentation of the care history is essential. In some countries, it is still discussed whether the interest of the biological and adoptive parents are met if the right of the child to information is having primary consideration. The professional support provided both prior and after the adoption can be of great help in this respect by supporting the parents to understand and accept the best interest of the child.

There are several issues that can be regulated in different ways in the respected countries as conditions of adoption like age limit, family status (one parent families, same sex couple), disability, living conditions etc. The assessment procedure should focus on the best interest of the child. Well established professional standards and evidence-based experiences must underlie the decisions and limitations. Separation of siblings due to adoption has to be carefully assessed and allowed only in cases, when it is not interfering with the best interests of the child. In certain cases, it is visible that conflicts of interest can occur in these cases and there is no general provision to be implemented only case by case evaluation of the situation.

According to the Implementation Handbook of the CRC, there are checklists for each article to help all those involved to explore the implications of the given article for law, policy and practice in order to promote and evaluate progress of the implementation.²

General measures of implementation:

Have appropriate general measures of implementation been taken in relation to article 21, including:

identification and coordination of the responsible departments and agencies at all levels of government (article 21 is relevant to the departments of justice, social welfare and foreign affairs)?

identification of relevant non-governmental organizations/civil society partners?

comprehensive review to ensure that all legislation, policy and practice is compatible with the article, for all children in all parts of the jurisdiction?

adoption of a strategy to secure full implementation:

- which includes where necessary the identification of goals and indicators of progress?
 - which does not affect any provisions which are more conducive to the rights of the child?
 - which recognizes other relevant international standards?
 - which involves where necessary international cooperation?
- (Such measures may be part of an overall governmental strategy for implementing the Convention as a whole.)
- budgetary analysis and allocation of necessary resources?

² Implementation Handbook on the Convention of the Rights of the Child (Rachel Hodgkin and Peter Newell), UNICEF, London, 2007 pp. 301-303

- development of mechanisms for monitoring and evaluation?
- making the implications of article 21 widely known to adults and children?
- development of appropriate training and awareness-raising (in relation to article 21 likely to include the training of social workers, judiciary, port and border control authorities, adoption agency staff and development of education for adoptive parents)?

Are the views and best interests of other children affected by a proposed adoption (such as the children of the prospective adopters) considered by the competent authorities?

Is due regard paid to the child's right to know and be cared for by his or her parents?

Is due regard paid to preservation of the child's identity and the desirability of continuity in the child's background and to the child's ethnic, religious, cultural and linguistic background?

Before agreeing to an adoption, must the authorities be satisfied that:

- the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians?
- all consents required by law have been given by the persons concerned?
- Where consents are required by law, are the persons concerned provided with counselling?

Do children have a right to consent to an adoption:

- at any age?
- at a particular age?
- according to age and maturity?
- Do all children have a right to veto their adoption?

Are all adoption placements centrally monitored and periodically reviewed by the authorities?

Are intercountry adoptions only permitted if the child cannot be placed in a foster or an adoptive family or cannot be cared for in any other suitable manner within the jurisdiction?

- Do all children involved in intercountry adoptions (whether leaving or entering the State) enjoy safeguards and standards equivalent to those regulating domestic adoptions?
- Do border controls monitor the entry and exit of babies and children travelling with adults who are not their parents?
- Is improper financial gain from intercountry adoption prohibited by law?
- Has the 1993 Hague Convention on Protection of Children and Cooperation in respect of Inter-country Adoption been ratified or acceded to?
- If yes, have all its provisions relating to law or administrative procedures been implemented?
- Has the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography been ratified?
- If yes, have all its provisions been implemented?
- Have any other bilateral or multilateral treaties relating to adoption been concluded?

The Convention is indivisible and its articles interdependent. Article 21 should not be considered in isolation.

Particular regard should be paid to:

The general principles

Article 2: all rights to be recognized for each child in the jurisdiction without discrimination on any ground

Article 3(1): the best interests of the child to be a primary consideration in all actions concerning children

Article 6: right to life and maximum possible survival and development

Article 12: respect for the child's views in all matters affecting the child; opportunity to be heard in any judicial or administrative proceedings affecting the child

Closely related articles

Articles whose implementation is particularly related to that of article 21 include:

Article 5: parental guidance and child's evolving capacities

Article 7: child's right to know and be cared for by parents

Article 8: preservation of child's identity

Article 9: non-separation from parents except when necessary in best interests

Article 10: family reunification

Article 11: protection from illicit transfer and non-return

Article 16: protection from arbitrary interference with privacy, family and home

Article 18: parents having joint responsibility

Article 20: children deprived of their family environment

Article 25: periodic review of placement

Article 35: prevention of sale, trafficking and abduction

Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

The adoption of Roma children in Hungary³

“... The Committee is... concerned by the high number of Roma children who are maintained in institutions even though some of them might benefit from adoption.

“... The Committee urges the State Party to identify those children who could benefit from adoption and initiate the adoption process, taking into consideration the cultural background of these children in accordance with article 20 of the Convention.” (Hungary CRC/C/HUN/CO/2, paras. 34 and 35, 2002)

“I can only repeat what I have already said: I think the heart of the problem is that we don't know anything about it at all.” (Child's rights representative)

“I think adoption is a huge challenge in itself, requiring a lot of energies, so I'm not sure we would have been able to make this extra effort (adopting a Roma child).” (Adoptive mother)

In response to repeatedly raised concerns about the vulnerable position of Roma children in the child protection systems in Europe, with special attention paid on out of home placements, the European Roma Rights Center conducted an in-depth study on the situation of Roma children in children's homes, in adoption and in institutions for the mentally disabled in Hungary.

According to the data and information provided by those professionals interviewed during the survey, Roma children are much less likely to be adopted than non-Roma children and therefore facing many additional difficulties while spending long years – in many instances their entire childhood – in the public care system, mostly in institutions. In the Hungarian child protection system, professionals and decision makers are almost all non-Roma, just like the majority of prospective adoptive parents who are not willing to adopt Roma children for reasons ranging from anti-Romani attitudes, to a lack of preparation to take on a Roma child, the pressure from the environment, to fear of being incapable of raising a Roma child.

Most potential adopters clearly refuse to adopt children with disabilities and/or with a Roma background. As Roma children are more likely than non-Roma children to be labelled with a mental disability or special difficulties, they are at a double disadvantage regarding the identification of suitable adoptive families. The Hungarian 1997 Child Protection Act is based on the UNCRC and declares the best interests of the child to be taken into consideration in all instances including adoption. Hungary also signed the Hague Convention and committed itself to implement its requirements.

In 2007, there have been 3118 prospective adoptive parents waiting for a child after taking part in the preparatory training and having a permission. There were 2003 children freed for adoption of whom 649 diagnosed with mental disability, 1307 over 10 years of age and 113 under the age of 3. In 2007, there were 723 initiated adoptions and 338 approved by the authorities of which 144 foreign adoptions. It is clear from the data that there are much more applicants than children, especially young children, or healthy babies. Despite of the fact that ethnic belonging is not permitted to be documented and identification is also not allowed legally, the estimation is that the representation of Roma children in the care system is very high, in some age groups and forms of care around 2/3 of all the children taken care of by the State. We can only rely on rough estimates as to the number of adoptable Roma children, or the rates of termination of parental care and qualification as adoptable in this group, when making inferences about differences as compared to non-Roma children.

The research was looking at the opinion of the professionals working in the care system and their perception on over-representation, disability, and adoption opportunities of children considered as Roma. At the same time, we were asking them about their approach to the identification of Roma children and the way they are handling the issues of prohibition of identification and its consequences.

The situation in Hungary reveals that, for a long time, even specialists were reluctant to accept the importance of providing proper information and preparing prospective adoptive parents. The most frequently recurring arguments referred to the absence of any support to help biological parents having and bringing up

³ This part of the presentation is based on the research project: Dis-Interest of the Child: Romani Children in the Hungarian Child Protection System (G. Havas, M. Herczog, M. Nemenyi), ERRC, 2007 Budapest. The adoption chapter was written by the author.

a child, while positing the yearning for a child as the proper basis of determining suitability. It was also stressed that putting extra burdens on people who, in their endeavor to adopt a child, had already gone through a great deal, was simply unfair. Today, on the contrary, there is an almost unanimous consensus about the insufficiency of the now compulsory 21-hours training, whilst monitoring and follow-up procedures still regularly provoke criticism for assumedly being detrimental to the privacy of the family. At the same time, the difficulties of children and families caused by the lack of post-adoption services are well known: due to inappropriate assistance or the absolute lack of any support, they are left alone in their struggle with the problems implicit in their hidden condition. Instances of canceled adoption, usually taking place in puberty, can also be traced back to the lack of training and support. The planned changes in the Family Law just passing the Parliament are tackling these issues by increasing the hours for preparation and offering on-going follow-up support on a compulsory basis for agencies working with adoption.

Roma children face several obstacles in terms of their acceptance, as well as concerning the respect of their identity, culture, and needs. One of the most obvious problems in this regard consists in determining who is considered Roma, which, in turn, entails another problem related to the ways in which such information is gathered. The question arises whether children, in general, need to know about their ethnic or religious background when institutionalized in the child protection system or adopted at a very young age, provided that their parents have not made any statements with respect to their identity, or they do not care about it at all. Furthermore, one wonders who is in charge of ensuring the right to ethnic identity, and in what form. Given that, as a rule, the family is supposed to dispose over the development of identity when the child lives with his or her biological family, one should decide how to proceed in case the family is replaced by some other form: according to uniform guidelines, or taking into account the ideas expressed by specialists or the families concerned?

From the point of view of specialized care, Roma origin becomes significant not so much as the basis of preserving culture and identity, but because Roma children presumably represent a much greater proportion among institutionalized children compared to what their rate within the population would justify, and they are subjected to disadvantages with respect to schooling and the way of they are treated within the system.

This problem was tackled in our research by asking whether adoptive parents have the right to refuse Roma children. Although there are no available statistics, listening to the word of mouth one learns that “exotic”, dark-skinned or Asian, African children, whose looks evidently disclose their “otherness,” easily find their ways to adoptive parents in Hungary as well. Therefore, it is clearly not only due to the mysteries, unfortunately still surrounding adoption, that Roma children get refused; the reasons are much more likely to be found in prejudice and the – often justified – fear from the attitude of the environment. In the course of our research, we asked adoptive parents and the representatives of institutions about their opinions regarding the forms of supporting the maintenance of identity and culture. In addition, the problem of how to prevent haphazard confrontations of the child with his or her Gypsy background, and what to do to protect him or her in case this does happen, was also discussed during the interviews.

The conversations we had with professionals working in the child protection service system clearly reflect our daily experiences, directing the attention to two issues in particular. Along with related perceptions, the tone and the style of discourse on Roma children have fundamentally changed lately. The majority of people reveal more professionalism, fairness and humanity when discussing these matters. This should be conceived of as a significant change, even considering that the participants of focus group discussions enjoy a special position as “the pick of the bunch”. It would be faulty to assume though that appalling voices and approaches have vanished from these conversations; however, now they represent the minority. It should be noted, too, that the picture is not so friendly at all when it comes to informal exchanges or, especially, to practical activities, that are not witnessed by outsiders. Yet, compared to what it used to be like, the situation has definitely improved.

On the other hand, the lack of information, specialized knowledge, techniques and skills, or often the complete ignorance, is alarming. The specialists themselves are only partially to be blamed, since professional trainings and vocational trainings, often not of a very high quality, hardly provide them with the necessary information. For instance, there is a striking lack of curricular materials, specialized literature, teaching aid, films, or other means to communicate the issues examined in our research, while providing orientation and methodological references. The problems regarding the categorization of children with special needs and school segregation form an exception: however, relevant specialized materials make only casual mention of children in specialized care.⁴ In sum, apart from their own beliefs, feelings and experiences, there is nothing to go by, or hold on to, for professionals in child protection in developing their own approach.

To this day, there have been no follow-up of any kind in the child protection system to give social workers and decision makers some feedback on the function or dysfunction of certain elements, allowing for a thorough analysis of the present state of affairs. We have no information regarding the future of persons who spent part or all of their childhood institutionalized in the various forms of specialized care, or lived with adoptive parents, and there are no indicators about the impact of actual decisions and interventions on the quality of life and the future of the children concerned.

Therefore, it is impossible to determine whether particular decisions were right or wrong with respect to the institutionalization, placement and upbringing of children. In the absence of specific data and analyses, the accounts of the future life, and the ups and downs of adulthood, available about children once in specialized care, or coming from an adoptive family, are usually based on anecdotic stories, assumptions and sporadic information. The lack of analyses, research and surveys concerning the life history of persons brought up in foster care is painful indeed, since without such information, orientation is obviously unfeasible for those who would need to see and understand the most how their own acts and behavior, views and affections impact the children they are in charge of, and who should also be able to estimate the effects of the decisions and active interventions made by everyone else involved in these children's lives.

The focus group discussions accomplished in the present project approached the issue of adoption by means of a story and related questions.

The groups were presented the following story: „A family that intends to adopt a child indicates on the personal data sheet that they do not want to adopt a Roma child by any means because they do not believe they would be able to raise the child as their own, and they also have aversions. Therefore, they would like to be assured that none of the children presented to them are Roma.”

The discussion was based on the questions below, implied in the story:

1. Is it permissible / possible to keep track of, or „know”, the child's ethnic origin?
2. Is it important, or not, that Roma ethnicity is visible? How do you know if the child is Roma?
3. How is it discussed among experts and specialists? Which children represent a greater demand, and which not? Why?
4. Can prospective adoptive parents choose whether to adopt Roma children? What about children with mental or physical disabilities?
5. Is it necessary/possible to help in ensuring a wider acceptance of Roma children by adoptive parents? Whose responsibility is this, and what can be done about it?
6. Is it better for a child not to be adopted because of the lack of acceptance, or adoption should be secured by all means so that he/she can live in a family? Is it acceptable not to tell prospective adoptive parents about the child's ethnicity?

⁴ The 2006/1 issue of *Család, gyermek, ifjúság* [Family, Child, Youth] was dedicated to the subject of adoption, including this problem (Csagyi, 2006/1, Budapest). There is also a book intended to professionals and adoptive parents by Eszter Neményi that is currently in print, which, again, barely touches the issues discussed in our research. Another volume, also available in manuscript, compiled by the working committee headed by Zsuzsa Mester and commissioned by the Ministry of Social and Labour Affairs via its Research Institute specifically deals with the issue of promoting the identity and culture of Roma and non-Roma children, as part of our collection of the potential tasks and tasks deserving support to be undertaken by basic or specialized care.

7. What about potential Roma adoptive parents? Are their opportunities good today?

Almost everyone shared the view that such a choice was viable today. Had it been forbidden, prospective adopters would refuse the child they cannot accept on some other grounds. It was also agreed that the child's interests would not be served by giving them to parents who don't want them.

"Obviously, we take down everything about the child, and attach a photo to this description, before giving him or her to adoptive parents. I think we evidently have to make a note regarding his ethnic origins as well." (Director of a children's home)

"It cannot be forbidden, even though we are not allowed to keep track about this, and nor are child protection agencies supposed to ask for the adoptive parents' statement. However, nothing prevents them from making objections in this regard." (Head of a guardianship department)

One of our respondents, who believed it was unacceptable to make judgments based on outward appearance, and doubted that ethnicity could be determined in this way, later said: "However, when we know or assume, based on outward appearance or name, that the child is Roma, we don't offer him or her to prospective adopters who don't want them." (Consultant at a guardianship department)

"You cannot assume being Gypsy to be a negative trait. Why not let the adoptive parents know that the child has Gypsy origins? If they like the child and want to raise him or her, they will decide for adoption. And if they refuse to take him or her by making such objections, I would not give them the child anyway. These children have a lot of positive traits others don't. I don't think ethnic origins should be suppressed." (Specialized kindergarten educator at a child protection agency,

The approaches of the participants of focus group discussions varied with respect to the basis of determining Roma ethnicity by professionals and parents. They made references either to the looks or the name of the child, to meeting the parents and reading their statement, or to familiarity with the child's "past record". The majority of respondents took the visibility, and the possibility to discern, Roma ethnicity for granted, only some of them maintaining that it cannot, and should not, be simply determined.

"In some counties, they wouldn't tell it, even on the phone. They offer a child for adoption and we ask if he or she is Roma, knowing that the prospective adopters are totally negative about it." (Social worker, adoption consultant).

When it came to the problem of the legitimacy and means of, and responsibilities involved in, registering ethnic and religious background, it was easy to see the confusion caused by the contradiction of legislation and professional regulations on the one hand, and existing practices on the other. While professionals acknowledge the prohibition of including such information in the records, they nevertheless take it into account, and mostly respond to the related questions of adoptive parents. Apparently, many of them assume that ethnicity is obvious or discernible, and the prohibition of registering it will not stop anybody from doing so. Opinions vary as far as keeping track of ethnicity is concerned, depending on whether professionals take a legalistic approach with reference to the protection of personal data, child protection, or child's rights. Given the possibility of excluding Roma children from the group of adoptable children, their identification seems to be necessary, while failing to do so appears to be hypocritical.

"It does not concern children who have been living there since they were babies. When the child is already 9 or 10, he or she has already developed a kind of attitude or a sense of belonging. However, I don't think it is a problem in the case of babies." (Deputy manager at a child protection agency)

The deferral, characterizing the attitude of professionals in dealing with the problem of selfhood and the choice of identity, reveals deep-seated uncertainty with respect to these issues. The question whether they feel responsible in initiating the formulation of identity-related claims was not raised, and we do not know if they have any stakes in their own identity, or whether this influenced the suppression of this problem during the discussions.

The account given by one of the participants suggested that it was possible to influence such biased, and often ill-considered, positions: "We always invite families that have already adopted children to participate in preparatory trainings. Apparently, when we invite a family that has adopted a Roma child, prospective adopters are likely to realize that a Roma child is also a child, and they become more accepting. When inviting an elder child, this affects participants usually in a way to defer the age of the child at adoption." (Adoption expert).

Although the situation is far more complex, it was evident that the power of the atmosphere, positive examples, and appropriate information in potentially changing negative, stereotypical and prejudiced attitudes. It is yet another question whether behavior is really affected by this kind of change, or what to do if problems still arise.

The opinions of the environment, the protection of the child, or, for that matter, the self-defense by the family, have all proven to be important factors: "In the latest training, there was a Roma boy whose ethnicity was not visible, and the participants said they didn't mind if the child was Roma as long as it was not visible." (Adoption expert).

In determining Roma origins – besides the typical references to name, skin color and outward characteristics – participants occasionally set forth certain doubts, while, at other times, they seemed quite confident in formulating their position, and indecision followed later. In the meantime, they underlined the illegitimacy of keeping track of ethnicity and religious attachments, yet also assumed the infringement of relevant legislation to be natural.

Biological parents usually have difficulties in understanding the question, and why it is asked. They often have justifiable fears of saying more, and sometimes they do not see the relevance of this issue, or, given their actual circumstances and condition, they do not feel like answering such questions in front of an official or a group of specialists. In most cases, all previous experiences taught them to be careful and understandably afraid, so they obviously would not say anything unless the motives behind the question are clear and honest. On the other hand, this question presumably appears to be insubstantial for many of them, and these people are probably at a loss as to understanding what keeping such records would add up to, and whether their child would benefit from it.

"I am not sure if all the Roma parents at a placement assessment meeting would claim that they want their child ... Very few of them express what they want; after all, the purpose of such meetings is not so much to satisfy the parents' expectations. Therefore, even if they want it, they would not say so. In my opinion, we should consider how to give an opportunity to the child to make choices in the future." (Child welfare specialist).

With respect to unsuccessful adoption and the cancellation of adoption, there is complete consensus among professionals as regards the untenable provision for the cancellation of adoption in Hungarian legislation, meaning that, in case of "unsuitability", adoptive parents may get rid of the now troublesome child or youngster.

"...officially, we are not supposed to keep track of how many Roma children were brought back. The demand for Roma children is already lower, as it has been stated already. When it comes to canceling adoption, parents are probably more inclined to refer to behavior problems in case the child is Roma." (Child's rights representative).

There has been a statement made recently by the Ombudsman responsible for minorities and the other Ombudsman responsible for data protection on the need for identification and documentation of the ethnic background of children in public care in a form of a family history book or legendary, to give them a chance to learn about their families' past without a clear documentation and registration.⁵

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⁵ <http://www.kisebbségiombudsman.hu/hir-477-jelentes-az-etnikai-adatok-kezeleserol.html>,
10 November 2009

Making national adoption easier – the view from Russia

Olga Khazova

1. What is the purpose of adoption? The purpose of adoption is to find a family for a child left without parental care in order to provide the child with full physical, mental, spiritual, and moral development. This is what is stated in the Russian Family Code (s. 124 (2)). Russian Family Code also stresses, after article 20 (3) of the UN Convention on the Rights of the Child that, when arranging family placement, due regard shall be paid to the child's ethnic, religious, cultural and linguistic background, to the possibility of continuity in a child's upbringing and education" (s. 123 (1)). In accordance with this requirement, Russian citizens have the advantage over foreigners in adopting Russian children. The Family Code provides that inter-country adoption of Russian children is permitted only if there is no possibility for these children to be adopted by the families of Russian citizens, permanently residing on the territory of the Russian Federation, or by the child's relatives irrespective of their place of residence (s.124 (4)).

In this context, how could we describe the main role and responsibility of the state with regard to adoption? Having tried to summarize numerous Russian legal rules concerning adoption, I could state that it consists in the following:

- 1) to find the children left without parental care and register them;
- 2) to assist in placing children left without parental care to the families, preferably to the Russian ones;
- 3) to create conditions that would help those who are willing to adopt a child receive complete and reliable information about children available for adoption; to organize the adoption procedure and proper control over this procedure; and
- 4) to perform post-placement control.

2. Adoption is a rather painful and highly politicized issue in Russia. As many of you probably know, Russia is one of the main sending countries. The point is that after the

USSR breakdown, in the beginning of the 1990^{ies}, Russia faced the international adoption boom, and since then there was a stable increase in the number of foreign adoptions, while the in-country adoption was decreasing.

By 2003 number of foreign adoptions¹ reached 7,986 and for the first time exceeded the number of in-country adoptions which was 7,188 in 2003.

In 2004, the number of foreign adoptions was already 9,419 while the number of national adoptions kept decreasing and, in 2004, was 7,013.

It was clear that something urgently needed to be done to improve the situation. It was necessary to reverse the trend. The state had to develop certain strategies to stimulate national adoption, to make it more available and appealing. To a certain extent it succeeded. Therefore, I will focus mostly on what has been done during the recent years.

3. I will indicate several different initiatives that aimed at making national adoption easier, both technically and psychologically, and their results.

I will start with the results.

2005 was the first year when we had slight increase in national adoption (7,526) and decrease in foreign adoption (6,904).

In 2006 and 2007 the gap between in-country and inter-country adoption increased in favour of in-country adoption:

2006: 7,742 – in-country adoptions; and 6,689 – inter-country adoptions.

2007: 9,048 – in-country adoptions; and 4125 – inter-country adoptions.

The last year, 2008, there were 9,530 national adoptions and the number of foreign adoptions dropped down to 4,536.

Now, let's turn to what actually has been done.

First of all, in 2004, Russian Family Code was amended with the provisions that soften the rules concerning suitability of adoption applicants (s. 127). Without going into a detailed analysis of the requirements that would-be adopters should meet, I just mention some of them: an adoption applicant must have full legal capacity; must not be deprived of parental rights or limited in parental rights by a court order; must not have serious health problems, criminal records, and etc. Two requirements that were amended recently concern a would-be adopter's income and living conditions. Under the Code a person shall not be an adoptive parent if this person:

- does not have an income that could ensure subsistence level to an adopted child; and
- does not have a dwelling space that meet the established sanitary and technical requirements.

Both of these provisions were strictly imperative and did not allow any judicial discretion. The amendments allowed the court, when considering an adoption case, to disregard these requirements taking into account the interests of the child going to be adopted and the facts that justify adoption in such the circumstances. Though important the income and housing conditions may be, love and care that a child taken away from children institution may receive in a loving family may overweight in a certain situation – this was the main reasoning behind these amendments. Sure, it did not mean that the children might be adopted by homeless people or people who lived in cellars or roof spaces. The Plenum of Russian Supreme Court in its Decree No. 8 of 20 April 2006 “On Application by the Courts of the Legislation when Considering the Cases on Adoption of Children” gave some guidance to the courts, having explained that the court may depart from the requirements concerning income and housing conditions when a child is adopted by his/her relative (family member); or when a child had been living with a prospective adopter before adoption proceedings were started and treats the adoption applicant as the parent; when a adoption applicant lives in a country-side (rural areas) and has household plot (subsidiary husbandry). Also, under the amendments, these requirements shall not be applied in cases when a child is planned to be adopted by a step-mother or step-father (Family Code, s. 127 (1²)).

Secondly, in 2006 and subsequent years adoptive parents got to be entitled to different allowance paid from federal and regional budgets. These payments differ in form and amount. It is a lump sum paid upon adoption, similar to that that is paid to biological parents when a child is born; it is also monthly payments paid to those who adopted a child. The amount of support paid to adoptive parents differs from region to region, and in some of them it is relatively low, while in other regions it is quite significant. For instance the amount of a lump sum paid upon adoption reached USD 1,300 in Tomsk and even USD 5,000 in Stavropolsky krai (area).

Third innovation, to which my attitude is contradictory, was prolongation of the period during which a child is available for in-country adoption for three months.

A system of registration of children available for adoption in the State Data Bank for Children Without Parental Care is too technical to be explained here², but the result of the three-month extension of keeping information about a child available for adoption in the Data Bank meant that on the whole a child may be transferred for inter-country adoption only upon expiration of eight-month period since this child became available for adoption (instead of five months before the amendments³).

In fact, whether this provision is in the best interests of the child or not is a question. On the one hand, indeed, it extends the period during which a child may be adopted within the country. On the other hand, it extends the period during which a child lives in children institution. Eight months period on the whole may turn out to be too long if a child is a newborn or only several months old, taking into account what an evolution a human being makes during the first year. It is also well-known that if a child has health problems, which is often the case in adoption, every day may count.

Finally, fourth point which I would like to draw your attention to has no relation to law. It was also important to change public attitude towards adoption. It was necessary to make adoption popular and fashionable, and not as something which adoptive parents should make a secret of and that they should hide. With this aim in view, a kind of adoption advertising has started on the central and especially local TV, radio, in the local newspapers. What is important, adoption has started to be discussed in a positive tone, people have been provided with information about children available for adoption – children who “are looking for a family” – and have been explained about the adoption procedure and what specifically the persons willing to adopt a child should do, where to apply, etc.

This is exactly the aspect in the whole adoption matter where local initiative is very important and where regional and local authorities, private bodies and NGOs could do a lot. Below, there is an example of what may be called success practice or success story.

4. The success story concerns one of the Russian regions, Krasnodarsky krai, located in the south of Russia. As the result of different measures undertaken in this region, the situation with children left without parental care has greatly improved in different respects⁴. To anticipate, there is some data, which speak for themselves.

In 2006, in Krasnodarsky krai, there were 789 children left without parental care that were registered as neglected children and transferred to the children institutions.

In 2007, there were already 321 children registered and transferred to the children institutions.

In 2008, there were 280 children registered, and during the first 9 months of 2009 – 191 children.

Two years ago, in 2007, in Krasnodarsky krai, there were about 4,000 children that lived in 40 children institutions. At present, there are 1418 children that live in 29 children institutions. Another noticeable result is that the number of cases when placement of children with the family was terminated (in particular, because of absence of mutual understanding and difficulties in communication) and children had to be returned to the children institutions significantly decreased during the last two-three years.

These amazing data are the result of a set of different measures carried out in different directions and on different levels. In particular, special emphasis has been put on informing people about state support that is provided to the families which take a “strange” child (whether it is a foster family placement or adoption). Also, a system of education and support of such the families was created – the system called “school for foster parents”, which included adoptive parents as well. Parents are taught there many different things, but, most importantly, they are taught how to overcome difficulties that are inevitably connected with taking a “strange” child to the family, how to make communication with children conflict-free; they are explained specifics of children psychology as applied to different age, etc. Schools for foster parents turned out to be a great success indeed. In the beginning there was just one such school created. Now there are already 44 schools, and the demand for such schools is increasing as their popularity is growing.

The result of these strategies is that children institutions in Krasnodarsky krai are becoming empty.

5. Whether the increase in the Russian national adoption should be attributed to these measures or to something in particular, it is hard to say. No doubt, state allowances, a kind of remunerative incentives, must have been one the main catalysts of increase in the number of in-country adoptions. However, I would not attribute this increase exclusively to financial support, though important it might be. Most probably, it was the result of all the steps made in this direction altogether. Krasnodarsky krai “story” proves this statement.

Though we cannot say that there are no problems with regard to adoption left at all, and “all is quite on the Russian adoption front”, positive dynamics is evident, and this seems to be the most important now.

¹ These and the following data are taken from the official statistics available at the website of the RF Ministry of Education and Science <<http://www.usynovite.ru>>.

² The main Russian adoption authority is the Ministry of Education and Science. Special departments that are called federal and regional operators deal with adoption matters at the federal and regional levels respectively. The work of these operators is regulated by the federal Law on State Data Bank for Children without Parental Care 2001 and numerous Government Decrees in great detail. Briefly, the task of these bodies is to carry out centralized record of children let without parental care and available for adoption, centralized record of persons wishing to adopt a child (children), the home-study of children and of prospective adoptive parents, the medical examination of children for adoption, the preparation of a final recommendation for the court, records of adoptions which have taken place, and so on. According to the Law on State Data Bank for Children without Parental Care, when a child becomes available for adoption, information about him/her is transferred to a regional operator of the State Data Bank, where this information is kept for one month. If the child was not adopted by anybody in this region, information about him/her is transferred to the federal operator of the Data Bank, where it is kept for six months (before it was three months). A child may be adopted by a foreigner only if he/she did not find a family after the expiration of the six month period during which information about him/her was available in the federal data bank.

³ Taking into account that information about a child available for adoption is transferred to a regional operator after a custody and guardianship agency failed to place the child within a month period in the area of child's residence, the maximum “waiting” period for a foreigner wishing to adopt a particular child constitutes eight months.

⁴ According to the paper of the Head of the Department of Family Policy of Krasnodarsky krai T.F. Kovalevoi presented at the Russian-Italian Workshop on application of the provisions of the Agreement on Inter-country Adoption (Moscow, 28-29 September 2009).

REVIEW OF THE OPERATION OF THE 1993 HAGUE CONVENTION: A GLOBAL PERSPECTIVE

**Joint Council of Europe and
European Commission Conference**

**“Challenges in Adoption Procedures in Europe:
Ensuring the Bests Interests of the Child”
Strasbourg, France**

30 November to 1 December 2009

William Duncan, Deputy Secretary General
Hague Conference on Private International Law

Conférence de La Haye de droit international privé | *Hague Conference on Private International Law*

1

BEFORE THE HAGUE CONVENTION OF 1993 – THE DARK SIDE

- Interests of the child not always the paramount or primary consideration.
- Fundamental rights of the child and biological family not protected.
- Abductions, sale of and traffic in children. Improper financial gain.
- Adoptions not recognised.
- Lack of co-operation (sharing of responsibilities) between countries of origin and receiving countries.



2

BEFORE THE HAGUE CONVENTION OF 1993 – THE DARK SIDE (CONT.)

- Unauthorised intermediaries.
- UNCRC principles (Art. 21) not supported by a practical legal framework.
- Adoptive parents exploited.
- Adoptive parents given inaccurate information concerning the child.
- Adoptive parents left with uncertainty concerning the legitimacy and status of the adoption.



3

SOME OBJECTIVES OF THE 1993 HAGUE CONVENTION

- Interests of the child the paramount consideration.
- Introduction of safeguards and harmonised procedure based on co-operation and shared responsibility between the country of origin and the receiving country.
- The suppression of abuses, including improper financial gain.
- Securing the recognition of Convention adoptions.
- Creating a framework which offers prospective adopters greater clarity, transparency and predictability.



4

ABOUT THE 1993 HAGUE CONVENTION

Concluded	29 May 1993
Entered into force	1 May 1995
81 Contracting States	8 October 2009



Contracting States to the Convention – now more States of origin than receiving States.

3 States have signed, but not yet ratified the Convention: Ireland, Nepal and Russian Federation.

UN Committee on the Rights of the Child regularly recommends –

- that States join the 1993 Hague Convention;
- that Countries of origin accept technical assistance from HCCH;
- UNICEF supports the Convention.

5

81 States have ratified or acceded to the Convention



Contracting States to the 1993 Hague Convention as per 24 November 2009

EUROPE

Albania – Andorra – Armenia – Austria – Azerbaijan
Belarus – Belgium – Bulgaria – Cyprus – Czech Republic
Denmark – Estonia – Finland – France – FYR Macedonia
Georgia – Germany – Greece – Hungary – Iceland
Israel – Italy – Latvia – Liechtenstein – Lithuania
Luxembourg Malta – Moldova – Monaco – Netherlands
Norway Poland – Portugal – Romania – San Marino
Slovakia Slovenia – Spain – Sweden – Switzerland
Turkey – United Kingdom

AFRICA

Burkina Faso
Burundi
Cape Verde
Guinea
Kenya
Madagascar
Mali
Mauritius
Seychelles
South Africa
Togo

ASIA PACIFIC

Australia
Cambodia
China
India
Mongolia
New Zealand
Philippines
Sri Lanka
Thailand

AMERICA

Belize
Bolivia
Brazil
Canada
Chile
Colombia
Costa Rica
Cuba
El Salvador
Equator
Guatemala
Mexico
Panama
Paraguay
Peru
Dominican Republic
Uruguay
United States
of America
Venezuela

7

SOME CHALLENGES IN IMPLEMENTING THE CONVENTION EFFECTIVELY

1. Need for capacity building in countries of origin

- Establishment of a professional, independent, ethically-based Central Authority, which has continuity.
- Placing intercountry adoption in the context of a realistic national child care and protection plan.
- Controlling the activities of intermediaries.
- Regulating the activities of accredited bodies.
- Managing pressures from abroad.
- Eliminating unnecessary bureaucracy.
- Training for the key players, including the judiciary.
- Closing the back doors / preventing evasion.



8

2. Exercising financial control

- Improper financial gain from adoption is prohibited (Art. 32).
- Article 32 puts into practice Article 21(d) of the CRC *((d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it).*
- Improper = illegal, excessive or unreasonable material benefit.
- A person or body may charge reasonable fees to cover their costs for providing an adoption service.
- Accredited bodies (licensed adoption agencies) must be non-profit organisations (Art. 11).
- Effective regulation of the financial aspects of adoption can be achieved with:
 - transparency of costs;
 - accountability of service providers;
 - criminal penalties for persons making improper financial gain.
- Establish co-operation between States of Origin and Receiving States to establish reasonable fees and prevent improper financial gain.

9

3. Challenges for receiving countries

- Working with and supporting the efforts of countries of origin.
- Managing the expectations of prospective adopters.
- Understanding the post-adoption concerns of countries of origin.
- An ethical approach to non-Convention countries of origin.
- Supporting capacity building and training in countries of origin.



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4. Getting more States on board (*e.g.* Ethiopia, Haiti, Korea, Russian Federation, Ukraine, Vietnam)

- Solidarity among receiving States.
- Application of Convention safeguards and procedures as far as practicable.



11



QUESTIONS

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Intercountry Adoption Section

12

November 2009



**HOW THE 1993 HAGUE INTERCOUNTRY ADOPTION CONVENTION
HELPS TO PROTECT THE BEST INTERESTS OF CHILDREN
IN INTERCOUNTRY ADOPTION**

*Jennifer Degeling
Secretary
Hague Conference on Private International Law*

**Joint Council of Europe & European Commission Conference
Challenges in Adoption Procedures in Europe:
Ensuring the Best Interests of the Child
30 November – 1 December 2009**

OUTLINE

1. **Protective purposes of the Convention**
2. **Protection of the parties**
3. **Safeguards for the adoption procedure**

1. PROTECTIVE PURPOSES OF THE CONVENTION

1. to establish **minimum standards** for the protection of children who are the subject of intercountry adoption
2. to ensure adoptions are made in the **best interests** of children
3. to develop **safeguards** to prevent the **abduction, the sale of, or traffic in children**, and to **eliminate various abuses** associated with intercountry adoption
5. to **reinforce and expand** the adoption principles of the United Nations Convention on the Rights of the Child in Article 21

2. PROTECTION OF THE PARTIES

2.1 Child

- All decisions must be in child's best interests (Arts 1, 16)
- Take actions that contribute to a child's best interests
- A family in the home country sought first (subsidiarity Art. 4)
- Investigation of child's origins before he/she is declared adoptable (Arts 4, 16)
- Professional matching of child with suitable adoptive family.

2.2 Birth parents

- The State should provide protections in the law for birth parents against baby buying, selling and abductions (Art. 1)
- The State should support birth parents to keep their child if possible (subsidiarity) e.g. by providing temporary relief for a family in crisis;
- Birth parents must not be pressured to consent to an adoption (by coercion or bribery) (Art. 4);
- Their informed consent to the adoption must be given and verified – understand consequences of intercountry adoption (Art. 4);
- Counselling about their decision and the legal effect of intercountry adoption (Art. 4)

2.3 Adoptive parents

- Professional evaluation of adoptive family (Art. 15)
- Thorough preparation of prospective adoptive parents for an intercountry adoption (Art. 5)
- Preparation of an accurate report on the prospective adoptive parents (Art. 15)
- Advice or assistance to parents about the child referred to them by the State of origin (Art. 17)
- Post-adoption support to deal with problems and prevent breakdown of adoption

SAFEGUARDS DIRECTED AT PROTECTING CHILDREN AND FAMILIES:

3. SAFEGUARDS FOR THE ADOPTION PROCEDURE

- 3.1 Give full effect to best interests principle
- 3.2 Verify a child's background to ensure he/she is genuinely adoptable
- 3.3 Financial regulation of intercountry adoption
- 3.4 Regulate adoption agencies by accreditation (licensing)
- 3.5 Verify the Convention procedure is followed (Art. 17)
- 3.6 Additional safeguards may be imposed by any country

3.1 Give full effect to best interests principle

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

- Implement the principle of subsidiarity
- Ensure the child is adoptable
- Preserve information about the child and his/her parents
- Evaluate thoroughly of the prospective adoptive parents
- Match the child with a suitable family
- Impose additional safeguards if necessary

3.2 Verify a child's background to ensure he/she is genuinely adoptable

- The Convention requires that the country of origin establish that a child is adoptable (Art. 4);
- This means child's origins and background must be verified, and the subsidiarity principle applied - before declaring that the child is adoptable;
- A report on the child's medical condition and family history and is also required by the Convention (Art. 16).
- These procedures must be reviewed again by both States before an adoption is finalised (Art 17 c).

3.3 Financial regulation of intercountry adoption

- Improper financial gain from adoption is prohibited; (Art. 32)
- Article 32 puts into practice Article 21(d) of the CRC *((d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;)*
- Improper = illegal, excessive or unreasonable material benefit
- A person or body may charge reasonable fees to cover their costs for providing an adoption service
- Accredited bodies (licensed adoption agencies) must be non-profit organisations (Art. 11)
- Effective regulation of the financial aspects of adoption can be achieved with
 - transparency of costs
 - accountability of service providers
 - criminal penalties for persons making improper financial gain
- Establish co-operation between States of Origin and Receiving States to establish reasonable fees and prevent improper financial gain

3.4 Regulate adoption agencies by accreditation (licensing)

- The process of accreditation of bodies is one of the Convention's safeguards to protect children in adoption
- The Convention sets only minimum standards for the accreditation of adoption agencies for their structure, accountability, ethics and professionalism (Articles 10, 11 and 32) – additional standards may be imposed
- They must play an effective role in upholding the principles of the Convention and preventing illegal and improper practices in adoption
- Authorisation of accredited bodies of a Receiving State to operate in a State of origin - must be specifically given by the competent authorities of both countries (Article 12)
- The State of origin may impose its own conditions for such authorisation

3.5 Verify Convention procedures are followed: Art. 17

- Obligation in Art. 17 : Central Authorities of Receiving country and country of origin give agreement that the adoption may proceed to finalisation;
- Art. 17c gives the opportunity to examine if the Convention procedure was followed before agreement to proceed is given.
- If any procedure or document raises doubts, the central Authorities should not give agreement until the problems are investigated and resolved;
- Art. 17 is the final opportunity to verify the correctness of the procedure before the child is entrusted to the PAPS and the adoption decision will be made.

- Convention obligations are imposed on Central Authorities and adoption accredited bodies to apply Convention's rules and safeguards and to support its objects;
- Central Authorities must co-operate regarding Convention procedures, as well as co-operate to prevent abuses and avoidance of the Convention;

3.6 Other safeguards may be imposed

- Convention imposes minimum standards only
- More safeguards or conditions than those in the Convention may be imposed by any country e.g. because of the national situation or challenges
- To ensure Convention safeguards are applied effectively, other restrictions may be imposed by a Country of origin on
 - the number of applications from Receiving countries
 - the number of foreign accredited bodies allowed in CO
 - the number of Receiving countries to work with for intercountry adoptions.

CONCLUSION

4.1 Convention is the accepted legal framework

- The international legislation of the Hague Convention was "designed to put into action the principles regarding inter-country adoption which are contained in the Convention on the Rights of the Child". (UNICEF)
- United Nations' Children Fund has given its strong, explicit and unambiguous support to the 1993 Hague Intercountry Adoption Convention and protections it offers (Statement of October 2007)
- Laws, regulations, legal procedures are needed in each country to implement the Convention fully and effectively

Conférence jointe du Conseil de l'Europe et de la Commission européenne

« Les enjeux dans les procédures d'adoption en Europe: garantir l'intérêt supérieur de l'enfant »

Strasbourg, Palais de l'Europe
30 novembre - 1 décembre 2009

Le rôle et les responsabilités des Etats d'accueil : l'importance du Programme d'assistance technique en matière d'adoption

Laura Martínez-Mora
Coordinatrice du Programme d'assistance technique
Conférence de La Haye de droit international privé

Le principe de coresponsabilité

- Le rôle des Etats d'origine (EO) et des Etats d'accueil (EA)
- La Convention établit un **cadre juridique** pour **la coopération** entre les autorités des Etats d'origine (EO) et celles des Etats d'accueil (EA)
- La reconnaissance du fait que les EA et les EO doivent **partager les responsabilités** pour développer des garanties et des procédures protégeant l'intérêt supérieur de l'enfant

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Les responsabilités des Etats d'accueil (1)

Les États d'accueil doivent accepter plus de **responsabilité pour les problèmes relatifs à l'adoption**, entre autres ils devraient :

- Tenir compte des besoins réels d'adoption dans les EO et s'abstenir d'exercer toute pression sur les EO pour obtenir des enfants
- Respecter les conditions requises relatives à l'adoption des EO
- Mieux préparer les familles adoptives quant aux réalités et aux défis spécifiques à l'adoption internationale, et rendre obligatoire la préparation
- Encourager le respect des exigences raisonnables des EO en matière de rapports de suivi d'adoption

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Les responsabilités des Etats d'accueil (2)

- Contrôler **les aspects financiers** de l'adoption internationale
- Veiller au bon fonctionnement **des organismes agréés**
- Mettre fin aux **adoptions privées** (celles qui ne sont pas réalisées à travers une Autorité centrale ou un organisme agréé) - ces adoptions ne sont pas compatibles avec les règles et procédures de la Convention
- Les États doivent appliquer les **mêmes règles et garanties** établies par la Convention aux Etats non contractants concernant les adoptions internationales

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Les responsabilités des Etats d'accueil (3)

- Aider à améliorer **les systèmes de protection de l'enfance** dans les EO:
 - Apporter de l'aide au développement de la protection de l'enfance – mais sans lien avec l'adoption internationale
 - Un État à lui seul, ne peut pas développer une bonne procédure pour éliminer les mauvaises pratiques - « une étiquette de responsabilité partagée » des États
 - « Les EO pauvres ne peuvent prévenir seuls le fait que leurs systèmes d'adoption sont corrompus, car des sommes d'argent importantes provenant des pays occidentaux pénètrent leurs systèmes... seules des limites imposées et mises en place par les États demandeurs eux-mêmes, ainsi que le travail en commun de ces États avec les autorités des États fournisseurs pourront arrêter les cycles des abus »
 - Les EA doivent montrer le chemin vers une réforme et assister les EO à mener à bien les améliorations
 - CEPENDANT, la coopération institutionnelle ainsi que toute forme d'aide humanitaire ne doivent pas être subordonnées à des processus d'adoption internationale

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Programme d'assistance technique

- Programme créé par le Bureau Permanent de la Conférence
- Renforcer la mise en œuvre de la Convention
- Objectif : assistance aux Etats qui prévoient de ratifier ou d'adhérer à la Convention, ou bien qui l'ont ratifiée ou y ont adhéré mais connaissent des difficultés pour sa mise en œuvre
- Pays pilotes : Guatemala et Cambodge

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Programme d'assistance technique (cont.)

- À la demande des Etats
- Etapes :
 - 1^{ère} : assistance juridique
 - 2^{ème} : formation des acteurs
- En collaboration avec UNICEF et d'autres OI, gouvernementales ou non, qui travaillent sur le terrain
- En collaboration avec d'autres Etats parties à la Convention
 - Groupes de travail
 - Experts d'autres Etats d'origine
 - Experts indépendants

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www.hcch.net
Espace adoption internationale



Le droit à une famille ? Analyse du cadre juridique existant

*Contribution à la Conférence jointe du Conseil de l'Europe et de la Commission européenne
« Les enjeux dans les procédures d'adoption en Europe : garantir l'intérêt supérieur de
l'enfant », Strasbourg, 30 novembre - 1^{er} décembre 2009*

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Madame la Présidente,
Mesdames, Messieurs,

C'est avec intérêt que j'ai pris connaissance du thème que les organisateurs de cette Conférence m'ont proposé, et je les en remercie. Intérêt critique car, au risque de paraître provocatrice, je vais commencer par questionner cette notion de droit à une famille qui intitule ma contribution, mais aussi toute notre session.

Droit à une famille. Qui aurait droit à une famille ? S'agirait-il de l'enfant, cet enfant qualifié d'« abandonné » pour lequel des praticiens, se fondant notamment un peu rapidement sur le préambule de la Convention des droits de l'enfant, revendiquent le droit à une famille, droit à des parents ? S'agirait-il des candidats adoptants qui, parfois, du fond de leur désir ou de leur besoin d'enfant, peuvent être tentés d'invoquer un prétendu droit à l'enfant, droit à une famille ?

Est-il vraiment paradoxal de mettre ainsi sur le même pied des enfants privés de famille, vulnérables, et des candidats adoptants généralement en pleine possession de leur moyens sur le plan social mais le plus souvent biologiquement inféconds ?

Ce paradoxe me paraît chargé de sens. En effet, malgré nos souhaits un peu démiurgiques de donner une famille à la fois à ces enfants et à ces candidats parents, juridiquement, en matière de droits humains - droits de l'homme et droits de l'enfant - il n'existe pas de droit à une famille.

Si elle peut être difficile, cette affirmation est importante, pour éviter de tomber dans les excès, en essayant de trouver « à tout prix » des enfants pour des candidats adoptants, mais aussi en considérant de façon exclusive ou privilégiée la solution de l'adoption, a fortiori de l'adoption internationale, pour les enfants privés de famille. Je reviendrai sur ces risques d'excès dans les deux sens, et les orateurs qui me suivent également sans doute.

Mais me direz-vous, au nom de quoi affirmez-vous qu'il n'existe pas de droit à une famille, alors que nous aimerions tellement que ce droit existe ?

D'abord, en philosophie du droit et en éthique, personne ne peut prétendre à un droit, encore moins un droit fondamental - droit de l'homme, droit de l'enfant - qui chosifie un autre être humain. Personne n'a droit à un autre être humain, sous peine de faire perdre à ce dernier son statut même d'humain et de l'instrumentaliser comme objet du droit d'un autre.

¹ Voir par exemple *L'adoption et les droits de l'homme en droit comparé*, Bruylant, Bruxelles et L.G.D.J., Paris, 2001.

² llammerant1@bluewin.ch.

Mais alors, de quoi traite l'article 8 de la Convention européenne des droits de l'homme (CEDH)³ ? Cet article ne garantit pas le droit à une *famille*, mais le droit au *respect de la vie privée et familiale*. Comme de nombreux arrêts de la Cour l'ont répété, et encore récemment l'arrêt E.B. c. France, « l'article 8 ne garantit ni le droit de fonder une famille ni le droit d'adopter. Le droit au respect d'une vie familiale ne protège pas le simple *désir* de fonder une famille ; il *présuppose l'existence d'une famille*⁴ »⁵. En conformité, donc, avec les principes éthiques esquissés plus tôt.

Les parents et les enfants ont droit au respect de leur vie familiale, s'ils en ont effectivement une. Que ce soit dans la famille de naissance, y compris lorsque l'enfant est placé hors de la famille. Que ce soit dans la famille adoptive, après l'adoption. L'adoption étant elle-même considérée par la Cour européenne des droits de l'homme, par exemple dans un récent arrêt X c. Croatie, comme une ingérence très sérieuse dans le droit au respect de la vie familiale des parents d'origine et de l'enfant, surtout si elle a lieu sans le consentement des parents. Quand donc est-elle justifiée, dans l'intérêt supérieur de l'enfant ? Autrement dit, que se passe-t-il, sur le plan des droits fondamentaux, lorsque les liens avec la famille de naissance se distendent ? Car voilà la situation qui nous préoccupe sans doute le plus, celle des enfants parfois qualifiés d'« oubliés » dans des placements, dans *tous* nos pays. C'est pour ces enfants, sans doute, que nous sommes tentés d'inventer un droit à une famille, à des parents.

Au lieu de rêver à un impossible droit, je vous propose de nous tourner vers la Convention des droits de l'enfant, qui pose des principes clairs, également consacrés par la jurisprudence de la Cour EDH et par la Convention de La Haye de 1993.

Article 7 de la Convention des droits de l'enfant : « l'enfant a, dès la naissance et dans la mesure du possible, le droit de connaître ses parents et d'être élevé par eux ». Nouveau paradoxe : le droit... dans la mesure du possible.

Article 9 : « les Etats parties respectent le droit de l'enfant séparé de ses parents d'entretenir régulièrement des relations personnelles et des contacts directs avec eux, sauf si cela est contraire à son intérêt supérieur ». Un droit à nouveau, mais soumis à l'intérêt supérieur de l'enfant.

Article 20 : « tout enfant qui est temporairement ou définitivement privé de son milieu familial a droit à une protection et une aide spéciale de l'Etat. Cette protection de remplacement peut notamment avoir la forme du placement dans une famille, de la kafalah

³ Repris par l'article 7 de la Charte des droits fondamentaux de l'Union européenne, lui-même complété par l'article 24 en ce qui concerne les droits de l'enfant.

⁴ C'est l'auteur qui souligne.

⁵ - L'article 12 de la CEDH, selon lequel « à partir de l'âge nubile, l'homme et la femme ont le droit de se marier et de fonder une famille selon les lois nationales régissant l'exercice de ce droit », outre qu'il semble se limiter aux couples hétérosexuels mariés et qu'il soumet les libertés garanties au droit national, ne crée pas plus un droit d'adopter (Commiss. EDH, 10 mars 1981). Cet article ne pourrait en tout état de cause être invoqué comme source d'un prétendu droit de l'enfant à (fonder ?) une famille.

- L'article 9 de la Charte des droits fondamentaux de l'Union européenne (« le droit de se marier et le droit de fonder une famille sont garantis selon les lois nationales qui en régissent l'exercice ») est pareillement soumis aux lois nationales et ne paraît pas plus pouvoir fonder ni un prétendu droit de l'enfant d'être adopté ni, pour les raisons éthiques et juridiques invoquées plus haut, un droit d'adopter.

- Par ailleurs, la Cour européenne des droits de l'homme a également répété que l'adoption consiste à donner une famille à un enfant, et non un enfant à une famille. Avec tout le respect à développer à l'égard des personnes souffrant dans leur désir d'enfant, il convient donc d'accepter que l'adoption est d'abord une institution de protection de l'enfance, et non un instrument de planning familial.

de droit islamique, de l'adoption ou, *en cas de nécessité*⁶, du placement dans un établissement approprié. Dans le choix entre ces solutions, il est dûment tenu compte de la nécessité d'une certaine *continuité*⁷ dans l'éducation de l'enfant, ainsi que de son origine ethnique, religieuse, culturelle et linguistique ».

Article 21 : « l'adoption à l'étranger peut être envisagée comme *un autre moyen*⁸ d'assurer les soins nécessaires à l'enfant si celui-ci ne peut, dans son pays d'origine, être placé dans une famille nourricière ou adoptive ou être convenablement élevé » (principe de subsidiarité de l'adoption internationale).

Et enfin, un article clé souvent insuffisamment mis en lumière, l'article 25 : « l'enfant qui a été placé » - hors placement en vue d'adoption bien sûr - « a le droit à un examen périodique de toute circonstance relative à son placement ».

Cette construction, qui complète et illustre le droit au respect de la vie familiale de la CEDH, me paraît fonder un droit de l'enfant qui n'est pas explicitement exprimé comme tel dans la Convention des droits de l'enfant, mais qui à mon avis y trouve un fondement implicite certain, qui est de plus en plus reconnu sur le plan international et qui serait le plus proche d'un droit à une famille: le droit de tout enfant séparé de sa famille à un projet de vie permanent (*permanency planning*), de préférence familial.

Droit donc de ne pas être « oublié » en placement, mais à ce qu'un travail soit entrepris dès le placement et même, préventivement, avant celui-ci, avec la participation de l'enfant et celle de la famille d'origine, pour évaluer, prioritairement, les possibilités de restauration et de renforcement des liens entre l'enfant et sa famille.

Et si ce n'est pas possible, droit à ce qu'une solution permanente soit dégagée, pour sortir du provisoire perpétuel et donc de l'insécurité qui caractérise de nombreux placements.

Sans cependant ignorer que pour certains enfants, trop marqués par un passé de séparations répétées, voire de traumatismes, l'intégration dans une famille n'est sans doute malheureusement plus adéquate. La meilleure solution permanente peut donc être pour eux un placement en institution, de préférence de type familial. Mais pour tous ceux qui ont besoin d'une famille, et qui sont capables de s'y intégrer, l'Etat a l'obligation de rechercher activement - voire de susciter - une famille apte, sans que cela devienne un droit de l'enfant, l'expérience nous montrant en outre que pour de nombreux enfants, plus âgés, en fratrie, présentant des problèmes de santé, il est difficile de trouver une famille de substitution. Le placement familial peut être envisagé pour eux, et pour tous ceux qui conservent des liens vivants avec certains membres de leur famille de naissance. Mais sans le privilégier systématiquement par rapport à l'adoption car certains enfants, dont les parents sont défaillants, ont besoin d'un père et d'une mère pour toute la vie, de la sécurité d'une nouvelle filiation et de l'appartenance pleine et entière à une famille, si possible dans leur pays d'origine, à défaut dans un pays d'adoption.

En résumé, le droit à une famille n'existe pas. Mais les enfants, y compris les enfants placés, ont droit au respect de la vie familiale effective, même lacunaire, qu'ils ont développée avec la famille *qu'ils ont*. Et, lorsque les liens avec cette famille sont considérés comme définitivement insuffisants ou préjudiciables, ils ont le droit, dans les meilleurs délais, à un projet de vie permanent, de préférence familial. Corrélativement, les Etats ont l'obligation positive de rechercher le délicat équilibre entre ces deux droits, en soutenant prioritairement

⁶ C'est l'auteur qui souligne.

⁷ Idem.

⁸ Idem.

les familles en difficulté *et* en élaborant un projet de vie permanent, au cas par cas, pour chaque enfant placé, dans le respect de ses besoins, de son individualité et de son opinion.

En résistant, donc, à toute tentation simplificatrice, idéologique, de privilégier une solution, que ce soit l'adoption internationale, l'adoption nationale, le placement familial ou l'institution de type familial, au détriment d'une politique globale et différenciée de protection de l'enfance, proposant *toutes* les solutions utiles. Car en privilégiant une solution, on oublie forcément des enfants.

Que pouvons-nous faire, en Europe, pour promouvoir cette vision de l'intérêt supérieur de tous les enfants placés, ceux d'Europe mais aussi ceux des autres continents, dans le cadre de la coopération internationale et lorsque des Européens souhaitent les adopter ?

Sans doute confier à nos autorités un mandat clair et les doter d'une autonomie effective leur permettant de résister aux pressions qui les éloigneraient de leur mission, à savoir : placer l'enfant au centre, et non les souhaits des adultes, et choisir pour chaque enfant la solution la plus adéquate.

Mais aussi examiner nos politiques et nos pratiques pour vérifier qu'elles offrent effectivement, *dans chaque pays*, l'ensemble des solutions en matière de protection des enfants privés de famille.

Partager nos bonnes pratiques et élaborer des standards communs.

Et, en matière d'adoption internationale, *refuser la compétition entre pays d'accueil et la pression sur les pays d'origine* - qui sont certainement des causes majeures de violations graves de l'intérêt supérieur de nombreux enfants.

Je vous remercie de votre attention à ma libre réflexion sur l'adoption face à nos souhaits de famille pour tout être humain, réflexion fondée sur mes recherches juridiques mais aussi sur deux décennies de pratique avec les adoptants, les enfants, les parents et les pays d'origine.



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Conférence jointe du Conseil de l'Europe et de la Commission européenne

« Les enjeux dans les procédures d'adoption en Europe :
Garantir l'intérêt supérieur de l'enfant »

Prévention des abus dans les procédures d'adoption suggestions et bonnes pratiques

Marlène Hofstetter

Terre des hommes – aide à l'enfance

Lausanne, Suisse

Contenu

- Introduction
- Les enfants dans le monde en besoin d'adoption internationale
- Le rôle des Autorités centrales
- Les pays d'origine non parties à la Convention de la Haye
- Les partenariats avec les pays d'origine
- L'adoption privée
- Les organismes agréés
- La transparence financière

Introduction

Début 2007, la Roumanie et la Bulgarie entrent dans l'Union Européenne. Dans le domaine de l'adoption internationale, le cas de la Roumanie fait école, puisque pour la première fois un pays d'origine se retrouve aux côtés des pays traditionnellement dits d'accueil. Une des conditions de son entrée dans l'UE est d'ailleurs la mise en place de meilleures pratiques, après des années de scandales. La Roumanie ira jusqu'à interdire l'adoption internationale, décision drastique qui lui sera reprochée par la suite.

Ainsi, l'adoption internationale se négocie au plus haut niveau. Trafic d'enfants, adoption commerciale, scandale des institutions d'Etat, il y a là suffisamment à déplaire. La réflexion se concentre depuis de nombreuses années sur les pratiques des pays d'origines. Pas assez strictes, trop corrompus, ces derniers ne cessent d'être considérés comme responsables des dérapages en matière d'adoption internationale.

Or, à l'heure de la globalisation où un enfant peut être acheté sur internet, où des candidats toujours plus nombreux cherchent à adopter dans un contexte à risque, il est urgent de mener une réflexion sur la coresponsabilité des pays d'accueil. Le présent congrès est donc une excellente initiative et une chance, une opportunité pour élaborer des valeurs, une éthique et des procédures communes qui servent au mieux l'intérêt de l'enfant.

Les enfants dans le monde en besoin d'adoption internationale

Depuis quelques années, le nombre des enfants adoptables dans le monde diminue pour plusieurs raisons:

- Dans de nombreux pays d'origine, on s'est rendu compte que l'institutionnalisation des enfants n'était pas une solution à long terme, mais devrait rester une solution transitoire. Il fallait donc construire un projet d'avenir pour l'enfant en dehors des institutions et des orphelinats.
- Par conséquent, les états ont cherché des alternatives, notamment le retour de l'enfant dans sa famille biologique, la famille d'accueil et l'adoption nationale. La Convention des Droits de l'Enfant et la Convention de la Haye ont largement contribué à cette prise de conscience.
- A travers une sensibilisation aux besoins des enfants en institution et l'émergence d'une classe moyenne, qui peut se permettre d'accueillir un enfant, l'adoption nationale a connu un développement important dans de nombreux pays. En Inde, il y a 20 ans, personne ne parlait de l'adoption nationale, alors que 75 % des enfants abandonnés sont maintenant adoptés sur place.

Il reste, néanmoins, que beaucoup d'enfants se trouvent dans les institutions parce que la parenté biologique ne donne pas son consentement à l'adoption (même s'ils ne s'occupent pas de l'enfant), parce que des autorités laxistes ne prennent pas de décision quant à l'avenir de l'enfant ou parce que l'enfant est grand, malade ou handicapé.

Le rôle des Autorités centrales

Les pratiques des Autorités centrales diffèrent considérablement d'un pays d'accueil à l'autre et se reflètent dans les messages adressés par ces autorités et leurs gouvernements aux candidats adoptants et aux pays d'origine.

Certaines Autorités centrales ne cachent pas leur objectif d'augmenter continuellement le nombre d'enfants adoptables mis à la disposition de leurs candidats à l'adoption, en fonction des souhaits de ces derniers. Un pareil objectif ne va pas sans pression sur les pays d'origine et contribue à la propagation de l'idéologie erronée d'un « droit d'adopter ».

Par ailleurs, la composition et les compétences des Autorités centrales sont réglementées de façon très inégale selon les pays. Dans la plupart d'entre eux, un contrôle effectif et préventif de toutes les adoptions internationales fait défaut ou n'est exercé qu'après l'apparement, lorsque l'enfant et les adoptants ont entamé le processus d'attachement réciproque.

J'aimerais aussi tirer la sonnette d'alarme par rapport à des procédures frauduleuses où les enfants ont été adoptés sans le consentement de leurs parents biologiques. Nous en avons recensé un certain nombre (58 pour être précis) au Népal, mais nous savons très bien que ce genre d'abus existe aussi en Haïti ou en Ethiopie. Au Népal, beaucoup d'enfants sont placés dans les institutions pour leur éducation par des parents pauvres. Puis, un jour, les parents apprennent que l'enfant a été adopté à l'étranger avec de faux papiers, stipulant que l'enfant est orphelin. Sans forcément demander le retour de l'enfant, les parents demandent néanmoins des nouvelles de leurs enfants. Dans de nombreux cas, nous avons pu obtenir l'identité des adoptants à travers les institutions qui ont organisé les adoptions en les mettant sous pression. Nous avons alors contacté les OAA et les Autorités centrales pour qu'ils informent les familles adoptives sur la demande de la parenté biologique. Hors, les autorités refusent d'entrer en matière pour « ne pas perturber le bon développement de l'enfant ».

Cette attitude est inadmissible pour deux raisons. D'abord parce que l'enfant a le droit de savoir qu'il y a une mère et/ou un père biologique qui se soucie de lui et aimerait avoir de ses nouvelles. Dans une majorité de pays, l'adopté a le droit de consulter son dossier à l'âge adulte. On s' imagine son désarroi quand il va s'apercevoir qu'on lui a caché la vérité sur ses parents biologiques et menti sur son histoire.

Le refus d'entrer en matière de la part des autorités et des OAA est un signe clair de ne pas vouloir aborder la question des adoptions frauduleuses ou illégales. Si les OAA et les autorités admettent qu'elles existent, il faut réagir dans l'intérêt des enfants et dans le respect de la CLH et, par conséquent, mieux surveiller les adoptions dans certains pays, voire de les interdire. Dans des pays d'accueil où la satisfaction des adoptants prime sur les intérêts des enfants, de telles décisions sont évidemment très impopulaires.

Pour tenir compte de l'intérêt supérieur de l'enfant, les mesures suivantes devraient être prises:

- définir clairement, dans une charte, l'approche éthique choisie par le pays en matière d'adoption internationale;
- de la part des autorités politiques et administratives, adresser des messages clairs afin de conscientiser la population, les médias et les professionnels quant au nombre et au profil des enfants réellement en besoin d'adoption internationale;
- établir une collaboration étroite entre l'Autorité centrale et les postes diplomatiques à l'étranger afin de garantir le suivi et le contrôle de chaque procédure d'adoption sur les plans légal, administratif, éthiques et psychosocial, au plus tard au moment de l'apparement;
- imposer à ses représentations diplomatiques dans les pays d'origine une mission spécifique de dénonciation des mauvaises pratiques et suspicions de trafic d'enfants ou de violation de leurs droits.

Les pays d'origine non parties à la Convention de la Haye

La CLH offre des garanties importantes aux enfants des pays parties. Ce n'est souvent pas le cas

dans les autres pays qui n'ont pas ratifié la Convention, alors qu'une majorité des enfants adoptés provient de ces pays. Le Vietnam, Haïti, Guatemala, le Népal ou encore l'Ethiopie ont été ou sont connus comme des pays à risque et pourtant, les pays d'accueil ne s'empressent pas de contrôler d'avantage les adoptions conduites avec ces états non parties à la CLH.

Des enfants sont proposés à l'adoption internationale dans ces pays par des privés (avocats, intermédiaires, directeurs de crèche) sans aucune vérification de leur adoptabilité ou pire, en produisant de faux documents, attestant qu'ils sont abandonnés ou orphelins. Malheureusement, les lois ou les procédures des pays d'accueil, pourtant parties à CLH, ne respectent fréquemment pas l'article 29 de la CLH, qui interdit le contact entre les adoptants et l'enfant avant la vérification de son adoptabilité.

Ces pratiques entraînent une discrimination de certains enfants venant de pays non parties à la CLH pour lesquels de nombreux pays d'accueil acceptent des règles de procédure allégées et des garanties réduites.

Pour tenir compte de l'intérêt supérieur de l'enfant, les mesures suivantes devraient être prises:

- garantir légalement à tous les enfants résidant dans les pays non parties à la CLH des garanties analogues à celles incluses dans la CLH;
- restreindre, voire interdire l'adoption privée;
- interdire les contacts entre les candidats adoptants et les parents ou gardiens de l'enfant.

Les partenariats avec les pays d'origine

Dans l'exercice de leur mission, les Autorités centrales des pays d'accueil développent un partenariat avec un nombre variable de pays d'origine, que ce soit dans le cadre de la CLH, par des accords bilatéraux ou via tout autre mode de coopération administrative. Des financements sont parfois offerts par les gouvernements ou les organismes d'adoption agréés (OAA) pour soutenir le système de protection de l'enfance et/ou d'adoption des pays d'origine ainsi que les structures d'accueil pour les enfants.

A travers ces financements, gouvernements, Autorités centrales et OAA exercent des pressions explicites ou implicites sur les pays d'origine, en vue de se voir « fournir » des enfants adoptables, de préférence jeunes et en bonne santé. A quoi se rajoute le nombre des OAA, très élevé dans certains pays d'accueil, qui entrent en compétition les uns avec les autres dans les mêmes pays d'origine.

Trop souvent, les pays d'accueil présentent des candidatures de parents adoptifs ne correspondant ni au nombre ni au profil des enfants en besoin d'adoption. Certains pays d'origine ont, de ce fait, limité la quantité et resserré les critères d'acceptation des candidatures.

Pour tenir compte de l'intérêt supérieur de l'enfant, les mesures suivantes devraient être prises:

- Développer avec chaque pays d'origine partenaire le dialogue sur le nombre et les caractéristiques des enfants en besoin d'adoption internationale;
- tenir compte de ces données dans une politique responsable des agréments délivrés aux candidats adoptants: il est en effet non respectueux des candidats d'autoriser des projets d'adoption irréalistes qui peuvent, de surcroît, être la cause potentielle de trafics d'enfants;
- tenir compte des mêmes données dans une politique responsable d'agrément des OAA, en fonction des pays d'origine. Leur nombre ne doit encourager ni la compétition entre eux ni la pression sur les pays d'origine.

L'adoption privée

L'adoption privée ou indépendante consiste, pour les candidats adoptants, à réaliser une adoption internationale sans le recours à un OAA. Lorsque les deux pays concernés sont parties à la CLH, les candidats agissent à tout le moins par l'intermédiaire des Autorités centrales et/ou compétentes qui posent un cadre légal et éthique minimal.

Lorsque l'adoption privée est pratiquée dans un pays d'origine non partie à la CLH, les garanties quant à l'adoptabilité de l'enfant et la légalité de la procédure sont minimales, voire inexistantes.

Ce type de procédure est le lieu potentiel des pires abus de l'adoption internationale: sélection des enfants par les adoptants, pression sur les parents biologiques, corruption, faux documents, illégalités procédurales, enlèvement d'enfants...

La pression exercée par des milliers d'adoptants individuels constitue en outre un frein essentiel au développement d'une politique responsable de la prise en charge des enfants en dehors de l'adoption internationale, à travers le retour de l'enfant dans sa famille biologique, l'adoption nationale ou les familles d'accueil.

Il faut dire que les enjeux financiers sont souvent énormes, d'où des résistances importantes de la part des « acteurs » de l'adoption internationale dans les pays non conventionnés, sans mentionner l'économie qui profite de ces « touristes » qui viennent chercher leur enfant et utilisent les infrastructures comme les hôtels, les restaurants, etc.

Néanmoins, pour tenir compte de l'intérêt supérieur de l'enfant, les mesures suivantes devraient être prises:

- restreindre légalement et effectivement le recours à l'adoption privée;
- dans les cas exceptionnels où celle-ci est autorisée, veiller à ce que l'Autorité centrale – en collaboration avec la représentation consulaire dans le pays d'origine – vérifie la fiabilité du partenaire local ainsi que le dossier de l'enfant.

Les organismes agréés

Pour mener à bien une politique de l'adoption internationale centrée sur l'intérêt de l'enfant, les pays d'accueil ont besoin du concours d'organismes agréés d'adoption (OAA), présentant un bon degré de professionnalisme et d'engagement éthique. Or, le profil qualitatif des OAA, ainsi que leur nombre, est très variable selon les pays européens. Certains n'agrément que quelques uns, composés de professionnels, alors que d'autres pays accréditent jusqu'à 50 ou 70 OAA. Le professionnalisme n'y est pas toujours exigé, de nombreux OAA étant composés essentiellement, voire exclusivement, de bénévoles dont la formation et la supervision sont parfois aléatoires.

La multiplication des OAA ne crée pas seulement une compétition malsaine, elle ne favorise pas non plus un contrôle régulier par les Autorités centrales qui manquent parfois des compétences pour évaluer le travail administratif, légal et surtout psychosocial dans les pays d'accueil et d'origine.

Pour tenir compte de l'intérêt supérieur de l'enfant, les mesures suivantes devraient être prises:

- limiter le nombre des OAA dans un même pays d'accueil ainsi que dans les pays d'origine ;
- promouvoir la formation initiale et permanente, la pluridisciplinarité (droit, travail social, psychologie et médecine) et la supervision des équipes des OAA ;
- limiter la durée de l'agrément des OAA et assurer un contrôle régulier de la qualité de leur travail dans le pays d'accueil et les pays d'origine.

La transparence financière

L'argent est le nerf de la guerre des trafics d'enfants. D'une manière générale, il convient de distinguer entre le coût légitime des services rendus par des professionnels, les frais inhérents à la procédure et le paiement de sommes dont l'affectation n'est pas rigoureusement justifiée. Dans certains pays d'origine avec un contrôle étatique lacunaire, les avocats et/ou les responsables des institutions demandent des paiements importants à l'avance et proposent les enfants aux plus offrants. Pendant la procédure, des « rallonges » sont fréquemment exigées, soit disant pour obtenir un papier supplémentaire, pour obtenir des passe-droits ou des accélérations de la procédure tenant du favoritisme...

Certains pays d'accueil tentent de réglementer les frais de l'adoption internationale, surtout quand il s'agit des coûts des OAA supportés par les candidats adoptants. Cependant, il est parfois difficile de vérifier les sommes dépensées sur place et les contrôles sont fréquemment insuffisants. La vérification des coûts des adoptions privées est encore plus aléatoire.

Pour tenir compte de l'intérêt supérieur de l'enfant, les mesures suivantes devraient être prises:

- réglementer les coûts que les OAA peuvent imputer aux adoptants en précisant leur nature, leurs montants, leur mode de paiement aux destinataires du pays d'origine et les sommes qui ne peuvent être réclamées ;
- pendant la procédure d'adoption, interdire les donations par les adoptants à l'OAA ou à une institution ;
- réglementer les coûts que les candidats adoptants peuvent supporter, s'ils sont exceptionnellement autorisés à agir par voie privée ;
- développer une coopération internationale diligente avec les pays d'origine et les autres pays d'accueil pour assainir les paiements en matière d'adoption et dénoncer les trafics.

Lausanne, novembre 2009

CHALLENGES IN ADOPTION PROCEDURES IN EUROPE: ENSURING THE BEST INTERESTS OF THE CHILD

30 November - 1 December 2009

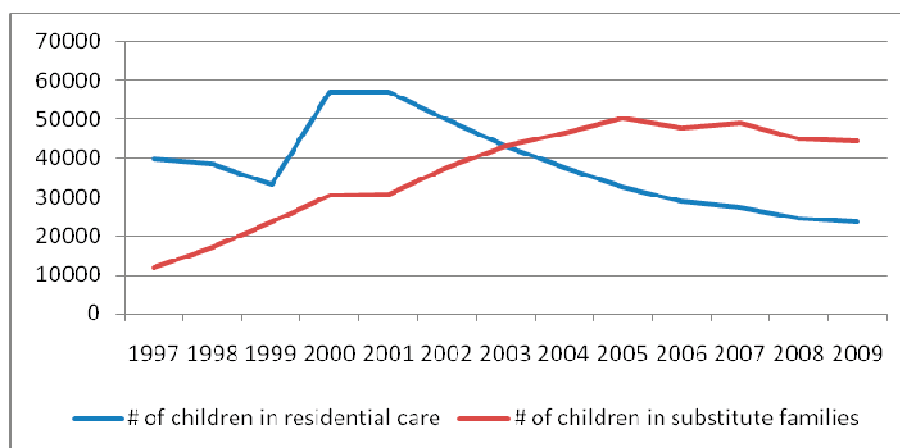
The Right to a Family in the International Legal Framework and in Practice

The Experience of Romania

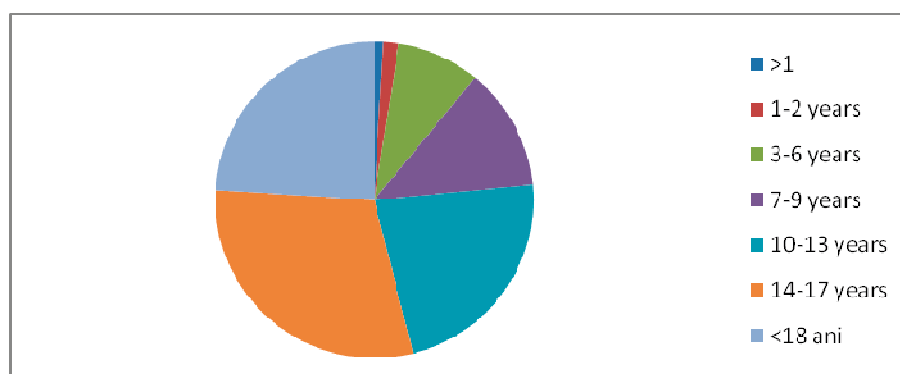
Edmond McLoughney
UNICEF Representative, Romania

It is widely agreed that three principles should guide decisions regarding long-term substitute care for children, once the need for ensuring such care has been established:

1) Family-based solutions are generally preferable to placements in residential facilities



As of June 2009 in Romania, about 44,450 children were in family-type services, including foster care (some 21,000), and some 23,586 (down from 25,000 in December 2007), were in residential care. Just over 2,050 children were placed with a guardian. Most of the children in residential care are older, and many have special needs.

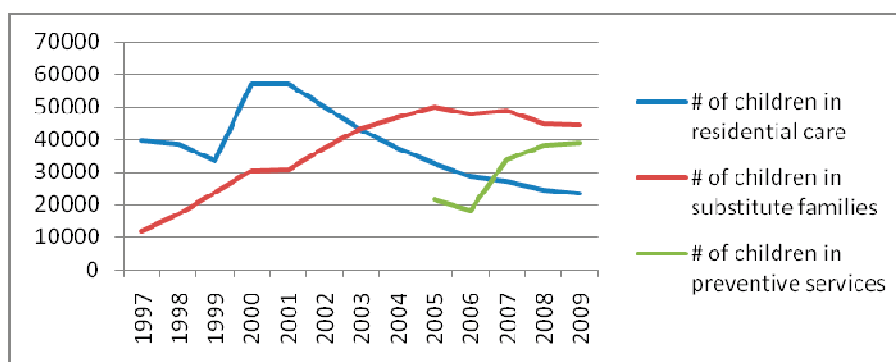


It is UNICEF's view that, in recent years in particular, substantial progress has undeniably been achieved through, for example, the massive development of foster-care and the concomitant gradual closure of the larger institutions.

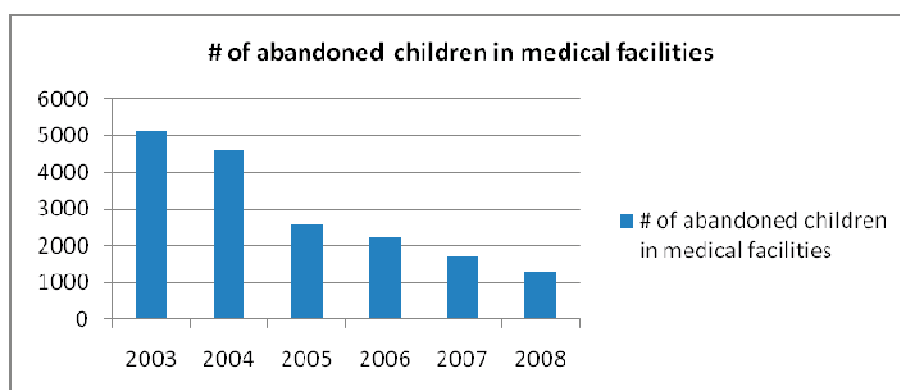
New legislation in Romania that has been enacted to back up policy decisions is to be welcomed. One notable example is the prohibition of institutionalisation of children under 2, a courageous response to research findings showing the harmful long-term effects of such placements.

2) Permanent solutions are generally preferable to inherently temporary ones

As of June 2009, 38,814 children benefited from prevention services (15,167 in day care centres and 23,647 benefiting from counselling services and/or various other types of prevention services), up from 34,000 in December 2007.



The number of abandoned children in medical facilities (maternity and paediatric hospitals) dropped from 5,130 in 2003 to 1,317 in 2008. In the first semester of 2009, 704 cases of abandoned children were registered.



Out of the total of 704 cases reported by June 2009, 396 were abandoned in maternities, 225 in paediatric hospitals and 83 in other medical units. Of these 565 were discharged by November 2009 and 226 were reintegrated into the natural families, 261 were placed in foster care and the others were placed in extended families, in residential care (26), emergency centres (13) and other public care facilities.

3) National (domestic) solutions are generally preferable to those involving another country (Note. The reference to "generally" is important; decisions are to

be made for each individual child according to his or her particular characteristics and circumstances.)

National adoption has been fairly constant since 1999; the total number of cases per year being around 1,200 – 1,400 adopted children.

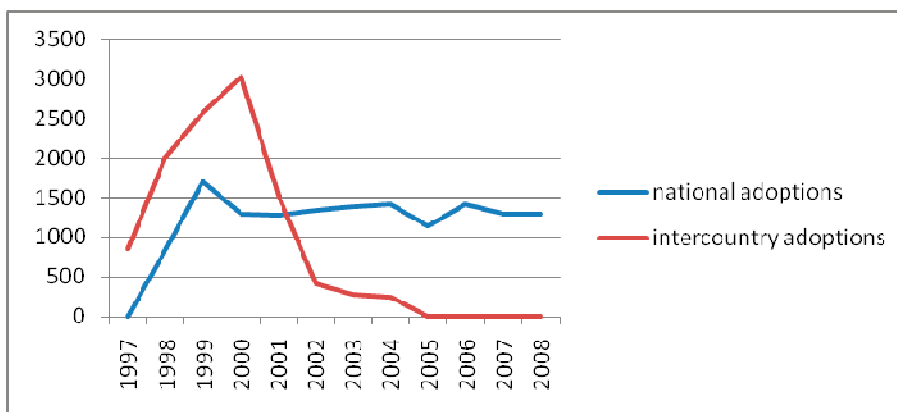
The new legislation effective since 2005 regulates aspects that were not regulated by the previous norms, such as the procedure and situations in which a child can be adopted (i.e. individualised protection plan providing domestic adoption as finality) and such as the Court's decision regarding the initiation of the domestic adoption procedure.

The Romanian Office for Adoption is concerned about constantly improving the quality of the national adoption system and services and is currently working on introducing changes to enhance the capacity of professionals working in national and decentralised institutions responsible of adoption services, and also amending legal provision which would contribute to speeding-up the adoption process and to increasing the number of national adoptions.

4) Solutions involving another country (ICA)

Short history in Romania

- Moratorium on ICA in 1991 and 1992;
- Romania's ratification of Hague Convention: December 1994. Entered into force, May 1995;
- Moratorium again in 2001 until 2004.
- 2005: law imposes a *de facto* moratorium;
- to date: relatives up to the 3rd degree (aunts, uncles) can adopt;
- As a result of the 2005 law on the protection and promotion of child rights, there are currently virtually no inter-country adoptions (which registered a peak in year 2000 with over 3,000 cases). After 2005, statistics show that only 2 international adoptions were approved based on the new legal provisions.



It was concerns about how intercountry adoption (ICA) was developing in the CEE/CIS region that sparked UNICEF's very first initiatives on this issue – at the beginning of the 1990s, first in Romania and then in Albania. In both countries, moreover, UNICEF was instrumental in proposing and facilitating initial reforms designed to combat serious problems that had been identified in the way that adoptions were being carried out.

Consistent with the aim of its overall mandate – bringing about conditions whereby all children can be properly cared for by their families or, where necessary, others in their

country of origin – UNICEF sees inter-country adoption as one of a range of protection options – of last resort though – which may be open to children, and for individual children who cannot be placed in a permanent family setting in their country of origin. The fact that intercountry adoption fulfils only two of the three principles of decisions regarding long-term care solutions for children (family-based and domestic) means that it is to be considered “subsidiary” to any foreseeable solution that corresponds to all three guiding principles, such as domestic adoption and other permanent forms of family-based alternative care in-country. The active and systematic implementation of this “subsidiarity rule” is key to ensuring respect for children’s rights in this sphere, as are robust efforts to prevent abandonment and relinquishment and to promote the reintegration of children into the care of their families under appropriate conditions.

In fact, and fully in line with the Convention on the Rights of the Child, UNICEF recognises the practice and persistently advocates and provides assistance (if necessary) for ensuring the rigorous application of international standards when the intercountry adoption of a child is contemplated or takes place.

“With so many Romanian children in public care, and continuing high rates of child abandonment, how can the decision to ban intercountry adoptions be justified?” The short answer is: because, although many problems obviously remain in Romania as elsewhere, responses have been and continue to be consistently improving. As is the case for many other countries, the Romanian authorities have for various reasons decided that adoption of children abroad was not an appropriate element of child protection policy (at the time the of approving the law on adoption, 2004).

UNICEF fully understands that there was a need to clamp down firmly on recourse to intercountry adoption, all the more so in light of the irregularities which persisted and also of the positive developments in the country itself in recent years. UNICEF therefore accepts that virtual closure of intercountry adoption from Romania may have seemed to constitute the only workable option in the circumstances, in line with the aims of the overall reform of the child welfare and protection system.

UNICEF foresaw (in 2005) that, at some point in the future, Romania might decide to review aspects of its outlook and policy on intercountry adoption. UNICEF is aware of various initiatives outside Romania, since the ICA ban was introduced, seeking the reconsideration of adoptions from the country, as for example the European Parliament Resolution “Towards an EU Strategy for the rights of the child” adopted in January 2008 and calling for consideration to possibility of devising a Community instrument on adoptions, that improves the preparation and the processing of international adoptions. It also notes that in June 2009 the CRC Committee has recommended that the Romanian Authorities “withdraw the existing moratorium”.

In UNICEF’s view, it is clear that Romania’s need for recourse to intercountry adoption has been declining rapidly, and that Romania now would be able to reconsider its position towards intercountry adoption based on thorough evidence based analysis. This would imply a comprehensive assessment of the impact and prospects for developments in the area of child rights after almost five years of implementation of the entire legislative package, including both legislation on the promotion and protection of children’s rights and the law on adoption. Until such an evaluation will be performed, efforts to prevent abandonment and relinquishment must be pursued and further strengthened, as must those directed to ensuring suitable alternative care and adoption in-country for children who are unable to live with their parents. It is up to the competent authorities to judge, on the basis of hard data, whether current care conditions for each and every child are “suitable”, and if not, whether ICA might be in their best interests. Re-opening ICA possibilities for some children would of course require strict adherence by all concerned – both within and outside Romania – to the

letter and spirit of the 1993 Hague Convention. This implies, among other things, a system in place that is purely “child-driven”, that effectively precludes any incitation to release a child for ICA, and that ensures that no influence can be brought to bear by foreign governments, agencies or individuals over who might be adopted and in what numbers. The development of any such system would demand considerable preparation, especially bearing in mind the problems of the past.

In the meantime, UNICEF will continue working with the Government of Romania to strengthen the child care system and intensify efforts for the prevention of abandonment. This includes, among other measures, the promotion of Baby Friendly Hospitals (BFHs), 21 of which are due to be certified as having reached the required WHO/UNICEF standards by the end of this year. The BFH practice of putting the baby to the mother’s breast within half an hour of birth has proven to be extremely effective in preventing abandonment. We look forward to continuing our partnership with the Government in this and other areas to strengthen the implementation of the CRC.

CHALLENGES IN ADOPTION PROCEDURES: ENSURING THE BEST INTEREST OF THE CHILD

**THE RESULTS OF THE STUDY CARRIED OUT BY THE
EUROPEAN PARLIAMENT**

RAFFAELLA PREGLIASCO

ISTITUTO DEGLI INNOCENTI

Firstly, I'd like to thank you the European Commission and the Council of Europe for having invited us to present this report on International adoption in EU that was awarded by the EU Parliament to the Istituto degli Innocenti and that was realized with the collaboration of many european experts (one for each EU member states) and of ChildONEurope network.

The main purpose of the report consists of proposing an up-dated comparative vision in the field of intercountry adoptions at European level, in particular following an interdisciplinary perspective able to give adequate consideration both to social and legal aspects involved. In particular, the research envisages two different levels of analysis: a documentary analysis based mainly on a statistical profile of the phenomenon within EU countries followed by a review of the fundamental international and European instruments that actually regulate the international adoption system and a comparative survey that has been realized specifically through the analysis of national experiences. The study led to some concrete proposal for the interventions of EU level and national policy-makers as well as representatives of civil society directed to harmonize the different national rules and experiences and to create a European adoptionsystem.

Fort that purpose, a network of experts coming from EU countries, with specific knowledge of the subject, was entrusted with collecting the documents and data in the different Member States and drawing the national reports using a format (questionnaire) drafted to help them in finalizing their work with the specific aim to harmonize the qualitative information and the quantitative references and statistical data sources to be collected about intercountry adoptions.

In order to provide a complete perspective on the subject, it was necessary to know the viewpoint of some entities that operate from a privileged point of view in monitoring the phenomenon of adoption. The "qualified" interviews have been prepared by sending preliminary "guiding questions" that have been used as facilitators to broaden the topics into a full range of discussions and exchanges on adoption in the course of the interviews that have been arranged.

The interviews were specifically directed to representatives of the following bodies:

1. international association of juvenile court judges
2. international association of adoptive families
3. Euroadopt (Association of European Authorized Agencies)
4. central authorities pursuant to the Hague Convention
5. members of the Hague Conference.

Statiscal aspects

For what concerns the statistical profile of the phenomenon within Europe, the enquiry made it possible to underline that EU receiving States accounted for over 40 per cent of total intercountry adoptions worldwide in 2004; in the same year the 9 EU States of origin provided 3.3 per cent of the children sent for international adoption (falling to 2 per cent in 2006). All of the States of origin, apart from Estonia, now send children primarily to other EU countries. In contrast, most EU receiving States take children mainly from non-European countries and only Cyprus, Malta and Italy took more than 10 per cent from other EU States.

Moreover, the analysis put in evidence some general trends of the phenomenon, which determined the initial rise (1998-2004) and the subsequent fall (2004-2007) in the total number of intercountry adoptions. In particular, it could be underlined that the number of intercountry adoptions worldwide grew substantially from the mid-fifties, reaching a peak of over 45,000 in 2004. In the next three years the numbers fell to 37,000, similar to the level in 2001. 3 EU states – France, Spain and Italy – have been among the top 5 receiving states for the last 15 years.

While the evidence submitted has been helpful in providing an overall picture of this phenomenon, it is important that the European Parliament take steps to encourage all states to keep accurate records of children sent or received with more detail than is found in most returns. An immediate step could be to support current efforts by the Hague Convention to develop a standardized pattern of returns from all contracting states.

Psyco-social and policy aspects

In the report, legislative choices taken both at supra-national and national level have been viewed in parallel together with practices followed in the domestic experiences to verify if and to which extent the declarations of principles, the enactments, interpretations and applications of legal rules are adequately reflected in concrete measures adapted to the actual needs in individual situations.

In particular, referring to the services enacted, the issues analyzed in this report are represented by the role of adoption in the national child welfare policy, the interdisciplinary approach to this instrument, the preparation services, the modalities of support during the waiting time, the matching, the main traits of post-adoption services, the impact and problems related to special-needs adoptions, and finally a review and an analysis of the forums for adoptive/birth parents and adopted persons.

In particular, it has to be underlined that the preparation work with prospective adopted children is still scarcely developed. Most countries (of origin) acknowledge the relevance of preparation services for children but they often lack the resources or knowledge to prepare the child for adoption in an adequate way, taking into account issues of child development.

Moreover, **with respect to matching, there is not a set of clear-cut criteria or guidelines available** for matching issues and procedures. **From the child's best interest perspective, it should be recommended that psychological expertise (by clinical psychologists or experts on child development) is used to guarantee good matching.** More research is needed on which decision rules are used in practice and how adequate these rules are.

Finally, although more special-needs adoptions are realized in intercountry adoptions nowadays (and even more are expected in the future), there is no consensus about special measures or policies in the European countries. At the same time, some countries have experience with campaigns or protocols to better prepare prospective adoptive parents for a special-needs adoption. It should be concluded that **special-needs adoption deserves more attention, now and in the future, and therefore existing experiences and efforts should be combined to improve awareness, knowledge, and practice.**

Legislative and normative aspects

A detailed national policy analysis has been carried out with the specific aims to find unifying elements in the legislation in place and the main questions at stake in the different countries with regard to adoption procedures, trying, at the same time, to identify major regulatory issues and areas of conflict for which common solutions could be proposed.

Special attention has been given in particular on the rules about the competent authorities, those regulating the adopters' and the adopted children's requirements and rights, the models of adoption, the measures to react to the phenomenon of abuse and of trafficking in children, the child's right to know his/her origins, etc.

It has to be underlined that the comparison made in the report among the EU states' experiences makes it clear how deep are some divergences. These contrapositions can be also extremely sharp. Both procedural aspects and national practices and services present intense diversities. The role played by national legislators, courts and competent administrative authorities is still a core one in this field.

In particular, the major differences underlined in the research regard the procedural aspects and the prerequisites of the prospective adoptive parents. For what concerns the procedural aspects, there are still great differences between international and domestic adoptions. Besides, the competent authorities in the adoption process (administrative or jurisdictional ones) may act quite differently and have different role and functions.

Referring to the prerequisites of Paps, most of the requirements are rather similar but there can be great differences as for the civil status (couples, singles, homosexual couples etc) and age. They vary from countries where only married heterosexual couples can adopt (IT, LAT, PT) to countries where also single can adopt and countries where same-sex married couples (NL, BEL, SP) may adopt as well.

Finally, for what concerns the fundamental normative instruments and measures that regulated

international adoption systems, at international (the Convention on the Rights of the Child and the 1993 Hague Convention) and regional level, it has been underlined that the multiplicity of solutions aimed at regulating this specific issue – with or without binding force – may create strong tensions in Europe.

Therefore, it seems to be decisive to think about the possible modifications to be made in the future, in order to simplify and coordinate all the coexisting measures in this area, to give rise to a common strategy.

Based on the findings emerged from the research, some recommendations may be taken in consideration.

When all the persons involved in the adoption procedure have European citizenship, unitary solutions should be envisaged to ensure the direct recognition, in a EU country, of decisions concerning adoptions made in another EU country, whether or not the latter has ratified (adhered or made accession to) the 1993 Hague Intercountry Adoption Convention, on condition, however, that its principles are accepted and the best interests of the child have been duly respected and ascertained.

Besides, as far as the substantive and procedural aspects of adoption law are concerned, they should continue to be regulated by national statutes, however in a manner that is respectful of the principle of **equal treatment: both domestic and intercountry adoptions shall be subjected to the same guarantees.**

Regarding the **application of subsidiarity principle**, the EU should take steps to promote the formulation of a set of guiding rules or detailed guidelines to be used by States to enact in a more consistent way the principle.

In this perspective, it would appear worth developing plans aim to follow some **clear objectives:**

- ratifications of international conventions;
- enactments of new pieces of national **legislations;**
- creation of **monitoring mechanisms;**
- **supervision** of governmental initiatives
- allocation of **resources;**

To reach this objectives, it seems that there's no need for a "European adoption", strictly speaking, but for a Europeanization of adoption law, in a broad sense: a **"common frame of reference" could prove to be a satisfactory and widely acceptable compromise.**

Finally, **international collaboration together with a strong pressure to promote a wide ratification of the Hague Conference as well as of the 2008 Council of Europe Adoption Convention** can ensure a more intense protection for children in need and a real respect of the subsidiarity principle.

Report to the EU Parliament

2 level of analysis

- International level (statistical profile of the phenomenon in EU and review of international and european instruments)
- National level (comparative national survey)

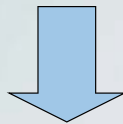
Main Conclusions and recommendations Statistical aspects

- In 2004 EU receiving States accounted for over **40 %** of total intercountry adoptions worldwide
- In 2004 the 9 EU States of origin provided **3.3 %** of the children sent for international adoption (falling to 2 % in 2006).
- All States of origin excluding Estonia send children primarily to other EU countries
- most EU receiving States adopt children mainly from non European countries.

Main Conclusions and recommendations Statistical aspects

- Decline in the number of international adoptions in 2004-2007
- France, Spain and Italy have been among the top 5 receiving states for the last 15 years
- Great majority of EU receiving States have more children adopted with intercountry adoption than domestically

Main Conclusions and recommendations Statistical aspects



- European Parliament should encourage all states to keep **accurate records** of children sent or received
- An immediate step could be to support current efforts by the Hague Convention to develop a **standardized pattern of returns** from all contracting states.

Main Conclusions and recommendations Psycho-social and policy aspects

- **Preparation** with prospective adoptive **children**
 - still scarcely developed
- **Matching**: no clear set of criteria emerged
 - Psychologists should be in charge of the matching process, to guarantee the best interest of the child
- increasing number of siblings and **special needs**
 - **more attention** is needed (e.g. public campaigns, preparation for parents)

Main Conclusions and recommendations Legislative and normative aspects

- Great differences in:
 - **procedural aspects** (differences between domestic and international adoption, competent authorities)
15 countries have both central authorities and accredited bodies
The others don't have accredited bodies (mainly the countries of origin)
 - who can be **prospective adoptive parents**
Most of the requirements are rather similar but great differences as for the civil status (couples, singles, homosexual couples etc) and age
Varying from countries where only married heterosexual couples can adopt (IT, LAT, PT) to countries where also single can adopt and countries where same-sex married couples (NL, BEL, SP)

Main Conclusions and recommendations Legislative and normative aspects

- **direct recognition, in a EU country, of decisions concerning adoptions made in another EU country**
- **equal treatment: both domestic and intercountry adoptions shall be subjected to the same guarantees**
- **application of subsidiarity principle: promote the formulation of a set of guiding rules or detailed guidelines**

Main Conclusions and recommendations Legislative and normative aspects

- **No need for a “European adoption”, strictly speaking, but for a Europeanization of adoption law, in a broad sense**
 - a common frame of reference could be enough
 - Promoting wide ratification of **Hague Convention and 2008 COE Convention**



**Complete report available at
www.childoneurope.org**

European Commission Study on Adoption - Outline of presentation
By Patrizia De Luca
Team leader –Civil Justice Unit
DG Justice, Freedom and Security
European Commission

Good afternoon, Ladies and Gentlemen,

I should like to start with a few words about the **background to the European Commission study**, in other words, why the European Commission decided to carry out a study on adoption procedures in the Member States of the European Union.

Protecting children's rights is one of the European Union's top priorities, as stated in Article 3 of the Treaty on European Union.

This aim is also recognised in Article 24 of the Charter of Fundamental Rights of the European Union, which states that '**in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration**'.

Already in July 2006 the Commission presented a Communication *Towards an EU Strategy on the Rights of the Child*, which proposes a comprehensive strategy to safeguard children's rights effectively in all European Union policies and to support Member States' efforts in this field. The strategy will be implemented in cooperation with the Member States, international organisations and civil society. To this end, the European Forum on the Rights of the Child was opened on 4 June 2007, the aim being to work together and exchange best practices.

One of the rights that children have is to be brought up in a **family environment, as clearly stated in the preamble to the United Nations Convention on the Rights of the Child**. Hence, adoption is part of the picture.

If the European Union wishes to protect and promote children's rights, it must pay more attention to the issue of adoption. However, at present there is no common policy in this field.

Indeed adoption is specifically excluded from the scope of Council Regulation Brussels IIa which relates to issues of parental responsibility, visiting rights and child abduction.

International framework

We can, however, count on an important international legal framework for adoption: the 1993 Hague Convention on Inter-country Adoption and the Council of Europe Conventions, in particular the revised one.

We have also to consider the **United Nations Convention on the Rights of the Child** and its **principle of subsidiarity** that has sometimes lent itself to uncertain interpretations. We can now affirm that, as recalled by the UNICEF in the 2007 statement on Inter-country Adoption, which endorses The Hague Convention *inter-country adoption may indeed be the best solution for individual children who cannot be placed in a permanent family setting in their countries of origin. Institutionalisation should be considered as a 'last resort' solution for a child without parental care.*

The principle of subsidiarity -and here I am quoting the Hague Conference on Private International Law- must be applied realistically.

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

The principle of the best interests of the child is the overriding principle in the Convention, not subsidiarity.

Moreover, we should not forget that the Convention on the Rights of the Child is of a universal nature and therefore must also take into account the point of view of countries, Islamic for example, which do not recognise the institution of adoption, or specific cases where children are separated from their parents by war or natural disasters.

However, where adoption is permitted, it should be carried out in the best interests of the child **and this means that the child needs to be brought up in a family environment which is able to assure the permanency of the relationship. If national adoption is not possible, inter-country adoption has to be considered as a possible alternative for the care of the child.** Institutionalisation and foster care should be seen, where possible, only as temporary measures.

Why the Commission deals with this issue

That said, we have to apply these general principles to the specific context of the European Union. We cannot deny that the European Union has its own particular background and that adoption between Member States does not have the same implications as adoption involving third countries.

The European Union is an integrated area with no internal borders. The Member States of the European Union share common values. They are working together to establish a common area of justice, freedom and

security based on the principle of mutual trust. Closer cooperation on adoption between the Member States might be regarded as one of the inevitable consequences of the free movement of citizens and the gradual emergence of a European judicial culture built on the diversity of legal systems, the promotion of citizens' rights and unity through European law.

According to a recent **Eurobarometer survey** (Flash Eurobarometer 188 published on 15 January 2007), most citizens want the European Union to take an active role with respect to adoption between Member States. The figures vary from one Member State to another, with the highest figures in Italy (87 %) and France (87 %). Nevertheless, on average, the number of citizens in favour of EU action in this field is very high (76 %).

Moreover, in recent years the European Commission has received **several complaints** from citizens and associations on the issue of adoption between Member States explicitly asking for action on the matter. One of those citizens is here today to tell us about her experience.

The content of the study

That is why the study ordered by the Commission has focused on: adoption procedures in the Member States of the European Union, including the practical difficulties encountered in this area by European citizens in the context of a European area of justice in civil matters; and the available options for resolving such difficulties and protecting children's rights.

We asked our contractor:

- (1) to produce a **comparative analysis** of the situation in the 27 Member States with respect to legislation, organisational arrangements, procedures and practices relating to inter-country adoption and in particular adoption between the Member States of the European Union, and
- (2) to identify practical difficulties and problems encountered in this area by European citizens, in particular those which prevent or hinder them from exercising parental responsibility, and to identify possible solutions to these problems, including the feasibility of setting up a European adoption procedure between Member States.

The study is divided into, on the one hand a legal analysis of the legislation on adoption in the 27 Member States and, on the other an empirical analysis based on the collection of statistical data.

The empirical analysis includes:

- the number of decisions on domestic or inter-country adoption issued in a Member State in a given calendar year (preferably 2005 or 2006);
- the proportion of those decisions involving cases of adoption between the Member States of the European Union;
- the average length of the adoption procedure, from the point at which the adoption application is submitted until the close of the procedure;
- the number of cases in which the adoption was achieved but only with difficulty;
- the nature and causes of the difficulties encountered (e.g. problems locating the child, resistance from a holder of parental responsibility, language problems, missing information, incompetence, etc.);
- the role of advisory services and family mediation in the adoption procedure;
- in cases where the adoption procedure has been prevented or abandoned or has not gone ahead on other grounds, the reasons for this, indicating the difficulties encountered and the scale.

Moreover, a **survey was conducted**, based on 500 interviews with representatives of the professions concerned (specialised lawyers, judges, social workers, associations of adoptive parents, other family-law and child-welfare associations, administrative authorities in the Member States responsible for the adoption procedure, individuals identified as having faced difficulties in this area, etc.), and policy-makers at national and European level.

I have to admit that the European Commission is not completely satisfied with the outcome of the study but in defence of the contractor he did reported several difficulties in collecting the relevant data.

I will limit myself to a brief overview of the results of the legal and empirical analysis which are obviously similar to those of the European Parliament's study.

Legal analysis

In general, we can affirm that:

The analysis of the legislation has identified a **vast set of national solutions**, sometimes presenting a high degree of difference one from the other.

A first consideration is that in the majority of Member States (17) the legal instruments for national and inter-country adoption are the same. In some cases there are specific rules related to inter-country adoption such as the role of the Central Authorities under the Hague Convention.

In 10 Member States we find different regulations for national and international adoption. Requirements for parents are more detailed for inter-country adoption (Sweden) or a prior judicial decision is necessary (Italy, Portugal). In the United Kingdom the role of the Central Authority is important in that it has to deliver a certificate of eligibility for the prospective adoptive parents.

Another common characteristic is a mandatory post-adoption service in international adoptions.

The situation of Romania is unique in the landscape of the European Union. In that country international adoption is limited to the child's grandparents living abroad. We will come back later to the particular case of Romania and Bulgaria to which the study has paid particular attention.

Concerning the role of the **Central Authorities**, the study observed that 25 out of 27 Member States have appointed a Central Authority which has the role defined in the Hague Convention. However, there are several differences in the way this role is adopted in practice in each Member State. They are generally placed under the Ministry of Welfare (or Social Affairs) or the Ministry of Justice.

Italy and France are special cases. In Italy the Central Authority reports to the Prime Minister's Office and in France it comes under the Ministry of Foreign Affairs.

As Greece only ratified the Hague Convention in September 2009, the Greek Central Authority could not be taken into consideration in the study. Ireland has not yet ratified the Hague Convention but has an Adoption Board, appointed by the Government, which carries out this function.

A total of 15 countries have both **accredited bodies** and Central Authorities, but the division of competencies between them differs

widely. Some countries have delegated intermediation entirely to the accredited bodies; some foresee both possibilities and others allow intermediation only through Central Authorities. The remaining Member States do not have accredited bodies.

Normally, the accredited bodies are under the auspices of the Central Authorities. They must be non-profit-making associations and prove that they are experts in the matter and able to operate in foreign countries.

Member States have completely different **provisions with regard to the prospective adoptive parents**: for example, their age or civil status (single person, married couple-heterosexual or same sex couple). Regarding the adoptability of the child, most EU Member States require the consent of the biological parents. Only Italy requires the state of abandonment of the child.

Recognition

One problem which has been raised with the European Commission is the lack of recognition of adoption decisions between Member States.

Theoretically, if a State is a member of The Hague Convention on Inter-country Adoption, foreign adoption orders should be recognised automatically. In practice, this is not always the case as is borne out by the complaints submitted by citizens to the European Commission.

It is worth noting that, in most cases, the lack of recognition refers to national adoptions (therefore not carried out under the Hague Convention) which are sometimes not recognised in other Member States.

In the UK, for instance, under the Adoption (Designation of Overseas Adoptions) Order of 1973 (amended in 2002) there is a list of designated countries whose adoption decisions are automatically recognised by the UK.

If an EU Member State is not on that list, even if it is party to the Hague Convention, the adoption is not recognised.

EU citizens resident in another Member State often encounter difficulties in acquiring nationality for their adopted child. It could be difficult for the child to acquire the citizenship of the adoptive parents resident in another Member State or the citizenship of the adoptive parents' habitual residence (of which they do not have citizenship).

Even if, theoretically, there are no special rules for EU citizens resident in another Member State, there are practical problems with applications made by EU citizens habitually resident or domiciled in another Member State.

For instance, the Commission's attention has been drawn to the fact that, because of the increased mobility of EU citizens within the Union, a

citizen who has started an adoption procedure in one MS and afterwards changes his/her habitual residence or domicile to another Member State is obliged to re-start the procedure from the beginning even if he/she has already obtained a certificate of eligibility.

I would like to invite the representative of the Central Authority of the French Community in Belgium to explain this kind of problem to us in more detail during the next discussion.

Empirical analysis

The study contains statistical data, where that data is available. Comparative tables have been prepared in order to highlight the main similarities and differences between Member States. However, the European Commission has no means of verifying the appropriateness or accuracy of the data.

The survey was conducted among adopted persons, people seeking to adopt, representatives of the competent authorities in each country (Ministries, judges and administrative authorities). It appears that the interest shown by the European Union in this issue was considered to be positive, especially with a view to establishing some minimum standards. It was underlined that, in most cases, even parents who did not take care of their children or mistreated them can always contest the adoption procedure, even after the children's long-term placement in an institution. Many interviewees underlined the **need for training courses** in order to prepare prospective adoptive parents for the realities of inter-country adoption.

In many countries interviewees complained about lack of training for all staff representatives at all levels of the adoption procedure: social workers, psychologists, and people managing the process in general.

Private adoption is often regarded as a means of circumventing the provisions against child trafficking.

A **post-adoption service** is also requested in those countries where such follow-up does not yet exist.

The **cost of adoption** is an important issue and sometimes forces the prospective adoptive parents to give up the procedure. Other complaints include excessive bureaucracy, the duration of the procedure and the disparity of case law, even at national level, which often leads to discrimination. Finally, incomplete or incorrect information about the child (especially concerning his or her health) is another shortcoming of adoption procedures.

As I mentioned, particular attention has been paid to **Romania and Bulgaria** in the context of the study, because these were the last two countries to accede to the European Union, on 1 January 2007. In this context adoption was a sensitive issue, because of the high rate of international adoptions, the lack of transparency in adoption procedures, the risk of corruption and child trafficking and the poor living conditions of children in institutions.

I will not repeat what has been already said by the previous speakers. It is however interesting to note that Romania and Bulgaria, faced with a similar problem, have ended-up with a different solution. After a moratorium on international adoptions, they are now possible again under Bulgaria's legal system, even if the number of adoptions has been considerably reduced (less than 100 in 2006 and 2007).

Romania on the other hand has banned inter-country adoptions from its legal system as a radical measure to prevent the reoccurrence of past abuses in adoption procedures.

The **UN Committee of the Rights of the Child** recently (June 2009) asked Romania to withdraw the moratorium on inter-country adoptions in order to implement Article 21 of the UN Convention.

The Memorandum sent by the Romanian Office for Adoptions to the Romanian Government in October 2009 referred to the possibility of resuming international adoptions, at least for certain categories of children.

The European Commission will follow this development with interest.

Policy options

I should now like to look at possible solutions to the problems identified in the study. The experts who conducted the study have underlined a certain number of possible policy options to be taken by the European Commission which are more or less feasible in the current circumstances.

1. Creation of a European Adoption Agency.

One of these options could be the creation of a European Adoption Agency, a kind of **super Central Authority**, whose task it would be to coordinate adoption procedures in Europe.

This option could ensure equal treatment for all European citizens and the possibility to collect all relevant data. This solution would probably allow for a certain harmonisation of rules and would alleviate the

problems of the costs and duration of adoption procedures as well as the risk of child trafficking and corruption.

The disadvantage of this solution is the time required to set up a new agency and the costs involved. We should not forget, moreover, that in family law matters the unanimity of all Member States in the legislative procedure is required.

2. Recognition of certificates of eligibility of prospective adoptive parents and recognition of adoption decisions in all Member States.

When all the parties involved in the adoption procedure have **European citizenship**, a common solution should be found to ensure recognition of decisions concerning adoptions taken in another Member State. This could be done via direct recognition or by means of a simplified procedure.

This option would favour the exercise of the freedom of movement of European citizens throughout Europe.

3. Creation of EU common adoption certificates.

Rather than having simple recognition, one solution might be to create **common adoption certificates**, for the eligibility of the parents, for example, or the recognition of adoption decrees issued in other Member States. A **single European procedure** could be developed for the delivery of the certificates. Selected parents would then be eligible to adopt throughout Europe without the need for further recognition.

It would have the advantage of being a unique procedure, saving time and establishing equality for all European citizens vis-à-vis adoption in Europe.

4. A register of children awaiting adoption.

A further option is the development of a **European register of children** awaiting adoption listing children eligible for adoption at the European level.

All these children would then have an equal opportunity to find a family in Europe.

5. The child's right to a family.

Although this core principle is sometimes not uniformly interpreted at international level it should definitely be so at European level.

By making the child's right to a family an absolute principle it would always be possible to act in the child's best interest, giving clear preference to the possibility of European adoption over institutionalisation or long-term foster care in the child's country of origin.

A shared interpretation of the **principle of subsidiarity** would be most welcome.

6. Harmonisation of national legislation on the basis of the existing Conventions

The Member States of the European Union could be encouraged to harmonise their legislation, at least on a number of specific issues. The correct implementation of the Hague Convention on Inter-country Adoption and the ratification of the 2008 Council of Europe Convention could play also an important role in this respect. Any European policy on the matter should focus on the **simplification and coordination of all coexisting measures**.

7. Status quo

The last possibility, of course, is to do nothing, apart from general adherence to the principles stated in the international Conventions. However, this option does not seem appropriate because the majority of European citizens want the European Union to intervene and the current situation undermines some of their fundamental rights.

Thank you for your attention.

As we heard this morning the importance of Hague Convention Adoptions is clear, however it does not cover all scenarios and therefore it is essential (as mentioned by Claire Gibaud) that non-Hague Convention Adoption policies in individual countries are constantly reviewed and updated. Additionally I am not sure whether the experience we faced is unique to the UK or the same problems exist elsewhere in Europe.

- **I am a Hungarian citizen**
- **I have lived in London, UK for 13 years**
- **My husband is British**
- **Toby, our adopted son is my cousin's birth-child from Hungary**

I am a very happy adoptive parent with a very bitter experience and memory of the process.

January

- **My cousin in Hungary was to give birth and decided to relinquish her unborn child for adoption**

Fortunately, we had previously (October 2007) started UK domestic adoption , by choice and not due to infertility and our assessment/Home study was almost complete. We did however have to change the process to Inter-Country and we were told that it is impossible to complete assessment and be ready for Toby's adoption before he was due to be born

March

- **To prevent Toby from being put into care and to keep him within the extended family we decided to adopt him**

Sought legal advice in UK prior to Toby's birth - we were suggested NOT to go through a Hague Convention Adoption. Our Hungarian solicitor advised to formally move back to Hungary to be allowed to go through a kinship adoption process as a single mother with my husband's supportive statement.

March to June 2008

- **Toby was born on 21 March**

We travelled to Hungary 1week later and had to go through various checks (that were prepared before our arrival) to be able to pick Toby up from hospital. The initial paperwork (birth mother's

statement and consent and our statements) had to be officially registered. Baby was released from hospital and we started a fairly normal family life. We had weekly visit from the Health Visitor and had health check-ups every 2weeks, additionally to the initial 'home assessment' done by social services. Reports were sent to the local Hungarian Child Protection Agency who also visited us and filed their report

- **All legal requirements completed in accordance with Hungarian adoption legislation**

In the first 4weeks I was acting as the legal guardian for the child then further statements were taken and the Guardianship Order was replaced with an Adoption placement followed by the final adoption Order in early June 2009. During the process the birth mother was given several opportunities to change her mind.

- **Hungarian social services encouraged us to live a normal family life (no further visits / intervention)**
- **UK experience not straight forward**

Since our assessment was not complete I had to fly back several times to be able to finish the UK process. Eventually we were recommended as prospective inter-country adopters by an adoption panel. Then they made a recommendation and a further body issued the actual approval.... This however was still not valid until the UK Central Authority (DCSF) double checked (what exactly in our case- is unknown) and issued the necessary 'Certificate of Eligibility' to adopt. Adoption panel was in May , Certificate was issued in September (4months). It was already addressed yesterday and today how every day and month is too long for a child in need to be waiting.

- **Toby was issued a passport, new birth certificate in Hungary**
- **I became the only legal representative and mother of Toby under Hungarian Law**

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June to September 2008

- **Forced to stay in Hungary as UK authority (DCSF-Department for Children Schools and Families) did not allow Toby and me to enter the UK**
- **I risked my home and my job. Accumulated debt paying for a second life in Hungary (rent, living costs, flights for my Husband) our life as a complete family was greatly compromised**
- **Restriction of Freedom of Movement (Amsterdam Treaty violated)**

Under normal circumstances a child is allowed to travel (in fact reside within the EU) with his / her parent as soon as an EU passport is issued in their name. UK immigration law states that visa is NOT required, even for an adopted child, however the Certificate of Eligibility is necessary. A child who is

adopted, and a parent who adopted him lose their freedom of movement rights when attempting to enter into the UK.

September 2008 to October 2009

- **UK authority (DCSF) finally issued a “Certificate of Eligibility” allowing Toby and I to return to the UK. But Toby was not allowed to travel back to UK without my husband**

Although we followed Non-Hague Convention Adoption the procedure the DCSF (Department for Children Schools and Families) followed was in accordance to those rules. They sent documents to the responsible Hungarian Ministry, and they wanted the Hungarian Ministry to give me (the only mother legally Toby had) permission to travel to the UK without my husband. The Hungarian ministry was not willing to comment on this since they do not have the power to restrict a mother and child's EU freedom of movement. Later the UK court was considering to track down the birth mother for a new consent (19 months after her original), although the Hungarian proceedings were completed.

- **DCSF forced me to re-adopt Toby in the UK with continuous social worker visits and assessments**
- **Full legal adoption of Toby in UK finally recognised by UK High Court on 4th November 2009**

Hague Convention adoption was unsuitable

-because of Article 17 and 29 –

If we proceeded according to Hague Convention Adoption rules Toby would have gone into care until the relevant paperwork was completed. How is that in the best interest of the child

- **Authorities in state of origin and the receiving country must exchange completed assessment of adopters and the child before adoption**
- **Waiting for the lengthy UK process to be completed would (UK inter-country assessment can take 12-18 months) have resulted in Toby going into care and adopted to a non-family member**

One assessment and approval should be valid across Europe and adoption orders should be mutually recognized.

The Problem:

UK only recognises adoption from “the designated list”

Such as

All Commonwealth countries (including Zimbabwe, Malawi, Sri Lanka, Tonga, Nigeria.....) most of them are not signatories of the Hague Convention Adoption

Other countries (including France, Germany, Italy, Sweden, Austria.....)

Does NOT recognise adoptions from:

All former Eastern Bloc countries (including Hungary, Poland, Czech Republic, Slovakia.....)

This list is ‘currently’ being reviewed under the provisions of the Adoption and Children Act 2002. This is the message on the UK inter-country adoption website for at least 2 years now. It is apparent that the 2004 Accession countries (Eastern Bloc) are not on the list. Personally I find it difficult to believe that the ‘membership criteria’ did not cover legal obligations related to Family law. If a divorce is valid across all member states why isn’t an adoption order ?

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Conclusions

- **Current UK legislation is not in the best interest of the child. The present process is unfair, unclear, difficult to navigate and expensive**

I personally considered to adopt Roma children from Hungary (and as mentioned by Maria Herczog, UN Committee, yesterday they are in great need of parents) and know others would be interested in this. However the cost and bad experience with the UK inter-country adoption process prevents me from doing so. There are always children in need for a home and there are always people waiting to be allowed to adopt. What is going wrong, where and when?

If IVF treatment is subsidised and widely available through the National Health Services across Europe than why inter-Country (Cross European) adoption is treated as a luxury (GBP 8-10 Thousand in the case of Hungary). In fact we were constantly asked why we want to adopt when we can have IVF . Surely this is not the right approach.

In Europe 2009 there are families who are connected to different Member States by relatives. These relatives should have the possibility to be informed and accommodate a child of a family member should they decide to do so.

- **The Hague Convention of Adoption has no subsection for ‘kinship- adoption’. This needs attention.**

Is the best interest of the child in question to stay within the extended family (family members abroad) or to be kept within their country. If the UK identifies a child in need of placement they search for extended family (sometimes even world-wide) and fast-track placement should they find someone suitable and willing to adopt that child. This is not possible for Europeans within the current scope of the Hague Convention Adoption.

- **We would like to see an EU centralised agency or working group to be set up, to advise Adopters, oversee and unify processes across Europe** and prepare a mutual recognition process to be implemented

Thank you for inviting me to talk about my experience.

Joint Council of Europe and European Commission Conference

CHALLENGES IN ADOPTION PROCEDURES IN EUROPE: ENSURING THE BEST INTERESTS OF THE CHILD

PRESENTATION

Rosemary HORGAN

Solicitor, Member of Working Party which drafted the revised Convention on Adoption
Ireland

The European Convention on the Adoption of Children (Revised)

Introduction

The child is the “pole star” which must guide the competent authorities in navigating through the adoption constellation of interests because the child is a vulnerable party in a process conducted by adults. This was recognised by the Council of Europe at the beginning of the 1960’s with the adoption of Recommendation 296 (1961) by the Consultative Assembly. Thereafter, the Committee of Ministers set up an ad hoc sub-committee of legal and social experts with the task of looking into the problems associated with the adoption of children.

The European Convention on the Adoption of Children of 24 April 1967 entered into force on 26 April 1968¹. It contains minimum essential principles which each Contracting State must incorporate into its national legislation and a list of additional principles to which each Contracting State are free to give effect to or not. The Convention was an instrument of its time and social mores and national policy developments over the last forty years provided a catalyst for change.

The competent bodies of the Council of Europe decided in 2002 to revise the European Convention on the Adoption of Children of 1967. The catalyst for change was both the denunciation of the Convention by Sweden and because some Convention provisions became outdated and contrary to the ever developing jurisprudence of the European Court of Human Rights (ECtHR). The European Committee on Legal Co-Operation (CD-CJ) invited the Committee of Experts on Family Law (CJ-FA) to form a working party on the issue of Adoption – this working party (CJ-FA-GT1), which was ably chaired by Mr. Werner Schütz from Austria. With a strong background in International Family Law and experience at Hague Conference level also, Mr Schütz brought his wealth of experience to bear in drawing together the working party so that we all worked hard and maintained purpose and focus throughout the work of the group.

The task of the working party was to examine the text of the 1967 Convention in the light of developments in child and family law, building on work in the area undertaken since the European Convention on the Legal Status of Children Born out of Wedlock 1975 (ETS No. 085), the First European Conference on Family Law (Vienna 1977), Parliamentary Assembly Recommendation 1443(2000). The White Paper concerning the establishment and legal consequences of parentage, and the 1993 Hague Convention on the Protection of Children and Co-Operation in respect of Intercountry Adoption. The task also necessarily involved an examination of the jurisprudence of the ECtHR and a review of international declarations and conventions which inform and regulate modern adoption law and practice such as The United Nations Declaration on Social and Legal Principles relating to Adoption and Foster Placement of Children Nationally and Internationally (1986) and The United Nations Convention on the Rights of the Child (1989) (CRC).

In order to assess the position in the individual countries, a questionnaire was sent to Member States in order to assess the convergence and divergence in national laws and policy in the area of adoption. 23

¹ There are currently 17 Contracting States to the Convention. Sweden denounced the Convention in 2003. Three States have signed the Convention but not ratified it (France, Iceland and Luxembourg).

States and one international organisation (International Social Service) replied to it. The Working Party noted that out of the 23 replies from States, 11 had ratified the European Convention on the Adoption of Children and three had signed it. The nine other States that replied had neither signed nor ratified the Convention. The text of the questionnaire and the replies are available on the Council of Europe website and highlight the sensitivities and differences amongst Member States on this subject².

The proposals for change recommended by the working party CJ-FA-GT1 were approved by the competent bodies of the Council of Europe in 2004 and the Working Party was tasked with drafting the text of a revised Convention. During two meetings in 2006 the Working Party drafted texts of the revised Convention and of the revised Explanatory Report. These texts were presented to the Committee of Experts on Family Law (CJ-FA). Various amendments and refinements were made to the draft texts in 2007 by the European Committee on Legal Cooperation (CDCJ). When the draft came to the Committee of Ministers for consideration in April, 2007, The United Kingdom put forward proposals involving substantive amendment of the text³. The Committee of Ministers agreed to look at the proposals for amendment together with an Opinion on the Draft Convention which it asked the Parliamentary Assembly to submit to it⁴. The final text of the Revised Convention was adopted by the Committee of Ministers on the occasion of its 118th session in Strasbourg in May 2008. So far eleven countries have signed the Revised Convention and no reservations have been made⁵.

The backbone giving structure to the revised Adoption Convention is the principle that the best interests of the child is of paramount importance and no adoption should be permitted, or annulled, if this requirement is not met. In each case the competent authority is obliged to pay particular attention to the importance of the adoption providing the child with a stable and harmonious home. Like its predecessor, the revised Convention mainly deals with “full” adoption (permanently severing all legal ties of filiation with the family of origin and reattaching them to the adoptive family). However, those States that provide “simple” adoption (less permanent severance/maintenance of ties of legal filiation) may also continue to use this form of adoption. The child for the purposes of the Revised Adoption Convention is defined as any child under the age of eighteen years, who has not attained the age of majority and is not or has not been married or in a registered partnership. The child is acknowledged as the bearer of rights and has now been given a ‘voice’ to ensure that the ‘best interests’ of the child or paramountcy principle has substance in the adoption process.

Consent of the child

In line with the growing awareness of children’s individual rights in the adoption process, the working group were conscious of the silence on the issue in the 1967 Convention. It was felt that having regard to the CRC 1989⁶, and the European Convention on the Exercise of Children’s Rights (The 1996 Convention)⁷, and bearing in mind the important place given to the voice of the child in EU Council Regulation (EC) 2201/2003 in matters relating to parental responsibility, it was necessary to specifically address the issue of consent of the child in the revised Convention. Article 5 of the Revised Convention makes the consent of the child necessary, if the child has sufficient understanding. The chronological age to be fixed by national law in this regard is not to exceed 14 years. However, the consent of a child who suffers a disability preventing the expression of a valid consent may be dispensed with. Even in cases where the “consent” threshold is not met, and unless it would be manifestly contrary to the child’s best interests, the child should be consulted in relation to the proposed adoption and his or her views and wishes taken into account, having regard to his or her degree of maturity (Article 6).

² See, www.coe.int/.../legal_co-operation/family_law_and_children's_rights/Documents/CJFAGT1.

³ The UK proposal for amendment was to Article 2 of the Revised Draft. Article 2 of the draft Convention excludes children who have been married from the scope of the Convention, but not specifically those who have entered into a registered partnership. This exclusion was taken as “a given” by the working party and is only referenced in paragraph 22 of the Draft Explanatory Report. The UK indicated an unwillingness to see the matter dealt with in this way, as the explanatory Report cannot alter the text and for that reason the matter should be explicit in the text of the Convention.

⁴ At the request of the Committee of Ministers, the Assembly gives its opinion on draft conventions prior to their final adoption by the foreign ministers. The Committee of Legal Affairs and Human Rights is the de facto legal advisor to the Assembly, and its opinion was sought in this context.

⁵ Armenia, Belgium, Denmark, Finland, Iceland, Montenegro, Norway, Romania, Serbia, Ukraine, United Kingdom. Limited reservations may be made pursuant to Article 27 but such reservations must be formulated at the time of signature or upon the deposit of its instrument of ratification, acceptance, approval or accession.

⁶ See Articles 12, 13 and 23.

⁷ The Convention is restricted to civil family law cases, see, Articles 1, 3, 4 and 5. However, States are free to specify additional categories of cases to which the Convention is to apply, or provide information concerning the application of Article 5, paragraph 2 of Article 9, paragraph 2 of Article 10 and paragraph 11.

There was considerable discussion on the appropriate age of the child having the right to consent to the adoption and to be consulted about the proposed adoption⁸. The child who does not have sufficient understanding to give a formal "consent" or who suffers from a disability preventing the expression of a valid consent should, in any event, be heard before granting an adoption and his/her views should be duly taken into account, thus taking due account of the jurisprudence of the ECtHR on the issue of involvement of children in court proceedings affecting them⁹. Dispensing or overruling a child's consent should only occur on exceptional grounds determined by law or if disability prevents the expression of a valid consent. Consultation is the norm unless such consultation would be manifestly contrary to the child's best interests.

Access to Birth Records

The working group noted the need to address the issue of adopted persons' access to information about themselves in the context of the rights of other parties to an adoption. The group took into account Article 7 of the CRC (the child's right to know his/her identity) and the jurisprudence of the ECtHR¹⁰ which suggested that birth, and in particular the circumstances in which a child is born, form part of a child's, and subsequently the adult's, private life guaranteed by Article 8 of the ECHR, which in turn must be balanced against the rights of a mother to preserve anonymity in order to protect her health. The balance struck in the proposed revised Adoption Convention is set out in Article 22 paragraph 3, and the decision concerning the disclosures has to be made by the competent authority in the country concerned bearing those principles in mind.¹¹

The Adults

Joint Adopters / Single Adopters

Under the 1967 Adoption Convention, the possibility of joint legal parenthood through adoption is only available to married couples. The married nuclear family may still be the 'normative ideal' in much of the Western World, however it now abuts more diverse family forms as a result of separation, divorce and the increasing number of unmarried de-facto family units. The reality of legalised registered partnerships for unmarried opposite sex and same sex couples and the equality requirements of the ECHR forced a reassessment of whether such non-traditional family units should continue to be denied the possibility of joint legal parenthood through adoption.

The need for the adoption to be in the best interests of the child is the 'acid test' in all adoptions. After careful consideration, it was agreed that the potential for a joint adoption should be extended to same sex registered partners in States which recognise that institution. In terms of same sex registered partners, however, 17 of the 23 answers to the questionnaire clearly showed that the majority of those replies were not in favour of extending a right to create joint legal parenthood through adoption to same sex registered partners living together. Bearing in mind the different attitudes prevailing in Sweden, Denmark, Iceland and the Netherlands in allowing same sex couples adoption rights and the denunciation of the Convention by Sweden, the working group felt that some flexibility, or subsidiarity principal was required to be built into the revised Convention on this sensitive issue¹².

The Revised Adoption Convention does not oblige any Contracting State to introduce a system of registered partnership into its national law for either same sex or opposite sex partners. Where such an institution exists, opposite sex registered partners may now jointly adopt in the same way as a married couple.

⁸ National legislation differs widely on this, and some countries such as Ireland require a child from the age of 7 years to consent to adoption, whereas in France the law requires the consent of a child from thirteen years in similar circumstances. See generally Carr, M. (2000). "Seeking Children's perspectives about their learning" In A.B. Smith, N.J. Taylor, & M.M. Gollop (Eds). *Children's Voices: Research, Policy and Practice*. Auckland: Pearson Education, pp. 37-55, Freeman, M. (Dec. 1996). "The importance of a children's rights perspective in litigation." *Butterworths Family Law Journal*, pp. 84-90, Freeman, M. (1998), "The sociology of childhood and children's rights." *The International Journal of Children's Rights*, 6, pp. 433-444.

⁹ See *Sahin v Germany* 30943/96, *Sommerfeld v Germany* 31871/96, [2003] 2 FLR 671, ECHR 565, [2002] 1 FLR 119, ECHR and *Sahin v Germany*, 30943/96, *Sommerfeld v Germany* 31871/96, *Hoffmann v Germany* 34045/96, [2003] 2 DLR 671, ECHR (Grand Chamber), *Elsholz v Germany* [GC] Application No. 25735/94, RJD 2000-VIII, (2002) 34 EHRR 1412 [2000] 2 FLR 486, ECHR and *Pini and others v. Romania* ECHR 2005 2 FLR 596.

¹⁰ *Odièvre v. France* Application No 42326/98, (2003) 14 BHRC 526, [2003] 1 FCR 621, EHCR Grand Chamber, *Mikulić v. Croatia* Application No. 53176/99, [2002] 1 FCR 720. (2002) 11 BHRC 689, ECHR.

¹¹ The Grand Chamber Judgement in *Odièvre v France* afforded a wide margin of appreciation to France arising from its tradition of facilitating anonymous birth. However, it should be noted that the court's judgment was supported by a slim majority of ten votes to seven and that four of the majority wrote separate opinions, see Kilkelly U "ECHR and Irish Family Law", Jordan Publishing Limited 2004, pp. 145-146

¹² See Article 5 of the Treaty Establishing the European Community (consolidated version following the Treaty of Nice, which entered into force on 1 February 2003, and Article 5, paragraph 2 of the Convention on Contact concerning Children (ETS 192).

Contracting States are free to extend the scope of the Convention to persons of the same sex who are either married together or who have entered into a registered partnership. They are also free to extend the scope of the Convention to same sex couples and same sex couples who, though not registered partners, live together in a stable relationship (Article 7.2 of the revised Convention). Single adoption remains as an option under the Revised Adoption convention (Article 7.1.b).

Consent to Adoption of both parents

The working group recommended that both parents of the child to be adopted should be required to give their voluntary consent to the adoption of the child. The 1967 Convention, being a product of its time, did not require the consent of the father in the case of a child born out of wedlock. The case of *Kroon v the Netherlands* established that where the existence of a 'family tie' with a child has been established, the State must act in a manner which enables that tie to be developed. It was also held that legal safeguards must be established that render possible as from the moment of birth or as soon as practicable thereafter the child's integration into his or her family¹³. This principle was reiterated in the case of *Görgülü v. Germany*¹⁴.

The decisions of the ECtHR in *Keegan v Ireland*¹⁵ established that adoption laws, which ignore the rights of the unmarried father and permit the secret placement of the child for adoption, amount to an interference with the father's right to respect for family life.

Pending proceedings to establish parentage taken by a putative biological parent where appropriate shall take precedence over proceedings for adoption. Article 16 of the revised Convention recognises that pending parentage proceedings must be expedited by the competent authorities to ensure the right of the biological parent to participation in the adoption process and the rights of the child.

Provision is also now made for the consent of the spouse or registered partner to be sought and given before an adoption can be granted (Article 5.c Revised Convention). This ensures that there is no discrimination where the domestic law of the Member State provides for the institution of registered partnership. There is no obligation on Member States who do not have such an institution nevertheless to introduce one.

Minimum Age of Adopters

The working group recommended that it was important to ensure a realistic age difference between the adopter(s) and the person to be adopted perpetuating the adage that "adoption imitates nature". The working group felt that there should be an appropriate age difference between the adopter and the child, having regard to the best interests of the child, preferably a difference of at least 16 years. It was felt that the minimum age of the adopter should be prescribed by national law. This minimum age should be neither less than 18 nor more than 30 years (Article 9 of the revised Convention). The working group did not recommend a maximum age of the adopter (s) as each situation should be judged on its individual merits and bearing in mind the best interests of the child to be adopted. In the present Convention, the minimum age of the adopter is between 21 and 35 age of years.

Incidence and Effects of Adoption

The scope of the revised Convention is not limited to "full adoptions" where the consequence of the adoption order is necessarily to sever all legal ties with the family of origin. However this form of full adoption is clearly preferred. The object of the revised Convention is to promote adoption which establishes a permanent parent-child relationship and in full adoption the child is fully integrated into the adoptive family in every respect as if the child were born within the family. Provision is also made for nuances to the total severance of rights of the birth parent on adoption in the case of adoption by spouses or registered partners of the birth parent. Similarly, there is a nuancing of the severance of all links to the family of origin in some situations, for example the automatic acquisition of the adopter's surname is not an absolute rule, and the blood link between the child and certain categories of the family of origin may remain to be an obstacle to marriage, and residual rights to maintenance in a subsidiary basis, may be provided for if the adopter is unable to comply with maintenance obligations towards the adopted child.

13 *Kroon & Others v the Netherlands* Application number 00018535/91 (27 October 1994) A/197/C, (1995) 19 EHRR 263 ECGR (presumption of legitimacy of married woman); See also *Libbink v The Netherlands* Application No. 45552/99 of 1st June 2004 which determined that the formation of "family ties" can be achieved by reference to the particular facts in the case, even in situations where there has not been a legal formalisation of paternity. However, biological links alone are insufficient to establish "family ties".

14 *Görgülü v. Germany* Fn. 3: ECHR, No. 74969/01, Judgement of 26 February 2004.

15 *Keegan v Ireland* 18 ECRR 342 (1994).

States whose laws allow for “simple adoptions” (a form of adoption which does not sever the relationship with the child’s family of origin totally) are afforded the possibility of keeping these other forms of adoption (Article 11 of the revised Convention).

Annulment of Adoption: Article 13

The concept of full adoption has of necessity the character of permanence. The 1993 Hague Convention does not deal with annulment or revocation of Intercountry adoptions. However, the current European Adoption Convention provides that before a child reaches the age of majority, the adoption may be revoked by a decision of a competent authority on serious grounds and only if the revocation on that ground is permitted by law. The group felt that the given the gravity of the issue, annulment or revocation should only be permitted within the confines of explicit guarantees in law and in its application.

It was therefore felt that in those States which permit annulment/revocation, the conditions should be more proscribed to prevent the application of contract law for example and rendering an adoption null and void on the basis of any error with regard to the “quality” of the child. Conditions were therefore set to any annulment or revocation with the best interests of the child being of paramount consideration. A short limitation period is also fixed for the commencement of the proceedings being within three years of the adoption order being made.

Essential/ Non Essential Provisions

The structure of the 1967 Convention – with an essential Part II (mandatory provisions) and an optional Part III – has now been changed and the provisions of the Revised Convention are all mandatory. Reservation may however be made in respect of the provisions of Article 5 1 b (the consent of the child considered by law as having sufficient understanding), Article 7 1.a.ii (permitting joint adoption by registered partners in countries where such institution exists), or Article 7 1 (b) permitting adoption by one person, and Article 22. 3 (access to identifying information). Reservations must be formulated at the time of the signature or on ratification, acceptance, approval or accession, and may be withdrawn at a later date.

Conclusion

The revised Convention will form a useful complement of the Hague Convention of 1993 on Inter - country Adoptions. Contracting States will be obliged to adopt the higher standards of the new Convention in their national law which will contribute to a further harmonisation of adoption law in Europe.

FINAL REMARKS
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Directorate-General Justice, Freedom and Security
European Commission
Strasbourg, 1st December 2009

- We are approaching to the end of our Conference that has represented a fruitful exchange of information and ideas between the interested parties. It is time to draw up some conclusions from the point of view of the European Commission.
- The entry into force, today, of the Treaty of Lisbon reinforces the importance of the principles included in the Charter of the Fundamental Rights of the Union. A first consideration is that the promotion and the **protection of the rights of the child must continue to be a priority in all Commission's actions**. In particular, in the matter of adoption, the best interests of the child should be the primary concern. The European Union will continue its action to **prevent child trafficking and improper financial gain** in adoption procedures. On the other hand **the right of the child to a family** should be recognized without hesitations at the European level.
- We consider it essential to promote largely **the accession to the 1993 Hague Convention on inter-country adoption**. Already 26 out of 27 EU Members States are parties to the Convention; we would urge the remaining one to accede also. Furthermore, we have included the 1993 Convention to the international framework that is important for the candidate countries. And finally, we promote the Convention also for the third countries in order to rely on a common international legal framework.
- It is clear that not only the accession to this Convention is important, but the fact that it has to be properly implemented. This consideration has a special importance for the Member States of the European Union, whose legislation on adoption present by now intense diversities.

- The European Union, since 2007 a full title Member of the Hague Conference on Private International Law, can play in this regard a coordination role, for instance by promoting the use of standard forms and the keeping of accurate records about the children.
- Also the cooperation between Central Authorities of the Member States throughout every step of the adoption proceeding should be supported by the European Union, by financing training courses and facilitating the exchange of best practises.
- In the context of the European Union, an economic integrated area without internal borders, which is developing into an area of freedom, justice and security, where the citizens enjoy the freedom of movement and have the possibility to live and work in another Member State, also **the principle of subsidiarity in adoption procedures** should be interpreted in a uniform and consistent way, meaning that, when the biological family unity cannot be preserved and the adoption of the child in his/her country of origin is not possible, international adoption should be considered, in the light of the UNICEF position, the best solution to allow the child to grow up in a permanent family environment .
- As the complete harmonization of substantive laws on adoption is currently not a realistic option, we encourage **the ratification by the Member States of the European Union of the revised Council of Europe Convention on adoption**. It offers a common set of principles to be respected by Member States in their legislation and practises concerning adoption.
- The respect of the fundamental principle of the freedom of movement within the Union calls also for an EU action ensuring **free circulation of adoption decisions concerning EU citizens**. Adoption decrees issued by national Courts or administrative bodies should circulate freely in Europe. Also the mutual recognition of certificates of eligibility or suitability for prospective adoptive parents could be taken into account in order not to harm the freedom of movement of the European citizens.
- I thank you for your important contribution through the discussions in this Conference. This feeds in to considerations on how to effectively promote the best interest in the child in the Union.

ANNEX 4 CONCLUSIONS



COMMISSION EUROPÉENNE
EUROPEAN COMMISSION



Joint Council of Europe and European Commission Conference
www.coe.int/family

CHALLENGES IN ADOPTION PROCEDURES IN EUROPE: ENSURING THE BEST INTERESTS OF THE CHILD

30 November - 1 December 2009

Strasbourg, Palais de l'Europe

CONCLUSIONS

The participants of the Adoption Conference held in Strasbourg on 30 November and 1 December 2009 would like to express their thanks to the European Commission and the Council of Europe for organising this event and for providing the opportunity for them to discuss this important matter.

Speakers have referred to a number of legally binding instruments adopted at both national and international level safeguarding the rights of the child during the adoption process in order to ensure the best interests of the child. Particular attention was paid to the revised European Convention on the Adoption of children of the Council of Europe, as well as to the 1993 Hague Convention on Inter-country adoption, in highlighting good practices which help to ensure the rights of children during this sensitive and emotional procedure. Speakers noted that those instruments are adoption-neutral: they neither encourage nor discourage adoption. The hierarchy of choices available to State parties for the care of children must respect the rights of the child. However, when adoption proceedings take place, they should always be in the best interests of the child.

Participants agreed that accession to and ratification of both of these international legal instruments should be strongly encouraged. When ratified, they should be effectively and scrupulously implemented and monitored to set minimum standards for the further development of national legislation and policies. Only three ratifications are needed for the revised Convention of the Council of Europe to enter into force, and we all hope that this instrument will be a binding one sooner rather than later.

A number of participants have indicated that their countries are in the process of promulgating national legislation to implement both conventions to ensure that the best interests of the child are safeguarded. The revised Adoption Convention should even now have a resonance in national courts and has been referenced in adoption cases coming before the European Court of Human Rights.¹ Participants are particularly grateful to the two judges of the European Court for their insights into the evolving case law of the Court on adoption.

The importance of the role of both governmental and non-governmental institutions promoting children's rights, and governmental monitoring mechanisms, cannot be overemphasized. These institutions have a vital role in issuing guidelines for the implementation of adoption policies and procedures for professionals working in this area, in accordance with relevant international norms. Clear processes and procedures should minimise unnecessary bureaucracy.

International cooperation needs to be further developed to promote the exchange of information and experiences, to identify good practices, to support best practice standard setting and effective implementation, and to promote the development of national integrated strategies to prevent and combat all forms of child trafficking. The Council of Europe and the European Union could play a crucial role for the benefit of national forums following insights gained from the conference, and building upon study already undertaken and to be published.

All professionals - in particular judges, psychologists, social workers and lawyers – who become involved with a child in contact with the judicial system should receive appropriate information and opportunities for training in appropriate methods for interviewing a child. The role of responsible media reporting of adoption issues is recognised. The issue of the

¹ Wagner v. Luxembourg (76240/01), E.B. V France (43546/02) and Emonet and others v. Switzerland (39051/03).

adoption of children needs to be de-politicized, by giving paramount consideration to the best interests of children rather than the political sensitivities of sending or receiving countries. Whether residential care, foster care, national or international adoption is the best solution for an individual child in need of a home, must however depend upon the specific facts presented by each case.

The mature child's consent to adoption is now necessary. The interpretation of the child's wishes and best interests should be facilitated through child psychologists and other qualified professionals. It is vitally important that children's views are duly taken into account in all adoption proceedings. The awareness of all professionals working in this area should be raised in this respect. A multidisciplinary interaction between various professionals involved, including judges, lawyers, psychologists, social workers, and other professionals involved in adoption proceedings, must be encouraged, in order to give practical substance to the concept of the best interests of the child, their right to be heard and to articulate their views. Information conveyed to the child should be age-appropriate, and their psychological needs taken into account. There may be a role to appoint a guardian *ad litem* for the child in this regard. We have heard the encouraging experience of the members of the judiciary who consider it necessary to hear the child directly before making a decision on adoption.

Participants noted divergences in practices and procedures on the requirement for the consent of unmarried fathers, notwithstanding the case law of the European Court of Human Rights on this matter. A lively debate on a possibility of joint adoption for same-sex couples highlighted a divergence of views on this issue. The revised Convention remains flexible on this topic. Everybody agreed that the best interests of the child should once again be the paramount interest guiding every decision on adoption. Every effort should be made to avoid discrimination including discrimination based on ethnicity or disability of children.

The severance of ties of filiation arising from full adoption brings into sharp focus the rights of siblings, parents and grand parents. The question was raised as to whether this represents a disproportionate effect on adoption and as the discussion from the floor developed, it became clear that these issues may need to be further developed.

The right to know one's origins and the importance of that to adopted persons became very clear through the testimony of several adult adopted persons, who spoke with great emotion about their personal experiences which were very powerful and persuasive. The need to complete their life stories and quest for identity was perceived as important for their psychological well-being. Questions surrounding the collection data storage and protection might need to be re-considered in the coming years.

It should be borne in mind that the revised Adoption Convention is an instrument of harmonization, setting minimum standards, one would hope and expect that States parties will continue to improve and raise national standards over time. Work continues on other international conventions, promoting the rights of children, and recalibrating the balance between the rights of children and of adults.

The focus of the Hague Convention is to provide a framework for the process the inter-country adoption which is aimed at protecting the best interests of the child by establishing a system of co-operation between contracting countries to prevent the abduction, sale, or the trafficking of children. This gives practical expression to the international standards set out in the UN Convention on the Rights of the Child. States of origin and receiving

countries participated in formulating the Convention to ensure the best adoption procedures acceptable to all the contracting States. The Convention like all legal instruments is a framework document and, by definition, incomplete and imperfect. Co-operation and transparency are the key ingredients to improving its implementation. States parties must be vigilant in complying with the Convention's obligations. Participants were encouraged to take an active part in the review process of this Convention scheduled for 2010.

Every country which engages in inter-country adoption should become a party to the Hague Convention because it embodies 'best practice' standards for regulating Inter-country adoption thereby protecting the rights of children in adoption situations. All States which are parties to the Convention should, when dealing with non Contracting States, apply as far as possible the safeguards and procedures set out in the Hague Convention.

The co-operative framework of the Hague Convention is based on an agreed division of responsibilities between sending and receiving countries. The 'best interests' of the child in inter-country adoptions is safeguarded by:

- establishing specific safeguards to ensure the 'adoptability' of the child;
- ensuring that due consideration has been given to alternative permanent forms of care for the child in the sending/receiving country,
- ensuring that the necessary consents have been knowingly and freely given after counselling;
- regulating the financial aspects of the adoption;
- accrediting and authorizing adoption agencies; and
- verifying that the Convention procedures are followed.

Receiving countries must ensure that the adoptive parents are eligible and suitable to adopt, that they have been appropriately counselled and that the child is allowed to enter and permanently reside in the State.

The responsibilities of sending and receiving countries are not mutually exclusive. Indeed, they share the responsibility for developing the safeguards and procedures protecting the best interests of the child. Receiving countries should avoid placing pressure on sending States and should help them to improve their child protection systems. Central Authorities have both international and national aspects to their functions. Attention was drawn to the Inter-country Adoption Technical Assistance Programme, coordinated by the Hague Conference, which assist Contracting States in developing the infrastructure and procedures required to meet international standards. Co-operation and harmonisation between central authorities are important and must be supported through training courses and exchange of best practices. Several participants expressed their opinion that financial support from the European Union member States would be welcome in this report.

In accordance with the fundamental principles of the freedom of movement within the European Union, it is important that there should be mutual recognition of certificates of eligibility and suitability of prospective adoptive parents and publication and circulation of adoption decisions.



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Conférence conjointe du Conseil de l'Europe et de la Commission européenne
www.coe.int/family

**LES ENJEUX DANS LES PROCÉDURES D'ADOPTION EN EUROPE :
GARANTIR L'INTÉRÊT SUPÉRIEUR DE L'ENFANT**

30 novembre – 1^{er} décembre 2009

Strasbourg, Palais de l'Europe

CONCLUSIONS

Les participants à la Conférence sur l'adoption qui s'est tenue à Strasbourg les 30 novembre et 1^{er} décembre 2009 tiennent à remercier la Commission européenne et le Conseil de l'Europe d'avoir organisé cet événement qui leur a permis d'étudier ce sujet important.

Les intervenants ont évoqué plusieurs instruments juridiquement contraignants adoptés à la fois aux niveaux national et international, qui protègent les droits de l'enfant au cours du processus d'adoption afin de garantir l'intérêt supérieur de ce dernier. Une attention particulière a été accordée à la Convention révisée du Conseil de l'Europe en matière d'adoption des enfants et à la Convention de La Haye de 1993 sur l'adoption internationale, mettant en lumière les bonnes pratiques qui aident à garantir les droits de l'enfant tout au long de cette procédure sensible et chargée d'émotion. Les intervenants ont noté la neutralité de ces instruments qui n'encouragent ni ne découragent l'adoption. Les choix qui s'offrent aux Etats parties dans cette matière doivent respecter les droits des enfants, et les procédures d'adoption devraient cependant toujours garantir l'intérêt supérieur de l'enfant.

Les participants sont convenus que la signature et la ratification de ces deux instruments juridiques internationaux devraient être encouragés. Dès lors qu'ils sont ratifiés, ils devraient être réellement et scrupuleusement mis en œuvre dans le but de fixer des normes minimales pour développer davantage la législation et les politiques nationales. Seules trois ratifications sont nécessaires à l'entrée en vigueur de la Convention révisée du Conseil de l'Europe et nous espérons tous que cet instrument deviendra contraignant dès que possible. La Convention révisée en matière d'adoption devrait même aujourd'hui trouver un écho au sein des tribunaux nationaux, et elle a déjà été invoquée dans des affaires d'adoption portées devant la Cour européenne des droits de l'homme¹. Les participants sont particulièrement reconnaissants aux deux juges de la Cour européenne de les avoir éclairés sur l'évolution de la jurisprudence de la Cour en ce qui concerne l'adoption.

Plusieurs participants ont indiqué que leurs pays promulguaient actuellement la législation nationale favorable à la mise en œuvre des deux conventions permettant de protéger l'intérêt supérieur de l'enfant.

On n'insistera jamais assez sur l'importance des mécanismes de suivi nationaux et des institutions gouvernementales et non gouvernementales qui font la promotion des droits des enfants. Ces institutions jouent un rôle vital dans l'établissement de lignes directrices sur l'application des procédures et politiques d'adoption, destinées aux professionnels travaillant dans ce domaine, en conformité avec les normes internationales pertinentes. La clarté des procédures et processus contribue à réduire au minimum la bureaucratie inutile.

Il est nécessaire de renforcer la coopération internationale pour promouvoir l'échange d'informations et d'expériences, recenser les bonnes pratiques, favoriser les meilleures pratiques en matière d'élaboration et de mise en œuvre effective de normes, et l'élaboration de stratégies nationales intégrées visant à prévenir et à combattre la traite des enfants sous toutes ses formes. Le Conseil de l'Europe et l'Union européenne peuvent jouer un rôle crucial pour encourager les espaces d'échange à l'échelon national, dans le prolongement des enseignements tirés de la conférence et le fondement d'étude déjà menée et bientôt publiée.

¹ *Wagner c. Luxembourg* (76240/01), *E.B. c. France* (43546/02) et *Emonet et autres c. Suisse* (39051/03).

Tous les professionnels – en particulier les juges, les psychologues, les travailleurs sociaux et les avocats – qui interviennent auprès d'enfants en contact avec le système judiciaire devraient recevoir une formation appropriée, et avoir l'occasion de se former aux méthodes d'entretiens adaptés aux enfants. Le rôle de médias responsables est reconnu dans la présentation de la question de l'adoption des enfants. La question doit être dépolitisée en faisant primer l'intérêt supérieur de l'enfant sur les sensibilités politiques des pays d'origine ou d'accueil. Qu'il s'agisse de prise en charge en établissement, en famille d'accueil ou d'adoption nationale ou internationale, la meilleure solution pour un enfant qui a besoin d'un foyer doit cependant tenir compte des faits du cas particulier d'espèce.

Le consentement de l'enfant d'âge mûr à l'adoption est désormais nécessaire. L'interprétation de leurs souhaits et de leur intérêt supérieur devraient être facilitée par des pédo-psychologues et autres professionnels qualifiés. Il est extrêmement important de prendre en compte l'avis des enfants dans toutes les procédures d'adoption. A cet égard, il faut sensibiliser l'ensemble des professionnels travaillant dans ce domaine. Une interaction pluridisciplinaire, entre les diverses professions concernées, notamment les juges, les avocats, les psychologues, les travailleurs sociaux et d'autres professionnels qui interviennent dans les procédures d'adoption, doit être encouragée pour donner corps à la notion d'intérêt supérieur d'enfant, à leur droit d'être entendu et d'exprimer leurs points de vue. Les informations communiquées aux enfants doivent être adaptées à leur âge, et leurs besoins, pris en compte. A ce titre, il peut être souhaitable de leur désigner un « tuteur ». Nous avons entendu l'expérience encourageante des membres du pouvoir judiciaire qui estiment nécessaire d'entendre les enfants directement avant de prendre une décision quant à l'adoption.

Les participants ont noté des divergences dans les pratiques et procédures sur la condition du consentement des pères non mariés, en dépit de la jurisprudence de la Cour européenne des droits de l'homme sur ce point. Le débat animé sur la possibilité d'une adoption conjointe pour les couples homosexuels a révélé des divergences de points de vues sur cette question. La Convention révisée demeure souple sur ce point. Tous les participants s'accordent sur le fait que l'intérêt supérieur de l'enfant devrait, une fois de plus, être primordial dans le choix concernant l'adoption. Il faut faire le maximum pour éviter la discrimination, y compris celle fondée sur l'origine ethnique ou le handicap des enfants.

La rupture des liens de filiation qui découle d'une adoption plénière met particulièrement en relief les droits des fratries, des parents et des grands-parents. La question de savoir si cela peut avoir un effet disproportionné sur l'adoption a été posée, et, à mesure que les discussions des participants avançaient, il devenait clair que ces points mériteraient d'être approfondis.

Le droit de connaître ses origines et l'importance qu'il revêt pour les personnes adoptées est ressorti très clairement du témoignage de plusieurs adultes ayant été adoptés qui se sont exprimées avec une grande émotion sur leurs expériences personnelles, particulièrement fortes et convaincantes. Le besoin de rassembler les pièces de son histoire et la quête d'identité s'est révélé important pour leur bien-être psychologique. Dans les années à venir, il faudrait probablement réexaminer les questions qui se posent concernant la collecte, le stockage et la protection des données.

Il convient de garder à l'esprit que la Convention révisée en matière d'adoption est un instrument d'harmonisation, qui fixe des normes minimales ; il y a lieu d'espérer que les Etats parties continueront d'améliorer et d'élever les normes nationales au fil des ans. Le

travail se poursuit sur d'autres conventions internationales pour promouvoir les droits de l'enfant et rétablir l'équilibre entre les droits des enfants et ceux des adultes.

La Convention de La Haye entend avant tout fournir un cadre au processus d'adoption international qui vise à protéger l'intérêt supérieur de l'enfant par l'établissement d'un système de coopération entre les Etats contractants afin de prévenir l'enlèvement, la vente ou la traite des enfants. Cet objectif traduit concrètement les normes internationales énoncées dans la Convention des Nations Unies relative aux droits de l'enfant. Les pays d'origine et d'accueil ont participé à la formulation de la Convention afin de garantir des procédures d'adoption acceptables pour toutes les parties contractantes. Comme tout instrument juridique, la Convention est un document cadre qui est, par définition, incomplet et imparfait. La coopération et la transparence sont les ingrédients clés pour améliorer sa mise en œuvre. Les Etats parties doivent faire preuve de vigilance en respectant les obligations de la Convention. Les participants ont été encouragés à prendre une part active dans le processus de révision de cette Convention, prévu pour 2010.

Tout pays qui opte pour l'adoption internationale devrait être partie à la Convention de La Haye puisque celle-ci formule les « meilleures pratiques » de réglementation de l'adoption internationale, donc de protection des droits des enfants en situation d'adoption. Tout Etat partie à la Convention devrait appliquer, dans la mesure du possible, les garanties et procédures énoncées dans la Convention de La Haye lorsqu'il traite avec un Etat non contractant.

Le cadre coopératif de la Convention de La Haye se fonde sur une division convenue des responsabilités entre les pays d'origine et d'accueil. « L'intérêt supérieur » de l'enfant dans des procédures d'adoption internationale est protégé par :

- l'établissement de garanties spécifiques assurant « l'adoptabilité » de l'enfant ;
- l'assurance que les autres formes de prise en charge permanente de l'enfant dans le pays d'origine ont été mûrement réfléchies ;
- l'assurance que les consentements nécessaires ont été accordés sciemment et librement après que des conseils ont été donnés ;
- la réglementation des aspects financiers de l'adoption ;
- l'accréditation et l'autorisation des agences d'adoption ; et
- la vérification du respect des procédures énoncées par la Convention.

Les pays d'accueil doivent s'assurer que les parents adoptifs remplissent l'ensemble des conditions et correspondent aux critères d'adoption, qu'ils ont reçus des conseils appropriés et que l'enfant est autorisé à entrer et à résider à titre permanent sur le territoire de l'Etat concerné.

Les responsabilités des pays d'accueil et d'origine ne s'excluent pas mutuellement. En effet, ils partagent la responsabilité d'apporter des garanties et des procédures qui protègent l'intérêt supérieur de l'enfant. Les Etats d'accueil devraient éviter de faire pression sur les pays d'origine et aider ces derniers à perfectionner leurs systèmes de protection de l'enfance. Les fonctions des autorités centrales ont à la fois une dimension nationale et internationale. L'attention a été portée sur le Programme d'assistance technique en matière d'adoption internationale, coordonné par la Conférence de La Haye, qui aide les Etats contractants à mettre en place l'infrastructure et les procédures exigées pour respecter les normes internationales. A cet égard, la coopération et l'harmonisation entre les pouvoirs publics est nécessaire et doivent être étayées par des sessions de

formation et l'échange de meilleures pratiques. De l'avis de plusieurs participants, l'aide financière des Etats membres de l'Union européenne serait la bienvenue.

Conformément aux principes fondamentaux de liberté de circulation à l'intérieur de l'Union européenne, il importe de mettre en place une reconnaissance mutuelle des attestations d'éligibilité à l'adoption et d'aptitude des futurs parents adoptifs, de la publication et de la diffusion des décisions d'adoption.

ANNEX 5

LIST OF PARTICIPANTS



COMMISSION EUROPÉENNE
EUROPEAN COMMISSION



COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Joint Council of Europe and European Commission Conference
Conférence jointe du Conseil de l'Europe et de la Commission européenne

**CHALLENGES IN ADOPTION PROCEDURES IN EUROPE:
ENSURING THE BEST INTERESTS OF THE CHILD**

***LES ENJEUX DANS LES PROCÉDURES D'ADOPTION EN EUROPE :
GARANTIR L'INTÉRÊT SUPÉRIEUR DE L'ENFANT***

30 November – 1 December / 30 novembre – 1 décembre 2009
Strasbourg, Palais de l'Europe
Room / salle 1

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LISTE DES PARTICIPANTS

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