

PROPERTY OF
ISS/IRC

Nº THC-COM.
001

REPORT ON INTERCOUNTRY ADOPTION

drawn up by J.H.A. van Loon

* * *

RAPPORT SUR L'ADOPTION D'ENFANTS
ORIGINAIRES DE L'ÉTRANGER

établi par J.H.A. van Loon

I INTRODUCTION

A History of the project

1 The Sixteenth Session of the Hague Conference on private international law which met at The Hague from 3-20 October 1988 decided -

"to include in the Agenda for the Seventeenth Session the preparation of a convention on adoption of children coming from abroad" and instructed the Secretary General "to undertake the preliminary work and to convene a Special Commission for this purpose".

The Sixteenth Session added to its Decision that it considered -

*"to be indispensable the participation in this Special Commission of non-Member States from which many of these children come" and requested "that the Secretary General make his best efforts to obtain their participation in this work as ad hoc Members".*¹

2 The decision to include the subject of intercountry adoption in the Agenda of the Conference was thus closely linked to the decision to open the Conference for non-Member Countries having an interest in the subject, especially countries of origin of children adopted abroad. The principle that non-Member States may participate in the work of the Conference had been accepted by the Fourteenth Session (1980),² but this was the first time that this principle had been implemented in respect of a family law topic.

It was felt indispensable to open the discussions of the first Special Commission meeting and also the subsequent negotiations and the drafting of the Convention to non-Member States because in the view of the delegates present at the Sixteenth Session there was a clear practical need for a multilateral instrument which would not, or not only, be a traditional convention unifying private international law rules, but one which would define certain substantive principles and establish a legal framework for co-operation between authorities in countries of origin of children and receiving countries, in order to protect those children effectively. Obviously this necessitated inviting all interested countries to participate from the beginning in this project on an equal footing with Member States.

3 The topic had first been brought up by the Permanent Bureau of the Hague Conference in a note for the attention of the Special Commission of

January 1988 on general affairs and policy of the Conference³ and it had been formally proposed to this Special Commission by the Government of Italy.⁴ It attracted great interest among the experts, who agreed that international adoption was posing at present very serious problems of a kind or degree different from those existing when, in 1964, the Tenth Session of the Hague Conference drafted the *Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions*, first signed at The Hague on 15 November 1965 - hereinafter referred to as the 1965 Hague Adoption Convention (see *infra*, in particular Nos 157-161) - in particular because today substantial numbers of children from economically developing countries are being placed for adoption with families in industrialized countries.

The Special Commission recommended that this topic be retained and invited the Secretary General to obtain assurances on the part of countries of origin which were not at that time Members of the Conference that they would be willing to co-operate with the Conference, and to report back to the Sixteenth Session.⁵ Immediately after the Special Commission meeting, the Secretary General and the Permanent Bureau started developing a number of activities on three levels and in this connection contacts were established with

- other intergovernmental, as well as with non-governmental international organizations, with a view to co-ordinating international work on intercountry adoption;
- high ranking officials of countries of origin of children which were not at that time Members of the Hague Conference, in order to determine their Governments' possible interest in participating in the Conference's work, and
- private organizations and individuals active in the field of international child protection and intercountry adoption, as well as scholars interested in the field, with a view to establishing channels for informal co-ordination, information and support for any future work by the Conference on the topic of intercountry adoption.

The initial reaction from the representatives of many non-Member Countries was positive and justified the thought that many of these countries would accept a formal invitation on the part of the Hague Conference to participate in the negotiation of a new convention on intercountry adoption. Moreover, it appeared that other international organizations

³ H. van Loon, "Note on the Desirability of Preparing a Convention on International Co-operation in Respect of Intercountry Adoption", Preliminary Document No 9, December 1987 for the attention of the Special Commission of January 1988.

⁴ Preliminary Document No 13, January 1988, for the attention of the Special Commission of January 1988.

⁵ "Conclusions of the Special Commission of January 1988 on General Affairs and Policy of the Conference", Preliminary Document No 14, April 1988, for the attention of the Sixteenth Session.

¹ Hague Conference on private international law, Sixteenth Session, *Final Act* (The Hague, 20 October 1988), under B 1.

² *Final Act of the Fourteenth Session under D 1, Hague Conference on private international law, Actes et documents de la Quatorzième session, Tome I, page 1-63.*

interested in the subject were willing to co-operate with the Hague Conference (see *infra* C).⁶

The first commission of the Sixteenth Session discussed the subject in its meeting of 10 October 1988. All delegations and observing international organizations spoke in favour of the project and the decision for its inclusion in the Agenda of the Conference, as it appears in the Final Act cited *supra* No 1, was taken on 19 October 1988 without any further discussion.⁷

4 The reasons for deciding to include the subject with priority in the Agenda were essentially those set out in the note of the Permanent Bureau which can be summarized as follows:

- (i) a dramatic increase in international adoptions which had occurred in many countries since the late 1960s to such an extent that intercountry adoption had become a world wide phenomenon involving migration of children over long geographical distances and from one society and culture to another very different environment;
- (ii) serious and complex human problems, partly already known but aggravated as a result of these new developments, partly new ones, with among other things manifold complex legal aspects; and
- (iii) insufficient existing domestic and international legal instruments, and the need for a multilateral approach.

B *Nature and scope of the project*

5 In defining the project as "the preparation of a convention on adoption of children coming from abroad", the Sixteenth Session indicated that it wished to focus the work on what it saw as the most pressing problems of international adoption, i.e. those which are international from the outset because they involve a child living in one country, one or more prospective adoptive parents living in another and the transfer of the child to that other country to live there with such adoptive parent or parents. Consequently, this Report will focus on these adoptions and not - or only exceptionally - deal with adoption of adults, or adoptions which start as internal adoptions and only subsequently acquire an international aspect or those which are international only because of the foreign nationality of the child or parents involved.

⁶ "Report of the Secretary General on the Question of Intercountry Adoption of Children", Preliminary Document No 17 of September 1988 for the attention of the Sixteenth Session.

⁷ Minutes of the Plenary Session, No 2, to be published in *Proceedings of the Sixteenth Session*, Tome 1.

The international adoptions envisaged by the Sixteenth Session involve the child, his or her biological family and the adoptive parents, as well as private intermediaries, but also the authorities of the countries concerned - usually the country where the child had lived immediately before the adoption took place and the receiving country - which might be and usually are involved in various capacities and various stages of the process. This poses problems of co-ordination, both in each country individually and between them. Such problems include matters generally understood to be questions of private international law - international jurisdiction of the courts or other authorities, applicable law and recognition and enforcement of foreign decisions - but go beyond this and include as well the need to co-ordinate laws and practices regarding social welfare, migration and nationality.

6 Delegates also agreed that until then unilateral attempts to deal with a phenomenon, which by its very nature has now become very much internationalized, often fell short of their objectives or were easy to circumvent. The Italian delegate mentioned, for example, that the most recent modifications of Italian law (1983) had been criticized by Latin American countries for not having sufficiently taken their viewpoint into account. The Australian delegate mentioned the problem of couples who, unable to fulfil the necessary criteria for adoption within Australia, establish a "sham residence" in another country in order to adopt there. It was also suggested that bilateral or multilateral private international law treaties, such as the *Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors*, first signed at La Paz on 24 May 1984 or the 1965 Hague Adoption Convention, were not effective in this context precisely because they were of regional application only and did not involve the participation of both countries of origin and receiving countries.⁸

7 The Sixteenth Session favoured an approach which would establish standards for the protection of children and channels for co-operation between the authorities of the countries of origin and the receiving countries. In respect of the latter aspect, reference was made to the Hague Conventions on Judicial and Administrative Co-operation, i.e. those on Service and Evidence Abroad and on International Access to Justice⁹ and, more specifically in the field of children, to the *Convention on the Civil Aspects of International Child Abduction* first signed at The Hague on 25 October 1980 - hereinafter referred to as the Hague Child Abduction Convention. All of these Conventions have established systems of co-operation among Central Authorities of the participating States which, as experience shows, over time tend to develop into ever more close

⁸ Minutes No 1 of Commission I, to be published in *Proceedings of the Sixteenth Session*, Tome 1.

⁹ *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* first signed at The Hague on 15 November 1965, *Convention on the Taking of Evidence Abroad in Civil or Commercial Matters* first signed at The Hague on 18 March 1970 and *Convention on International Access to Justice*, first signed at The Hague on 25 October 1980.

co-operation. In the case of the Hague Child Abduction Convention, the Central Authorities have a particularly preeminent role in order to secure the prompt return of children wrongfully removed to or retained in a Contracting State and to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States. Several "monitoring" meetings have already taken place at The Hague to study the practical operation of the Hague Service and Evidence Conventions and recently, in October 1989, a similar meeting took place concerning the Child Abduction Convention.¹⁰ Such meetings serve several functions: they make personal contacts possible, they allow for the exchange of information, they reinforce the objectives of the Convention and the commonality of interests it serves, and they may help to resolve existing problems of co-operation and even disputes.

8 While the establishing of a set of substantive principles and the creation of a framework for co-operation were seen as the core objectives to be achieved by the new convention, no final conclusion was arrived at concerning the inclusion of rules of jurisdiction, applicable law or the recognition and enforcement of foreign decisions. Some delegations felt that the convention should not be too ambitious and should limit itself to the framework of judicial and/or administrative co-operation, others felt that it should extend into the other fields mentioned above.

9 Finally, there was an implicit understanding among delegates that the project should stay outside the criminal field. The Hague Conference on private international law has traditionally not involved itself in the area of criminal law and the Permanent Bureau has no experience in this specialized field. Although at some point co-ordination with criminal policies might be necessary - there is no doubt, for example, that abduction of a child for adoption abroad is a criminal offence under the laws of most countries¹¹ - the work of the Conference was to focus on the civil aspects of international adoption, just as it had done in the work leading up to the Hague Child Abduction Convention.

C *Parallel activities of and co-operation with other international organizations*

10 Since international adoption started growing from a regional into a worldwide phenomenon about two decades ago, several international organizations, both intergovernmental (IGOs) and non-governmental (INGOs), have developed, or renewed, an interest in this field.

¹⁰ See Overall Conclusions of the Special Commission of October 1989 on the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, February 1990, published by the Permanent Bureau.

¹¹ Cf. M. Bennett, "Crimes Against the Family - III", in International Legal Practitioner, December 1988, pp. 106-107.

1 *Intergovernmental organizations*

a *United Nations*

11 As early as 1972 the General Assembly of the United Nations had adopted a Resolution (3028 (XXVII) of 18 December 1972) entitled "United Nations Conference for an International Convention on Adoption Law" requesting that the Secretary General make an enquiry to the governments of the Member States in order to gather information on policies, programmes and laws for the protection of children for adoption and foster placements, and government views on an international conference on adoption law. The Secretary-General sent a questionnaire to the Member States and received replies upon which he based a report published in 1975.¹² This was followed by Resolution (1925 (LVIII) of 6 May 1975) of the Economic and Social Council (ECOSOC). At ECOSOC's request an expert group met in Geneva in 1978 which prepared a draft declaration - the idea of a binding convention on adoption law had been given up.¹³ This declaration was studied further and in September 1982 the General Assembly decided to include the draft declaration in its agenda. After extensive consultation¹⁴ the General Assembly in its Resolution 41/85 of 3 December 1986 adopted the *Declaration on Social and Legal Principles Relating to Adoption and Foster Placement of Children Nationally and Internationally* - hereinafter referred to as the UN Declaration, see *infra* in particular Nos 166-168 and Annex H to this Report.

12 On 20 November 1989 the United Nations General Assembly, after many years of preparation, adopted the *Convention on the Rights of the Child* - hereinafter referred to as the UN Convention - which in its Articles 20, 21 and 35 deals with the protection of children without families, adoption nationally and internationally and the sale, trafficking and abduction of children, see *infra* in particular Nos 166-168 and Annex I to this Report.

13 The latter aspect - sale and trafficking of children for adoption for commercial purposes - continues to be studied by the Commission on Human Rights of ECOSOC, in particular under the angle of "contemporary forms of slavery", see *infra* Nos 78-85.

¹² E/CN.5/504 of 15 November 1974.

¹³ See Adoption and Foster Placement of Children, Report of an Expert Group Meeting on Adoption and Foster Placement of Children, Geneva, 11-15 December 1979, ST/ESA/99. Included in this Report are two important research papers: B. Spring Miller, "The child without a family of his own - a review of currently recorded activities and programmes for children with special needs", and A. Kadushin, "Problems relating to the formulation of principles for adoption and foster placement of children". The Expert Group Meeting Report was submitted by the UN Secretary-General to ECOSOC in his Report Draft Declaration on Social and Legal Principles Relating to Adoption and Foster Placement of Children Nationally and Internationally, E/CN.5/574 of 22 January 1979.

¹⁴ See inter alia Report of the UN Secretary-General A/37/146 of 19 October 1982.

14 Other UN bodies also deal from time to time with questions relating to international adoption, in particular UNICEF, see *infra* Nos 57-59, and the UN High Commission on Refugees, see *infra* No 60.

15 In order to co-ordinate the work of the Conference with that of the United Nations the Secretary General of the Hague Conference met with the Legal Counsel to the Secretary General of the UN in April 1988. The Legal Counsel confirmed that the United Nations, after the adoption by the General Assembly of the Declaration of December 1986, did not intend to pursue work specifically on intercountry adoption. The United Nations would, however, welcome any initiatives undertaken by the Hague Conference on private international law.

b *UNIDROIT*

16 In 1986 the Government of Switzerland had called attention within UNIDROIT, the International Institute for the Unification of Private Law based in Rome, to the problems which international adoption from countries in the Third World to industrialized countries posed. The matter was discussed by the governing council at its 65th, 66th and 67th sessions in 1986, 1987 and 1988, respectively.¹⁵ At the Sixteenth Session of the Hague Conference the Secretary General of UNIDROIT, in order to avoid duplication, offered UNIDROIT's support for any work in this area carried out by the Hague Conference.

c *Council of Europe*

17 The Council of Europe, through its *European Convention on the Adoption of Children* first signed at Strasbourg on 24 April 1967 - hereinafter referred to as the European Adoption Convention (see *infra* No 163A and Annex E - has contributed considerably to achieving uniformity of internal domestic laws in Europe. As early as 1977 a study was made on the background of the transfer of growing numbers of children from Third World countries, in particular from South East Asia to families in Western Europe¹⁶ and the Council of Europe has maintained an interest in various aspects of the subject. The European Committee on Legal Co-operation has studied the practical operation of the 1987 European Adoption Convention; the Council of Ministers adopted a Resolution (77)33 on the placement of children and a Recommendation No R(87)6 on foster families both of which also touch upon matters pertaining to the (international) adoption of children; and the Sixteenth Conference of European Ministers of Justice which met in Lisbon from 21-22 June 1988 paid special attention to the adoption of children from the Third World and the trafficking of children. At the Sixteenth Session of the Hague Conference the representative of the Council of Europe expressed its support for the work of the Hague Conference.

¹⁵ See the respective Reports on the Governing Council's Sessions prepared by the Secretary General.

¹⁶ See Council of Europe, *The Role of Governmental and non-Governmental Organizations in Supervising the Placement in Europe of Children from the Third World*, Strasbourg 1980.

d *Organization of American States; the Inter-American Children's Institute*

18 Carefully prepared by a meeting of experts organized by the Inter-American Children's Institute,¹⁷ the Third Inter-American Conference on Private International Law at its meeting at La Paz on 24 May 1984, adopted the *Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors* - hereinafter referred to as the Inter-American Adoption Convention (see *infra* Nos 162-163 and Annex D). The Secretary General of the Hague Conference consulted the Deputy Secretary for Legal Affairs of the Organization of American States who saw the work of the Conference as complementary, rather than contrary, to the work already done by the Organization of American States. The Permanent Bureau of the Hague Conference maintains close liaison with the Inter-American Children's Institute. The Fourth Inter-American Specialized Conference on Private International Law (CIDIP-IV), which met in Montevideo from 9-15 July 1989 - and which adopted *inter alia* the *Inter-American Convention on International Return of Children* - recommended that the Inter-American Children's Institute co-operate with the Hague Conference on private international law in the elaboration of a convention on intercountry adoption and that OAS Member Countries participate in such work.¹⁸

e *Others*

19 At the Sixteenth Session two other intergovernmental organizations, although not themselves currently engaged in any work on intercountry adoption, the Commonwealth Secretariat and the International Commission on Civil Status, expressed their support for the work to be undertaken by the Hague Conference on intercountry adoption.

2 *International non-governmental organizations*

a *International Social Service (ISS)*

20 ISS, which had already given valuable assistance to the Hague Conference in the course of its preparation of several conventions on child protection including the 1965 Hague Adoption Convention, has had a continuous interest in intercountry adoption and has actively co-ordinated international social work in this field.^{18a} ISS is presently studying the creation of an international adoption monitoring and resource centre to provide consultancy and resource services to adopters, agencies, governments, etc. At the Sixteenth Session the representative of ISS emphasized the need to promote more co-operation between the countries of origin and the receiving countries. At the same time it was stressed that

¹⁷ See Inter-American Children's Institute, *Meeting of Experts on the Adoption of Minors*, 7-11 March 1983, Quito, Ecuador, *Final Report* (Montevideo, 1983).

¹⁸ See G. Parra-Aranguren, "The Fourth Inter-American Specialized Conference on Private International Law" (CIDIP-IV, Montevideo, 9-15 July 1989), in 36 *Netherlands International Law Review*, pp. 269-284, (1989).

^{18a} The author of this Report is a member of the International Council of ISS as was the former Secretary General of the Hague Conference on private international law, Mr M.H. van Hoogstraten.

the existing child welfare systems should be strengthened and, as such systems were largely lacking in countries of the Third World, should be developed in those countries.

b *Defence for Children International (DCI)*

21 DCI has also from the beginning shown a great interest in the project of the Hague Conference. By providing information and helping to organize an *ad hoc* experts' seminar, DCI has, like ISS, greatly facilitated the preparatory work of the Permanent Bureau. Its International Children's Rights Monitor, a quarterly review published since 1983, contains a rich source of information on topics such as intercountry adoption, abandonment of children, street children, child trafficking and others. Also highly informative are its special reports on the Rights of Abandoned Children (Geneva, 1989) and on Protecting Children's Rights in International Adoptions (Geneva, 1989).

c *International Council on Social Welfare (ICSW)*

22 (Draft) "Guidelines for intercountry adoption" (see Annex J) were adopted by the ICSW at its Western Pacific Regional Conference in Bombay in September 1981. These Guidelines have been given wide publicity and constitute an authoritative source for social workers in the field of intercountry adoption.

d *International Association of Juvenile and Family Court Magistrates*

23 The International Association of Juvenile and Family Court Magistrates also has a continuing interest in the subject, which it has included in the agenda for its biennial worldwide conference to be held in Turin, Italy, 16-21 September 1990.

e *International Law Association (ILA)*

24 The ILA already studied this topic in the 1960s¹⁹ and in 1984 set up a new committee on "International Recognition of the Adoption of Children", whose terms of reference were subsequently broadened so as to include other legal aspects of intercountry adoption. The topic was dealt with at the Warsaw Conference (1988) and will again be studied at the next conference in Brisbane, Australia (August, 1990).^{19a}

f *International Bar Association (IBA)*

25 The Committee on Family Law of the Section on General Practice of the IBA has recently set up a working party conducting research into problems

which prospective adoptive parents meet when taking steps to adopt children from abroad.²⁰

II THE SOCIAL REALITY OF ADOPTION ACROSS THE WORLD

A *Cultural universality of adoption; the Islamic exception*

1 *Cultural universality*

26 In a broad, non-legal sense adoption may be defined as the institutionalized social practice through which a person, belonging by birth to one family or kinship group, acquires new family or kinship ties that are socially defined as equivalent to biological ties and which supersede the old ones, either wholly or in part.²¹

"Although adoption practices vary widely around the world and through time, in one form or another they appear to approach cultural universality."²² A major exception is the absence of adoption in most Islamic societies (see further *infra* No 30).

27 Old stories tell the tale of foundlings raised by shepherds, princesses or kings as their own child. Moses²³ and, perhaps, Joseph²⁴ are ancient examples of children adopted in a foreign culture. Interestingly, while Joseph integrated perfectly into that culture, Moses broke away from it and led his people to the promised land.²⁵ According to one of the versions of the Greek myth of Oedipus, his father, Laius, having been told by the Delphic Oracle that Oedipus would become his father's murderer, locked him in a chest which was lowered into the sea from a ship. The chest drifted ashore at the land of King Polybus who, being childless, was pleased to raise Oedipus as his own son. One day, "taunted by a Corinthian youth with not in the least resembling his supposed parents" Oedipus went

²⁰ See also *International Legal Practitioner*, December 1989, p. 115.

²¹ Cf. E.A. Weinstein, "Adoption", in *International Encyclopedia of the Social Sciences* (New York, 1968), p. 97.

²² *Ibid.*

²³ Exodus 2:10; "and the child grew, and she [i.e. "the child's mother"] brought him to Pharaoh's daughter, and he became her son. And she called his name Moses: and she said, Because I drew him out of the water" (translation taken from the King James' version).

²⁴ Genesis 41: 40-45; Pharaoh "made him ruler over all the land of Egypt", gave him a new name, but unlike in the case of Moses, it is not said expressly that Joseph became Pharaoh's son.

²⁵ The example "ambivalent, as often" is given by J. Foyer, in J. Foyer and C. Labrusse-Riou (eds.), *L'adoption d'enfants étrangers*, Paris 1986, p. 94.

¹⁹ See Reports of the Fiftieth Conference (Brussels, 1962) and Fifty-First Conference (Tokyo, 1964).

^{19a} The author of this Report is also the Reporter of the ILA Committee.

to consult the Delphic Oracle about his future - whereafter the tragedy unfolds depicted by Sophocles in his Tragedy.²⁶ The search for identity, so characteristic for the adopted child in at least some stages of his or her life, appears here in a most dramatic context.^{27 28}

28 Anthropologists have found that adoption practices exist in cultures as diverse as those of the Inuit in the North American Arctic,²⁹ the Kikuyu in Kenya,³⁰ the Moluccans in Indonesia,³¹ and on Manihi Atoll in the South Pacific, east of Tahiti.³² There is a rich variety of social functions which adoption performs in non-literate societies and, as a result, of its conditions, procedures and effects. Yet there are also recurrent patterns. Continuing the main line of descent of an (extended) family so as to preserve property, in particular land, for that family is a frequent motive. In such cases the interests of the family are clearly preponderant. However, concern for child welfare is also evident and adoption of orphaned children for example is widespread. Very common are adoption practices among relatives or friends which may serve such diverse functions as relieving natural parents who have many children, providing the child with education or extra care, or helping the adopters who are childless or need a girl to help in the home or a boy to look after the cattle. Especially where it serves the purpose of transmission of property, adoption may be an affair of the whole community and require a public statement by the adopters, ceremonies, "rites de passage". Secret adoptions are rare in non-literate societies.³³

²⁶ R. Graves, *The Greek Myths*, Vol. 2, (London etc, 1960), p. 9.

²⁷ Cf. R. Hoksbergen and L. Bunjes, *Een buitenlands kind adopteren*, (Amersfoort etc, 1989), p. 82.

²⁸ (*De facto*) adoption is a recurrent theme in literature. One needs only to think of classics such as Henry Fielding's *History of Tom Jones a Foundling*, Mark Twain's *Huckleberry Finn* or Hector Malot's *Sans Famille* or in the twentieth century William Faulkner's *Light in August*. A recent moving book on the forced termination by the Nazi's of a *de facto* adoption by Austrian parents of a gypsy child is Erich Hackle's *Abschied von Sidonie* (Zürich, 1989). Even modern intercountry adoption has been the subject of fiction, see for example Hannes Meinkema's *Moogie Horizon* (Amsterdam, 1989).

²⁹ J.B. Silk, *Adoption among the Inuit*, in *Ethos* (1987) Vol. 15(3), p. 320.

³⁰ A.J.F. Simmance, "Adoption of Children Among the Kikuyu of the Kiambu District", in E. Cotran and N.N. Rubin (eds.), *Readings in African Law*, Vol. II, (London, 1970), p. 60.

³¹ F. Strijbosch, "Molukse Adopties in Nederland", in *Nederlands Juristenblad* (1988), Vol. 63(38), p. 218.

³² M. O'Collins, "The influence of western adoption laws on customary adoptions in the Third World", in Ph. Bean (ed.), *Adoption, Essays in Social Policy, Law, and Sociology* (London etc, 1984), p. 288.

³³ One exception is adoption on Mamoluk Atoll, where "a conspiracy of silence surrounds the adoption and it is considered to be very bad taste to tell a child he is adopted". See M. Marshall, "Solidarity or Sterility? Adoption and Fosterage on Mamoluk Atoll", in I. Brady (ed.), *Transactions and Kinship*, (Honolulu, 1976), p. 78 cited in M. O'Collins, *loc. cit.* (footnote 32), p. 294.

29 Generally (there may be exceptions to this: in a number of cultures adoption between strangers is known; adoption may sometimes involve a complete cutting of ties with the natural family) it would seem true that

"in many small scale societies adoption is between relatives; it is not always permanent although this may be the intention at the time of adoption; it does not involve cutting of ties with the birth parents; and may involve continuing or additional inheritance and successional rights".³⁴

This also explains why "the drawing of hard and fast lines between what does and does not constitute adoption is an extremely difficult task",³⁵ and why one may sometimes hesitate between defining a customary practice as "fostering", "guardianship" or "adoption".

Since adoption is firmly entrenched in the whole social fabric of society, it is not surprising that where western-style written adoption laws have been introduced, customary adoption practices have not easily let themselves be forced into the straight jacket of western models and have often continued despite the imposition of western-style laws.³⁶

The transition, it would seem, has been easier in communities such as those of the former French colonies and generally in Latin America where adoption forms were introduced which did not entirely supersede the original family ties (simple adoption). Customary practices in Mali, Senegal, Gabon, Guinea, Burundi and Ivory Coast could relatively easily be moulded into or characterized as the *adoption simple* of the Code Napoléon.³⁷ Similarly, in Latin America the existence of simple adoption forms (*adopción simple*, *adoção simples*) which also do not lead to a complete dissolution of the bonds with the natural family, correspond better with informal arrangements, made especially in rural areas, whereby a child is taken care of by another family without losing its bonds with the natural family (see also *infra* No 48). The general "relativity" of adoption in the Third World may pose special problems of a transcultural nature in the context of intercountry adoptions (see *infra* Nos 121-126).

³⁴ M. O'Collins, *loc. cit.* (*supra* footnote 32), p. 289.

³⁵ Weinstein, *loc. cit.* (*supra* footnote 21), p. 97.

³⁶ This was brought out, for example, at the first Australian Conference on Adoption held in 1976. To representatives from Papua New Guinea, Oceania and aboriginal communities in New Zealand and Australia "the idea that adoption means that a child was lost forever was considered intolerable, not only for the immediate family but for the wider kinship network, as the adoption of the child diminishes the family group and is a loss for the wider society". M. O'Collins, *loc. cit.* (*supra* footnote 32), p. 299.

³⁷ See D. Nding, "L'adoption", in *Encyclopédie juridique de l'Afrique*, Tome 6, *Droit des Personnes et de la Famille* (Abidjan etc, 1982), pp. 415-426.

2 The Islamic exception

30 The absence of adoption in most Islamic societies poses another cross-cultural problem. According to the interpretation most broadly prevailing in these societies the Koran introduced a prohibition of the artificial creation of family ties (*nasab*) by *tabanni*, a widespread practice in pre-Islamic times which had led to a complete integration of the child in the new family, including the raising of the same marriage prohibitions as for biological relatives.³⁸ In fact it was because of those marriage prohibitions that the Prophet at first declined the offer of Zaid, the Prophet's adopted son, who had repudiated his wife so that the Prophet could marry her.³⁹ When the Prophet finally did marry her, the *tabanni* practice could not be maintained. Consequently, the Koran explicitly provides that adopted sons shall not be held as natural ones and shall not be named after their adopters.⁴⁰ Islamic jurists have concluded from this that adoption can also not produce any other effect such as marriage prohibitions and inheritance rights and that indeed it cannot confer the status of a legitimate child - in other words cannot exist in Islamic law. The present position of a number of Islamic countries is illustrated by the following comments of one of these countries, Kuwait, on an early draft of the UN Declaration (*supra* no 11):

"4 With regard to the paragraphs concerning adoption, that practice is, as is well known, forbidden in Islam on account of the confusion of lineage it involves ... These paragraphs can therefore not be accepted. While some features of adoption are to be found in our laws, they are included in the system of foster care which performs its role in the psychological, health, social and educational care of the child with the aim of securing a better life for him in the future and granting him nationality as a basic pre-condition. With regard to the question of names, the child is not registered in the name of his guardian but in another name, in compliance with the Koranic injunction "Call them after their true fathers", while he continues to be cared for either by the foster family or the State."⁴¹

³⁸ See L. Milliot, *Introduction à l'étude du Droit musulman*, (Paris, 1953) pp. 395-396. See also his note, "L'adoption en droit musulman", in M. Ancel, *L'adoption dans les législations modernes*, (Paris, 1958), pp. 319-325.

³⁹ Sura 33:35 "And when Zaid had settled concerning her [i.e. his wife] to divorce her, we married her to thee [i.e. the Prophet], that it might not be a crime in the faithful to marry the wives of their adopted sons, when they have settled the affair concerning them. And the behest of God is to be performed" (translation taken from *The Koran translated from the Arabic* by J.M. Rodwell, (London etc, 1943)).

⁴⁰ Sura 33: 4-5 "God hath not given a man two hearts within him; neither hath he made your wives whom ye divorce to be as your mothers; nor hath he made your adopted sons to be as your own sons. Such words are indeed in your mouths; but God speaketh the truth, and in the right way He guideth.

Name them after their fathers: this will be more right before God. But if ye know not who their fathers are, then let them be your brethren in the faith, and your comrades. And unless made with intent of heart, mistakes in this matter shall be no crime in you: for God is Lenient, Merciful." (same translation as in previous note).

⁴¹ See UN General Assembly Document A/38/389 of 6 October 1983, p. 23.

As this passage brings out, the crucial point is the creation of artificial filiation bonds which is not tolerated, but this does not mean that a child who is raised by another family than his biological one remains legally unprotected. Indeed, it is significant that the above statement takes the view that granting nationality to a (foreign) foster child is a "basic pre-condition" for an effective system of foster care. The legislation of several Islamic countries contain detailed rules on alternative solutions for family care such as *kafalah*, or *El Dham* (Iraq).

Not all Islamic countries exclude adoption altogether. First of all, in countries such as Egypt and Syria where the system of personal religious laws is followed, Christians may adopt a child according to their laws. Secondly, a few Islamic countries have introduced adoption into their laws. Examples include Tunisia (since 1958) and Indonesia (see further Annex C).

It should be noted, finally, that Islamic law does recognize acknowledgement of filiation (*al-igrar bil-bunuwah*), which may also serve in the case of foundlings of unknown descent. This is not, however, regarded as adoption but as an affirmation of parentage.⁴²

B Evolution of adoption as a social institution - historical overview

31 One of the oldest written laws, the Codex Hammurabi (18th century B.C.), already contained provisions on the adoption of children, in particular foundlings. Interestingly, the principle that the "first priority of a child is to be cared for by his or her own parents" (Article 3 of the UN Declaration) is already reflected in that code: Section 106 provides that before a man can adopt a foundling he must look for the child's parents and if he finds them must restore the child to them.

In ancient Rome the principal object of adoption was to provide a son and heir to a childless man as a means by which the family line was saved from extinction. Several Roman Emperors (e.g. Tiberius, Nero) were adopted for this purpose.⁴³ The adoption of children who had not reached puberty was at one time prohibited and later allowed only under strict conditions. Adoption always led to the placing of the person to be adopted under the *patria potestas* (parental power) of the adopter and brought a child in the same position as a child, or a grandchild, born in lawful wedlock (*adoptio plena*, i.e. complete or full adoption). Justinian made a fundamental change and limited *adoptio plena* to the case of adoption by a natural ascendant such as a grandfather. For all other cases he created the *adoptio minus plena* (i.e. incomplete or simple adoption) which did not impair the rights of the natural family (i.e. the father). The adopted person acquired intestate inheritance rights from the adopter but remained under *patria potestas* of his natural father and retained inheritance rights

⁴² See, for example, Articles 361-364 of the Egyptian Code of 1875 on Personal Status and Inheritance according to the hanefitic rites.

⁴³ The practice later developed into a mere political act, see M. Ancel *op. cit.* (*supra* footnote 38), p. 4.

in its natural family.⁴⁴ For a long time, adoption in the legal civilizations influenced by Roman law as well as in Scandinavia and Russia⁴⁵ remained a device mainly to produce descendants for purposes of transmission of property and/or name or title. It did not exist, however, in the common law nor in all civil law systems.⁴⁶

In the Hindu tradition the principal object of adoption was to confer spiritual benefit upon the adopter and his ancestors; the presence of a (male) child was necessary for solemnizing the last rites of the adoptive parents. Under the old Hindu law, adoption was surrounded with many conditions and, although modern Hindu law is more flexible, adoption in India is today still only open to Hindus (see further *infra* No 47).⁴⁷ The traditional religious character of adoption is also manifest in Nepal where one of the conditions for adoption by foreigners is that the child will not be converted nor his or her name changed.⁴⁸

32 The Code Napoléon of 1804 marked the beginning of modern legislative concerns with adoption. The Code, contrary to the wishes of Napoleon,⁴⁹ took a very strict view on adoption. It abolished the adoption of minors only permitting the adoption of adults who in their youth had been cared for by the adopters for six years. The adopter had to be 50 years of age and be without descendants. The adoption was a contract but had to be approved by the court, which checked the substantive conditions and the reputation of the adopter. The adoptee retained all his or her rights in the original family and only acquired successorial rights and the name of the adopter. This situation disfavoured homeless, in particular abandoned children, and it was not until after the First World War, in 1923, that the law made the adoption of minors possible.

The Code Napoléon inspired the Spanish legislator who in 1889 introduced the *adoptio minus plena* in the Spanish Civil Code, but opened it also for minors. The Code Napoléon and the Spanish Civil Code served as an example

⁴⁴ See for example R.W. Lee, *The Elements of Roman Law*, (London, 1956), pp. 70-76.

⁴⁵ The *Svod Zakónov* of 1832 provided detailed rules for the transmission of titles with varying types of adoptions for noblemen, merchants, farmers, etc - an eloquent illustration of the 19th century practice of using adoption to reinforce existing class distinctions rather than to bridge them. See M. Ancel, *op. cit.* (*supra* footnote 38), p. 5.

⁴⁶ Cf. H.D. Krause, "Creation of Relations of Kinship", in *International Encyclopedia of Comparative Law*, Vol. IV, Chapter 6, (The Hague etc, 1976) (No 21).

⁴⁷ See for example P. Diwan, *Private International Law*, (New Delhi, 1988), Ch. 11, Adoption, p. 350.

⁴⁸ See the Letter of Permission for Adoption under Number 12A of the Chapter on Adoption of the Law of the Realm (Mulki Ain).

⁴⁹ Napoleon is reputed to have advocated the cause of illegitimate children; more generally he took the view that "men have the feelings which are instilled into them. Thus if an adopted son's feelings are shaped at an early age, he will prefer his adoptive father to his biological father". See F. Boulanger, *Droit Civil de la Famille*, Tome I, Paris 1990, p. 80.

for Latin American States, for example Colombia, where adoption was introduced in 1873.

33 Full adoption leading to a complete or almost complete integration in the new family originated in the United States, first in Massachusetts. New York, California and other states followed.⁵⁰

Generally, however, although adoption existed *de facto* in many societies, "it was only after the First World War that, under pressure of public opinion and with a view to regularizing numerous *de facto* situations [in particular *de facto* adoptions of orphaned war children], several countries promulgated their first adoption laws, or revised existing laws".⁵¹ The adoption laws enacted in several dominions (e.g., British Columbia (1920), Tasmania (1920), Quebec (1924)) influenced the English Adoption of Children Act 1926 which in turn led to the promulgation of adoption laws in other parts of the British Empire. In the beginning the 1926 Act did not confer upon the adoptee any inheritance rights against the adopter; later amendments assimilated the adoptee's position to that of a legitimate child.

In France it took until 1939 before full adoption was introduced: the *légitimation adoptive*, specially designed to fully integrate the small abandoned and orphaned children into the adoptive family. Other European States followed, and Uruguay in 1945 was the first Latin American State to introduce full adoption into its laws.

C Adoption in industrialized societies

1 Social aspects

34 The Second World War and its consequences made the problem of parentless children very acute and this in turn reinforced the new conception of adoptions as "a unique means of providing parental relationships for children deprived of their natural parents".⁵² Still it took some time before this new idea acquired large acceptance. By the early 1960s when the Hague Conference started preparing its Adoption

⁵⁰ "[T]he Massachusetts law of 1851 is generally considered to be the first adoption statute to expressly take into account the interests of the child, and to require that an adoption agreement be approved by a judge. The Massachusetts law required the written consent of the child's married parents, unwed mother or legal guardian, the consent of the child if 14 or older, the joining of the adopter's spouse, if any, in the adoption petition, and the finding by the probate judge that the petitioners are 'of sufficient ability to bring up the child ... and that it is fit and proper that such adoption should take effect'. The effect of the adoption decree was to make the child a legal child of the adopters 'to all intents and purposes' and to deprive the biological parents of all legal rights and obligations respecting the child. The adoptive parents thus became solely responsible for the support and care of the child, while at the same time acquiring the right to the child's custody and services." J.H. Hollinger, "Introduction to Adoption Law and Practice" in J.H. Hollinger, *Adoption Law and Practice*, (New York etc, 1989), pp. 1-22 - 1-23. It should be noted, however, that the Massachusetts and other early State laws were ambiguous with respect to rights of inheritance of the adoptee.

⁵¹ See *Adoption and Foster Placement of Children*, *op. cit.* (*supra* footnote 13), p. 2.

⁵² *Ibid.*

Convention, the Netherlands had only recently introduced adoption into its laws (1956), while it still did not exist in Portugal (here adoption was introduced in 1966 only). In the early years after the Second World War public debate focused more on the *raison d'être* of the institution itself, which was still very much seen as a juridical imitation of the natural birth of the child (with the result that on adoption the original birth certificate was destroyed and replaced, with retroactive effect, by a new one), than on its social and psychological effects. Adoption was surrounded with secrecy and taboo. Adoption of a child by a biological parent and, generally, adoption by relatives, in which case the biological parent could not remain undisclosed, did not fit into this pattern. Preparation of children, their biological families and the prospective adopters for adoption was not well advanced. Social and psychological research on adoption was limited and little was known on how adoption affected the minds and hearts of those involved and how it affected society in general.⁵³

35 Around 1960, when the welfare state gained a firm foothold in many industrialized countries, adoption started to be considered within the framework of family and child protection and welfare. The Leysin seminar sponsored by the United Nations in 1960, may be seen in retrospect as a major event which reinforced this emerging new child-welfare oriented view on adoption. It inspired legislative work both on the international plane (Council of Europe and Hague Conference) and at the national level. Practically all industrialized countries started revising their adoption laws so as to make them more child-oriented, a development which is still continuing. On the one hand this has led to a broader flexibility both as to permitted types of (full) adoption (adoption by relatives, step-parent adoption, single parent adoption) and as to the substantive conditions for adoption, e.g. statutory age limits and age differences⁵⁴ or the statutory requirement of absence of biological children of the adopters; at first this flexibility also extended to the conditions for revocation of adoption, but more recently the trend has been towards excluding revocation altogether. On the other hand the welfare state has led to greater control by governmental authorities over the adoption procedure; this control has also been extended to alternative means of providing family care for children deprived of their own parents, in particular foster care.⁵⁵

⁵³ See generally, *European Seminar on Inter-country Adoption*, Leysin, Switzerland, 22-31 May 1960, a meeting sponsored by the United Nations, UN/TAO/SEN/1960/Rep.2.

⁵⁴ Research studies confirmed that the age of the adoptive parents was "not significantly related to either measures of the child's adjustment or evaluations of the quality of parental care", see Weinstein *loc. cit.* (*supra* footnote 21), p. 66.

⁵⁵ See, generally, L. Salgo, *Pflegekindschaft und Staatsintervention*, (Darmstadt, 1987).

2 Psychological aspects

36 Under the influence of psychology and other social sciences insight has grown into the specific psychological problems to which substitute family care and, more specifically, adoption may give rise. There is now wide agreement among experts in the field that in order for adoption to be successful in the long term, specific requirements must be met and that preparation and counselling not only before but also after the placement of the child are necessary.

This is true in particular of course in those cases where an older child is adopted or where the child has an emotional, mental or physical handicap; in a number of countries there is a growing willingness (sometimes encouraged by tax allowances and governmental adoption assistance benefits) among couples, both without and with children, and single persons, to provide a home for older and/or handicapped children.⁵⁶

37 Adoption requires a lasting "reconstructional effort" on the part of the child - especially in the case of older children who have a previous social and psychological history and not merely a genetic one - in order to overcome the loss of his or her natural parents, to form new bonds with the adoptive parents and to build a new identity for him or herself. There is a growing awareness that the time factor plays a very important role here and that, as the child develops, the process of its identity building goes through various stages where the child is by turns very interested in his origin and not interested at all, alternately accepting and rejecting his different roots. The adoptive parents have to attune themselves to this process and at the same time build their own identity as adoptive parents. Finally, the biological parents go through a process of loss of their child which may take very different forms; sometimes abandonment of a child may give rise to feelings of loss many years later.⁵⁷

In the light of research⁵⁸ and practical experience there is now a growing tendency to inform the child not only of the fact of his/her being adopted but also about his/her family background as opposed to the practice of

⁵⁶ See, for example, G. O'Hara, *Placing children with special needs for adoption - recruitment, selection and support*, extract from paper presented to the International Conference on Adoption Today, Athens 6-9 July 1987. See also C. Godde, *Hard to Place*, paper presented to the NGO Expert Meeting on the Implementation of the UN Declaration of 3 December 1986, Vienna 10-11 June 1987.

⁵⁷ Fundamental research work in this field has been done, for example, by H.D. Kirk who formulated the hypothesis of acknowledgement versus rejection of differences. According to Kirk, adoptive parents have a "role handicap" stemming from the romanticization of natural parenthood and the view that adoption is an inferior alternative. Acknowledgement of the differences involved in being an adoptive parent will lead to a more satisfactory adoptive relationship than rejecting those differences. See H.D. Kirk, *Shared Fate: A Theory of Adoption and Mental Health*, (New York, 1964).

⁵⁸ See in addition to Kirk (previous footnote), for example, A. Sorosky, A. Baran and R. Pannor, *The Adoption Triangle*, (New York, 1979).

"sealed records".⁵⁹ A beginning has been made to establish some form of communication (including visitation rights) with the biological parents - usually the biological mother - in short towards more "open" as opposed to "exclusive" adoptions. This new practice is of course particularly important in the case of older adopted children, who may be wrestling with the question: why did my mother/father put me away?

Another new trend in (applied) psychology is the greater emphasis on the inherent capacity for growth of the participants in the adoption process. In the past attention was often focused solely on the child's psychological dependency, its need for protection and on the anxieties of the adoptive parents. More recently the strength of the child's reactions and the adoptive parents' preparedness for conflict have started to become acknowledged as valuable and empowering components in the adjustment process.⁶⁰

3 Independent adoption and agency adoption

38 There is a growing tendency in many countries to discourage independent adoptions (also referred to as "direct", "private" or "parent-initiated" adoptions) and to promote the intermediary services of adoption agencies.⁶¹ The trend is also to regulate these agencies through government authorities. In many European countries and a number of US states, for example, private individuals may not act as intermediaries. The statutory rules are of course minimum standards and many agencies have established for themselves more severe rules of conduct.

One factor which explains the increased role of agencies is the more sophisticated views on adoption⁶² which demand more careful determination of the needs of the child (through child studies) than in the past as well as more careful home studies of the prospective adopters, post-placement supervision of the adoptive family, services to the biological parents and various post-adoption services. The increased role of state control stems

⁵⁹ The change is taking place more slowly in some countries than in others. In England and Wales, for example, records have been unsealed since 1975 (in Scotland they have been unsealed since 1925) whereas in the United States most states allow access to records only upon a judicial finding of "good cause", although there is a trend towards more openness (see *infra* No 108).

⁶⁰ See, for example, G. Halldén, *Adoption in a Conflict and Development Perspective*, English summary of a dissertation, Institute of Pedagogy, University of Stockholm, 1981...

⁶¹ In the United States, however, it would seem the trend recently has been the opposite way. Independent adoptions are growing, one major reason for this being "the relatively inadequate response by social service professionals ... who would otherwise be expected to resist continued expansion by 'independent' facilitators of adoption and the creation of a 'baby market' which focuses more on the needs of adoptive parents and monetary contributions than the needs of children for homes". W. Pierce, *Independent Adoptions and the 'Baby Market'*, abstract, International Conference Adoption Today: Developments and perspectives, Athens, 6-9 July 1987, p. 24.

⁶² As one researcher observes, adoption "is increasingly a simple term for a complex social institution". P. Hepworth, *Foster Care and Adoption in Canada*, Ottawa 1986, p. 177.

on the one hand from concern over irregular practices - in particular profit-making - and on the other hand from the welfare state philosophy which tends to attribute a supervising responsibility to the State.

4 Transcultural and interethnic adoptions

39 Adoption of ethnic minority children - such as black, hispanic and native Indian children in the United States, of native Indian children in Canada, and of aboriginal children in Australia - may be seen as a transition from the traditional mono-cultural and mono-ethnic in-country adoption towards intercountry adoption in its present form which, more often than not, also involves a cross-cultural and cross-ethnic element.

40 In the United States, as a result of the general climate of sympathy for Afro-American aspirations, several thousands of black children were placed with white families in the sixties. However,

"[d]espite the positive evaluation given to transracial adoption by most research, the adoption of black children by white families has been dramatically reduced in the last decade. A strong statement in 1972 by the National Association of Black Social Workers describing transracial adoption as a form of genocide helped to generate a reconsideration of transracial placements ... The problems in transracial placement reflect broader changes in black and white attitudes about the desirable form of American race relations and the appropriate policies to bring these changes about. One point on which all concerned with the placement of Afro-American children remain agreed, however, is that the principle effort in placing these children must be made within the Afro-American community. Substantial progress has been made in increasing the ability of agencies to place black children in black homes in the last decade."⁶³ ^{63a}

Similarly, adoption of native children who have been born in American Indian communities by non-Indians is a highly controversial issue in the United States. After it had been evidenced that the adoption of American Indian children in non-Indian homes not only caused serious problems to the children and their parents but in particular to the tribes, Congress enacted the Indian Child Welfare Act of 1978 (ICWA) which *inter alia* gives

⁶³ A.R. Silverman and D.E. Weitzman, "Nonrelative Adoption in the United States: A Brief Survey", in R.A.C. Hoksbergen and S.D. Gokhale (eds.), *Adoption in Worldwide Perspective*, (Lisse etc, 1986), p. 6 (footnotes omitted).

^{63a} The idea that black children should not be placed with white families has also had a strong impact in the United Kingdom, where it is shared by most local authorities responsible for adoption matters, and has influenced recent court decisions, see, for example, Family Division, 16 March 1989, *Re N (A Minor)* (Adoption) [1990] 1 FLR 58, and Court of Appeal, 23 August 1989, *Re P (A Minor)* (Adoption) [1990] 1 FLR 96.

tribal courts exclusive jurisdiction over adoption proceedings involving an Indian child "who resides or is domiciled within" a tribal reservation.⁶⁴

41 While legislation along the lines of the ICWA is lacking in Canada and Australia, there is much concern in these countries about the adoption of Canadian Indian and Aboriginal children. In 1985 the Ontario Parliament passed the Children and Families Services Act which provides that in adoption proceedings "the importance, in recognition of the uniqueness of Indian and native culture, heritage and traditions, of preserving the child's cultural identity"⁶⁵ shall be taken into consideration in determining the best interests of the child. The Act also recognizes customary care defined as "[t]he care and supervision of an Indian or native child by a person who is not the child's parent, according to the custom of the child's land or native community".⁶⁶ An obvious important consequence of this position is that a child cared for in this way is not free for adoption by other persons. Other Canadian provinces as well as the federal government are studying additional measures to better protect native children in matters of adoption and child welfare.⁶⁷

42 In Australia Aboriginal people have taken the initiative for a recognition of abuses of their communities and of the special needs of their children. The Supreme Court of the Northern Territory in 1975 responded to these concerns,⁶⁸ and several states and territories as well as the federal government have prepared or are preparing legislation in order to better protect Aboriginal children and respect Aboriginal values, e.g. by no longer ignoring traditional *de facto* marriages, and giving

⁶⁴ In a recent opinion, the United States Supreme Court (by a 6-3 majority) held that a Mississippi State Court did not have jurisdiction to rule on adoption of Indian twins by a non-Indian couple although the children were born outside the reservation and never resided in it; the twins were held to have been "domiciled" within the meaning of the ICWA's exclusive tribal jurisdiction provision which must be determined under a uniform federal standard and not under varying state law standards, since their parents were domiciled on the reservation which domicile traditionally determined that of the children. A dramatic aspect of this case was that the biological parents of the twin babies had given their written advance consent to the adoption and, when the adoption was challenged by their tribe, reaffirmed their desire that the intending adoptive couple adopt the two children. Indeed, the biological mother had expressly arranged for the twins' birth outside the reservation. In the view of the majority of the Supreme Court the express desire of the biological parents to avail themselves of the adoption procedures of the state court should have been respected by the court. *Mississippi Band of Choctaw Indians, appellant v. Orrey Curtiss Holyfield, et ux., J.B., natural mother, and W.J., natural father*, 109 S.Ct. 1597 (3 April 1989).

⁶⁵ S. 37(4), 130(3).

⁶⁶ S. 191.

⁶⁷ See the comparative summary in The (Australian) Law Reform Commission, *The Recognition of Aboriginal Customary Law*, Report 31, Vol. 1, Canberra 1986.

⁶⁸ "In the Matter of Freddie", S.Ct. of the Northern Territory, No AC48, reprinted in *Australian Child and Family Welfare*, Vol. 2, No 6, pp 19-23, reference in C. Picton, "Adoption in Australia", in R.A.C. Hoksbergen and S.D. Gokhale, *op. cit.* (supra footnote 63), pp. 151-167.

preference in placements of Aboriginal children to a parent, members of the child's extended family or other members of the Aboriginal community.⁶⁹

5 Alternatives to adoption

a Alternative child care

43 There is growing agreement worldwide that good child care "starts with family care, moves on to prevention, to serious restoration work for children entering public care, before eventually 'permanence' outwith the natural family is contemplated".⁷⁰ Accordingly, permanent child care outside a family through adoption, foster care or placement in an institution should be the final resort only after the previous steps have subsequently been carried out; it depends for its legitimization on the adequacy and efficacy of early assistance to the original family. As regards the choice between adoption and foster placement on the one hand, and placement in an institution on the other, there is also wide agreement that "the placement of children in foster families or adoption should be preferred to placement in institutions, unless a child's particular needs could best be made in a specialized facility".⁷¹

These views are now reflected in the UN Declaration in particular in Articles 3 and 4. While western societies have to a certain extent generally been able to implement these principles, this has proved much more difficult for developing countries due to the economic social and cultural problems they face (see *infra* D and Chapter III, B).

43A In many countries in the west, in particular where the confidential nature of adoption was emphasized, adoption and foster placement were seen as mutually exclusive. As openness concerning adoption increased, it came to be seen as legitimate and indeed preferable that foster parents after some period of foster care applied for adoption of the child; fostering started to be seen as a bridge not only to the biological family but also to adoption. In the latest development there is a trend towards a convergence of adoption and fostering as is illustrated, for example, by increased acknowledgement of the significance of the question of identity for adopted and foster children, state subsidies for both forms of family

⁶⁹ Cf. the proposals in the Law Reform Commission's Report (supra footnote 67).

⁷⁰ J. Triseliotis, "Some Moral and Practical Issues in Adoption Work", in 13, *Adoption and Fostering* (1989), pp. 21-27 at p. 24.

⁷¹ See *Adoption and Foster Placement of Children*, *op. cit.* (supra footnote 13), p. 6.

care and legal regulation of long term foster care.⁷² The UN Declaration (Chapter B) and Recommendation No R(87)6 of the Committee of Ministers of the Council of Europe of 20 March 1987 on foster families illustrate this trend.

b Alternative reproduction

44 The advancement of medical science has led to a whole series of reproductive techniques which offer new options to achieve parenthood to many infertile couples as an alternative to fostering or adoption of a child. Some of these techniques, such as in vitro fertilization, are designed to enable couples to conceive a child which is genetically related to both parents. In that case there is no question that the couple are the legal parents of the resulting child. In other instances of alternative reproduction, a third (or even fourth) biological parent must be drawn into the reproductive process. Examples are artificial insemination by donor, egg donation, embryo donation, surrogate gestational motherhood, and surrogate motherhood. There are opposing views as to the applicability of the adoption model to such questions as well as to other aspects, for example, access to information about the non-rearing biological parent.⁷³ This whole area is, of course, very new and in many respects controversial.⁷⁴

D Adoption in developing societies and societies in transition

45 While, as we shall see in more detail *infra* Chapter IV, A, most developing countries have adoption laws which are comparable with those in welfare societies, the social reality surrounding adoption in those societies is generally quite different. In several developing countries resistance to adoption of children from a different class, ethnic group, caste or extended family and, in some cases, to the adoption of girls, is strong. Such cultural resistance has become manifest since, throughout a broad range of developing societies the traditional extended family network which in the past took care of homeless children through adoption or otherwise, has started to break down (see *infra* Nos 57-59). Moreover, the loss of the extended family structure has not, or not fully, been compensated for by an effective welfare system either through private or government initiatives. This means that services nowadays generally available and considered essential in welfare states for an adoption to be successful - such as family counselling, child study, home study, not to

speak of post-placement and post-adoption services - are largely lacking in developing countries.

46 In several countries, in particular in those which have seen rapid economic growth in recent years, a trend may be noted, however, towards promoting in-country adoption despite cultural resistance and socio-economic difficulties which have not yet fully been overcome. The Republic of Korea, which has become a major industrial nation in South East Asia, provides a good example. Although the practice of adoption began very early in Korea, there is deep-rooted resistance towards adoption of unrelated children because of a strong emphasis on ancestry and blood lines. This cultural climate was not favourable to large scale adoption. The Korean War which led to a total disruption of family bonds throughout the peninsula and the birth of mixed blood children who, like their unmarried mothers, were faced with negative attitudes, left thousands of children parentless. Initially the government "established the Social Welfare Society as a non-profit organization in 1954 to find new homes abroad for those children and, in particular for the mixed blood ones".⁷⁵ Subsequently, rapid industrialization led to an even greater number of orphaned or abandoned children. "From the mid-1970s on, the government also started emphasizing in-country adoption and foster care. As a result, remarkable growth was made: from 242 in-country adoptions in 1973 to 3,079 in 1977. Since then the growth has slowed down. In 1980, the number of in-country adoptions was 3,657 and in 1987, 4,235."⁷⁶

Recently the trend towards in-country adoption would seem to have become more intense, partly as a result of wide media coverage during and after the Olympic Games in Seoul in 1988 which criticized the government's policy in respect of intercountry adoption. The present government's policy is summarized in the following statement:

"... Korea is now a country, like Japan or the US, which is fully able to take care of its own, and as such, we do not wish to send our children to foreign countries. ... The Korean Government does intend eventually to decrease all foreign adoption to near zero. This, of course, will come about gradually as Korean society adjusts to accepting non-related children for adoption."⁷⁷

As this statement brings out, the government recognizes that conservative attitudes and prejudices with respect to domestic adoption cannot be

⁷² See L. Salgo, *op. cit.* (*supra* footnote 55), pp. 367-388. See also A.K. Kadushin, *op. cit.* (*supra* footnote 13), p. 46.

⁷³ See L.B. Andrews, "Alternative Reproduction and the Law of Adoption", in J.H. Hollinger, *op. cit.* (*supra* footnote 50), Chapter 14.

⁷⁴ See, generally, B.M. Knoppers, *Rapport général*, presented to the Committee on International Medical and Humanitarian Law, International Law Association, Warsaw Conference, 1988.

⁷⁵ See B. Moon Chun, "Difficulties and Prospects in Increasing the Role of In-country Adoptions in Korea", in ISS, German Branch, *Support of Children in Need and Intercountry Adoption*, Documentation of the Special Interest Meeting of International Social Services, Berlin, 3 August 1988 (Frankfurt, 1988), pp. 30-34 (at p. 30).

⁷⁶ *Ibid.* p. 31.

⁷⁷ Statement made by the Consul of the Republic of Korea in Washington, DC, Mr Baek-Sang Cho, in an interview quoted in an article, "South Korea Slows Export of Babies for Adoption", in *New York Times*, 12 February 1990, p. A15.

expected to disappear overnight. Also, as this statement implies, large scale institutionalization is no answer. In fact it was a policy of large scale institutionalization that the Republic of Korea had embarked on in the '50s and '60s which as of 1965 it had to reconsider in light of "problems caused by institutional care".⁷⁸ Therefore, and because the social welfare sector has been less emphasized as a result of high expenditure on national defence and on reviving the economy, the implementation of the objective of bringing intercountry adoption to an end will not be easy in the immediate future.

47 The Republic of Korea does not stand alone in its dilemma. It is a general problem for many countries in Asia, Africa and Latin America, many of which are in a much more difficult economic situation than the Republic of Korea. In its pioneering judgment *Laxmi Kant Pandey v. Union of India*, the Supreme Court of India clearly indicated that in-country adoption of Indian children should have priority over intercountry adoption:

"... before any ... application from a foreigner is considered, every effort must be made by the recognised social or child welfare agency to find placement for the child by adoption in an Indian family. Whenever any Indian family approaches a recognised social or child welfare agency for taking a child in adoption, all facilities must be provided by such ... agency to the Indian family to have a look at the children available with it for adoption and if the Indian family wants to see the child study report in respect of any particular child, such ... report must also be made available ... in order to enable the Indian family to decide whether they would take the child in adoption. It is only if no Indian family comes forward to take a child in adoption within a maximum period of two months the child may be regarded as available for inter-country adoption, subject only to one exception, namely, that if the child is handicapped or is in bad state of health needing urgent medical attention, which is not possible for the social or child welfare agency looking after the child to provide, the ... agency need not wait for a period of two months and it can and must take immediate steps for the purpose of giving such child in inter-country adoption."⁷⁹

As is intimated by this ruling, however, the adoption of special needs children, even more so when they grow older, is a difficult problem in India.⁸⁰ Moreover, as in many parts of India boys are preferred over girls, girls are often difficult to place for adoption. Generally, as the Director of an Indian children's home put it in a frank comment "Indian adoption is still in its infancy ... To effect change is no doubt a matter

of time and education ...".⁸¹ In fact, since it appeared that finding adoptive homes in India for children was often very difficult and the requirement of postponing intercountry adoptions for two months in practice often merely led to delay, the Supreme Court in its judgment of 27 September 1985 qualified its above quoted ruling.⁸²

While a parallel system of *de facto* adoption exists in India, a major obstacle to promoting in-country adoption is the lack of comprehensive adoption legislation. Among the various religious communities in India only the Hindus have the Hindu Adoption and Maintenance Act of 1956 and this law is more parent-centred than aimed at the well-being of the child.⁸³ Other communities in India have to rely on an outdated Guardianship and Wards Act of 1890 which cannot bestow upon the child the status of a son/daughter, legal or natural. A bill to introduce adoption generally in India was submitted to parliament in December 1980 but met with opposition, in particular from certain Islamic circles, and has not yet passed into law.⁸⁴

48 In Latin America there is general agreement among social welfare experts that domestic adoptions are to be preferred both over intercountry adoption and other forms of in-country assistance to minors. As the experts' meeting which prepared the 1984 Inter-American Adoption Convention concluded:

"domestic adoptions ... must be encouraged and fostered by the governments, and only when that possibility has been exhausted would it be proper to think in terms of international adoptions. ... Adoption should be considered the best alternative solution in the absence of a family ... only when adopting families are not immediately available and during long waiting periods should resort

⁸¹ *Ibid.* p. 23.

⁸² "(...) Whilst the application for a release order is pending before the juvenile court or the Social Welfare Department or the Collector, (...) the child may be offered simultaneously to Indian parents as well as foreign parents, subject to the clearance of the child for adoption by the juvenile court or the Social Welfare Department or the Collector. The recognised placement agency need not wait until the release order is made by the juvenile court or the Social Welfare Department or the Collector, before offering the child in adoption, because otherwise even with the reduced time limit which we have now provided it would take at least six weeks before the child can be offered in adoption." *Laxmi Kant Pandey v. Union of India on Civil Petition (Criminal) No 1171 of 1982*, (1986)1 *Supreme Court Weekly Reporter* 52, paragraph 18.

⁸³ For example, a Hindu can adopt a son only when he does not have a son, grandson or great-grandson. Likewise, a Hindu can adopt a daughter only when he does not have a daughter or a son's daughter. If a Hindu has a son or daughter, a son or daughter can be given only under the Guardian and Wards Act 1890. See D.P. Chowdhry, *Inter-country Adoption*, (New Delhi, 1988), Ch. 6.

⁸⁴ Despite this legal vacuum, it has recently been noted that "there is a growing demand for children in India, particularly in the major cities. Till the advent of the Supreme Court of India's guidelines, only Bombay had two major organizations carrying out Indian adoption. ... Now, similar ... agencies have been formed in other States". A. Damodaran, *Foster Care and Adoption in India - An Overview*, paper presented to the Second Expert Meeting on the Implementation of the UN Declaration of 3 December 1986, Geneva, 14-15 November 1989.

⁷⁸ B. Koon Chun, *loc. cit.* (*supra* footnote 75), p. 30.

⁷⁹ Judgment of 6 February 1984, paragraph 16, *Supreme Court Almanac* 1984(1), Scale 159.

⁸⁰ See also N. Chandry, "Perspectives on Child Care in India", in ISS, German Branch, *op. cit.* (*supra* footnote 75), pp. 19-26 (at p. 22).

to other forms of assistance be advisable as a next step, such as placement in foster homes in properly qualified and oriented institutions."⁸⁵

De facto arrangements of a foster care or simple adoption-like character have traditionally been popular in Latin America.⁸⁶ In some parts of Latin America, however, as in other parts of the world, ethnic prejudices exist, and older and handicapped children are not readily adopted. So far, governmental policies directed at promoting in-country adoption would not seem to be much developed.⁸⁷

In some countries, however, more small scale initiatives have been taken to promote domestic adoptions. In Brazil, for example, where juvenile courts enjoy large discretionary powers in matters of adoption, several such courts have formulated adoption policies to the effect that first of all an attempt must be made to find a domestic solution.⁸⁸

III *Intercountry adoption: evolution, practices, abuses and alternatives*

A *Historical overview*

49 Intercountry adoption started developing on a large scale at the end of the Second World War. It began with the adoption by families in the United States of children from Europe (in particular from Germany, Italy

⁸⁵ Inter-American Children's Institute, *op. cit.* (*supra* footnote 17), pp. 7-8.

⁸⁶ "In Latin American culture, school age children from poor families are sometimes entrusted to godparents of a more prosperous class. The godparents feel a religious and moral obligation to take charge of the education of the child. Although sharing the life of the godparents, the child is not entirely assimilated with their family in certain respects. Close contact is maintained with his own family to which he returns when his education is finished and he is able to work.

In some regions, families living in the country send their children to friends living in a town so that they can go to school. The host family expects that the children will do certain jobs and take more of a share as they grow up.

In both of these situations, the child stays in the same cultural and geographical environment as its own family with which it remains in contact. The links between the host family and the natural family are based on mutual trust and not on legislation or administrative measures for the protection of children." See Council of Europe, *op. cit.* (*supra* footnote 16), p. 7.

⁸⁷ This may well change in the future. Cf. the new Article 107(1) of the Colombian Code of Minors of 27 November 1989 (*Diario Oficial* of 27 November 1989) entered into force on 1 March 1990 which gives preference to applications for adoption from Colombians rather than from foreigners. This reflects a policy similar to that of the Indian Supreme Court judgment of 1984 (*supra* No 47).

⁸⁸ See, for example, C.L. Marques, "Adoption of Brazilian Children - Report of the Work of an Interdisciplinary Team in Porto Alegre, Brazil", in ISS, German Branch, *op. cit.* (*supra* footnote 75), pp. 35-38.

and Greece), but also from Japan and China. US troops came into contact with orphaned children and with families who could not feed some of their children and decided to surrender them for adoption abroad; in addition, the presence of these troops led to an increase in the number of illegitimate children.

With Europe and Japan recovering from the Second World War and with a declining American presence in these countries, adoptions from Europe and Japan to the US decreased but the Korean War led to a new interest in the US in homeless children in Korea. This also led to a new phenomenon, the involvement of private agencies in intercountry adoption. Organizations, such as those founded by Harry Holt, initiated efforts to find US families for these children.⁸⁹

50 With the exception of the migration of Korean children towards the US, around 1960, the year in which the Ninth Session of the Hague Conference decided to prepare a convention on the private international law aspects of adoption, the trend was towards a concentration of migration of children within Europe. Significantly, when the United Nations first convened an international conference of experts on the topic of intercountry adoption in Leysin in 1960⁹⁰ this was a regional seminar in which only European States participated and which focused on international adoptions between European States.

It was against this essentially European background that the Hague Conference on private international law completed its Convention in 1964 and that the Council of Europe drew up its European Convention on the Adoption of Children in 1967.

51 At the end of the '60s, however, the picture started changing radically. Instead of reducing itself to an intra-European problem, as was expected in the early 1960s, intercountry adoption started turning into a world scale trend. Around 1970, in many industrial countries the number of children available in these countries for adoption started declining sharply as a result of social and demographic changes. Birth rates began lowering, birth control practice became socially accepted and widely available, legal abortions started being introduced, the stigma attached to single parenthood decreased and social benefits for one-parent families were made available. While adoption became more widely accepted as an institution, at the same time less and less children were available to be adopted. These demographic and social changes in the industrialized

⁸⁹ Between 1953 and 1981 over 38,000 Korean children were adopted by US families. This took place against a background of important changes in North American society. It "commenced in a period which saw an historic reversal of American attitudes towards the more blatant forms of racism. Court rulings striking down desegregation and the Civil Rights Movement of the late '50s and early '60s formed the background for these adoptions". A.R. Silverman and D.E. Weitzman, *loc. cit.* (*supra* footnote 63), p. 2.

⁹⁰ See *supra* No 35 and footnote 53.

countries had far reaching consequences. As long as only the existence of children deprived of their families had a structural character, the problem of intercountry adoption could be phrased in a relatively straightforward fashion as: how to find a family for this child? The question became less unambiguous when, as a result of declining fertility, birth control and changed attitudes, the impetus and motivation for intercountry adoption arising from the industrialized countries also acquired a structural character. At this point a structural "supply" of children "available" for adoption abroad in economically developing countries met with a structural "demand" for such children in economically advanced countries. The language of economics made its appearance and intercountry adoption became a more complex and controversial social phenomenon.

52 Around the same time, the Viet Nam War aroused worldwide public awareness of the fate of hundreds of thousands of homeless children in South East Asia. For the first time, pictures of these children were immediately brought into American and European homes through television. Again the movement started in the United States.⁹¹

At the same time, the wide public interest in the Viet Nam War was a symptom of a more general change of consciousness in the industrialized countries arousing a greater interest in and engagement with developing countries. Children from Viet Nam, Indonesia, Thailand, as well as Korea, started being adopted by citizens of the Federal Republic of Germany, the Netherlands, Belgium, France, Switzerland, Great Britain and other European countries. Similarly, adoption of children from South East Asia has become significant in Australia since the early 1970s.

53 Although precise statistics are not available for all countries, there is no doubt that the majority of children adopted from overseas in Europe, the United States, Canada and Australia have come from Asian countries. For a long time the Republic of Korea was the most important country of origin for adoptive children.⁹² However, as we have already seen (*supra* No 46), this country has recently revised its policy and, as a result, the migration of children abroad for adoption has considerably decreased. Intercountry adoption from Viet Nam was brought to an abrupt end by the new Government in Saigon in 1975.⁹³ Government policies halted the adoption from Bangladesh where the "Abandoned Children's (Special

⁹¹ Between 1963 and 1976 over 3,000 Vietnamese children were adopted in the United States. "Unlike the adoption of Korean-born adoptees the adoption of children from Viet Nam was a matter of considerable controversy. Those who opposed these adoptions argued that it was inappropriate to remove Vietnamese children from Viet Nam. It was also argued that many of the children were only temporarily separated from their families. There is at least some evidence that this conflict had a negative impact on the adjustment of the children who were so adopted." A.R. Silverman and D.E. Weitzman, *loc. cit.* (*supra* footnote 63), p. 4.

⁹² "Since 1980, American couples have adopted more than 40,000 Korean babies." *New York Times*, 12 February 1990, p. A15.

⁹³ To the United States it "resumed in at least a limited form as children of American servicemen and Viet Namese women [were] permitted to emigrate to the United States. Most of these children [would] enter foster or adoptive homes rather than be united with their American fathers". A.R. Silverman and E. Weitzman, *loc. cit.* (*supra* footnote 63), p. 4.

Provisions) Order" 1972 was repealed in 1980 following reports on abuses and public protests. In Indonesia intercountry adoption was first regulated in 1979 and then was severely restricted in 1983. For a time the Government of Sri Lanka practically brought all intercountry adoptions to an end, but recently it changed its policy under the influence of the civil war. In addition India and, to a lesser degree, Thailand and the Philippines, among others, permit homeless children to leave their countries to be adopted abroad under certain conditions, which are tending to become more strict.

54 Until the early 1970s adoptions from Latin America to other regions of the world were small in number.⁹⁴ A sharp increase took place around 1975. Between 1976 and 1981 more than 5,000 South American children were adopted in the United States, almost 80% of whom were born in Colombia. Canada, Europe, Israel and Australia followed. A study published several years ago found in "the scant data available" some pattern in the migratory flows. Mexico and El Salvador were important "sources" of children for the United States but not so much for Western Europe; Colombia, like the Republic of Korea, was an important "source" for both regions; "during the late 1970s, the majority of Chilean children went to Europe, whereas after 1980 there was a significant increase in the flow to the United States". While substantial numbers of children have also been adopted from Ecuador, Peru and Brazil, emigration of children from Cuba, Argentina, Venezuela, Uruguay and Paraguay has been very small.⁹⁵

55 The number of intercountry adoptions from Africa and Oceania seem to have so far been comparatively small. There has been a small flow of migration of children from former colonies (e.g. Madagascar, Senegal) to Europe. Recently, as an effect of the civil war, Ethiopia has permitted adoption of children abroad. Within Europe there is a comparatively small migration of children from south (e.g. Greece, Portugal) to north (e.g. Sweden) and from east (e.g. Poland, Hungary, Romania) to west (e.g. France).

56 The picture of "source countries" of children is one of continuous fluctuation. When one country closes its borders or restricts the possibilities of intercountry adoption, another country may liberalize its policies. Some countries permit very young children and babies to leave, others allow only older or handicapped children to leave. The overall trend, it would seem, however, is to reduce intercountry adoption of

⁹⁴ "From 1948 through 1962 there were only 15 adoptions of children born in South America by United States citizens. Between 1963 and 1975 there were 1205 such adoptions." *Ibid.* p. 5.

⁹⁵ See F.J. Pilotti, "Inter-country Adoption: A View from Latin America", in R.A.C. Hoksbergen and S.A. Gokhale (eds.), *op. cit.* (*supra* footnote 63), pp. 143-149.

children who are adoptable in the country, in particular healthy infants.⁹⁶ See Annex A, "Road to Foreign Adoptions Gets Rockier".

B Abandonment as a main cause of children being homeless

1 Abandonment and poverty

57 During the past decade socio-economic causes in particular rapid urbanisation, the creation of slums, *favelas*, etc, in addition to wars and natural disasters have become more prominent causes of children being homeless. In the course of the 1980s abandonment of children has become an ever more widespread phenomenon, in a number of countries of Latin America, Asia and, more recently, in Africa.⁹⁷ There is broad agreement that in most cases the root cause of abandonment is poverty.⁹⁸

A decline in health services, including family planning services, and loss of opportunity to be educated are other consequences of the economic deterioration.

"Because of socio-economic pressures accompanied by increasing stress, both within the home and in the community, families are often forced apart and the support of parents for their children weakens. Frequently, marriages and less formalized adult relationships break down and one parent or guardian leaves, placing an additional burden upon the remaining single parent - often the mother - as well as upon the children who may be forced to work for the family's survival. Home relationships and the economic situation may continue to deteriorate to the point of the child's abandoning the family, or becoming abandoned by it."⁹⁹

⁹⁶ R.A.C. Hoksbergen *et al.*, *Adopted Children at Home and at School*, (Lisse, 1987), p. 3, estimated that "an estimate of between 15,000 and 20,000 children a year [being adopted from the Third World] does not seem beyond the mark". This estimate was made before the Republic of Korea decided to reduce the migration of babies for adoption.

⁹⁷ See, generally, Defence for Children International, *International Investigation into the Rights of Abandoned Children*, March 1989.

⁹⁸ Studies carried out by UNICEF have revealed that "[o]ver the course of the 1980s, average incomes have fallen by 10% in most of Latin America and by over 20% in sub-Saharan Africa. ... In many urban areas, real minimum wages have declined by as much as 50%. For the very poorest, those who are forced to spend three quarters of their incomes on food, cuts in income on this scale cannot mean anything else but the malnourishment of their children". UNICEF, *The State of the World's Children 1990*, p. 8. See also generally R. Jolly and G.A. Cornia, *The Impact of World Recession on Children*, a study prepared for UNICEF (Oxford etc, 1984) and G.A. Cornia *et al.*, *Adjustment with a Human Face*, Vol. I, *Protecting the Vulnerable and Promoting Growth* (Oxford, 1987) and Vol. II, *Country Case Studies*, (Oxford, 1988).

⁹⁹ UNICEF, *Exploitation of Working Children and Street Children*, (E/ICEF/1986/CRP.3), p. 7. "Statistics recorded by the *Patronato Nacional de la Infancia* in Costa Rica on the motivation behind the act of children declared abandoned by its services in 1985 indicated the following factors, in order of importance: family economically deprived; mother failed to return after leaving a child in the care of another person or institute; mother deceased; mother involved in alcohol abuse, drugs and/or prostitution; mother mentally ill; mother irresponsible. The same 1985 PANI study also concluded that in the great majority of cases (over 80%), mothers were not in a couple. They were either abandoned, single mothers or the "only-known parent" (as in case of rape, for instance)" (Defence for Children International *op. cit.* [*supra* footnote No 97], p. 16). According to the DCI report this situation applies across the board in many countries and strongly impacts on the abandonment of newborn babies, which becomes a critical problem in times of economic recession.

Many countries provide in their laws a legal definition of child abandonment. Such definitions which may be included in the civil code, the criminal code or special acts range from the strict definition of wilful abandonment or neglect of a child to much wider definitions such as failure to show interest in the child who has been placed in the care of another person or institution.¹⁰⁰

2 Institutionalization

58 The standard response to abandonment of children in many societies and governments has been institutionalization. Systems may vary from one country to another, ranging from that of some African countries "where the state runs no residential units of its own but issues licenses for setting up private centres, to the system prevalent in most Latin American countries which is based on a mixture of state run and state subsidised centres and strictly private (religious and other) institutions".¹⁰¹ Although there are reports about a high mortality rate of children in residential care in some cases, the basic problem, it would seem, is not that the institutions do not manage to meet the material needs of the children, but "that private and state 'homes' [do] not provide a child with a setting conducive to the child's intellectual and emotional development".¹⁰² Institutions run on a "substitute family basis", are scarce and, there are many reports on children losing their identity and personality in an institutionalized setting and being maladjusted upon leaving. Moreover, often due to "lack of staff and the inertia of the preventive systems and, in many cases, a lack of data ... initiative for family reunion usually comes from the family and not from the institution".¹⁰³

Throughout Latin America, Asia and Africa and also in some European countries (Poland, Romania) these institutions, often poorly staffed, managed and supervised, are a major, perhaps the major, "source" of children being adopted abroad.

3 Children on the street and children of the street

59 There is growing awareness, however, that the standard approach (institutionalization) may tend to overlook the fact that not all children "on the street" are all also children "of the street". As a recent UNICEF

¹⁰⁰ Defence for Children International *op. cit.* (*supra* footnote 97), pp. 8-9.

¹⁰¹ *Ibid.*, p. 25.

¹⁰² *Ibid.* p. 26.

¹⁰³ *Ibid.*

report¹⁰⁴ emphasizes, the majority of so-called street children would maintain some form of family contact and cannot, therefore, be simply considered as abandoned. It is generally only a small minority of children who have lost all contact with their original families. UNICEF and many organizations have therefore increasingly focused their efforts on supporting and restoring families and communities.¹⁰⁵ All this also has obvious consequences for the question of intercountry adoption: the popular statement that "millions of street children" in the Third World are homeless and therefore available for adoption in more affluent societies must be qualified, and the question of consent to adoption by the original parents becomes of increased importance. See extract from the UNICEF report, Annex B.

4 Refugee children

60 In respect of refugee children under its care, UNHCR likewise pursues a policy aimed at reunifying such children with their families to the extent possible. In 1980 UNHCR's Executive Committee adopted the following position concerning unaccompanied minors:

"Every effort should be made to trace the parents or other close relatives of unaccompanied minors before their resettlement. Efforts to clarify their family situation with sufficient certainty should also be continued after resettlement. Such efforts are of particular importance before an adoption - involving a severance of links with the natural family - is decided upon."¹⁰⁶

Consequently, UNHCR does not encourage intercountry adoption as long as the child's family situation has not been cleared. "As a general rule, two years is considered a minimum period for tracing relatives and for investigating any claims made for a child."^{106a}

¹⁰⁴ *Op. cit.* (supra footnote 99).

¹⁰⁵ "The best approaches aim to help individual children, support and restore their families and develop strong active communities which can protect and support their children more effectively. Many of these projects assist the children to meet their needs of income generation, education and vocational preparation. Prevention of further family separation for children who have families, as well as the re-incorporation of homeless children into new families, are the real marks of the success of any initiative.", UNICEF, *op. cit.* (supra footnote 99), p. 28. See also, generally, Stichting Mensen in... Mood *et al.*, *Street Children in the Third World*, a symposium on theory and practice, Amsterdam 1989, which contains a rich variety of contributions on various aspects of the problem.

¹⁰⁶ See UNHCR *Handbook for Social Services*, Ch. 8.1, "Unaccompanied Minors", pp. 7-8, and see *idem*, *Principes directeurs concernant les enfants réfugiés*, Geneva 1988.

^{106a} See UNHCR *Note on Refugee Children* EC/SCP/46 of 9 July 1987, No 32.

This view is widely shared¹⁰⁷ and the UNHCR policy principle is now also reflected in the Convention on the Rights of the Child, Article 22 (see Annex I).

C Independent and agency adoptions

61 The practice for establishing contact between an orphanage or other institution, a natural family or other custodian of a child in one country and a couple or a single person wanting to adopt a child in another country varies. The distinction between "independent" and "agency" adoptions (supra No 38) may also be made at the international level. There are two perspectives here, however: that of the prospective adopters in the receiving country and that of the biological parents or other custodians in the country of origin.

1 From the perspective of the receiving country

a Independent adoptions

62 In the case of independent adoptions, the prospective parents work directly with individuals or agencies in the country of origin. It may be that they have the contacts in that country because they are living there temporarily or have lived there before. They may also make that contact specifically with a view to adopting a child. The explanations for doing so vary. It may be that there is no adoption programme in a receiving country operating in the country where the child lives, or the child may not be involved in such an intercountry adoption programme. Most often, however, the prospective adopters want to avoid what they see as the drawbacks of an agency adoption: the costs, the time involved in having to wait on a list for an indefinite period, and the restrictions inherent in the adoption programme, such as the age of children or lack of personal control.¹⁰⁸

For some years, in a number of receiving countries, the trend in intercountry adoption has been away from independent adoptions and towards agency adoptions. On the one hand, many prospective parents discovered that, after all, adopting a child by themselves involved many risks and uncertainties, for example because of unfamiliarity with the (legal) culture of the child's country. Secondly a number of receiving countries, for example Sweden, have adopted measures so as to discourage independent adoptions. As a result, while for example in Switzerland 90% of

¹⁰⁷ See, for example, ISS, *Unaccompanied Children in Emergencies, A Field Guide for Their Care and Protection*, (Geneva, 1987). A major study on the whole problem is E.M. Ressler *et al.*, *Unaccompanied Children, Care and Protection in Wars, Natural Disasters and Refugee Movements*, (New York etc, 1988).

¹⁰⁸ See, for example, James A. Pahz, *Adopting from Latin America: An Agency Perspective*, (Springfield, Ill., 1988), p. 43.

intercountry adoptions are independent, the figure is only 10% in Scandinavia.¹⁰⁹ See also *infra* Nos 137-141.

b *Agency adoptions*

63 In this case an agency based in a receiving country has a contractual agreement or other contact with an institution or individual overseas and thus has access to available children. They may offer a whole range of services, including the legal preparations, home study of the prospective parents, selection and presentation of their child and post-placement supervision.¹¹⁰

64 In many receiving countries agencies dealing with the adoption of children from developing countries also provide aid to the countries of origin. They may finance a welfare centre, pay the salary of a social worker, arrange sponsorship for children, assist rural industry, provide medical assistance, etc.

Obviously the combination of facilitating international adoption and providing such assistance is a delicate one because the latter activity may easily put the agency in a better position to get access to available children. In an attempt to deal with this ethical question, agencies in some countries have introduced a strict organizational separation between their adoption mediating activities and their welfare programmes in the countries of origin.

2 *From the perspective of the country of origin*

a *Independent adoptions*

65 With social and child welfare systems largely lacking, or lacking resources, in many developing countries, agencies specializing in assisting biological parents or other custodians of the child living in those countries in their decision to relinquish a child for adoption abroad are rare. Ideally, as the Indian Supreme Court put it in *Laxmi Kant Pandey v. Union of India*:

"Before a decision is taken by the biological parents to surrender their child for adoption they should be helped to understand all the implications of adoption, including the possibility of adoption by a foreigner and they should be told specifically that in case the child is adopted, it would not be possible for them to have any further contact with the child. The biological parents should not be subjected to any duress in making a decision about relinquishment and even after they have taken a decision to relinquish a child for

giving in adoption, a further period of about three months should be allowed to them to reconsider their decision".¹¹¹

While India and some other countries (see *infra* Nos 66-69) have made substantial progress in providing assistance to biological parents, in many developing countries no such services are available and the decision to relinquish a child is often made by the biological parents (generally the mother) alone.

b *Agency adoptions*

66 A growing number of countries of origin has sought to restrict direct adoptions and to channel international adoptions through agencies.

In the Republic of Korea intercountry adoptions are allowed only through four agencies. In 1954 the government established the Social Welfare Society (see *supra* No 46). The three other organizations - World Children's Services, Eastern Child Welfare Society and Korean Social Services - are of United States origin. The law requires certain qualifications of the institutions' staff. "Insistence on these standards has led to adoptive families in Europe finding Korean children to be particularly well-prepared for their transplantation, and as a result better able to adapt. The safeguards taken for the placement of a large number of Korean children abroad have therefore made it possible to avoid a host of serious difficulties which this kind of placement can cause."¹¹²

67 In Thailand, under the Child Adoption Act (1979), private persons are not allowed to arrange the adoption of a child and child welfare organizations must act under a license from the Director General of the Public Welfare Department within which a "Child Adoption Board" has been constituted to supervise those agencies as well as the adoption procedure in general.

68 In India the Supreme Court of India in *Laxmi Kant Pandey v. Union of India* (judgment of 6 February 1984 referred to above) gave directions to stop all independent or private adoptions conducted by unauthorized individuals or agencies. Applications for taking a child in adoption "should be processed only through a social or child welfare agency licensed or recognized by the government of the State in which it is operating".¹¹³

¹¹¹ Paragraph 14, see *supra* No 47 and footnote 79.

¹¹² Council of Europe, *op. cit.* (*supra* footnote 16), p. 27.

¹¹³ The court also suggested that "... before taking a decision to recognize any particular social or child welfare agency for the purpose of intercountry adoptions, the government of India or the government of a State would do well to examine whether the social child welfare agency has proper staff with professional social work experience ... It would also be desirable not to recognize an organization or agency which has been set up only for the purpose of placing children in adoption: it is only an organization or agency which is engaged in the work of child care and welfare which should be regarded as eligible for recognition, since intercountry adoption must be looked upon not as an independent activity by itself, but as a part of child welfare programme so that it may not tend to degenerate into trading" (paragraph 15).

¹⁰⁹ See H. Rauline, *Le trafic d'enfants lié à l'adoption internationale: Etude et propositions*, study made for Terres des Hommes, Lausanne 1988.

¹¹⁰ See generally, Council of Europe, *op. cit.* (*supra* footnote 16).

In a later judgment of 27 September 1985, the Supreme Court made a clear distinction between "scrutinizing agencies" and "placement agencies".¹¹⁴

This judicial legislation has had a great impact on the practice of intercountry adoption in India and it would seem that direct adoptions from India have indeed come to an end.

69 There is generally no ban on private adoptions in Latin American countries and child welfare agencies are not widely available. In Paraguay and Peru, for example, a few private organizations are active but they are completely dependent upon voluntary help and private funding.¹¹⁵ State child welfare institutions exist, for example, in Brazil (*Fundação do Bem Ester do Minor*, FEBEM) and Guatemala (*Consejo de Bienestar Social de Guatemala*). Both organizations counsel single mothers and provide information on the legal consequences of adoptions, including international adoptions, and assist the courts. Elaborate procedures for intercountry adoption exist in Costa Rica and Colombia. In Costa Rica most adoptions, including intercountry adoptions take place through the *Patronato Nacional de la Infancia* (PANI) which under the Constitution of Costa Rica has general responsibility for the protection of mothers and children. The most elaborate structure probably exists in Colombia, where the *Instituto Colombiano de Bienestar Familiar* (ICBF) has set up an extensive regional network providing counselling and support to single mothers, including advice on the consequences of adoption abroad. Most intercountry adoptions take place through the ICBF.

In Ecuador, after a series of scandals relating to kidnapping of children, negotiations with false mothers and trafficking of children abroad, a "technical unit for adoptions" was set up in 1989 funded by the National Institute for the Protection of Minors which is part of the Ministry of Social Welfare. The TUA has launched a "national adoption programme" which aims at serving as a bridge between local and international applications for adoption.

¹¹⁴ "The scrutinizing agency, appointed by the Court for the purpose of assisting it in reaching the conclusion whether it would be in the interest of the child to be given an adoption to the foreign parents must not in any manner be involved in the placement of children in adoption. [It] must be an expert body having experience in the area of child welfare and it should have nothing to do with placement of children in adoption or otherwise objective and impartial evaluation may not be possible." (Paragraph 3, *supra* footnote 82.) The Supreme Court recognized the Indian Counsel for Child Welfare and the Indian Counsel of Social Welfare as scrutinizing agencies and directed that the Courts continue to entrust scrutinizing work to them. Other scrutinizing agencies might be employed provided that they be child welfare agencies and not engaged in placing children in adoption.

¹¹⁵ See U. Alfter, "Assistance Offered to Children in Their Home Countries", in ISS, German Branch, *op. cit.* (*supra* footnote 75), pp. 12-15.

D Adjustment of international adoptees

1 A special challenge

70 Once a child from Asia, Latin America, Africa or Oceania has been placed with adopters in an industrialized country, how well does that child adjust to his or her new environment? The new insights acquired into the social and psychological aspects of adoption (see *supra* Nos 34-37) are of particular significance in the context of intercountry adoption because of the considerable social, cultural and ethnic differences involved. This was not immediately recognized when intercountry adoption started on a large scale after the Second World War. In the beginning intercountry adoption was new and on the defensive and there was a tendency to minimize the differences between natural families and adoptive families. Now that it has become a common phenomenon in many countries it is realized that the challenges which adoptive families face are often enlarged in the case of intercountry adoption because of the considerable differences in background and expectations between the child and the adoptive parents.

71 Recent cross-cultural research suggests that genetic and environmental factors may lead to qualitative differences in rhythms, in reactions and motor behaviour in the earliest stages of a child's development.¹¹⁶ These differences in turn, it would seem, influence the parents' reactions, and vice versa. "Adopted parents should be prepared in advance to expect and understand these differences. Otherwise, they will interpret the difficulties of adjusting to one another as their own lack of capacity to relate to a new baby."¹¹⁷

2 Positive research outcomes

72 A number of studies carried out in the United States in the 1970s - particularly concerning Korean children - concluded that international adoptees functioned well.¹¹⁸ This positive impression was confirmed by a recent major nationwide study undertaken in Denmark concerning the

¹¹⁶ For example, while in some cultures newly born babies appear to demonstrate a preference for vigorous motor activity, in other cultures they prefer much quieter and smoother responses, see, T.B. Brazelton, *Families: Crisis and Caring*, (Reading, Mass, 1989), pp. 214-218.

¹¹⁷ *Ibid.* p. 217. Another possibility is that the parents may place the blame for the difficulties of adjustment on the baby itself. Even when the adopted child's personality has in a gradual process taken on aspects of the adopters' own personalities, "under stress, such as a traumatic experience or a new adjustment such as school, ... the child's inborn temperamental style is likely to resurface she will need understanding and respect from her adoptive parents all over again", *ibid.* p. 218.

¹¹⁸ See, for example, D.S. Kim, "How They Fared in American Homes: A Follow-up Study of Korean Children in US Homes", in 31 *Children Today*, (1977) pp. 2-6; S.P. Kim *et al.* "Adoption of Korean Children by New York Area Couples, A Preliminary Study", in 58 *Child Welfare*, (1979), pp. 419-427. See also, however, S.P. Kim, "Behavioral Symptoms in Three Transracially Adopted Children: Diagnosis Dilemma", in 59 *Child Welfare*, (1980), pp. 213-224, which suggests that trans-ethnically and transculturally adopted children may be inherently vulnerable, developmentally and physically.

conditions of 18-25 year old foreign-born adoptees.¹¹⁹ As in the United States studies, the majority of the young people (±60%) had been born in Korea.¹²⁰ The study concluded that these children had adjusted well to their Danish environment. Particular attention was given to the problem of racial discrimination. Although the great majority reported that they had not been subjected to such behaviour, negative (as well as positive) discrimination had been experienced by some - although not on a large scale. The importance of an open relationship with one's adoptive parents and the environment at large is illustrated by the responses of those children who had experienced occasional discrimination; those who had such an open relationship felt less uncomfortable than those who had not. The process of identity-building by these children had generally developed satisfactorily.¹²¹

3 A certain risk of maladjustment at later age

73 On the other hand, recent studies carried out in the Netherlands suggest that international cross-cultural adoptees run a somewhat greater risk of later maladjustment. A large scale study concerning behavioural and emotional problems and competencies in international adoptees aged 10 to 15 years in the Netherlands revealed that, although the majority of adopted children who took part (2,148) did not show more problem behaviour than non-adopted children, more than twice as many 12-15 year old adopted boys showed problem behaviour (stealing, overactivity, vandalism, truancy, etc.) than non-adopted boys.¹²² A further study confirmed the hypothesis that the older the child was at the time of placement for adoption, the greater the risk was of developing behavioural and emotional problems.¹²³ The results of these findings were confirmed by clinical interviews.¹²⁴

¹¹⁹ See M. Rørbech, *Mit land er Danmark*, Social Forsknings Institut, Copenhagen, 1989; English abstract *idem*, *Denmark - My Country*, (Copenhagen, 1990).

¹²⁰ Two thirds of them had attained the age of 3 years before their arrival in Denmark. In contrast, most foreign-born children nowadays adopted in Denmark are below the age of 2 on arrival.

¹²¹ Interestingly "[a]bout one half [of the respondents] agreed fully or partly, that, with the status they have, they may be bridge-builders between the nations", M. Rørbech, *Denmark - My Country* (supra footnote 119) p. 20. Similar positive results are reported from Australia concerning Vietnamese adoptees (in respect of very young adoptees however). See I.J. Harvey, "Adoption of Vietnamese Children: An Australian Study", in 18 *Australian Journal of Social Issues* (1983), pp. 55-69.

¹²² F.C. Verhulst et al., "Problem behavior in international adoptees: I", in 29 *Journal of the American Academy of Child and Adolescent Psychiatry*, 1990, pp. 94-103.

¹²³ F.C. Verhulst et al., "Problem behavior in international adoptees: II", in 29 *Journal of the American Academy of Child and Adolescent Psychiatry*, 1990, pp. 104-111 (at pp. 104-105). The greater impact of various kinds of deprivation at early age as well as increasing concerns among adolescents over their biological parentage might explain this finding; a different ethnic background in itself was not found to be a powerful predictor for problem behaviour.

¹²⁴ See F.C. Verhulst et al., "Problem behavior in international adoptees: III", to be published in *Journal of the American Academy of Child and Adolescent Psychiatry*, May 1990. See also F.C. Verhulst and H.J.M. Versluis-den Bieman, *Buitenlandse Adoptiekinderen, Vaardigheden en Probleemgedrag*, (Assen etc., 1989).

These studies were undertaken following increasing concern in the Netherlands about over-representation in institutional treatment of adopted children born in countries with a different culture and ethnic background. Nationwide research had investigated the extent of this problem and found that negative experiences in the child's country of origin, too high expectations of the intending adopters and insufficient educational capacity of the adopters in combination with difficult children were among its main causes.¹²⁵

4 The need for information and preparation

74 The Dutch research findings have so far no true parallel in other countries. Whether or not their outcome will be confirmed by future studies, however, there is no doubt that adoption of children born in a foreign culture poses very special challenges and requires special counselling and preparation of the intending adopters. Because of the uncertainties concerning the child's genetic background, perinatal history and possible deprivation of many kinds at early age, common expectations - such as "we want to adopt a healthy child of normal intelligence" - will often not be met. Intending adoptive parents should be prepared for health problems¹²⁶ when the child arrives and for other adjustment difficulties. For this reason, in some countries prospective adopters are strongly advised to attend courses which give them general information on adoption of foreign children (e.g. Sweden). In the Netherlands such courses are now compulsory by law and a special Centre for Information on and Preparation for Adoption of Foreign Children has been founded in this connection. Such an obligation corresponds with what might be seen as an emerging right of (international) adoptees, i.e. to be received by well-informed and well-prepared adoptive parents.

5 Identity building

75 Inter-country adoption has also intensified the discussions on the desirability of informing the child about his or her origin - country of birth, culture and biological parents (cf. supra No 37). That an international adoptee is in origin different from the adoptive parents is of course often visible and it has become quite common in many countries to acknowledge this difference, for example by giving an adopted child a Korean, Thai or Spanish first name. As ISS and many other organizations active in this field have found, more and more adoptees go in search of

¹²⁵ See R.A.C. Hoksbergen et al., *Bittere Ervaringen*, (Lisse, 1988).

¹²⁶ Swedish studies, for example, have shown that many children upon arrival show health problems of various kinds: diarrhoeal diseases, respiratory tract infections, skin infections, sometimes hearing impairment which may cause delay in language development. See NIA *Inter-country Adoptions - Manual for municipal social welfare committees* (Extracts from *Handbok för socialnämnder*), (Stockholm, 1986), p. 18.

their roots.¹²⁷ Prospective adopters are now encouraged to develop an interest in the child's culture and to support the child in its psychological process of building up a complex identity. Generally the experience has been that "frankness in matters of adoption is good for both children and parents"¹²⁸ and that the anxieties of adopters about such openness are unfounded. In some countries, programmes have been set up to organize visits by adopted children to their country of origin.¹²⁹

6 Confidentiality v. openness

76 A cross-cultural problem may arise here since in a number of developing countries confidentiality rather than openness is the rule. The Supreme Court of India in *Laxmi Kant Pandey v. Union of India*, for example, held that it was "absolutely essential that the biological parents should not have any opportunity of knowing who are the adoptive parents taking their child in adoption and therefore notice of the application for guardianship should not be given to the biological parents".¹³⁰ The reason for this ruling was that according to the court the biological parents knowing who are the adoptive parents, might "try to extort money from the adoptive parents". Secrecy about the child's biological parents is also generally the rule in Latin America (see *infra* Nos 107-109).

77 Due to this difference of views it was not possible to reach agreement in the UN Declaration of 1986 nor in the Convention on the Rights of the Child on a firm right for the adopted child to know about his or her background. Article 9 of the UN Declaration provides that the "need of a ... adopted child to know about his or her background should be recognized by persons responsible for the child's care, unless this is contrary to the child's best interests". Article 7 of the UN Convention provides that "[t]he child ... shall have ..., as far as possible, the right to know ... his or her parents". Paragraph 2 of this Article makes it clear, however, that this provision is not meant to be self-executing. Since the need recognized by the UN Declaration appears to be growing and since, more

generally, the right of access to records of one's own history is emerging as a fundamental human right,¹³¹ this question is bound to be an important item for the negotiations on a new convention on intercountry adoption (cf. *infra* No 183).

E Abuses of intercountry adoption: international child trafficking

1 The problem of fact-finding

78 The structural demand for children from industrialized countries and the equally structural availability of many homeless children in developing countries (see *supra* No 51) has, in addition to regular and legal intercountry adoptions, led to practices of international child trafficking either for purposes of adoption abroad, or under the cloak of adoption, for other - usually illegal - purposes.¹³² As no country allows such practices, they have to take place in the dark. As a result, it is very difficult - if not impossible - to obtain a reliable picture of the overall geographical span, nature and scope of these practices. This fact-finding problem is reflected, for example, in various reports and notes on this subject prepared by the Secretary-General of the United Nations for ECOSOC's Commission on Human Rights.¹³³ Yet, the documents submitted to the Secretary-General by a number of governments, and by organizations such as Interpol, Defence for Children International,¹³⁴ International Federation Terres des Hommes¹³⁵ and the International Federation of Human Rights¹³⁶ leave no doubt that international trafficking of children does occur - in particular from Asian, Latin American and Eastern European countries to

¹³¹ Cf. for example European Court of Human Rights, *Gaskin* case (2/1988/146/200), judgment of 7 July 1989 in which the court ruled (11-6) that the question of access to case records relate to one's "private and family life" as protected by Article 8 of the European Convention on Human Rights and that the interests of a person seeking access to such records had to be secured when a contributor of the records either failed to answer or withhold consent. The "principle of proportionality" required in such instances that an independent authority decide on whether access is nevertheless to be granted. Cf. also Bundesverfassungsgericht, judgment of 31 January 1989, *Juristenzeitung* 1989, pp. 335-339; for possible public policy exceptions to this principle cf. also House of Lords, judgment of 30 November 1989 (*Regina v. Registrar-General, Ex Parte Smith*), *The Times Law Report*, 1 December 1989, p. 42.

¹³² On a more limited scale, international child trafficking already occurred in the fifties, see statement by G.S. Maridakis, concerning such trafficking from Greece to the US, *Conférence de La Haye, Actes et documents de la Neuvième session*, 1960, Tome I, p. 203.

¹³³ E/CN.4/Sub.2/1989/38 of 12 July 1989 for the attention of the Commission's Sub-Commission on Prevention of Discrimination and Protection of Minorities and E/CN.4/AC.2/1989/8 of 21 June 1989 (with Addenda 1 and 2), for the attention of the Sub-Commission's Working Group on Contemporary Forms of Slavery, with references to previous notes and reports of the Secretary-General.

¹³⁴ See also various detailed studies on this subject published in DCI's *International Children's Rights Monitor* and see various documents in DCI, *Protecting Children's Rights in International Adoption* (Geneva, 1989), (*supra* No 21).

¹³⁵ See also H. Rauline *op. cit.* (*supra* footnote 109).

¹³⁶ See A. Feder and A. Garapon, *Rapport de Mission*, (English translation), Paris, 1988.

¹²⁷ Often some general information about the biological family already meets the needs of an adopted child, and personal contact with the biological parents may not even be desired by the adoptee. See I. Baer, "Internationale Entwicklungen zum Themenbereich: 'Adoptierte suchen ihre Ursprungsfamilie'", in *5 Nachrichten des Deutschen Vereins für öffentliche und private Fürsorge* (NDV), 1988, p. 148 *et. seq.*

¹²⁸ NIA Intercountry Adoptions, *op. cit.* (*supra* footnote 126).

¹²⁹ See, generally, G. Andersson, *The Adopted Children's Search for their Identity*, paper presented to the ICSW seminar on intercountry adoption in Tokyo, 1986; see also P.C.Th.M. van Eeuwijk and J.H.A. van Loon (eds.), *Identiteitsproblemen bij adoptiekinderen*, (Amsterdam etc., 1989) and C. Hoffman-Riem, *Mediating Adoption Triangle*, paper presented to the NGO Expert meeting on the Implementation of the UN Declaration of 3 December 1986, Vienna 10-11 June 1987.

¹³⁰ Paragraph 22, see *supra* footnote 79.

North America and Western Europe. This confirms and broadens the conclusions of a 1987 Report of the Parliamentary Assembly of the Council of Europe.¹³⁷

2 General features of child trafficking

79 The various sources available permit us to draw up the following typical features of international child trafficking:

a Purpose

It may serve the purpose of adoption abroad, but may also be carried out for purposes of prostitution, pornography, cheap labour and other forms of exploitation abroad. It is not always possible to draw a sharp line between these different practices; for example, the biological parents may be told that their child will be adopted and cared for abroad, while in reality the child will be forced into prostitution.

b Children concerned

Child trafficking for the purpose of adoption usually concerns healthy, fair children because most prospective adopters in Western Europe, North America and Australia want their children to be in good health and as fair as possible.

c Methods for obtaining children

The three principal methods are the sale of children, consent obtained through fraud or duress and child abduction. Combinations are possible (e.g. selling of a child under pressure) and, in addition, it may be difficult in some cases to say whether the child was abducted or whether the biological parents gave their consent.

(i) Sales

There are frequent reports of parents giving up their child for adoption in return for a certain, often very small sum of money - for example, out of fear that the child would die of hunger if it remained with them. There are also reports of one parent selling a child without the other parent's knowledge.

(ii) Fraud or duress

A convincing intermediary (often a female scouting about for children) may persuade a pregnant woman or young mother that a great life awaits her child in a rich country, will reassure the mother and help dispel any feelings of guilt and (combination with (i)) get her to accept money so as to eliminate any suspicion of kidnapping.

(iii) Abduction

There are also many reports of outright abduction of children playing in the yard, returning from school or even being snatched from the arms of their mother.¹³⁸

d Organization of the trafficking

Often child traffickers are part of extensive networks. In some countries lawyers and notaries, social workers (even in some cases those appointed by the courts), hospitals, doctors, children's institutes, sometimes turned into complete "baby farms", and others work together to obtain children and make profit out of the despair of parents, in particular women, in difficult situations, sometimes by deceiving them. A basic principle of such networks is often that the various intermediaries operate without knowing each other: there are those who contact the pregnant women or young mothers; those who look after the children before they leave for abroad; those who search for clients in the receiving countries and those who bribe the competent authorities and "wash" the "commodity". Most of this takes place in the developing countries, but the network may also extend to lawyers or other intermediaries in North America or Europe.

e Leaving the country

In order for the trafficking to be successful it is essential that the child leave the country of origin in a legal or seemingly legal way.^{138a}

(i) Adoption

Where contractual forms of adoption are still allowed abuses are easily made. Where judicial adoption procedures exist, corrupt judges or officials may sometimes be found and documents relating to the consent of the biological family may be falsified.

In those regions where families living in the country will send their children to friends living in the city so that they can go to school, such families may be approached only to coax their children out of them, through money and/or pressure.

¹³⁸ See, for example, "Abductions in Salvador Fill a Demand: Adoption", New York Times, 17 December 1985, p. 2.

^{138a} See M.R. Will, "La Adopción de Niños Latinoamericanos Hacia los Países Europeos/Zur Adoption Lateinamerikanischer Kinder nach Europa", in Estudios de Direito Brasileiro e Alemão/Studien zum Brasilianischen und Deutschen Recht, Porto Alegre 1985, pp. 101-122.

¹³⁷ Report on the Traffic in Children and Other Forms of Child Exploitation, (Rapporteur P. Stoffelen), Doc. 5777 of 10 September 1987.

(ii) *Concealing of civil status*

There are several ways of concealing the real status of a child, for example:

- the client "parents" may declare that a child is theirs and have a false birth certificate drawn up establishing the clients' "parenthood";
- a fake mother may acknowledge a child as hers and immediately sign a declaration of abandonment which paves the way for an adoption by the clients abroad;
- the client "father" acknowledges the child as his, which is later followed by an adoption of the child by the adoptive mother.

Often private hospitals act as intermediaries in such cases - with or without the consent of the biological mothers.

f *The price of the child, and the profiteers*

Health, weight, sex, colour of eyes, social origin, all may influence the price of a child. Prices may vary between \$ 10,000 and 15,000 but can sometimes be substantially higher. The profiteers are generally neither the biological parents nor the adopters but the intermediaries - lawyers, doctors and others.

3 *Rumours on trade in fetuses and organs of children*

80 Despite repeated rumours in the press and other media concerning the trafficking in fetuses and the use of children for organ transplants, the Secretary-General of the United Nations in a preliminary report of 11 July 1988 expressed the view that "more substantial information would be necessary in order to meet the request of the Sub-Commission [on Prevention of Discrimination and Protection of Minorities] for precise and comprehensive information [concerning the existence of such practices]".¹³⁹ The Secretary-General confirmed this view in a note of 12 July 1989.¹⁴⁰ In the last mentioned note he referred to the detailed enquiry into the possible existence of a traffic in children's organs made by the International Federation of Human Rights in two Central American countries. The authors came to the following conclusions:

- 1 We have not been able to obtain any evidence of the existence of such a traffic;
- 2 We have found that there are widespread rumours to this effect, which appear to be without justification;
- 3 We can attest to the existence of a large-scale traffic in children under the cloak of adoption."¹⁴¹

¹³⁹ E/CN.4/Sub.2/1988/30 of 11 July 1988, p. 9.

¹⁴⁰ See footnote 133 *supra*, p. 7.

¹⁴¹ *Ibid.*

4 *The question of profit making*

81 Child trafficking means profit making by intermediaries at the expense literally of the biological parents and the adopters (to the extent that they act in good faith), and in a broader sense also of the child. Although the principle is clear enough, drawing the line between such practices and legal and regular intermediary services is in practice not always easy. We have seen that in the context of legal and regular intercountry adoption intermediary agencies have become increasingly more important in particular in receiving countries but also in countries from which children are adopted abroad. Such agencies (except where they are entirely government-subsidized) can only function if they demand payment for their services. But what does constitute reasonable payment and where does trafficking begin? In respect of agencies in the receiving countries the problem is compounded by the fact that, as we have seen (*supra* No 64), their activities are usually not limited to intermediary services in the strict sense but may well include different kinds of financial assistance to, for example, child institutions in the countries of origin. This may have financial consequences for the contributions to be paid by prospective adopters.

The difficulty of drawing a clear line between what is acceptable and what constitutes child trafficking gave rise to extensive discussion during the preparation of both the UN Declaration and the UN Convention. Article 20, second sentence, of the UN Declaration provides that "in no case should the placement result in improper financial gain for those involved in it". Similarly, Article 21, sub-paragraph d of the UN Convention, provides: "[States Parties ... shall] take all appropriate measures to ensure that, in intercountry adoption, the placement does not result in improper financial gain for those involved in it." The use of the words "improper financial gain", implying that a proper financial gain resulting from intercountry adoption is permissible, have been vigorously contested by some delegates.¹⁴² Cf. Article 15 of the European Adoption Convention.

5 *Obtaining the return of the child*

82 Following instances of child trafficking, parents and private organizations have of course often filed complaints which have led to police investigations, in most cases without any result.¹⁴³ There are reports in some countries of involvement of high civil or military authorities who have obstructed criminal investigations.

¹⁴² See ECOSOC document E/CN.4/1989/48 of 2 March 1989, p. 59 and p. 142.

¹⁴³ "The parents of abduction victims often can do nothing more than file a complaint and publish photos in the press; some even propose to pay money to the kidnappers. It is however very rare for children to be recovered." A. Feder and A. Garapon, *op. cit.* (*supra* footnote 136), p. 14.

In some cases parents have gone a step further and have sought to obtain the return of their children from the country to which they had been taken, sometimes with success. In the US, for example, *habeas corpus* proceedings to set the adoption aside were successfully brought by a biological mother from Romania who had been pressured by a social worker and by the attorney for prospective adopters to consent to her child's adoption¹⁴⁴ and wide publicity was given to a judgment of the Israeli Supreme Court of 16 June 1988 ordering the return to her real parents of a 3-year old girl kidnapped from her Brazilian home in 1986 and sold via Paraguay to an Israeli couple.¹⁴⁵

6 Preventive legal action at the national level

83 As we shall see in more detail below (*infra* Nos 138-141), several countries have taken legal measures to restrict the freedom of agencies to act as intermediaries in intercountry adoption, among other purposes in order to prevent child trafficking. Such measures, in particular if co-ordinated on an international scale, should help considerably to reduce abuses of intercountry adoption (see *infra* Nos 177-178).

7 International norms and recommendations

84 Article 35 of the UN Convention imposes upon the States Parties an obligation to make every effort to prevent the sale, trafficking and abduction of children. Article 9 - confirming the right of a child not to be separated from his parents against their will - and Article 21, sub-paragraph a - emphasizing the requirement of informed consent to the adoption - among others, also have a bearing on child trafficking. Rules concerning the law applicable to the question of consent are provided in the 1965 Hague Adoption Convention (Article 5) and the Inter-American Adoption Convention (Article 3).

85 In order to obtain a fuller picture of the question, the Secretary-General of the United Nations, following a suggestion made by Defence for Children International, proposed to the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the UN Commission on Human Rights "that a special rapporteur be appointed to undertake an overall study of the question of the sale of children, including commercially motivated (and especially transnational) adoptions ...".¹⁴⁶ Suggestions made to the UN Secretary-General by other organizations include the establishment of a special data base to identify suspects in international trafficking (Interpol), the establishment of a supervisory commission for adoption practices (International Federation Terre des Hommes) and "the conclusion of an international convention strictly regulating international adoptions and ensuring that the children have not been acquired illegally

¹⁴⁴ *In Re adoption of Alexander S.*, 188 Cal.App.3d 1469, (1987).

¹⁴⁵ See, for example, *The Guardian*, 18 June 1988.

¹⁴⁶ E/CN.4/Sub.2/1989/38, pp. 7-8.

..., and that supervision will continue in the receiving country ..." (International Federation of Human Rights).¹⁴⁷ It is in the latter respect in particular that a new convention on intercountry adoption could probably make a major contribution, see *infra* Chapter VI.

F Alternatives; subsidiary character of intercountry adoption

86 Intercountry adoption is one of many alternatives in the range of family and child care but, apart from intercountry fostering which is generally not considered acceptable because of the legal uncertainty to which this practice gives rise, those other alternatives do not involve migration of children to other countries.

There is growing worldwide agreement that in the continuum of child care services (see *supra* No 43) before intercountry adoption is chosen, sufficient consideration should be given to possible alternative plans for the child in his or her own country in view of the difficulties in transplanting a child from one society and culture to another. This principle is reflected in Article 17 of the UN Declaration and also appears in Article 21, sub-paragraph b, of the UN Convention.

While there seems to be broad agreement concerning the preferability of incountry adoption over intercountry adoption, it is sometimes suggested that retaining a child within his or her own society and culture is of such importance that even incountry placement in an institution is preferable to intercountry adoption; most child experts, however, it would seem, would not agree with this view (see *supra* Nos 46-48).

87 Alternatives to intercountry adoption include both domestic and international programmes aimed at providing care to children in their own environment.

1 Incountry adoption and foster care

As we have seen, *supra* D, many developing countries from which children are adopted abroad have embarked on programmes to stimulate incountry adoption but have also found considerable obstacles on their way. In respect of foster care as an alternative to adoption, in some developing countries difficulties have been noted because of legal uncertainty as to the rights and duties of the child and the parents.

¹⁴⁷ *Ibid.*, pp. 5-7.

2 Sponsorship programmes

International sponsorship programmes, such as those of Foster Parents Plan¹⁴⁸ founded in 1937 during the Spanish Civil War and now operating in over 20 countries, aim at improving the quality of life for poor children and families both in rural and urban areas. These programmes have evolved over the years as a result of practical experience. Rather than singling out individual children, Foster Parents Plan now directs its assistance at the whole family and even the whole community.

Another example are the SOS children's villages founded in 1949 by the Austrian Hermann Gmeiner.¹⁴⁹ In more than 90 countries SOS children's villages or facilities have been founded. Large, impersonal and understaffed institutions have been replaced by small, homely cottages where one or two competently trained women take care as a mother over a small group of children. This scheme has worked successfully and has been actively encouraged by many governments.

IV INTERNAL AND INTERCOUNTRY ADOPTION IN COMPARATIVE LAW

A Introduction

88 Intercountry adoption is legally complex not only because the rules of private substantive law governing adoption vary significantly from one country to another, giving rise to problems of private international law - questions of jurisdiction, applicable law and recognition of foreign adoptions - but also because in many countries intercountry adoption is in addition subjected to various provisions which override those rules of private international law: laws requiring preliminary permission to adopt a child in intercountry cases, immigration laws, nationality laws and others. It is impossible within the limits of this introductory Report to spell out the full breadth of all the legal issues to which intercountry adoption may give rise. Consequently this chapter will begin by presenting a comparative overview of the main characteristics of adoption laws in the world; it will then discuss some of the main problems arising in private international law and finally focus on some of the most significant recent developments concerning the regulation of intercountry adoption in various countries.

¹⁴⁸ See Foster Parents Plan, *How to Change the World One Child at a Time*, (London, undated). There are many other programmes of course, cf. for example, the recent programme "Opération Parrainage" organized jointly by the French television channel Antenne 2 and the weekly L'Express, L'Express No 2007, 29 December 1989.

¹⁴⁹ See H. Gmeiner, *The SOS Children's Villages*, (Innsbruck etc, 1986).

B *Private internal law*¹⁵⁰1 *Legal nature*a *Trend towards full adoption and court involvement*

89 Annex C presents an overview of substantive adoption laws in a number of countries in the world. It lists the main statutory sources, indicates whether adoption requires a court order, whether adoption leads to a cut-off of all legal bonds with the biological family and to full integration into the adoptive family, and whether the adoption is revocable. It is a summary overview based on information drawn from a variety of sources¹⁵¹ which may not all reflect the latest developments and may not all be complete, hence it should be consulted with caution; moreover, the field of adoption is in constant flux, so the chart is no more than a snapshot at a given moment in time. It should be noted, furthermore, that in conjunction with the legal sources cited other provisions may have to be consulted, for example laws relating to civil procedure and to civil registries.

90 In comparison with the position two or three decades ago, the chart reflects a double worldwide trend: (1) an increasing incidence of full adoption, leading to (a) a complete cut-off from the biological family and (b) to full integration into the adoptive family (generally, however, in systems where previously only incomplete forms of adoption existed, full adoption has been introduced in addition to, rather than in place of, such simple adoption) and (2) an increasing involvement of the courts, not only in respect of full adoption but also of simple adoption, which formerly was seen in many systems purely as a contractual arrangement.

91 The first trend is particularly clear in Europe, North America, Latin America and Australia but it can also be seen, for example, in Japan (which introduced full adoption in addition to simple adoption in 1988), Sri Lanka, Viet Nam and several African countries. It is inspired by the idea that the best interests of the child are generally better safeguarded by full adoption - especially if irrevocable - than by simple adoption. In developing countries, in particular in Latin America, it has in addition been an answer to increasing numbers of abandoned children for whom simple

¹⁵⁰ For more detailed comparisons see H.D. Krause *op. cit.* (supra footnote 46), pp. 6-150 - 6-196; M. Ancel *op. cit.* (supra footnote 38); J.M. Bischoff and A. Rieg (eds.), "L'adoption dans les principales législations européennes", in 37 *Revue internationale de droit comparé* (1985), pp. 505-700; G. Heinrich, "Adoption in Lateinamerika", in 85 *Zeitschrift für vergleichende Rechtswissenschaft* (1986), pp. 101-135; D. Nding, *loc. cit.* (supra footnote 37).

¹⁵¹ Important sources consulted include in addition to those mentioned in the previous footnote in particular A. Bergmann/M. Ferid, *Internationales Ehe- und Kindschaftsrecht* (X volumes) (Frankfurt), *Jurisclasser de droit comparé* (Paris); for Europe, ISS (Italy), A. Beghè Loreti (ed.), *L'Adozione dei Minori nelle Legislazioni Europee* (Milan, 1986); for (ISS) Latin America, *Législation en matière d'adoption en Amérique latine*, (Paris, 1984); and *Enfance et Famille d'Adoption - Législations étrangères en matière d'Adoption* (Paris, 1986).

adoption, with its assumption of a continuing relationship with the child's original family, is not adequate.¹⁵² Yet many of these countries have retained simple adoption because it corresponds with traditional social practices such as adoptions within the (extended) family (see *supra* No 29).

92 The second trend, away from the purely contractual view of adoption and towards court intervention, likewise reflects a concern to assure that the best interests of the child are served by the adoption. Preliminary approval or subsequent confirmation by the court of a simple adoption contract is now the rule in most of the countries which have retained this type of adoption; in France and some Latin American countries (Colombia for example) the contractual approach of simple adoption has been abolished altogether. Judicial intervention is generally the rule for full adoption. In some countries, although adoption is not seen as a judicial process, it requires nonetheless an administrative decision by a government authority (for example, Thailand (simple adoption), Viet Nam, Norway, Hungary (full adoption)).

b *Adoption as a protective measure for children; probationary period*

93 The leading thought underlying recent adoption reforms, i.e. that adoption should serve the child's best interests rather than any other purpose such as continuation of family descent, is expressed in various ways in many modern adoption laws.¹⁵³ Some legislation expressly provides that adoption is the final resort, only after all efforts to maintain the original family ties have failed.¹⁵⁴ In some systems (for example, the United States, several Latin American countries, the United Kingdom), adoption is a two-stage proceeding. In the first stage the court will determine whether the child is free for adoption. If so, the court will terminate the ties with the original family or declare the child abandoned (cf *supra* No 57 *in fine*), and either appoint the prospective adopters as the child's guardians or, as for example in the United Kingdom, vest parental rights in an adoption agency. Following a waiting period, or more generally a probationary period during which time the child resides with the prospective adopters, the adoption will be finalized. In other systems the proceeding consists of one stage only, but may be preceded by a court order creating a custodial relationship between the child and the prospective adopters as a probationary measure with a view to adoption (for example, the Netherlands).

¹⁵² Cf. Articles 1 and 2 of the Inter-American Adoption Convention where clear prominence is given to full adoption. Under its influence Colombia's new adoption law has abolished simple adoption altogether. In Brazil reform proposals are presently being studied which likewise aim at eliminating simple adoption.

¹⁵³ Cf. for example, most recently Article 88 of the new Colombian Minor's Code providing that "adoption is, primarily and preeminently, a measure of protection by which under the supreme surveillance of the state, there is established in an irrevocable manner the parent-child relationship between persons who do not have it naturally". Cf. also Article 13 of the UN Declaration and Article 21, opening line, of the UN Convention.

¹⁵⁴ See, for example, Articles 32 and 33 of the Civil Code of the Philippines.

94 The probationary period which is now generally required under modern adoption laws usually lasts six months to one year. Equally generally modern adoption laws prescribe a social investigation, in particular concerning the suitability of the prospective adopters and their motives (home study), preceding and during this probationary period, to be carried out by private or public agencies.¹⁵⁵ As we noted already, developing countries here often face the difficulty of an inadequate social infrastructure which frustrates attempts to encourage incountry adoption.

2 *Conditions for adoption: (1) who may adopt whom?*

a *Age*

(i) *Child*

95 In the case of simple adoption there is usually no age limit and adoption of adults is generally allowed. In contrast, those systems which provide for full adoption usually set age limits, for example, five years (Dominican Republic), six (Bolivia, Japan) or seven (Brazil, Ireland) but it may also be higher, for example 14 years (Costa Rica), 16 years (Haiti) or up to 21 years old. The United States is exceptional in that most states provide for (full) adoption of adults as well as of children.

(ii) *Adopters*

96 In the case of simple adoption, where the idea originally was to provide an heir to the childless, the law sometimes provides relatively high minimum ages for the adopters; a minimum age of 30 years is no exception in Latin America. In contrast, the minimum age in the case of full adoption is generally lower in order to facilitate the finding of a home for children; the law may permit this requirement to be waived in special circumstances.

(iii) *Age difference*

97 Prescriptions on age difference are often based on a compromise between, on the one hand a concern not to depart too much from the model of the biological parent-child relationship, and on the other hand a concern to facilitate full adoption as much as possible.¹⁵⁶ The trend is towards more flexibility, and in some systems the court has discretion to depart from the statutory age difference rules.

b *Other limitations concerning the child*

98 A number of systems, especially in Latin America (for example, Bolivia, Brazil, Peru), provide that in the case of full adoption the child must be an orphan or that the biological parents cannot be found or that

the child is in other "irregular situations"; for example where the parents have been deprived of their parental rights, or the child has been placed in an institution. Some systems now tend to establish special regimes for children belonging to indigenous tribes or groups (cf. *supra* Nos 39-42). The most recent example is probably Colombia whose new adoption law provides that such indigenous children may not be adopted unless they are found abandoned outside their community.¹⁵⁷

c *Other limitations concerning the adopters*

99 Although conditions tend to remain more severe for full than for simple adoption, in some parts of the world there is a development towards greater flexibility concerning the requirements as to the family situation of adopters. This is particularly clear in Europe where, for example, the requirement that prospective adopters may not have children of their own has almost disappeared (exceptions being Greece and Turkey). Likewise, most European systems now permit full adoption by a single person (an exception is the Netherlands, pending legislative reform). In most of Latin America the presence of biological children also is no longer an obstacle to full adoption; however, adoption by married persons remains the rule (Nicaragua and Colombia are exceptions permitting full adoption by unmarried couples, and Nicaragua also by single persons). In contrast, while the presence of biological children continues to be an obstacle to adoption in a number of former French-African colonies (for example, Senegal, Madagascar), married status is generally not a requirement in these systems.

3 *Conditions for adoption: (2) consent and consultations*

100 All systems require the consent of the parents of the child to be adopted, sometimes even consent of other members of the extended family and many that of the child as well. One of the principal functions of judicial or administrative intervention is precisely to determine whether consent is or has indeed been given. Many systems now require that the consent be given on the occasion of a personal appearance before the court.

101 As far as the child's parents are concerned, the trend is clearly to ensure that consent is given freely and in the knowledge of all the consequences of the adoption. Some systems require a minimum period between the birth of a child and the giving of consent by the mother¹⁵⁸ (if the child has been born out of wedlock the natural father's consent may not be required).¹⁵⁹ There are different views as to whether consent to

¹⁵⁷ Minors' Code (1989), Article 93.

¹⁵⁸ Cf. Article 5(4) of the European Adoption Convention.

¹⁵⁹ In some legal systems, such a father is entitled to notice and an opportunity to appear in the relevant legal proceedings.

¹⁵⁵ Cf. Article 9 of the European Adoption Convention and, less detailed, Article 16 of the UN Declaration.

¹⁵⁶ See Heinrich, *op. cit.* (*supra* footnote 150), p. 111.

adoption once given, may be revoked.¹⁶⁰ The new Colombian adoption law allows parents a period of one month to reconsider their consent, after which time it becomes final.¹⁶¹

Consent by the child's parents can be waived in most systems on certain grounds such as incapacity, or abandonment or neglect of a child, and in some systems, where consent is in the view of the court unjustifiably withheld. Some systems permit "incognito" adoptions (for example the Federal Republic of Germany) where the identity of the adopters remains undisclosed to the child's biological parents. This also tends to be the effect of the two-stage adoption, where the parent-child relationship of the biological parents is first terminated, and the child is then adopted in a confidential legal proceeding.

Some Latin American countries provide that where a child is in an institution, that institution's director must also be heard; occasionally the public prosecutor (*Ministerio Público*) must be consulted.¹⁶²

102 There is a general trend to obtain the child's consent at the age of 12 to 15 years and to consult the child as of the age of around 7.

4 Effects of adoption

a Introduction

103 The effects of adoption reflect its purpose as perceived by the legislator. Full adoption aims at integrating the child completely into the adoptive family: all systems providing for this type of adoption give the child the status of a legitimate child of the adopters. The concern to eliminate all discrimination between adopted children and children born in lawful wedlock^{162a} has in most of these systems resulted in the extension to the adopted children of all the rights which this status entails; there remain exceptions however, in particular in respect of inheritance rights. The current dominant view is that full integration of the adoptee has as a necessary corollary the irrevocable termination of all ties with the biological family.

In contrast, simple adoption of a minor child generally aims at providing the child with some form of social assistance;¹⁶³ and for that purpose it is often not necessary fully to integrate the child into the adoptive family nor desirable to cut off those ties with the biological family which do not interfere with this purpose. Many variations are possible here.

¹⁶⁰ See Krause *op. cit.* (*supra* footnote 46), pp. 6-169 - 6-176.

¹⁶¹ Minors' Code (1989), Article 94.

¹⁶² See Heinrich, *op. cit.* (*supra* footnote 150), p. 121.

^{162a} Cf. in this connection Eur.Crt. of Human Rights, 13 June 1979, *Marckx v. Belgium*, Eur.Crt.H.R., Series A, No 30.

¹⁶³ See, for example, expressly Guatemala, *Código civil*, Article 228.

104 While full adoption as sketched above is still coming on in many parts of the world, in particular in some industrialized countries one can already discern the outlines of a new development towards more flexible forms of adoption based on a less rigid conception of exclusively and irrevocably belonging to only one family. Step-parent adoptions, which now constitute the majority of adoptions in many industrialized societies, and new views inspired by social scientists and social workers favouring "open adoption" (see *supra* No 37), are contributing to this new development. In several countries for example visitation rights have been granted to biological relatives in the case of step-parent adoptions¹⁶⁴ and the trend towards more easy access to adoption records (see *infra* Nos 107-109) may well mark a new evolution towards granting such rights in the case of adoptions generally.¹⁶⁵

b Full adoption

105 There is only one general exception to the rule that full adoption leads to complete integration into the new family and to termination of all legal bonds with the original family and that is that prohibitions to marry members of the latter remain intact. Beyond this, the only major exceptions found in some systems concern inheritance rights. These exceptions are almost exclusively found in a few common law jurisdictions. In a minority of states of the United States and of Australia, adoption statutes do not terminate intestate inheritance rights between an adopted child or his or her issue and the biological family as existing under common law and/or do not establish full reciprocal rights of inheritance between the adopted child and certain adoptive relatives (other than the adoptive parents).¹⁶⁶ Such exceptions, in particular the latter, raise questions as to the appropriateness of their being classified as "full" adoptions. Obviously the more exceptions exist, the more one will be tempted to classify such an adoption as "simple" rather than as "full" (*cf.* Annex C). Another limitation on the fullness of the adoptive relationship is of course the possibility of revocation, which will be discussed *infra* Nos 110-113.

c Simple adoption

106 Here the child maintains some legal ties to the biological family although the adoptive relationship typically takes precedence and the adopters acquire parental authority concerning the child, often along with the duty of support. "For instance, [simple] adoption may mean that a support obligation is retained by the natural parents but is subsidiary to

¹⁶⁴ For example, in Belgium (Cass. 4 March 1976, *Journ.Trib.* 1977, p. 455), and France (Cass. 21 July 1987, *Gaz. du Palais* 1988, p. 12 note Massip) the courts have accorded visitation rights to the biological grandparents of children. For the US *cf.* J.H. Hollinger, "Aftermath of Adoption: Legal and Social Consequences", in J.H. Hollinger *op. cit.* (*supra* footnote 50), pp. 13-52 - pp. 13-95.

¹⁶⁵ See, generally, P. Shifman, "Kinship by adoption: where adoption differs from natural affinity", in 23 *Israel Law Review* (1989), pp. 34-76.

¹⁶⁶ See L.P. Hampton, "The Aftermath of Adoption: the Economic Consequences - Support, Inheritances and Taxes", in J.H. Hollinger, *op. cit.* (*supra* footnote 50), Ch. 12.

that of the adoptive parents, or that inheritance from the child passes primarily to the adoptive parents, with exceptions made regarding funds which the child received from his natural family which would go back there ...".¹⁶⁷ Typically the adoptive relationship is limited to the adoptive parents and the child and no legal relations arise with nor between their relatives (see Annex C). Great variety exists in respect of the question of whether the child acquires the name of the adopters or retains his or her original name.

d Confidentiality and access

107 Since simple adoption maintains some legal ties to the original family, the child's origin is generally not kept secret and so no question of confidentiality as to the child's origin arises. In contrast, full adoption carried to its extreme may imply that all traces of the child's origin are removed. The court proceedings are closed, records of the proceedings are sealed, the child acquires a new legal identity and a new birth certificate and the original certificate goes into a sealed file.

108 In a recent move towards greater openness, a number of systems have taken measures favouring disclosure of adoptive status to the adoptive child. This trend is particularly clear in Europe. In England, for example, Section 26 of the Children Act of 1975 provides that adopted children in England and Wales who have reached the age of 18 years are entitled to a copy of their original birth certificate. Interestingly, this information from the birth records is subject to the acceptance of counselling by adoptees.¹⁶⁸ The passing of this act has influenced legislators in other English-speaking countries, in particular New Zealand where in 1986 the Adult Adoption Information Act was passed, which enables the adopted child upon reaching majority to have access to his or her original birth certificate unless the birth parent has placed a veto on the birth registration to stop information being made available. In addition this Act also gives birth parents the right to request the Department of Social Welfare to attempt to locate their child and ask whether the child is willing to have his or her name and address communicated to the applicant.¹⁶⁹ In the United States there is also an evolution away from the absolute sealed records. Most states now require agencies or private intermediaries to share non-identifying background information such as the date and place of the child's birth, general description of the physical appearance of the biological parents and the facts and circumstances

relating to the adoptive placement. However, "[d]isclosure of identifying information to adoptees and adopting parents continues to remain tightly controlled, despite recently enacted statutory provisions for release upon mutual consent ...".¹⁷⁰

109 In Latin America confidentiality remains the rule in the case of full adoption. Article 7 of the Inter-American Adoption Convention provides "Where called for, the secrecy of the adoption shall be guaranteed. However, whenever possible, medical background information on the minor and on the birth parents, if it is known, shall be communicated to the legally appropriate person, without mention of their names or of other data whereby they may be identified".¹⁷¹ In practice the legal fiction of adoption is consistently upheld and all records are sealed and in some cases even destroyed.¹⁷² A few laws provide that a court in exceptional circumstances may give access to the adoption records. The recent new Colombian law provides that all records relating to the adoption will be preserved for a period of 30 years. If the adoptive parents or the adoptee show good cause, the anonymity may be lifted.¹⁷³

5 Revocability

110 Many systems provide that the adoption may be revoked. Some distinguish between revocation and annulment. In both cases the effect is generally that the rights and duties between the adopter's parents and their relatives and the adopted child are terminated and that the child's legal relationship with his or her biological family is restored. The legal consequences differ however and so do their legal grounds.

111 Annulment usually invalidates the adoption *ab initio*, as the annulment of marriage does in most legal systems. Grounds for annulment are severe defects at the outset of the adoption: fraud, legal ineligibility to adopt, absence of consent, in short, one or more of the conditions referred to *supra* Nos 95-102. Annulment generally requires a court order even in systems which do not see adoption as a judicial process, but for instance as an administrative proceeding. In legal systems which have a two-stage process, a finding of invalidity of the

¹⁷⁰ See J.H. Hollinger, "Aftermath of Adoption: Legal and Social Consequences", in J.H. Hollinger *op. cit.* (*supra* footnote 50), pp. 13-20.

¹⁷¹ See D. Opertti Badán, *Comentarios a la Convención Interamericana sobre Conflictos de Leyes en Materia de Adopción de Menores*, Montevideo, 1986, pp. 47-48.

¹⁷² See Heinrich, *op. cit.* (*supra* footnote 150), pp. 127-129.

¹⁷³ Minors' Code (1989), Article 114. Article 115 provides expressly that any adoptee has the right to know about his or her origin and the fact of being adopted. While the primary responsibility for the timing and the conditions of such disclosure is left to the adoptive parents, the adoptee may approach the court and ask that the confidentiality be lifted and that access be given to the information.

¹⁶⁷ See H. Krause, *op. cit.* (*supra* footnote 46), pp. 6-185.

¹⁶⁸ See J. Triseliotis, "Obtaining Birth Certificates", in Ph. Bean, *op. cit.* (*supra* footnote 32), pp. 38-53.

¹⁶⁹ See A. Corcoran, *Opening of Adoption Records in New Zealand*, paper submitted to International Conference Adoption Today: Development and Perspective, Athens 6-9 July 1987.

court order terminating the parent-child relationship with the biological parents necessarily entails invalidity of the adoption decree.

112 Revocation typically has no retroactive effect and is usually based upon circumstances developing after the adoption has been completed. In some systems, however, revocation does have retroactive effect but then generally requires a court order. Whether revocation is permitted or not, upon which grounds, whether it requires a court order or for example agreement by the parties, depends on the function assigned to adoption by the legislator.

113 In the case of full adoption the trend is towards irrevocability (cf. Article 12, first sentence of the Inter-American Adoption Convention).¹⁷⁴ Parental authority may be terminated only according to the procedures for biological parents and on the same grounds. Where it is revocable, a distinction must be made: "It is one thing to allow an adoption to be revoked if the best interests of the child are served thereby and quite another to allow revocation for the convenience of the adoptive parents or at the instance of third parties (such as the adoption agency that handled the placement) or the natural parents".¹⁷⁵ In the Netherlands and Peru for example the adopted child may, after reaching majority, apply for a court order terminating the adoptive relationship *ex nunc*. In several European countries revocation of full adoption is generally allowed only in the interests of the child. In contrast, in the United States "most states that provide for revocation allow only the adoptive parents to petition for revocation".¹⁷⁶ Indeed, "many commentators believe that despite the general commitment to the policy of permanence, there are increasing numbers of adoptive parents who seek to set aside an adoption", in particular in the case of adopted children who subsequently manifest severe and chronic physical, mental or behavioural disorders.¹⁷⁷ In Latin America revocation of full adoption is, with few exceptions such as Peru, generally excluded. See Annex C.

Simple adoption is in principle revocable but there is a trend to submit it to judicial scrutiny and to limit it to serious grounds. However, in Mexico and some other countries "ingratitude" of the child is still a ground which may justify revocation by the adoptive parents. See Annex C.

¹⁷⁴ See D. Oportti Badán, *op. cit.* (supra footnote 171), p. 37.

¹⁷⁵ Krause, *op. cit.* (supra footnote 46), pp. 6-188.

¹⁷⁶ *Ibid.*

¹⁷⁷ See K.J. Thompson and J.H. Hollinger, "Contested Adoptions: Strategy of the Case", Ch. 8 in J.H. Hollinger, *op. cit.* (supra footnote 50), pp. 8-37. "Nationally, about 13 percent of adopted children were returned to state officials last year, according to David S. Liederman, executive director of the Child Welfare League of America in Washington", see "When Adoption is Take-and-Give-Back", *Herald Tribune*, 23 April 1990, p. 1 and p. 6.

6 Growing international context of internal adoption law

114 It is worth remembering in concluding these comparisons of internal substantive provisions of adoption law, that in a substantial number of countries, both countries of origin and receiving countries of children (aside from step-parent adoptions) purely domestic adoptions are few in number and international adoptions constitute the rule. Since there is a trend, on the other hand, to exert control over international adoptions through domestic laws, including those substantive provisions on adoption, the latter will often be applied in international situations for which they were not specifically written. This may sometimes be a cause of friction in international situations.¹⁷⁸

C Private international law¹⁷⁹

115 The growing internationalization of adoption is reflected in an increased interest by legislators for the private international law of adoption. Apart from reforms in the context of new general codifications of private international law which have been made in the Federal Republic of Germany, Switzerland, Turkey, Yugoslavia, and Japan among others, Belgium, Chile, Colombia, Finland, Italy, Sweden and Norway provide examples of countries which during the past decade have introduced new provisions on jurisdiction, applicable law and recognition of foreign adoption decrees, in response to the increased number of intercountry adoptions. These reforms have only partially been inspired by the two main conventions on the private international law of adoption - the 1965 Hague Adoption Convention and the Inter-American Adoption Convention of 1984 - whose solutions, moreover, take different directions (see *infra* Nos 157-163). We will focus on the principal choices which legislators have faced and on some of the main problems which arise in private international law. These choices and problems relate on the one hand to the creation of the adoptive relationship by domestic courts or administrative authorities (1), on the other hand to the recognition of foreign adoptions (2).¹⁸⁰

¹⁷⁸ A recent example is the judgment of the *Hoge Raad* of the Netherlands of 10 November 1989 *Rechtspraak van de Week* 1989 No 244, concerning the adoption in the Netherlands of children who had already been adopted in Sri Lanka (full adoption) by a Dutch couple. The *Hoge Raad* disapproved the reasoning of the lower court which had interpreted the Dutch provisions relating to the conditions for adoption in a flexible way in order to make the Dutch adoption possible. No reference was made to the international context of the problem. Cf. on the other hand, *Rechtbank 's-Gravenhage*, 22 February 1989, *Tijdschrift voor Familie- en Jeugdrecht* 1990, p. 61, where the adoption of children from Sri Lanka was granted despite the fact that the age difference requirement of Dutch law was not respected.

¹⁷⁹ See, generally, J.M. Bischoff and A. Rieg (eds.), *loc. cit.* (supra footnote 150); A. Davi, *L'adozione nel diritto internazionale privato*, Milano 1981; I. Delupis, *International Adoptions and the Conflict of Laws*, Stockholm, 1976; R. de Nova, "Adoption in Comparative Private International Law" in 104 *Recueil des cours* 1961-III, pp. 75-158; D. Oportti Badán, "L'adoption internationale" in 180 *Recueil des cours*, 1985-II, pp. 299-411.

¹⁸⁰ See J.M. Bischoff, "Introduction comparative", in J.M. Bischoff and A. Rieg (eds.), *loc. cit.* (supra footnote 150), pp. 703-713.

1 Creation of the adoptive relationship

a Introduction

116 A general distinction may be made between two approaches: some systems tend to see adoption primarily in terms of the relationships it creates and the question then is what law governs its conditions and effects. These systems focus on the question of applicable law and the problem of the jurisdiction of authorities remains of a subsidiary character. This approach might be called the conflicts approach. Examples of this group of systems include France, the Federal Republic of Germany, most Latin American countries and Japan.

Other systems, in contrast, see adoption primarily as a decision of the courts (or administrative authorities) who create a new status by virtue of the power conferred upon them by their own law, the *lex fori*. Here the question of international jurisdiction is of primary importance, the applicable law being in principle the authorities' own law. This might be called the jurisdictional approach. Systems belonging to the common law or which have been influenced by it such as the United Kingdom, Ireland, Australia, India, Sri Lanka, Israel, Cyprus, Canada, the United States as well as some other countries like Switzerland, and more recently Italy, belong to this group.

Bearing this methodological distinction in mind, it would nevertheless seem possible for comparative purposes to start with the question of international jurisdiction and then to pass on to that of the applicable law. The justification for this is that even in the systems following the conflicts approach, the role of the courts in creating the adoption relationship is of growing importance.

b International jurisdiction

117 Usual criteria for international jurisdiction in matters of adoption are: the domicile or habitual residence in the forum of the adopters, the domicile or habitual residence in the forum of the child, the nationality of the forum of the adopters and the nationality of the forum of the child. Many systems provide for several of these criteria. Too broad grounds for jurisdiction may be tempered by the doctrine of *forum non conveniens*; too narrow grounds by exceptions giving broader powers to the courts. More rare are systems which do not provide for fixed criteria but use a more flexible ground such as sufficient connection with the legal sphere of the jurisdiction concerned.¹⁸¹

118 The United Kingdom provides an example where international jurisdiction is exclusively based on the domicile of the adopters. Since domicile is here to be understood in the traditional common law sense, this may mean that applicants domiciled in England or Scotland are actually living abroad. These extensive powers of the court are tempered by the

requirement of the English Adoption Act 1976 and the Adoption (Scotland) Act 1978 that the prospective adopters have a "home" with the child and that they spend at least some period before the adoption with the child in that home so as to enable the local authority to see them together and to report to the court.¹⁸² The result may then come close to the position in Australia where the common law rules relating to jurisdiction were expressly excluded and in addition to residence or domicile of the applicants in the forum, the child must be present there.¹⁸³ "Domicile" of the adopters is also a ground for international jurisdiction in Sweden and Switzerland but there it really means habitual residence, which is also found in Article 3, paragraph 1(a), of the 1965 Hague Adoption Convention. Both the Swedish¹⁸⁴ and the Swiss laws recognize a certain role for the national law of the adopters, but in the latter case with an interesting limitation, i.e. that the Swiss authorities have jurisdiction only "if it is impossible or highly impracticable to have an adoption granted at the domicile [of the Swiss adopter]".¹⁸⁵ In the Swedish and Swiss examples, the residence or nationality of the child is not an autonomous criterion for jurisdiction. In most other systems, it would seem, the child's residence in the forum or the fact that a child has the nationality of the forum is a ground on the same footing as the residence or nationality of the adopters (Federal Republic of Germany)¹⁸⁶ or at least of a subsidiary character (France).¹⁸⁷ In still other countries, the domicile or residence of the child may even take prominence, as is illustrated by the Inter-American Adoption Convention, Article 15 of which provides that "the authorities of the State of the habitual residence of the adoptee shall be competent to grant the adoptions referred to in this Convention".

119 Rather than describing these various jurisdictional grounds in detail, it would seem to be more useful for the purposes of this Report to stress that as some of the above examples illustrate, there is a growing trend among legislators to let substantive considerations relating to the welfare of the child influence their selection of the appropriate grounds for international jurisdiction. The difficulty in the intercountry adoption context is that the perception of what the welfare of the child

¹⁸² See P.R. Beaumont, *International Adoption*, paper presented to the XIIIth International Congress of Comparative Law, Montreal 1990, pp. 8-9.

¹⁸³ See P.E. Nygh, *Conflict of Laws in Australia*, (Sydney etc, 1984), p. 382.

¹⁸⁴ See M. Jänterä-Jareborg, *The Procedural and Material Conditions for Intercountry Adoption in Sweden*, paper presented to the XIIIth International Congress of Comparative Law, Montreal 1990, p. 3...

¹⁸⁵ This ground may be used, for example, in a case where the prospective adopters live in an Islamic country whose laws do not provide for adoption or in a country whose law only provides for simple adoption or even where the adoption procedure is very complicated. See A. Bucher, *L'adoption internationale en Suisse*, paper presented to the XIIIth International Congress of Comparative Law, Montreal 1990, pp. 4-5.

¹⁸⁶ Article 43 b FGG.

¹⁸⁷ Article 1166, *Code de procédure civile*.

¹⁸¹ See D. Kokkini-Iatridou, *L'adoption en droit international privé néerlandais*, paper presented to the XIIIth International Congress of Comparative Law, Montreal 1990, pp. 13-16.

requires in this respect may differ between countries from which many children are placed abroad for adoption and receiving countries. In fact, both may tend to favour jurisdiction of their own courts because this will allow those courts to be better informed about, and to exert control over the prospective adoptive family. The problem is compounded by the fact that the legal systems of several countries, receiving countries in particular, are restrictive in respect of recognition of foreign adoption orders and/or pursue restrictive immigration policies, one result of which is the now common phenomenon of second adoptions in many receiving countries.

120 One of the challenges of the new convention will be to acknowledge this common concern, the welfare of the child as a factor of eminent importance for the determining jurisdiction in matters of international adoption, and to reconcile the different ways in which this notion is perceived by countries of origin and receiving countries. See *infra* Chapter VI, in particular No 179.

c Applicable law

121 It is here that the "conflicts approach" and the "jurisdictional approach" may lead to significantly different results. Whereas in the former approach the personal law of the adopters and/or the child are of primary importance, in the jurisdictional approach, even in an international case, the courts will apply their own law, the *lex fori*. Yet, there would seem to be growing agreement worldwide that whatever choice of law system is preferred, the welfare of the child should be of paramount importance and should temper a mechanical application of conflict rules.

(i) Jurisdictional approach

122 The jurisdictional approach, leading to the application by the courts of their own laws, has the double advantage of simplicity and of producing a result which will generally correspond with the social environment of the future adoptive family. In the United States the Restatement, Conflict of Laws Second provides "a court applies its own law in determining whether to grant an adoption". Yet as the comment observes, "[t]his rule is mitigated by the fact that under the local law of at least the great majority of States the welfare of the child is the most important factor that a court should consider in determining whether to grant an adoption".¹⁸⁸ With the welfare of the child in view some courts in the United Kingdom, which also in principle follow the jurisdictional approach, have taken the view that "'welfare' does not mean simply physical or moral well-being but benefit in the widest sense which must include consideration of the effect the order, if made, will have on the infant's status".¹⁸⁹ In order to avoid limping adoptions, these courts have taken into account as a factual element the personal law of the child because they felt that "the court should consider

whether its order will be recognized elsewhere unless the case is one in which it is clearly for the welfare of the infant that an order should be made irrespective of its consequences elsewhere". The Swedish Act on International Legal Relations Concerning Adoption of 1971 law carries this idea a step further.¹⁹⁰

Such provisions may, of course, be useful in the case where the adoptive family lives outside the forum but also where that family maintains close links with a foreign country or intends to move there. One source of limping adoptions may be that the foreign country does not provide for adoption at all or does not provide for the type of adoption in question. Another is that the conditions for adoption, in particular the eligibility of the child or the consent by the child or his or her family required under the foreign law may differ from those of the *lex fori*. As to the latter aspect, taking the child's personal law concerning the question of consent into consideration if only as a factual factor, may not only contribute to reducing problems of non-recognition, it may also help to avoid the adoption being contested, for example by the child's relatives.¹⁹¹ Cf. *infra* No 124.

The 1965 Hague Adoption Convention which is in principle likewise based on the jurisdictional approach, goes a step further and provides (Article 5) that the authorities having jurisdiction under the Convention "shall apply the national law of the child relating to consents and consultations with respect to the child and his or her family".

In the systems following the jurisdictional approach the *lex fori* will not only govern the conditions for the adoption but also its effects, with the exception of questions relating to inheritance which are generally governed by the law designated by the conflict rules concerning succession to the estates of deceased persons.

(ii) Conflicts approach

123 Systems following the conflicts approach distinguish between the conditions for and the effects of adoption. As far as the conditions for adoption are concerned, no problem arises where both the adopters and the adoptee have the same foreign personal law, be that the law of the domicile or the national law. In intercountry situations, however, this will generally not be the case and this means that difficult choices must be made. French law, for example, has hesitated a long time between at least

¹⁹⁰ According to Section 2 of this Act: "An application concerning adoption shall be considered in accordance with Swedish Law. If the application concerns a child under the age of eighteen years, regard shall be paid in particular to whether the applicant or the child has a connection with a foreign state as a result of citizenship or domicile or otherwise and it would involve considerable inconvenience for the child if the adoption were not to be valid there." Cf. also Article 77 of the new Swiss Code for Private International Law, which however only takes into account the law of the adopters' domicile or nationality.

¹⁹¹ See, for example, United States Court of Appeals, Sixth Circuit, 20 October 1978 (*Huynh Thi Anh v. Levi*, 586 F.2d, 625 (1978)). In this case concerning "operation baby lift", the grandfather and uncle of four Vietnamese children contested the rights of their American foster parents to adopt those children bringing "strong evidence that some of Viet Nam adopted a law in 1972 which gives relatives, including grandparents, much broader parental rights in children than under the law of the United States", (*ibid.* pp. 630-631). The claim was dismissed however on jurisdictional grounds.

¹⁸⁸ Restatement of the Law Second, Conflict of Laws Second, Vol. 2, (1971), § 289.

¹⁸⁹ In *Re B(S) (An Infant)* [1968], Ch. 204 at p. 211.

four possibilities: application of the national law of the adopters (with further nuances where the adopters are of different nationality), the national law of the adoptee, distributive application of these two laws according to whether a condition concerns the adopter or the adoptee, or cumulative application of both laws.¹⁹² An important judgment of the *Cour de cassation* of 1984 decided in favour of the national law of the adopter (the case concerned adoption by a single person) to govern both the conditions and the effects of the adoption, with the exception of the conditions relating to consent and representation of the adoptee.¹⁹³ French legal doctrine has inferred from this judgment that where a couple adopts, the adoption will, with the exception noted, be governed by the law governing the effects of the marriage, i.e. the common national law of the adopters or, in the absence of a common nationality, the law of their common domicile.¹⁹⁴

A similar approach may be found in the new German Code on private international law: the adoption is governed by the national law of the adopter or, in the case of an adopting couple, the law governing the effects of their marriage with the exception of matters relating to consent of a child or his or her relatives, which are in principle governed by the national law of the child.¹⁹⁵ Cf. also the new Japanese Code on private international law¹⁹⁶ and the new Belgian conflict rules for the adoption of minors under 15 years of age in the case of simple adoption.¹⁹⁷

The Inter-American Adoption Convention has opted for a distributive system, see Articles 3 and 4.¹⁹⁸

In other systems the law relating to the consent of the child may be taken into account cumulatively with the law of the adopters; this is the case in Austria¹⁹⁹ and Portugal,²⁰⁰ for example.

¹⁹² See, for example, P. Bourel, *Jurisclasser de droit international*, fasc. 548-B V* Adoption.

¹⁹³ Cass. civ. 1ère 17 November 1984, affaire Torlet, *Revue critique de droit international privé*, 1985, 533, note Simon-Depitre.

¹⁹⁴ See H. Gaudemet-Tallon, *L'adoption internationale*, paper presented to the XIIIth International Congress of Comparative Law, Montreal, 1990, p. 27.

¹⁹⁵ Article 23.

¹⁹⁶ Article 20.

¹⁹⁷ Article 344(3) *Code civil* see J. Erauw and F. Sarre, "The new regime governing international adoptions in Belgium" in 35 *Netherlands International Law Review* (1988), pp. 117-134.

¹⁹⁸ See D. Opertti Badán, *op. cit.* (*supra* footnote 171), pp. 24-28.

¹⁹⁹ Article 26 Code on private international law.

²⁰⁰ Article 60(4) Civil Code. See R.M. Moura Ramos, *Droit international privé, l'adoption internationale*, paper presented to the XIIIth International Congress of Comparative Law, Montreal 1990, p. 15.

124 Despite the variety of approaches, it would seem therefore that there is growing agreement that whatever law should be applied to the other conditions for adoption, the personal law of the child should apply alone or cumulatively with the former law to matters of consent of the child or of his or her relatives. However, there remain several problems:

- The personal law of the adopter may prohibit adoption or may not provide for adoption (Islamic systems). In such a case, both the German and Belgian conflict rules provide that the *lex fori* may replace the otherwise applicable law. The inconvenience is of course that this may lead to limping adoptions and this is why in France legal doctrine is divided, some advocating and some opposing application of French law in such a case.²⁰¹
- The child's nationality and the child's habitual residence, before placement for adoption abroad, may not coincide. This may be the case for example with refugee children (*cf. supra* No 60). Some authors have suggested that in such a case the law of the habitual residence should apply.²⁰² This result would correspond with the rule of Article 3 of the Inter-American Adoption Convention.
- Consent may have been given in the country of origin with a view to the establishment of one type of adoption, for example simple adoption, whereas in the receiving country an application is made for another type of adoption, for example full adoption. That can easily happen when the biological parents or guardians live in a developing country where full adoption is not known or not widely practiced, *cf. supra* Nos 29 and 48. May the consent be interpreted in such a case as extending to that other type of adoption? Contrary to previous case law, the French *Cour de cassation* in the Torlet judgment of 1984²⁰³ gave an affirmative answer to this question and pronounced a substantive rule to the effect that where the consent given for the adoption of a foreign child does not specify for which type of adoption it has been given, this consent suffices for both types of adoption (simple and full adoption) known in French law. This rule has been widely criticized, however, because it is one thing to consent to a form of adoption where the legal ties of the biological family remain intact, and quite another to consent to full adoption where those ties are cut off.²⁰⁴

125 The trend in systems following the conflicts approach is to submit the effects of the adoption to the same law as that governing its conditions, i.e. in most cases the personal law of the adopters. The

²⁰¹ See, for example, Conseil Supérieur de l'Adoption, *L'adoption d'enfants étrangers, examen des questions*, 1989, pp. 23-24.

²⁰² See Conseil d'Etat (France), *Rapport sur l'adoption d'enfants étrangers*, établi par H. Muir-Watt-Bourel, (1989), p. 11.

²⁰³ *Supra* footnote 193.

²⁰⁴ See, for example, E. Poisson-Drocourt, "L'adoption internationale", *Revue critique de droit international privé* (1987), pp. 673-710 (at pp. 689-690).

advantages are obvious: first of all there is a close link between the conditions and the effects of the adoption and, secondly, since the child will live with the adopters, it is desirable that the law governing the personal status of the adopters also applies to their relations with the child. As a result, the personal law of the adopters will determine the type of adoption, whether it is revocable or irrevocable and the question of parental authority.²⁰⁵ The same law may govern the matter of the name of the child, but that may also be governed by a separate conflict rule.²⁰⁶ Separate conflict rules may also apply to questions relating to maintenance obligations and succession to the estates of deceased persons.

126 A major contribution by a new convention on legal co-operation in respect of intercountry adoption could be that it would short cut various complex problems of private international law - in particular the question of consent - by providing substantive rules which would, for example, provide that the authorities of the country of origin of the child bear final responsibility for ensuring that all necessary consents and consultations required under the local law are in order before authorization is given for the child to leave the country (*cf. infra* Chapter VI, especially No 180).

2 Recognition of foreign adoptions

127 The recognition or non-recognition of foreign adoptions is a question of great practical importance in intercountry adoption in particular because several countries from which many adoptive children come require that the child be adopted in the country of origin either before the child leaves the country or some time thereafter (see further *infra* Nos 135 and 135A). The field of recognition is characterized by a considerable lack of uniformity. The great variety of solutions to the problem of recognition have their roots partly in policy considerations, partly in difficulties and uncertainties of a technical character. The core problem is the recognition of a foreign adoption order by persons who are nationals of or domiciled or habitually resident in the country where recognition is sought. All systems agree that (the recognition of) the foreign adoption must not be contrary to public policy (*ordre public*). Beyond that, they vary considerably both as to the degree of liberalism of their recognition policy and as to the criteria for recognition.

128 One of the most restrictive systems is that under the Italian Adoption Act of 1983. A foreign adoption order obtained by Italian adopters has no effect in Italy, unless (1) the adopters have previously obtained a declaration of suitability, (2) the adoption is in conformity with the law of the State of origin, and (3) it is not contrary to the fundamental principles of Italian law concerning family and children's law.

Even so, the adoption must have been preceded by a trial period of at least one year and if that condition has not been observed, the foreign adoption is considered simply as a pre-adoptive placement which after one year must be followed by an Italian adoption. For practical purposes this means that foreign adoptions will seldom be recognized.²⁰⁷ The position in the Netherlands is comparable with the Italian situation. The effect of a foreign adoption decree is mainly limited to recognition of the parental authority a foreign adoption has conferred upon the adopters; a second adoption according to Dutch law is necessary. Recent case law shows exceptions to this attitude,²⁰⁸ but even if this were to mark a new trend, the practice of second adoptions will continue because under the Dutch provisions concerning nationality only a Dutch adoption order will confer Dutch nationality upon the child.

The restrictive attitude of the Italian legislator is deliberate: it is an attempt to give the Italian courts full control over intercountry adoption. One might think that the position in the Netherlands is caused by the late introduction of adoption into Dutch law, but this is unlikely to be the only explanation since Portugal, where adoption was introduced later still, is less restrictive and recognizes foreign adoptions provided that the foreign court based its jurisdiction upon grounds acceptable from the Portuguese point of view and that the procedure was correct.²⁰⁹ The Spanish recognition practice is again restrictive but, it would seem, more for technical reasons.²¹⁰

129 The reform of private international law in the Federal Republic of Germany brought the introduction of a special rule for the recognition of foreign decisions which also applies to foreign adoptions provided that a "decision" by a foreign court or administrative authority has been obtained. This leaves, however, a characterization problem: what exactly is needed for a foreign adoption to qualify as a foreign decision? If there is a decision, it will be recognized provided that one of the adopters or the child had the nationality of that foreign country or had an

²⁰⁷ See G. Kojanec, "Italie", in J.M. Bischoff and A. Rieg (eds.) *op. cit.* (*supra* footnote 150), pp. 817-832. See also V. Varano, *L'adoption internationale en Italie*, paper presented to the XIIIth International Congress of Comparative Law, Montreal 1990.

²⁰⁸ See Kokkini-Iatridou *op. cit.* (*supra* footnote 181), pp. 25-30; see also Court of Appeal The Hague, 17 November 1989 (not yet published) where the court based its decision to recognize an Australian adoption in part on the right to family life guaranteed by Article 8 of the *European Convention on Human Rights* and Article 17 of the *International Convention on Civil and Political Rights*.

²⁰⁹ See R.M. Moura Ramos *op. cit.* (*supra* footnote 200), pp. 26-31.

²¹⁰ See D. Alexandre, "Espagne", and J.M. Bischoff, "Introduction", in J.M. Bischoff and A. Rieg (eds.) *op. cit.* (*supra* footnote 150), pp. 710-711 and pp. 785-798.

²⁰⁵ The latter aspect may be subject to the conflict rules of the *Hague Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors*.

²⁰⁶ *Cf. Convention sur la loi applicable aux noms et prénoms*, signed at Munich 5 September 1980 (drawn up by the International Commission on Civil Status (CIEC)).

habitual residence there.²¹¹ There is considerable uncertainty concerning the effects of a foreign adoption in the Federal Republic of Germany, particularly in the case of simple adoptions. Many authors have advocated a special recognition procedure for foreign adoptions in Germany, but so far no such procedure has been introduced.^{211a} As a result, Germans having adopted a child abroad are usually advised to apply for a second adoption in the Federal Republic.²¹²

French private international law applies not only a jurisdictional test - a foreign court must have based its jurisdiction on a ground which is internationally acceptable from the French point of view - but it also requires that the foreign court must have applied a law compatible with the result to which application of a French choice of law rules by the French court would have led. Since French law provides for both full and simple adoption the question of substitution²¹³ is, at least theoretically, less of a problem than under German law because a foreign adoption which does not qualify as an *adoption plénière* may nevertheless, sometimes perhaps after a small adaptation, be considered as equivalent to an *adoption simple*. Nevertheless, there remain cases where the effect of a foreign adoption differs considerably from both of the two French types of adoption. In those cases a second adoption in France is again unavoidable.²¹⁴

130 The new Swiss Code on private international law provides an example of a straightforward liberal rule on recognition and an interesting solution to the question of substitution.²¹⁵

The rules for recognition of foreign adoptions in the United Kingdom are liberal and so are generally the laws of other systems belonging to the common law group such as Australia or Canada. Under the British adoption laws a foreign adoption qualifying as an "overseas" adoption will in principle be recognized and considered to be equivalent with an English or Scottish adoption. The adoption must have been effected in a place which forms part of a country designated by the law, which includes most of the

member countries of the Commonwealth (with the exceptions of India and Bangladesh), all Western European countries, Yugoslavia, Greece and the United States of America.

If a foreign adoption is not an "overseas" adoption which will be the case for example with Latin American adoptions, it can nevertheless be recognized if it complies with the common law rules on recognition.²¹⁶ The leading case here is *In re Valentine's settlement*.²¹⁷ Lord Denning, speaking for the majority, held that since adoption creates a new status and since questions affecting status are generally determined by the law of the domicile, a foreign adoption "in order to be recognized everywhere, must be validly created by the law of the domicile of the adopting parent". The majority did not without hesitation come to its conclusion because it also saw merit in the view taken by the minority which refused to deny recognition to an adoption order made by a foreign court which had applied reasonable safeguards simply because the adopter was not domiciled in the country of the adoption.

A radical proposal for facilitating the recognition of foreign adoptions was submitted in 1989 by the Swedish Commission on Guardianship. Expressly referring to the UN Declaration, the UN Convention and the Inter-American Adoption Convention, it proposed that "as a main rule decisions on adoption decreed in the child's country of domicile shall be recognized in Sweden, without any further legalization or reconsideration made [t]here. Irrespective of whether or not adoption is considered as 'strong' or 'weak' ... by the court or other competent authority in the country of domicile, it shall be regarded as full adoption in Sweden".²¹⁸

131 Reviewing the present position with respect to recognition of foreign adoptions in a number of European countries, Professor Bischoff in 1985 concluded that "one has the feeling that few countries have really found their way and that in any case the situation is not yet ripe for an attempt towards multilateral unification".²¹⁹ It is difficult not to agree with the first part of this conclusion, but perhaps an effort could be made to improve the present highly confused situation in the framework of a new convention on intercountry adoption. Indeed, such a convention would help to create an atmosphere of mutual trust which should facilitate reaching agreement on some minimum rules on a reciprocal basis for recognition of foreign adoptions.

First of all, as to the criteria for recognition it would seem that there is growing agreement to apply a jurisdictional rather than a choice of law

²¹¹ See E. Jayme, *International Adoption in German Law*, report presented to the XIIIth International Congress of Comparative Law, Montreal 1990, pp. 23-24.

^{211a} See in particular K. Schurig, "Für ein Verfahren zur Anerkennung ausländischer Adoptionen", *Ehe und Familie, Zeitschrift für das gesamte Familienrecht* 1973, pp. 178 et seq.

²¹² See, generally, E.-M. Hohnerlein, *Internationale Adoption und Kindeswohl*, thesis, Munich, 1988.

²¹³ See I. Delupis, *op. cit.* (*supra* footnote 179), pp. 75-79.

²¹⁴ See E. Poisson-Drocourt, *loc. cit.* (*supra* footnote 204), p. 697.

²¹⁵ Article 78 provides:

"1 Foreign adoptions are recognized in Switzerland if they were granted in the country of the adopting person's or adopting spouses' domicile or citizenship.

2 Foreign adoptions or similar measures that have effects substantially different from a parent-child relationship under Swiss law are recognized in Switzerland only with the effects given to them in the country in which they were granted."

²¹⁶ For the UK, see Dicey and Morris, *The Conflict of Laws*, 11th Ed., Vol. 2, pp. 871-881 (see also pp. 884-889 for "Adoptions under the [1965] Hague [Adoption] Convention" which are of little practical significance, see *infra* Nos 157-161); for Australia, see P.E. Nygh *op. cit.* (*supra* footnote 183), pp. 384-390; for Canada, J. McLeod, *The Conflict of Laws*, (Calgary, 1983), pp. 751-756.

²¹⁷ [1965] Ch. 831 (C.A.).

²¹⁸ See Justitiedepartementet, *Adoptionsfrågor*, (Stockholm, 1989), English summary, p. 280.

²¹⁹ See J.M. Bischoff and A. Rieg (eds.) *op. cit.* (*supra* footnote 150) at p. 713.

test to the recognition of foreign adoptions. If this test could be applied not only when the foreign adoption is exclusively granted by a court or administrative authority (the hypothesis covered by both the 1965 Hague Adoption Convention and, it would seem, the Inter-American Convention) but also in the case where a contractual adoption is approved by a court, such a rule would cover the great majority of recognition problems. Next comes the question of what connection the adoption should have to the state of the foreign court or authority in order to qualify for recognition. It would seem that at least the four following criteria in principle provide an internationally acceptable link: (1) the nationality of the adopters; (2) the habitual residence of the adopters; (3) the nationality of the child; and (4) the habitual residence of the child. Then comes the question of the effects. Would it not be possible to agree that a foreign adoption, provided it has been established in a regular way, would have at least the effects which it has under the law under which it was created?²²⁰ In practice this would mean that in most cases adoptive parents would be deemed to have acquired at least parental authority over the child and have a maintenance obligation towards the child. Finally, it would be very helpful if a judicial or administrative procedure were to be established in the participating countries which would enable the parties, in case of doubt, easily to obtain a declaratory judgment to the effect that the foreign adoption is (or is not) recognized and concerning its effects.

D *Special provisions, immigration laws, nationality laws*

1 *Special mandatory provisions for intercountry adoption*

132 An increasing number of countries, both countries of origin and receiving countries of children, have taken special legal action in an attempt to exert supervision over intercountry adoption, on the one hand in order to improve the chances of success of such adoption and on the other hand in order to combat abuses. Such mandatory provisions generally are intended to override conflicting rules of private international law. We will first examine some of the measures taken by countries from which mainly children come and next those taken by receiving countries.

a *Countries of origin*

133 Broadly speaking, two methods are used. One is that special permission is required for a child to leave the country, following which the child is adopted in the receiving country. According to the other method, a child must be adopted in the country of origin as a prerequisite for his or her leaving the country.

²²⁰ This would imply, for example, that the "exception of the unknown institution may not be invoked" (Article 5 of the Inter-American Adoption Convention). Cf. Tribunal fédéral (Switzerland) 14 April 1987, *Annuaire suisse de droit international* 1988, pp. 463-468 rejecting the claim that a foreign simple adoption should not be recognized in Switzerland as being incompatible with public policy.

(i) *The adoption takes place in the receiving country*

134 This group includes a number of Asian countries: India, Korea, Nepal, the Philippines, Thailand, and, recently, also one Latin American country, Chile. These systems have in common that no adoption order is made but instead that a special leave is required from a government ministry or office (Korea, Nepal, the Philippines, Thailand) or from a juvenile court (India, Chile). Although no adoption order is made, the procedure may come very close to that leading to an adoption, with conditions being set for the child, for the prospective adopters (Thailand for example accepts only married applicants who in addition may not have more than two children of their own), for matching them, etc.²²¹ The permission to place the child abroad may be in principle unconditional (for example Korea, Chile)²²² or conditional upon successful completion of a probationary period (the Philippines, Thailand). According to the Philippine Rules and Regulations,²²³ the "custody and responsibility of the child shall be deemed transferred to the state welfare agency" in the receiving country which, in case the placement of the child is terminated during the probationary period, is under a duty to find another placement within three months, failing which it must send the child back to the Philippines.

India is a case apart. Under the Guardians and Wards Act 1890, the prospective parents may be appointed guardians of the child but the Act does not give any details concerning a procedure for adoption abroad. It is here that the Supreme Court of India in *Laxmi Kant Pandey v. Union of India*²²⁴ provided the necessary guidance.

India, the Philippines and Thailand all require that, until the adoption order is made in the receiving country, reports are sent to their authorities concerning the development of the child during the probationary period which they also require. Generally the foreign adoption order which is given after the probationary period in the receiving country must be notified to the authorities of origin and is registered there.

(ii) *The adoption takes place in the country of origin*

135 This system prevails in Latin America, Africa, several Asian countries, such as Sri Lanka and Viet Nam and in several Eastern European

²²¹ Such procedures are found in Korea in the special Adoption Law 1976 with its implementing regulations; in Nepal in a more summary form in the Adoption Law (*Mulki Ain*); in the Philippines in the *Rules and Regulations on Foreign Adoption* promulgated pursuant to the *Child and Youth Welfare Code* 1975; in Thailand, in the Ministerial Regulations of 1980 pursuant to Section 18 of the *Child Adoption Act* 1979 and in Chile in the new *Adoption Act* of 1988.

²²² However, the Chilean consuls in the receiving country are under instructions to see to it that the child is adopted there in accordance with the local laws (*Adoption Act* 1988, Article 46).

²²³ S.8(b).

²²⁴ *Supra* footnote 79.

countries such as Poland, Romania and Yugoslavia. The local adoption procedure must of course be followed but, in addition, an increasing number of countries have set additional requirements for foreign adopters.

Such requirements may go so far as to make such adoptions almost impossible. This is the case, for example, with the Nicaraguan adoption law which requires prospective adopters to have obtained a permanent residence permit and, in addition, to be prepared to take residence in the country until the child reaches majority. In Indonesia prospective foreign adoptive parents must have been domiciled and worked there for a minimum of three years.

Mauritius, Romania and several states of Yugoslavia, among others, require special government permission for adoption by foreigners. Several countries (for example, Costa Rica, Honduras, Peru) require that the prospective adopters or, in the case of spouses, at least one spouse, appear in person before the court. Some countries require that, after arrival of the child in the receiving country, reports on the child's progress be submitted to the authorities in the country of origin. Examples include Ecuador where this requirement exists for a period of five years after the adoption,²²⁵ and Ethiopia which requires reports every year until the child has reached the age of 18 years.

135A Some countries in this group allow the child to leave the country before the final adoption has been granted. The usual procedure in this case is that the court in the country of origin declares that the child is orphaned or abandoned or duly relinquished by the biological parents; the authorities will then give permission for the child to leave the country, usually in the understanding that the child and the prospective adopters will first go through a probationary period in the receiving country, following which the adoption is finalized in the country of origin. The practical difficulty with this system is that it is virtually impossible for the court in the country of origin to supervise this probationary period, or to ensure that conditions relating, for example, to the required length of this period are indeed observed. This has in some cases led to frustration with these courts when they learned that an adoption was granted in the receiving country before the expiration of the probationary period as determined by them. Also, this system tends to reduce the final adoption in the country of origin to a pure formality. This is a clear case where there is a need for more international understanding and co-operation (see *infra* No 179).

(iii) Compulsory intermediary role of agencies

136 Regardless of which of the two systems illustrated above is followed, an increasing number of these countries require that prospective adopters from abroad submit their application through agencies licensed by their governments, or at least show evidence that such agencies have found them suitable as adoptive parents. Examples include Colombia, India, Korea, the

²²⁵ The adopters are also under a specific obligation to notify the authorities in Ecuador of any change in their residence during this period.

Philippines, Sri Lanka and Thailand. Even where the law does not impose such a requirement - such as in Brazil - the courts and authorities increasingly demand that the application be made through or supported by a licensed agency in the receiving country.

In addition, as we have seen *supra* Nos 66-68, several countries of origin have restricted the possibility for their nationals to give up their children for adoption privately and require the intermediary role of a government or approved social welfare agency.

b Receiving countries

137 While there is a trend in receiving countries to submit the intercountry adoption process to some sort of governmental supervision, this trend has not been manifested in all receiving countries and, moreover, their practices vary considerably both with regard to the types of control and the degree of supervision.

(i) Governmental control over agencies

138 In many receiving countries a person or entity, in order to place minors for adoption, must be licensed by the government to do so. Compulsory licensing may be general, i.e. regardless of whether the agency engages in national or international adoptions, or especially required for intercountry adoption. In the United States, for example, "every state has some procedure for the licensing of adoption agencies".²²⁶ However, "the standards which agencies must meet for licensing purposes are generally minimum standards. The minimum standards themselves differ from state to state, as do the levels of enforcement".²²⁷ In the Federal Republic of Germany also only authorized adoption agencies may place children in adoptive families.²²⁸ In the case of intercountry adoption, if an adoption order is to be made in the Federal Republic, the youth welfare authority must be consulted by the court. In Switzerland agencies active in intercountry adoption must not only comply with the general authorization required for adoption agencies but must in addition obtain a supplementary authorization which requires them to have detailed knowledge concerning the legal, cultural and social conditions of the children whom they place in adoption and to be able to counsel the prospective adopters until the

²²⁶ See J.B. Boskay, "Placing Children for Adoption", in J.H. Hollinger *op. cit.* (*supra* footnote 50), pp. 3-18.

²²⁷ See W.M. Schur, "Attorney's Role in Private Agency Adoption", in J.H. Hollinger *op. cit.* (*supra* footnote 50), pp. 7-7. In some states (for example Texas), an individual person who meets the minimum standards may be licensed to place children for adoption, in other states (for example Massachusetts), individuals may not be licensed; in some states (for example California) the law requires that agencies must be operated on a non-profit basis, in others (for example North Carolina) they may be operated by entities organized for profit.

²²⁸ *Adoptionsvermittlungsgesetz* 1976.

adoption order is made; the authorization is only valid in respect of specific countries of origin.²²⁹

It is one thing for a receiving country to set minimum standards for an adoption agency, it is quite another thing to make the intermediary role of such an agency compulsory for purposes of intercountry adoption. But so far, only a few states have done so (see *infra* No 140), and this means that in most receiving countries prospective adopters have freedom of choice between initiating independent or agency adoptions, subject to further requirements, for example special preliminary permission to be given by the government or a court. Where such preliminary permission is not required, as for example in the United States and Switzerland, the freedom of the prospective adopters is, from the perspective of the receiving country, subject only to immigration laws (see *infra* Nos 141-145).

(ii) Special authorization

139 Several receiving countries require prospective adopters to obtain a preliminary authorization either for adoption in general (both nationally and internationally) or specially with a view to intercountry adoption. France provides an example of the first variant. Whether the child resides abroad or in France, a preliminary "*agrément*" is required from the *Président du Conseil général*, the responsible chief of the Department of Social Assistance to Children. The court when making an adoption order must check whether the agreement has in fact been given, but no sanction is provided and lack of permission is not a sufficient ground for refusal of the adoption order. The Swedish law is more severe: whereas all adoptions require the preliminary consent of the social welfare committee in the place of residence of the prospective adoptive parents, "in the case of a foreign child being received with a view to adoption, consent shall be obtained before the child leaves its native country. This consent shall lapse if the child has not been received into the home within a year of consent being given".²³⁰ Before the consent is given, the social welfare committee will make a careful home study; in addition, consent can be granted only if the form of mediation which the applicants plan to use is reliable.²³¹ Last year a special Act concerning the placement of foreign foster children with a view to adoption entered into force in the

²²⁹ See *Ordonnance réglant le placement d'enfants* of 19 October 1977, modified 21 December 1988, Article 6.

²³⁰ *Social Services Act*, Section 25, paragraph 2.

²³¹ *Idem*, Section 25, paragraph 3. "The underlying purpose of the act was to improve public control over intercountry adoptions. Before the act entered into force, approximately half the children arrived through private contacts. In 1984, a provision was added obligating the social welfare committee to obtain a statement from NIA on the reliability of the form of mediation, when private contacts are used. This reform brought down the number of private adoptions from 70% in 1984 to 10% in 1986". "In the last years, the number has again been rising much due to long waiting periods in the authorized adoption organizations", M. Jänterä-Jareborg *op. cit.* (*supra* footnote 184), pp. 3 and 4.

Netherlands.²³² This Act confirmed an earlier practice according to which the placement of a foreign foster child in the Netherlands is permitted only subject to written permission by the Minister of Justice, valid for three years. The Act also introduced a licensing system for mediation in the placement for adoption of foreign children and made it compulsory for prospective adoptive parents to attend a special course on adoption of foreign children (*cf. supra* No 74).²³³

We have already seen (*supra* No 128) that in Italy a preliminary consent by the court is required in all intercountry adoption cases.

(iii) Prohibition of independent adoptions

140 Despite a trend towards agency adoptions, only few receiving countries have completely outlawed independent adoption. Finland is an exception: under the 1985 Adoption Act all intercountry adoptions must be channelled through agencies which have been authorized by the National Board of Social Welfare. It is the agency which sends the application and the permission which parents must obtain to its counterpart in a country of origin (which also must have been approved by the Finnish authorities).²³⁴

c An emerging pattern: agency to agency adoptions

141 The examples given above illustrate a clear trend towards channelling intercountry adoptions through state licensed agencies both in the country of origin and in the receiving country: agency to agency adoptions. The trend is reinforced by the practice of many *bona fide* agencies which prefer to deal with an authorized reliable contact abroad rather than with private individuals or non-licensed entities, but also increasingly by governments. In effect, agency to agency adoptions can be mutually beneficial to both countries involved in several respects. First of all they facilitate supervision by the courts or administrative authorities in either country which have to examine the suitability of the prospective adopters and the eligibility of the child. Secondly they help provide continuity in the care of the child during the entire process culminating in the definitive placement with the adoptive family in the receiving country and, thirdly, their intervention is a major help in reducing trafficking in children. As we shall see in more detail, *infra* Nos 164-165, this pattern has been

²³² *Placement of Foreign Foster Children Act* 1988.

²³³ In addition, the Act sets a maximum age of 41 years for the adopters (exceptionally one of the adopters may be 43 years old but that is an absolute maximum), a maximum age difference of 40 years and a maximum age for the child of 5 years, subject to written exception by the Minister of Justice.

²³⁴ See K. Buure-Hägglund, *International Adoption*, paper presented to the XIIIth International Congress of Comparative Law, Montreal, 1990. See also M. Savolainen, "Finland: More Rights for Children", in 25 *Journal of Family Law* (1986), pp. 113-126.

further developed in a number of bilateral arrangements between countries of origin and receiving countries.

2 Immigration laws

141A Not only do the special mandatory provisions referred to in the previous paragraph interfere with traditional private international law rules, so do also immigration laws in receiving countries. An extensive discussion of these laws is, of course, beyond the scope of this paper, and only a few illustrations can be given. In some receiving countries immigration laws dominate the intercountry adoption process, in others they play a more subdued role.

142 The United States offers an example of the first kind. Only if federal immigration requirements have been satisfied, and the child has obtained a passport from his or her country of origin, will the United States consulate or embassy abroad provide a visa and only then can the child enter the United States as a legal "resident alien" and be provided with the "green card". Although the federal officials have no authority to grant an adoption, they must make an administrative determination so as "to ensure that: (1) the law of the parents' state of residence and the law of the foreign country has been satisfied; (2) the parents are suitable as evidenced in particular by domestic home study and (3) the child is "an orphan" as defined by United States immigration law ...".²³⁵ "In making such determinations, federal officials duplicate determinations that later must be made by a state court in the adoption proceeding, but the only necessary consequence of a favourable decision by federal immigration officials is that the child is eligible to immigrate to the United States."²³⁶ This entry-based system gives the United States immigration authorities a key role in the intercountry adoption process. United States embassies and consulates abroad play an active part in this process and in particular exercise some control over the relinquishment abroad of children destined for adoption in the United States. This has helped in some cases where local control over child trafficking was insufficient to prevent a child from being placed in the United States for adoption contrary to the wish of the child's parents.

143 France, the Federal Republic of Germany and Switzerland are examples of countries where immigration control would seem to be less prominent in intercountry adoption. Children up to the age of 16 can enter the Federal Republic of Germany without a visa and in France a visa is required but

²³⁵ See E. Bartholet, "International Adoption: Overview", in J.H. Hollinger, *op. cit.* (*supra* footnote 50), pp. 10-30.

²³⁶ See R.R. Carlson, "Transnational Adoption of Children", in 23 *Tulsa Law Journal* (1988), p. 342.

there is no specific sanction and,²³⁷ moreover, "children under 18 years of age are immune from deportation from France".²³⁸

144 With immigration laws becoming more restrictive in some countries their role tends to become of increasing significance in the context of intercountry adoption. An example is provided by the Netherlands where the recent Placement of Foreign Foster Children Act (*supra* No 139) gives clear priority to "the provisions of and pursuant to the Aliens Act concerning admission and residence".²³⁹ However, immigration law and adoption law have different objectives. Immigration laws regulate the admission of aliens from the perspective of the national interest; the laws relating to the adoption of children have the welfare of the child as their prime objective. Situations can therefore arise where, though the immigration authorities (and possibly even an administrative tribunal in appeal) reject an application for a child to remain in the country, the courts grant an adoption order or recognize a foreign order.²⁴⁰

145 A factor of growing importance, and one which contradicts the trend towards greater restrictionism in immigration control, is the increasing penetration of international law in this field and, in particular, the growing impact of human rights law. A refusal to allow entry of a child validly adopted abroad, for example, may well constitute under certain circumstances an infringement of the right to respect for family life as guaranteed by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Basing its judgment on this provision, the Supreme Court of the Netherlands recently ordered the Dutch government not to expel a Turkish child who had been validly adopted in Turkey and who had lived for some time with his adoptive parents in the Netherlands.²⁴¹

²³⁷ H. Gaudemet-Yallon, *op. cit.* (*supra* footnote 194), p. 22.

²³⁸ See R. Plender, *International Migration Law*, Second Edition (Dordrecht etc, 1988), p. 377.

²³⁹ Article 8.

²⁴⁰ As the British Court of Appeals has recently held: "Clearly, [the court] must pay great regard to the 'immigration decision' and in particular considerations of public policy and, where relevant, national security. It must be on its guard against the possibility of abuse; but the mere fact that nationality or patriality would result is not conclusive. It must treat welfare as the first consideration, outweighing any other factor but not all factors. If the court considers on the evidence and information before it that the true motive of the application is based upon the desire to achieve nationality and the right of abode rather than the general welfare of the minor, then an adoption order should not be made. If, on the other hand, part of the motive - or it may be at least as much - is to achieve real emotional or psychological, social and legal benefit ... of adoption, then an adoption order may be proper, notwithstanding that this has the effect of overriding an immigration decision or even an immigration rule. In every case it is a matter of balancing welfare against public policy, and the wider the implications of the public policy aspect, the less weight may be attached to the aspect of the welfare of the particular individual." The Court of Appeals in *Re W. (a Minor)* (Adoption non-patrial) [1986], *FAM.54*, 59 quoting from and confirming the lower courts decision. Cited in P.R. Beaumont, *op. cit.* (*supra* footnote 182), pp. 22-23, who comments "the welfare of the child will carry less weight if the child is nearly an adult. The implication is that the welfare principle is only relevant to protect the adopted person's interest while he or she is still a child".

²⁴¹ Hoge Raad, 12 December 1986, *Nederlandse Jurisprudentie* 1988, 188 (note E.A. Alkema).

The UN Declaration in general terms requires that in intercountry adoption "it must also be established that the child will be able to migrate and to join the prospective adoptive parents ..." (Article 22). Obviously this provision is addressed both to the country of origin and to the receiving country.

3 Nationality laws

146 A question of great significance to the welfare of children is whether the intercountry adoption results in loss of the original nationality of the child and/or acquisition of the nationality of the receiving country. A recent comparative study of the laws of 175 countries concerning the impact of adoption on nationality concludes that it is hardly possible to note a trend towards greater uniformity in this field.²⁴² Few countries have expressly regulated the question of loss of nationality as a result of adoption by a foreigner. In the absence of an express rule, the conclusion must be that no loss of nationality occurs.²⁴³ Some countries have a procedure for dismissal of nationality (for example Greece). A number of states provide that adoption abroad automatically leads to loss of nationality (for example Korea).

147 In contrast to the question of loss of nationality, acquisition of nationality is dealt with expressly in most systems. In the few cases where the law is silent (for example Israel, Austria) one must conclude that adoption does not have the effect of conferring nationality upon the child.²⁴⁴ The majority of countries exclude such effect expressly or by implication, the trend is, however, towards providing for at least some effect. This may range from a facilitated naturalization procedure (for example the United States) to optional acquisition of nationality (for example France in the case of simple adoption) and automatic acquisition of nationality. The latter mechanism, which gives the strongest nationality effect to adoption, is of growing significance and has been introduced in most of Europe and Africa but is more rare in Asia and America. Some systems extend the effect of automatic acquisition of nationality to the recognition of an adoption of a child by their nationals completed abroad.²⁴⁵

148 Automatic acquisition of nationality as a result of adoption has been criticized because it means that the decision is left in the hands of the courts (or administrative authorities) who pronounce the adoption and not in those of the authorities responsible for the acquisition of nationality. On the other hand in most countries nationality is still of such importance in terms of the benefits attached to it by the law, that not giving the child the right to acquire nationality would contradict the very idea of

²⁴² See H. Hecker, "Einfluss der Adoption auf die Staatsangehörigkeit", in 6 *Das Ständesamt* (1985), pp. 153-163.

²⁴³ *Ibid.* p. 160.

²⁴⁴ *Ibid.* p. 154.

²⁴⁵ For example, France, see E. Poisson-Drocourt *loc. cit.* (*supra* footnote 204), pp. 701-703.

(at least: full) adoption. This is probably the reason why most States Parties to the European Convention went beyond the obligation laid down in Article 11 of that Convention which only requires a facilitated naturalization process, and have provided for automatic acquisition of nationality.

149 In addition to the European Adoption Convention one other multilateral convention includes a rule on the effect of adoption on nationality: Article 17 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws, signed at The Hague 12 April 1930²⁴⁶ provides:

"If the law of a State recognises that its nationality may be lost as the result of adoption, this loss shall be conditional upon the acquisition by the person adopted of the nationality of the person by whom he is adopted, under the law of the State of which the latter is a national relating to the effect of adoption upon nationality."

The UN Declaration in Article 8 provides:

"The child should at all times have ... a nationality ... The child should not, as a result of foster placement, adoption or any alternative regime, be deprived of his or her ... nationality, ... unless the child thereby acquires a new ... nationality ..."²⁴⁷

V EXISTING INTERNATIONAL LEGAL INSTRUMENTS FOR THE PROTECTION OF CHILDREN IN CONNECTION WITH INTERCOUNTRY ADOPTION

150 Two major developments characterize the development of international legal instruments dealing with adoption of children: (1) a growing influence of concern for the welfare of children in the formation of rules for international adoption and (2) an increasing significance of substantive criteria and of procedures for international co-operation among domestic courts and authorities. This development has been manifested in conventions unifying private international law (A); in conventions unifying substantive law and procedures (B) and, finally, in the recent UN Declaration on Adoption and Foster Placement and the UN Convention on the Rights of the Child (C).²⁴⁸

²⁴⁶ The following States are parties to this Convention: Australia, Belgium, Brazil, Canada, China, India (uncertain), Kiribati, Lesotho, Malta, Monaco, Netherlands, Norway, Pakistan, Poland, Sweden, Swaziland and the United Kingdom.

²⁴⁷ *Cf.* also Institute of International Law, Recommendation of 14 September 1973: "The competent authorities of each State should develop rules, procedures and practices leading to the prompt extension to an adopted minor of the nationality of his, or her, adopter or adopters." The Institute felt "that a difference in nationality between the adopted person and the adopter or adopters may be an obstacle to unity within the adoptive family", see at 55 *Annuaire de l'Institut de droit international, Session du Centenaire*, (Rome, 1973), p. 800.

²⁴⁸ For a detailed discussion see E.M. Hohnerlein *op. cit.* (*supra* footnote 212), Chs. 9-11.

A *Private international law conventions*

1 *Conventions not specifically dealing with adoption of children*

a *The early Inter-American conventions on private international law*

(i) *The Código Bustamante of 1928*

151 Although the Fourth Pan-American Congress on the Child of 1924 had already encouraged the participating States to include the child welfare principle in national adoption laws, this idea was not reflected in the *Código Bustamante*, signed on 13 February 1928 in Havana.²⁴⁹ The Convention rather utilizes traditional private international law techniques also in respect of international adoptions. In the system of the *Código Bustamante* jurisdiction is based on prorogation (Article 318 and following) and, alternatively on the applicant's domicile (Article 330). As regards the applicable law, the Convention distinguishes between the conditions and the effects of the adoption. As far as the former are concerned, it applies distributively the personal law of the adopters and that of the adoptee (Article 73); unresolved remains, however, whether the national law or the law of the domicile is meant (Article 7). As far as the effects are concerned, the personal law of the adoptive child governs the question of the child's name and rights and duties towards the original family; the personal law of the deceased applies to the effects of the adoption on inheritance. Unclear, however, remains the applicable law regime concerning the child's relationship to the adoptive family and concerning the status of the child within the adoptive family.

(ii) *The Convention of Montevideo of 1940*

152 The provisions on adoption of the *Convention on international civil law*, first signed on 19 March 1940²⁵⁰ are just as little oriented towards the welfare of the child. In comparison with the *Código Bustamante* the Convention clarifies what is meant by the personal law: this is the law of the domicile of the parties. Concerning the conditions for adoption, it substitutes a cumulative system of applicable laws for the distributive system of the *Código* which of course makes international adoption more difficult since the most severe law will prevail (Article 23). The Convention extends this cumulative system to the effects of the adoption, and this may lead to the contradictory result that - in contrast with the position in regard to the conditions - the law offering least protection prevails. Moreover, the scope of the law applicable to the effects of the adoption remains unclear.

153 It should be noted that both of these Conventions were completed at a time when in Latin America full adoption did not yet exist: the rules on adoption were written with simple adoption in mind. There is no provision

in either of these Conventions on international co-operation in matters of intercountry adoption.

b *The Nordic Convention of 1931*

154 In contrast to the Inter-American Conventions, the *Nordic Convention containing certain provisions of private international law on marriage, adoption and guardianship*, first signed in Stockholm on 6 February 1931 (as revised on 26 March 1953 in Stockholm)²⁵¹ does refer to the welfare of the child. After providing that jurisdiction in matters of international adoption rests with the authorities of the country of the domicile of the adopter (Article 11), it provides that the authorities will apply their own law; however, in the case of adoption of a child, where the child resides in one of the other Nordic States and also has the nationality of that State, the adoption will only be granted after consultation with the child welfare authorities of the national State of the child (Article 12). The Convention includes a very liberal provision on the recognition of foreign adoption decisions: decisions rendered in conformity with the provisions of the Convention in one Contracting State must be recognized in all other Contracting States, and they may not be reviewed as to their substance (Article 22). The Convention does not, however, deal with the law applicable to the effect of adoptions, nor with the recognition of the effect of a foreign adoption.

c *Bilateral conventions*

155 A network of private international law conventions exists in Eastern Europe, which provide essentially uniform provisions concerning adoption. Jurisdiction lies with the national courts of the adopters, which apply their own law.²⁵² Concerning the question of consent of the child and the child's relatives, the national law of the child is to be applied cumulatively with the *lex fori* (cf. *supra* No 123). Although these Conventions do not specifically deal with the question of the effects of the adoption, the prevailing view is that this question is also governed by the national law of the adopters. All of these Conventions generally require the consent of the child welfare organizations of the country of origin of the child and several of them expressly require the consent of the authorities of that country for intercountry adoption.

156 Some bilateral private international law conventions exist between Eastern and Western European States. These, for example, exist between France and Poland and France and Yugoslavia, which also contain provisions on adoption. In contrast to the Eastern European bilateral conventions, in the system of the French-Polish bilateral, the court of the domicile of the adopted child has jurisdiction in matters of international adoption (Article 13). In intercountry adoption situations courts must apply the national law of the child. This of course may lead to a problem if the criteria for the suitability of the adoptive parents in the other Contracting State differ from those of the law of the forum. The French-

²⁴⁹ The following States are Parties to this Convention: Bolivia, Brasília, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru and Venezuela.

²⁵⁰ The following States are Parties to this Convention: Argentina, Paraguay, Uruguay.

²⁵¹ The following States are Parties to this Convention: Denmark, Finland, Iceland, Norway and Sweden.

²⁵² See M. Sośniak, "Les Conventions conclues entre les pays socialistes sur le droit civil international et le droit international de la famille", in *Recueil des Cours*, 1975, Vol. 1, pp. 3-76.

Yugoslavian Convention opts for alternative jurisdiction of the courts of both countries (Article 15) and for distributive application of adoption laws (Article 13). However, like the Polish-French bilateral treaty, no mechanism is provided for co-operation of the social welfare agencies of the two countries involved.

2 Conventions concerning the adoption of children

a The Hague Adoption Convention of 1965

157 Completing a series of conventions on maintenance obligations towards children and the protection of children,²⁵³ the Hague Conference on private international law at its Tenth Session in October 1964 drew up the *Convention on jurisdiction, applicable law and recognition of decrees relating to adoption*.²⁵⁴ It was first signed on 15 November 1965 by the United Kingdom, ratified by Austria in 1968, by Switzerland in 1973 and finally by the United Kingdom in 1978, which brought it into force on 23 October 1978. No other State has since become a Party to, or signed, the Convention.

158 The Hague Adoption Convention was the first convention to deal specifically and exclusively with the adoption of children. Ensuring as far as possible the protection of children was one of the main purposes of the Convention. With this objective in mind, the Permanent Bureau had prepared a draft Convention with a number of procedural provisions providing for co-operation between the courts and authorities of the habitual residence of the adopters and those of the child's habitual residence and also provisions of a substantive character aiming at reinforcing the position of the child within the adoptive family. This draft was inspired by recommendations made by International Social Service (which in turn followed up on the Leysin Report²⁵⁵) and which had insisted on the need for international co-operation. However, the Special Commission which prepared the preliminary draft and the Second Commission of the Tenth Session which prepared the final text took a different approach. Faced with considerable legal difficulties resulting from the very different internal and private international laws in the Member States, they excised most of the procedural and substantive provisions from the original draft. In fact, they believed that "by establishing rules governing the jurisdiction of authorities and of the law to be applied, and by ensuring the international recognition of adoptions, the protection of the interests involved would be ensured at the same time".²⁵⁶

²⁵³ See the *Hague Conventions of 24 October 1956 on the law applicable to maintenance obligations towards children*; of 15 April 1958 concerning the recognition and enforcement of decisions concerning maintenance obligations towards children and of 5 October 1961 concerning the power of authorities and the law applicable in respect of the protection of minors.

²⁵⁴ See *Conférence de La Haye, Actes et documents de la Dixième session, 1964, Tome II*, in particular the "Rapport explicatif" drawn up by R. Maul, pp. 409-431.

²⁵⁵ *Supra* footnote 53.

²⁵⁶ *Actes et documents de la Dixième session, 1964, Tome II*, p. 410.

159 The Convention's main characteristics may be summarized as follows:

(i) Basic principles

Under the Convention only those adoptions may be granted which are in the interests of the child and follow thorough enquiries relating to the adopters, the child and his family in the countries concerned (Article 6, paragraph 1). An embryonic system of mutual assistance between authorities in various countries is laid down in Article 6, paragraphs 2 and 3, and Article 9.

(ii) Scope

The Convention only applies to adoptions of unmarried children below the age of eighteen, and not to adult or married adoptees (Article 1). It only applies to judicial decrees ordering adoption, not to purely private contractual forms of adoption, but it does not define what is meant by "adoption" for purposes of the Convention.

The Convention only applies to adopters and adoptees all of whom are connected both by nationality and habitual residence to a Contracting State. This of course considerably restricts the scope of the Convention.

The Convention does not have an exclusive character, i.e. the Contracting States may grant jurisdiction to authorities other than those specified in the Convention; those other authorities are not required to comply with the terms of the Convention, but the other Contracting States are not required to recognize adoptions granted by them (Article 2 c).

The Convention does not apply to internal adoptions (Article 2 b).

(iii) Jurisdiction

Only the authorities of the country of the habitual residence or nationality of the adopters have power to grant an adoption - not the authorities of the habitual residence or nationality of the child (Article 3).

(iv) Applicable law

Those authorities apply their own laws to the conditions for adoption (Article 4, paragraph 1, with the possibility of an exception in favour of the national law of the adopters provided for in the second paragraph of that article, *juncto* Article 13). As regards the consent and consultations other than those with respect to an adopter, his family or spouse, however, the national law of the child will be applied (Article 5). The Convention does not deal with the question of the law applicable to the effects of the adoption.

(v) Recognition

Every adoption granted by an authority having jurisdiction under the Convention shall be recognized in the other Contracting States. The Convention does not, however, specify the effects of such recognition. The

same goes for any decision annulling or revoking adoption granted by an authority having jurisdiction under Article 7 (Article 8).

(vi) *Annulment and revocation*

The Convention also defines the bases for jurisdiction of the authorities who may annul or revoke an adoption and the grounds for such annulment or revocation (Article 7).

160 With its emphasis on the welfare of the child as a leading principle which should govern the international adoption of children, the Convention reflects an idea which has only become more important over the years. Also, as we have seen *supra* Chapter IV, C, and also No 155, there is a trend in the private international law of many countries to conform to the jurisdictional approach favoured by the Convention, with its application of the *lex fori* to the conditions for the adoption, as well as to accept the application of the child's national law to the question of consent of the child and of the child's relatives. Why, then, has the Convention not been more widely ratified? Several factors may explain this lack of success. First of all, its limited scope and non-exclusive character considerably reduce the effectiveness of the Convention. Secondly, the many reservations it allows detract from the uniformity it attempts to create. Thirdly, the fact that the Convention remains silent on the effects of the adoption limits its appeal.²⁵⁷

161 Generally, the Convention in many respects goes only half way. This is also true for the provisions on international communication and co-operation among authorities and courts of Articles 5, 6 and 9 which remain impractical and embryonic. The provision of Article 5, for example, that if according to the national law of the child, that child or his biological parents must appear in person before the authority granting the adoption, "the authority shall, if the person concerned is not habitually resident in the State of that authority, proceed, where appropriate, by means of a *commission rogatoire*" may be perfectly reasonable among developed judicial systems capable of dealing with such international requests, but it makes little sense for a developing country with a judicial system which is not adapted to executing such requests. Moreover, what if the national law of the child prohibits adoption, or is silent or unclear in respect of the consent of the child or his relatives? A more fundamental problem, it would seem, is this. The Convention depends for its operation on a certain amount of confidence being given to the courts in the State of the habitual residence or nationality of the adopters because they are the courts which will grant the adoption and which will, in principle and apart from Article 5 (1), apply their own laws. This confidence may be assumed if the receiving country and the country of origin more or less know each other's (legal) cultures and if both have compatible concepts of adoption. But if one or both of these conditions are lacking, this confidence will have to be built up and additional efforts of communication and co-operation will be necessary.

²⁵⁷ For a bibliography of commentaries, see Hague Conference on private international law, *Actes et documents de la Quatorzième session*, 1980, Tome I, pp. 1-284 - 1-285; *adde* E. Scoles and P. Hay, *Conflict of Laws* (St Paul, 1984), pp. 546-549.

Obviously, similar considerations apply to the confidence which the biological family or local authorities in the country of origin need to be able to give to the adopters and to the society, far away, where the child will grow up. Even if no practical or legal obstacles stand in the way of ascertaining the child's consent or that of his or her relatives, the geographical and cultural differences deepen the need for full information on the prospective adopters.

b *The Inter-American Convention*

162 *The Inter-American Convention on conflict of laws concerning the adoption of minors* was drawn up by the Third Inter-American Specialized Conference on private international law (CIDIP-III) in La Paz and was first signed on 24 May 1984 (see Annex D). The Convention has entered into force for Colombia and Mexico. Like the Hague Adoption Convention, the welfare of the child in international adoption was the main concern of the drafters. In comparison with the Hague Convention, however, the Inter-American Convention goes further in translating this idea both in its provisions on private international law and in more elaborate substantive provisions.²⁵⁸

163 The Convention's main characteristics may be summarized as follows:

(i) *Basic principles*

The Convention shall be interpreted in favour of the validity of the adoption and the best interests of the child (Article 9). The secrecy of the adoption shall be guaranteed, but non-identifying information on the child and the biological parents shall be communicated (Article 7). A limited system of mutual information between authorities in different countries is laid down in Article 8.

(ii) *Scope*

The Convention in principle deals with full adoption (Article 1), however the States Parties may extend its application to simple adoptions (Article 2).

The Convention applies when the domicile of the adopter is in one Contracting State and the habitual residence of the adoptee in another Contracting State (Article 1). However, a Contracting State may extend its application to a situation where both adopters and adoptee have their habitual residence within its territory but the circumstances of a given case indicate that the adopters plan to establish their domicile in another Contracting State after the adoption has been granted; in other words internal cases with a potentially international character. In comparison.

²⁵⁸ See U. Calvento Solari, "Convención Interamericana sobre Conflictos de Leyes en Materia de Adopción de Menores", *Boletín del Instituto Interamericano del Niño*, No 221, 1984, pp. 101-104; D. Operetti Badán *op. cit.* (*supra* footnote 171); G. Porra-Aranguren, "Codification in America with particular reference to the Third Inter-American Specialized Conference on Private International Law (CIDIP-III) (La Paz, 1984)", in *International Law at the time of its Codification*, Essays in honour of Roberto Ago (Milano, 1987), pp. 227-247 (at pp. 241-245).

with the Hague Convention, the Inter-American Convention thus has a much wider scope and, moreover, has an exclusive character, all of which means that it has a much broader range than the former convention.

(iii) *Jurisdiction*

Contrary to the solution of the Hague Convention, it is the authorities of the State of the habitual residence of the adoptee which are competent to grant the adoption (Article 15). There is a special jurisdictional rule concerning the relations between the adoptee and the adopters (Article 17).

(iv) *Applicable law*

The distributive system of applicable laws (see Articles 3 and 4, *cf. supra* No 123) departs from the proposal of the Experts' Committee which had taken the view that the child could as well be protected through a system of permission for leaving the country and had suggested application of the law of the adopters.²⁵⁹ In comparison with the early Inter-American conventions, the La Paz Convention gives a much fuller protection as regards the effects of the adoption. The relations between adopter and adoptee, including maintenance obligations, and between the adoptee and the family of the adopters are submitted to the same law which governs the relations between the adopter and his legitimate family (Article 9). A number of substantive provisions ensure that ties between the adoptee and the family of origin shall be considered dissolved (Article 9), that the adoptee and the adopters and their family shall have the same rights of succession as those of legitimate family members (Article 11) and that adoption is irrevocable (Article 12). There is a special rule for simple adoption (Article 10) and for conversion of a simple adoption into full adoption (Article 13).

(v) *Recognition*

The Convention guarantees automatic recognition of an adoption granted in conformity with the Convention (Article 5).

(vi) *Annulment and revocation*

As noted, revocation is excluded (Article 12). Another substantive provision guarantees that annulment shall only be decreed by judicial authorities. The governing law is the law under which the adoption was granted (Article 14).

On the whole, the Inter-American Adoption Convention marks a considerable progress protecting children in the context of intercountry adoption, in particular through its substantive provisions. Yet, like in the case of the Hague Adoption Convention, its provisions on international co-operation between authorities remain embryonic and there is no supervision system concerning the activities of intermediary agencies.

²⁵⁹ This is the system of the Chilean Adoption Law of 1988.

Both the Hague Convention and the Inter-American Convention suffer from the fact that they were negotiated among a regional group only. Nevertheless, both instruments contain valuable, even though in some respects conflicting, provisions which deserve to be taken into account in the drawing up of a new instrument.

B *Conventions unifying substantive law and procedure*

1 *The European Adoption Convention*

163A The European Convention on the Adoption of Children, signed on 24 April 1967, now binds 11 out of the 23 Member States of the Council of Europe.²⁶⁰ See Annex E. The Convention provides for certain minimum rules in respect of the internal law of adoption and only exceptionally deals with international aspects. Therefore a closer examination of this convention falls outside the scope of the Report. Yet it should be noted that by contributing to uniformity of internal laws, the convention has indirectly facilitated international adoptions. Of particular importance are its procedural provisions: Article 9 on the enquiries to be made concerning the adopters, the child and the child's family; Article 17 concerning the probationary period which, however, is not mandatory (this follows from Article 2) and the obligation to provide information in international cases (Article 14). Its provision on the effect of adoption on nationality (Article 11) has already been referred to *supra* No 148.

2 *Bilateral agreements*

164 Starting in the late 1960s bilateral agreements have been concluded between (organizations of) countries of origin and receiving countries in order to improve co-operation and protection of children adopted abroad. The legal status of these arrangements varies. They may be agreements

- between governments (generally on a less than treaty basis in the form of a "working arrangement" or "memorandum of understanding") or between governmental organizations
- between governmental and non-governmental organizations, and
- between non-governmental organizations.²⁶¹

Two examples of agreements of the first type are attached to this Report, one between the Philippine Ministry of Social Services and Development and the Australian States and Territories Adoption Authorities (see Annex F) and the other between the Government of El Salvador and the Government of Canada (see Annex G). Other examples of agreements of the first or second type include an agreement between the Philippines and Sweden (1975), between the Netherlands and the Philippines (1975), between Ecuador and

²⁶⁰ Austria, Denmark, Federal Republic of Germany, Greece, Iceland, Italy, Liechtenstein, Malta, Sweden, Switzerland, United Kingdom.

²⁶¹ See Council of Europe *op. cit.* (*supra* footnote 16).

Sweden (1976), between Norway and the Philippines (1982), between the Babies Centre Metera in Greece and the Swedish National Board for intercountry adoptions (1983/1985).

In contrast to the conventions on private international law, these agreements include detailed procedures for international co-operation between authorities. They generally start with a list of substantive principles which will govern intercountry adoptions and which stress the paramountcy of the welfare and interest of the child; they contain provisions on the scope of the instrument, in particular concerning the age and categories of children to which the convention applies. All of these instruments channel intercountry adoption through a procedure for the submission of requests for adoption and for this purpose define the respective responsibilities of a competent authority in the country of origin and in the receiving country (in the arrangements concluded by Australia there are competent authorities for each Australian state and territory). Several of these agreements stress the subsidiary character of intercountry adoption;²⁶² the agreement between Greece and Sweden gives the Greek competent authority the right to give priority to "families in Sweden of Greek origin or with special Greek connections" (Article 4).

165 Underlying all of these arrangements is the idea of a three-stage process:

- The prospective adopters in the receiving country submit an application to the competent authority in their country. The competent authority is responsible for the preparation of a home study (family study) and for the assessment and approval or rejection of prospective adopters. The agreements with the Philippines provide that in respect of the applicant's age, the requirements of both laws must be applied cumulatively. The competent authority in the receiving country is also generally required to confirm that the applicants have no criminal record. Approved applications will be forwarded to the competent authority in the country of origin. The latter is under an obligation to select as adoptive parents only persons approved by the competent authority in the receiving country²⁶³ or at least notify the competent authority in the receiving country of applications not made through the agreed channels.²⁶⁴ Adoptive parents considered eligible by the competent authority in the receiving country may be disapproved by that of the country of origin, but the idea is that they come together to a decision.²⁶⁵ Just as the prime responsibility for selecting the adoptive parents lies with the competent authority in the receiving country, the competent authority in the country of origin has prime responsibility

²⁶² Cf. Article 13 of the Philippino-Australian Agreement and very clearly Article 2 of the agreements concluded between the Philippines and Norway and with Canada: "foreign adoption shall be considered only when the child cannot be adopted in the Philippines".

²⁶³ Philippino-Australian Agreement 3.3, cf. 4.5.

²⁶⁴ Swedish-Greek Agreement, Article 7.

²⁶⁵ See Article 14 of the Philippino-Australian Agreement.

for selection of the child. A specific responsibility to ensure that any child being placed for adoption is legally available for adoption is included in at least one of these agreements.²⁶⁶ The matching of the candidate for adoption and the prospective adopters is also a matter of joint responsibility.

- Next the child is transferred to the receiving country. The country of origin is generally under an obligation to facilitate the child's departure for its country (obtaining passports, etc.), and the competent authority of the receiving country to facilitate the entry of the child into this country. A probationary period is generally provided, sometimes with detailed procedures for supervision of the pre-adoptive placement, a duty for the competent authorities to mutually inform each other concerning any significant change in the health or general circumstances of the child, and a duty to consult in a case where the pre-placement is not successful.²⁶⁷

- Finally, the adoption is granted in the receiving country. An important provision in some of these agreements relates to the question of custody or guardianship over the child pending the probationary period. The Philippino Australian Agreement, in addition, requires that the competent Australian authorities will "take all reasonable steps" to obtain an adoption order once the probationary period has proved to be successful. In other arrangements (for example those between Greece and Sweden and between Ecuador and Canada) an adoption order in the country of origin is required; yet under the latter arrangement the pre-adoption placement takes place in the receiving country and, upon completion of this period, the adoption is finalized in the country of origin. The agreement between Ecuador and Sweden seeks to avoid second adoptions by providing for a procedure for *aprobación* of the adoption order granted in Ecuador.

Some agreements seek to establish a link between the child and the country of origin even after the adoption, and the agreement between Sweden and Ecuador includes an obligation for adoptive parents to see to it that the adopted child acquires adequate basic knowledge of the Spanish language as well as of the history and geography of Ecuador.

The agreement between Ecuador and Canada provides that adopted children will not lose their nationality merely as a consequence of having been adopted.²⁶⁸

The common, and some individual, features of these various bilateral agreements provide a useful starting point for an attempt to draw up a multilateral convention. The Special Commission meetings for the preparation of such a convention will offer an opportunity to learn from the practical experiences with these arrangements.

²⁶⁶ Philippino-Australian Agreement, Article 3.1.

²⁶⁷ See Articles 5 and 4.11 and 4.12 of the Philippino-Australian Agreement.

²⁶⁸ See Article 3.2.

C *The UN Declaration and the UN Convention*

166 Throughout this Report reference has already been made to the UN Declaration of 1986 (Annex H) - cast in the form not of a treaty but of a recommendation - which specifically addresses the problems of adoption and foster placement nationally and internationally,²⁶⁹ and to the UN Convention of 1989 (Annex I) - in binding treaty form - which places these problems in the broader context of the protection of human rights. The UN Convention was opened for signature on 20 November 1989 and has already been signed by over 60 States. It requires 20 ratifications or accessions in order to enter into force and, in light of the massive public support for the Convention, it is likely that its entry into force will take place before long.

167 Both the Declaration and the Convention recognize the best interests of the child as the paramount principle which should govern placement of children outside of their families, nationally and internationally (Declaration, Article 5; Convention, Article 21); both emphasize the priority for a child to be cared for by his or her own parents and the duty of States to support the family (Declaration, Articles 1-3; Convention, Article 18, see also Articles 9 and 10); both stress the subsidiary character of intercountry adoption in relation to measures of protection in the country of origin (Declaration, Article 17; Convention, Article 21, sub-paragraph (b)); the need to involve and inform the child's biological parents and the child (Declaration, Articles 15 and 22; Convention, Article 21, sub-paragraph (a)); and the need for special protection of the child in the context of intercountry adoption (Declaration, Articles 18 and 20, among others; Convention, Article 21, sub-paragraphs (a) and (c)). Both especially require measures to combat child abduction and illicit placement of children (Declaration, Article 19; Convention, Articles 11 and 35); both condemn placements resulting "in improper financial gain for those involved in it" (Declaration, Article 20; Convention, Article 21, sub-paragraph (d)). Both instruments stress the importance of identity and nationality for the child (Declaration, Articles 8 and 9; Convention, Articles 7 and 8) and stress the importance of paying due regard to the child's background (Declaration, Article 24; Convention, Article 20, paragraph 3). The Declaration includes a few additional provisions as, for example, concerning the need to facilitate migration of the child (Article 22) and to ensure the legal validity of the adoption in each of the countries involved (Article 23).

168 Article 21 of the UN Convention, read in conjunction with Articles 20 and 35, is of essential importance to the future work of the Hague Conference. Although an explanatory report on the convention is not yet available, a few short comments may be made concerning this provision.

²⁶⁹ Two expert meetings have already been organized concerning the implementation of the UN Declaration. The first was held in Vienna from 10-11 June 1987 and the proceedings were published jointly by the organizers, the International Catholic Child Bureau, International Foster Care Organization and International Social Service, "Implementation of the UN Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children"; the second meeting was held in Geneva from 14-15 November 1989, the proceedings of which have not yet been published.

Introductory paragraph:

"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 ..."

The introductory sentence of Article 21 takes into consideration the fact that most Islamic legal systems do not permit adoption. It is for this reason that the first sentence of paragraph 1 of Article 11 of the draft adopted by the UN Working Group early in 1988, and which contained an obligation "to facilitate the process of adoption", was deleted.²⁷⁰

It is important to note that the Convention refers to the best interests of the child as the "paramount consideration" and not as the "sole" consideration.²⁷¹ This is important in light of the primordial role of the child's biological family (referred to in Article 18) and their rights referred to in Article 9, and also relates to the question of consent mentioned in sub-paragraph (a) of Article 21. In particular, where an application is made for an adoption order against the wishes of the biological families, many systems provide that the rights of the biological families cannot be disregarded even if the child's interest might be better served by preferring the applicants.

Sub-paragraph (a)

This paragraph would seem to exclude purely contractual adoptions since it requires authorization "by competent authorities" which it does not however define. Of special importance is the emphasis on "informed consent to the adoption" on the basis of "counselling". It has been argued that "this principle opposes the practice of independent adoption".²⁷²

Sub-paragraph (b)

This paragraph, which stresses the subsidiary character of intercountry adoption, only refers to foster placement and adoption in the child's country of origin and not expressly to other alternatives such as placement

²⁷⁰ Article 11 of the draft, began as follows:

"1. The States Parties to the present Convention shall undertake measures, where appropriate, to facilitate the process of adoption of the child ...".

²⁷¹ This may be contrasted with Article 5 of the UN Declaration in an earlier version (A/40/998 of 6 December 1985) which read as follows:

"In all matters relating to the placement of a child outside the care of the child's own parents, the best interests of the child, particularly his or her need for affection and right of security and continuing care, should be the sole criterion."

In the final text the word "paramount" was substituted for "sole".

²⁷² See A. Joanet, "International Baby Selling for Adoption, and the United Nations Convention on the Rights of the Child", in 7 *New York Law School Journal of Human Rights* (1989), pp. 82-150 (at p. 103).

in an institution (cf. *supra* No 86). Several delegates would have preferred a stronger formulation.²⁷³

Sub-paragraph (c)

This paragraph assumes that in States which recognize adoption safeguards and standards exist in the context of national adoption which as we have seen is not always the case (see *supra* No 47).

Sub-paragraph (d)

This provision was already discussed, see *supra* No 81.

Sub-paragraph (e)

This sub-paragraph, which calls for ensuring that "the placement of the child in another country is carried out by competent authorities or organs", would seem to oppose, once again, purely independent adoptions. The drafting group which was established to draw up this article was well aware of the forthcoming work of the Hague Conference on intercountry adoption. In fact, the observer for Egypt, speaking on behalf on the working group, pointed out that paragraph (e) had been included specifically in view of the forthcoming work of the Hague Conference on intercountry adoption.²⁷⁴

It should be noted that the Convention provides a system for supervision of the implementations of the Convention through reports to be submitted by the Contracting States at regular intervals to a Committee of Experts (Part II of the Convention, Articles 42-45).

VI TOWARDS A CONVENTION ON INTERNATIONAL CO-OPERATION FOR THE PROTECTION OF CHILDREN IN CONNECTION WITH INTERCOUNTRY ADOPTION

A *Objectives of a new convention*

169 It would seem to follow from the *tour d'horizon* made in the previous chapters that a new convention on intercountry adoption should serve a triple objective: it should

- ensure that no child is adopted abroad unless it has been established that the original family cannot take care of him or her and that no other viable alternative in the country of origin is available;
- define criteria and improve practice and procedures for intercountry adoption once it has been established that that is the only viable alternative to the child; and finally,
- help eliminate abuses of intercountry adoption, in particular, abduction and/or sale of children.

²⁷³ See, for example, the comments of the Representative of Brazil, *Report of the Working Group on a Draft Convention on the Rights of the Child*, by Mr Adam Lopatka, E/CN.4/1989/48 of 2 March 1989, paragraph 369.

²⁷⁴ See Report of the Working Group, (previous footnote), paragraph 350.

170 Firstly, the convention should ensure that no child is adopted abroad unless it has been established that the child cannot be taken care of by his or her own family or through an acceptable form of alternative care in his or her home country (cf. *supra* Nos 46-48, 86, 165). This general principle has acquired particular significance in the present stage of intercountry adoption, which is very much a one-way affair reflecting the socio-economic and demographic imbalances in the world: abandoned children from developing countries or countries in transition, for whom there is no adequate care in their own country are being adopted by parents in more affluent societies. The challenge for the world community is to strengthen social and family structures worldwide and to take initiatives to promote the welfare of each child in his or her home country. This will ultimately reduce the one-way character which is typical of intercountry adoption in its present form. In the meantime, however, many children in developing countries face severe forms of physical and emotional deprivation, in particular the risk of de-personalization in overcrowded and understaffed institutions (cf. *supra* No 58) and there are, on the other hand, many strongly motivated parents available in industrialized countries who can, provided that they are well-prepared (cf. *supra* Nos 70-77), offer the child a family and a home. In the short term, therefore, intercountry adoption may provide a positive alternative for such children but this should not disguise or detract from the principle that "the first priority for a child is to be cared for by his or her own parents" (UN Declaration, Article 3) nor from the policy that "intercountry adoption may be considered as an alternative means of child's care, 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" (UN Convention, Article 21, sub-paragraph b).²⁷⁵

The primary responsibility for reaching this objective will necessarily lie with the authorities in the country of origin, but it should inspire all those who are called upon to apply the convention. It will be very important that both the drafting of the convention and its implementation be carried out, not in isolation, but in consultation and co-operation with national and international organizations which take a broad approach towards child welfare and who are active in developing services for children and families in their countries of origin.

171 Secondly, there is a strong need to set criteria and to improve practices and procedures for intercountry adoption worldwide. As we have seen, all modern international instruments concur that in intercountry adoption the best interests of the child should be - not the sole but - the paramount consideration. The priority should be to find the best possible environment for the child, which implies the obvious but sometimes overlooked principle that the priority should be to find a home for the child and not vice versa. The UN Declaration and the UN Convention already provide more detailed principles which help to clarify the notion of the

²⁷⁵ Cf. British Agencies for Adoption and Fostering, *Statement of Policy on Inter-country Adoption*, London 1986.

best interests of the child in the context of intercountry adoption.²⁷⁶ Other valuable principles may be found for example in the *ICSW Draft Guidelines for Intercountry Adoption* (see Annex J) and the *Conclusions and Recommendations of the First Regional Seminar on the Procedures to Train Adoptive Families* organized in Montevideo, Uruguay from 26 June-1 July 1989 (see extract, Annex K). Since most of these principles are so widely shared it should not be difficult to reach agreement on incorporating and further articulating them in a new instrument. It would be particularly helpful if the new convention could provide basic criteria concerning the biological parents or guardians of the child, the child himself or herself, the adoptive parents and the activities of intermediary agencies. The convention should also contribute to improving the adopted child's legal position in the receiving country as well as in the country of origin and other participating countries, with due respect for the biological, linguistic and cultural background of the child in his or her country of origin.

The real challenge for a new convention would be to give hands and feet to these principles and to translate them into a workable and effective legal framework for international communication and co-operation.

172 Thirdly, the convention should contribute to combatting international child trafficking (*cf. supra* Nos 78-85). This will require, above all, strict control over the activities of intermediaries, which should meet the criteria defined for them. In addition, however, straightforward and well-structured procedures for intercountry adoption will help. If prospective adoptive parents are offered an alternative which provides them with guidance, avoids needless costs and minimizes bureaucratic procedures, they will be less tempted to have recourse to dubious intermediaries.

B Central Authorities

1 The system of Central Authorities

173 As we have seen (*supra* Chapter IV) the methods for the structuring and exercising of control over intercountry adoption vary widely. Because of these wide differences it would probably be very difficult to co-ordinate their use under a convention text unless the convention established a system of Central Authorities on the model of the Hague Conventions on the Service Abroad and the Taking of Evidence Abroad and, in particular, of the Hague Child Abduction Convention (*cf. supra* No 7) and

²⁷⁶ "The point of issue with the principle that governments should act in the best interests of the child, is not one of disagreement but uncertainty about how that "best interest" might be established and by whom. The uncertainties of this concept have plagued much well intentioned welfare legislation. Consequently, the efforts of well meaning adults to promote the best interests of the child can too often result in them promoting the opposite." See B. Franklin, "Children's Rights: developments and prospects", in *3 Children and Society* (1989), pp. 50-66 (at p. 63). *Cf.* "The supremacy of the interests of the child in the field of private law", *Report by the United Kingdom delegation to the 16th Conference of European Ministers of Justice*, Lisbon, 21-22 June 1988, Document MJU-16(88)2, especially p. 4 and addendum.

its European and American counterparts,²⁷⁷ setting out certain specific powers and duties of these Central Authorities.²⁷⁸ The powers and duties to be given to the Central Authorities might be of rather different types and relate to the national and the international level.

2 Duties and powers of the Central Authorities

a At the national level

174 - First of all, the Central Authorities could have a very useful role in co-ordinating administrative practice and procedures in each country using the best interests of the child as their guideline. They could, for example, co-ordinate with the appropriate bodies so as to avoid conflict with immigration policies (*cf. supra* Nos 141-145), and they could propose legislative reforms to improve such co-ordination;

- secondly, they could have a responsibility for gathering together information on various points, e.g. statistics which would allow objective policies to be established; information concerning foreign laws and procedures and concerning relevant organizations and agencies at home and abroad;

- thirdly, they could supervise the intermediary activity of agencies established in their country.

b At the international level

175 - First, the Central Authorities could exchange information both of a general nature (concerning legal, social and cultural aspects of their countries) and on individual cases;

- secondly, they could intervene in co-ordination with each other in individual cases (for example, where a child who had been selected for adoption is no longer available but another child might be helped through adoption by the applicants);

- thirdly, they could settle difficulties which have arisen between their countries, both of a general nature and individual cases.

176 Both lists could easily be expanded with extended duties and powers being given to the Central Authorities thus providing them with a larger

²⁷⁷ *European Convention on the Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children*, signed at Luxembourg on 20 May 1980; *Inter-American Convention on the International Return of Children*, signed at Montevideo on 15 July 1989.

²⁷⁸ It is conceivable of course that, as in the case of the other conventions just mentioned, federal States and other States with more than one legal system would designate more than one Central Authority for the purposes of this convention. It should be noted in any case that the "Central Authorities" designated under the treaties mentioned above are not large bureaucratic organizations. In most countries they consist of an office in a governmental ministry staffed by one, or at the most two, civil servants who may also carry out other duties unrelated to the treaty.

role in the intercountry process; they could be given (ultimate) responsibility:

a *At the national level*

- to determine the suitability of the prospective adoptive parents (receiving country) or to determine (or have determined by a court) whether a child is legally free for adoption (country of origin);
- to prepare (or have prepared) the home study reports (receiving country) and to prepare (or have prepared) the child case study (country of origin);
- to provide information and counsel the prospective adopters (receiving country) and to inform and counsel the biological parents or guardians of the child (country of origin);
- to supervise the probationary period, to have reports made and to take the necessary steps when the pre-adoptive placement fails (receiving country);
- to assist adopted children in their search for their roots;

b *At the international level*

- to channel applications for adoption;
- to exchange documents necessary to prepare adoption and court decisions including the ultimate adoption decision;
- to approve jointly of prospective adoptive parents and of the selection of particular adoptive parents for a child.

3 *Licensing of agencies*

177 Whether Central Authorities would have limited or extended duties and powers, a minimum requirement for the convention to be effective and to contribute to reducing abuses would be that only agencies licensed by the State where they are established and supervised by the Central Authority be allowed to act as intermediaries (*cf. supra* Nos 83 and 138). The convention might define certain minimum criteria to be met in order for such agencies to be licensed as "placement" or "scrutinizing" agencies, in particular concerning their non-profit character. The Central Authorities could provide information on such licensed agencies both at home and abroad and could recommend the use of such agencies.

4 *Reducing independent adoptions*

178 The requirement that agencies be licensed is only a first step to improve existing procedures for intercountry adoption. By itself it will not affect independent adoptions with their inherent risks of failure because of insufficient preparation and of susceptibility to child trafficking.

There are various possibilities to reduce independent adoptions (*cf. supra* Nos 61-69; 136; 139-141):

- requiring prospective adoptive parents to obtain preliminary permission for intercountry adoption from the Central Authorities in the receiving countries;
- making the use of licensed agencies compulsory, and
- providing Central Authorities with extensive powers and making it compulsory for all those involved in intercountry adoption to pass through those Central Authorities.

It might well be that if the Central Authorities were given broad duties and powers they would offer such an attractive channel to prospective adoptive parents (less expensive, less uncertain, less cumbersome) that this in itself would naturally reduce use of independent adoptions.

5 *Reducing jurisdiction and recognition problems: a single adoption decision in the receiving country?*

179 Those countries of origin which at present require that the adoption be granted in their country do so in order to retain control over the process. This system has its inherent limitations, however, because, by definition, the adoptive family will be living in the receiving country. Moreover, there is now broad agreement that adoption decrees should be preceded by a probationary period which again will usually take place in the receiving country (*cf. supra* Nos 135 and 135A).

If a framework were to be set up - in particular a system of Central Authorities with extensive powers which would guarantee that the Central Authorities in the countries of origin would be kept fully informed and involved in the adoption procedure, including the probationary period and the final adoption order - countries of origin might find it acceptable, within the context of such a system, to renounce the adoption order in their countries. Obviously this would considerably speed up the adoption procedure, with great benefits to all concerned.

C *Reducing conflict of laws problems - defining criteria concerning the biological parents, the child and the adoptive parents*

180 One of the functions of the convention would probably be to define criteria which must be fulfilled in order to safeguard the long-term welfare of the child as well as to provide a system of supervision of those criteria and of evidence that they have been met.

Those criteria would relate:²⁷⁹

- to the biological parents or guardians of the child, for example: have they been made aware of the options available for the child, have they been placed under pressure or offered financial inducement

²⁷⁹ *cf. British Agencies for Adoption and Fostering, op. cit. (supra footnote No 275).*

to relinquish their child; have they been helped to understand all the implications of relinquishing the child, including the possibility of full adoption abroad and of having no further contact with the child?

- *to the child*, for example: has the responsible body prepared written information about the child including identifying information (name, sex, age, nationality, religion), about the biological parents and family, about the child's physical, intellectual and emotional development and about the child's current health and any special needs in relation to his or her physical or mental health?
- *to the adoptive family*, for example: has special attention been paid to ensuring that each applicant has knowledge of the child's country and culture of origin and is prepared to allow the child to develop an understanding and awareness of his or her origins?

If the Convention were, in addition, to define clearly the responsibilities of the (Central) Authorities of each country to ensure that these criteria are observed (*cf. supra* Nos 174-176), this would reduce the need for application of conflicting laws of the countries involved (*cf. supra* Nos 100-102 and 121-126). Other conditions, such as those relating to age, age differences, etc could be left to the laws of each country and in a system of co-operation between Central Authorities those laws would probably be applied cumulatively (*cf. the Philippino-Australian Agreement, Article 4.2*).

D Recognition of adoption decrees and preliminary decisions

181 Even if countries of origin were to accept that the adoption decree be granted in the receiving country (*cf. supra* No 179), they would still continue to take preliminary decisions, e.g. whether a child is free for adoption or concerning the appointment of a guardian (*cf. supra* No 134); it would be desirable that such decisions be recognized in the participating countries. If they were not prepared to renounce the granting of an adoption decree in their own country there would be a definite need for such adoptions to be recognized in the Contracting States or, alternatively, to be converted into an adoption (preferably of a uniform type, see *infra* E) in the receiving country. An adoption decree granted by a competent authority in accordance with a regular procedure in the country of origin of the child should as a minimum, in the other Contracting States, have the same effects as to parental authority and care of the child which it has in the country of origin (*cf. supra* No 131).

E Full legal integration into the adoptive family

182 Would it be possible to insert a substantive rule into the convention to the effect that intercountry adoption should always, or preferably, lead to complete severance of all legal links with the original family and full integration into the adoptive family (*cf. supra* Nos 89-91)? Should the convention provide that where full adoption is granted, it should be irrevocable - at least by the adoptive parents (*cf. supra* Nos 110-113 and

163)? Would there be agreement that, where full adoption is granted, it should as a rule be preceded by a probationary period (*cf. supra* Nos 93-94)?

Should the convention, to the extent that it were to allow simple adoption, require that the adoption contract be in any event approved by a court or administrative authority in a procedure with full guarantees for all concerned (*cf. supra* Nos 90-92)?

F ... with full respect for the child's cultural identity

183 It would be highly desirable for agreement to be reached as to the minimum of information which should be available to the child and his or her original family and, if norms could be established to guarantee that such information be preserved during a certain minimum period (*cf. supra* Nos 75-77 and 107-109).

G A rule on nationality of the child?

184 Is it possible/desirable to include in the convention a rule relating to the nationality of the child, on the model of Article 17 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws of Article 11 of the European Adoption Convention or of Article 3.2 of the bilateral agreement between Ecuador and Canada (*cf. supra* Nos 146-149 and 165 *in fine*)?

H Special categories of children and of intercountry adoption

185 Some children and some forms of intercountry adoption may require special attention:

- *Older and handicapped children*: being transplanted into another culture may be particularly difficult for older children and children with a physical or mental handicap (*cf. supra* Nos 36-37 and 73). Special provisions may be necessary so as to minimize the harmful effects of their transition to the receiving country.
- *Adoption within the (extended) family*: is it possible/desirable to make an exception for adoptions among relatives without passing through the main procedures of the convention since such "relative" adoptions are also generally less regulated in purely internal situations? Which law should determine who is a relative?²⁸⁰

I Extension of the convention to other forms of placement abroad?

186 A system of co-operation among Central Authorities could possibly be extended so as to cover other forms of placements abroad, e.g. foster placements, guardianship, custodianship, etc. Would it be desirable to do so?

²⁸⁰ See British Agencies for Adoption and Fostering *op. cit.* (*supra* footnote 275).

J *Returning children who are abducted or sold abroad?*

187 Would it be desirable for the convention to provide a special procedure which would allow the biological parents or guardians whose children have been abducted for purposes of adoption to apply for their return through the system of Central Authorities (*cf. supra* Nos 79 and 82)? The Hague Child Abduction Convention may well apply to some of such situations. Is it desirable/possible to provide a link with that Convention? What if an adoption has already been granted in the receiving country? Should there be a special procedure for children who have been sold for adoption or whose parents have consented to the adoption under the influence of duress or fraud?

K *Conclusion*

188 The list of questions which arise in the context of intercountry adoption can easily be expanded. This Report cannot list them all, and certainly cannot provide answers to all of them. It is hoped, however, that it may provide a general idea of the main problems and may contribute to finding ways of improving the existing situation - which is in many respects chaotic, contradictory and unsatisfactory. The Convention on the Rights of the Child has delegated this difficult issue to the Hague Conference on private international law. The Centenary of the Conference provides a major challenge to come up with a clear and effective legal framework for international understanding and co-operation for the protection of children in connection with intercountry adoption.