



COMMISSIONER FOR HUMAN RIGHTS
COMMISSAIRE AUX DROITS DE L'HOMME



Strasbourg, 28 April 2011

CommDH/IssuePaper(2011)2
Original version

ADOPTION AND CHILDREN: A HUMAN RIGHTS PERSPECTIVE

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Acknowledgements

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Table of contents

SUMMARY	4
THE COMMISSIONER’S RECOMMENDATIONS ON ADOPTION.....	5
Introduction	6
I. The development of adoption of children in Europe.....	7
a. National adoption (adoption in the same country).....	7
b. Intercountry adoption.....	8
II. The international and regional legislative framework	9
III. Respecting children’s rights in the adoption procedure	13
a. The “right” to a family.....	13
b. The best interests of the child.....	13
c. Subsidiarity	14
d. Are potentially adoptable children not being identified?.....	14
e. Children with special needs.....	15
IV. Necessary procedural safeguards.....	15
a. Assessment of prospective adoptive parents, and matching	16
b. Adoption by same-sex couples, or by single gay or lesbian persons individually.....	16
c. Applications to adopt and the number of “adoptable children”	17
d. Non-regulated and private adoptions	18
e. Adoptions from non-Hague countries.....	19
f. Systemic problems or isolated violations?	19
g. Costs and contributions	20
h. Adoption following disasters	21
V. Conclusions	21

SUMMARY

The realities of adoption across member states of the Council of Europe have changed considerably over time, with wide variation by country. In some countries, adoption is a well-established practice, while in others it is still relatively unfamiliar. Some allow their children to be adopted abroad, others do not. Some “receive” adopted children from abroad, others are wholly or predominantly “countries of origin”, with certain among the latter now transitioning to becoming “net receiving countries”.

National (in-country) adoption has tended to decline – sometimes dramatically – in Western Europe, whereas successful efforts seem to have been made to promote it in several Baltic and Central and Eastern European states, especially those from which intercountry adoptions had grown in the past 20 years.

Intercountry adoption (ICA) numbers have been falling globally since 2004, a trend observed in most European countries, whether they are “receiving” foreign adoptees or “countries of origin”. The decline mainly reflects improved conditions for appropriate care of children – especially the youngest – in their own countries, including through national adoption. In contrast, the number of people applying to adopt internationally continues to rise. Within the Council of Europe, there is a long-standing concern that this growing imbalance tends to exacerbate the illegal and unethical practices that have increasingly plagued ICA.

At the same time, more and more countries of origin in and outside Europe are now looking to ICA more especially as a potential care solution for older children and those with disabilities and other special needs. In all countries, however, whether “receiving” or “of origin”, these children are “hard to place”, meaning that the number of people willing and able to adopt them is well below the level required. This imbalance in the opposite direction also creates special concerns.

International agreements have been developed and adjusted over the last fifty years to address the changing adoption landscape and the serious problems that have been encountered. The Convention on the Rights of the Child is now the basic standard-setting text on adoption at the global level. The 1993 Hague Convention focuses on the Protection of Children and Cooperation in Respect of Intercountry Adoption. National adoption in Europe is covered by the new European Convention on the Adoption of Children (Revised) of 2008. Jurisprudence from the European Court on Human Rights has also served to set standards.

Most of the protections and procedures established by these treaties are not contested, but a number of issues are still proving to be controversial. These include securing acceptance, for example: that there is no “right to a family” – and thus to adopt or to be adopted – under international law; that determining the “best interests” of children is a complex undertaking which must respect all other rights; and that ICA requires that it be subordinate to suitable domestic care solutions.

Many procedural challenges need to be tackled to ensure that adoptions are compliant with human rights and other obligations. Most of the problems identified are the result of lacunae in the system, rather than isolated criminal or unethical behaviour, and are particularly prevalent in “independent” adoptions and in countries that have not ratified and implemented the 1993 Hague Convention. In addition, the way that ICA was handled after the January 2010 earthquake in Haiti illustrates how fragile the compliance with internationally accepted standards can be in practice.

The Commissioner’s Recommendations on adoption, based on the findings and conclusions of this Issue Paper, are set out at the beginning of the document.

THE COMMISSIONER'S RECOMMENDATIONS ON ADOPTION

Adoption of children, whether in the same country ("national adoption") or across borders ("intercountry adoption"), raises several human rights issues. Hence it is essential that the whole process of adoption should be guided by the principle of identifying, and acting in, the best interests of the child. Measures are needed in several areas to better protect children and their rights during national and international adoption procedures. It is also important that the best interests of the child should be determined in a manner that ensures respect for all rights.

The Commissioner for Human Rights recommends that member States of the Council of Europe should:

General recommendations:

1. ensure that children's rights are fully taken into consideration during the whole adoption process, with particular attention being paid to the principle of the best interests of the child, including the right for the child to express his or her own views;
2. adapt national legislation and practices to the 1993 Hague Convention and the European Convention on the Adoption of Children (Revised), and ratify these conventions immediately where this has not yet been done;
3. ensure that children with special needs will be appropriately protected and cared for by prospective parents;
4. ensure that adequate programmes are in place to prepare prospective adoptive parents for both national and intercountry adoption, and that suitable and accessible support is available to them and to their child in the post-adoption phase, to minimise any risk of breakdown in the adoptive relationship;
5. review the national child protection systems to ensure that their control mechanisms also prevent, and/or detect and address abuse and neglect of adopted children during and after the adoption process;
6. prepare for the possibility of children asking to know their origins;

Specific recommendations in relation to intercountry adoption:

7. ensure that intercountry adoption is carried out only through accredited and authorised agencies and explicitly ban non-regulated and private adoptions from any country of origin;
8. establish a mechanism of regular and independent control of accredited and authorised agencies to prevent and/or address any cases of abuse or neglect and prevent improper financial gain from adoption procedures;
9. prevent any risk of children becoming stateless in the intercountry adoption process, *inter alia* by ensuring that they will receive the nationality of their adoptive parents;
10. ensure that applications to adopt are transmitted to countries of origin only in the numbers and at the time that the latter request, and that the characteristics of the applicants correspond to those requested;
11. adopt a particularly vigilant approach during and following emergency situations to prevent potential abuses and violations of international obligations;
12. provide prospective adoptive parents with accurate information as to the degree and nature of the need for intercountry adoption, as determined by the countries of origin concerned, and combat the dissemination of false information in this respect.

Introduction

There will always be children who need, and benefit from, adoption, in, from and to countries that recognise the practice. At first sight, adoption seems to be a relatively simple and even reassuring operation: a child without parental care is offered a permanent home and family. In reality, however, it is one of the most complex and hotly-debated measures in the sphere of child welfare and protection, particularly in its intercountry form.

The decision to allow the adoption of a child has monumental, and in principle definitive, repercussions for the child's life. It means a permanent change of primary caregiver, name, and, in the case of intercountry adoption, usually nationality as well; and a sudden and sometimes drastic change in the way, place and surroundings in which the child is to grow up.

That the issue is complex is therefore hardly surprising. When adoption is envisaged, serious account has to be taken of a wide range of factors involved. Adoption, indeed, can be seen as involving a map, in microcosm, of a child's human rights: it raises the issues of identity, family support and assistance for children without parental care, access to basic services, and protection from exploitation and maltreatment, without forgetting the child's right for his or her opinion to be taken into account – and the underlying principle that the child's best interests must be the paramount consideration in coming to adoption decisions.

Controversy has arisen over adoption more specifically, however, because of the concern that the concept of "offer" of a home to a parentless child has, in recent decades, evolved into a perception of "demand" for adoptable children: when the desire to adopt cannot be fulfilled in the applicants' own country, the focus shifts to countries where it is believed that children would – or should – be eligible for adoption abroad.

As early as 1980, the Council of Europe (CoE) issued a document in which it was noted that "over the past decade [the 1970s] pressure by numerous European couples wishing to adopt has reduced the attention that is paid to the child's interests. These [...] seem likely to be whittled away by the concern to find children for adoptive parents," and that "the third world countries [...] are encouraged to send abandoned children abroad, and that is no more than an easy way out".¹

Two decades later, at the turn of the century, the Parliamentary Assembly of the Council of Europe found it necessary to state that it: "fiercely opposes the current transformation of international adoption into nothing short of a market"; "roundly condemns [...] practices that include the use of psychological or financial pressure on vulnerable families [and] the falsification of paternity documents, etc."; and "wishes to alert European public opinion to the fact that, sadly, international adoption may prove to be a practice that disregards children's rights and that does not necessarily serve their best interests."²

Today, despite increasing regulation of adoption practice in national, regional and international law, both the concerns and the debate persist – and in some instances are intensifying. At the same time, there are widely differing perceptions both of the role that adoption should play as a child protection measure and of the very need for adoption, and intercountry adoption in particular. These divergences are in many cases regrettably fuelled by misinformation and misconceptions.

Reviewing the question of adoption in Europe is anything but straightforward. To begin with, the realities of adoption vary widely among the member states of the Council of Europe. For some, it is a well-established practice; for others it is still relatively unfamiliar and rare. Some allow their children to be adopted abroad, others do not. Some have always been "net receivers" of adopted children from other countries; others are clearly characterised as "countries of origin"; and certain of the latter are now transitioning towards being "net receivers". The lack of accessible and useful data on the situation in many countries is an additional obstacle. Dealing with the issue is further

¹ Council of Europe, Social Affairs (1980), "The role of governmental and non-governmental organisations in supervising the placement in Europe of children from the Third World", Doc. COE.G.6/80, p.35.

² Recommendation 1443 (2000) on "International adoption: respecting children's rights". In addition and more recently, PACE Recommendation 1828 (2008) dealt with the issue of the "Disappearance of newborn babies for illegal adoption in Europe".

complicated by the fact that, while national and intercountry adoption have clear links and factors in common, the problems that each gives rise to can be quite different – often, of course, because intercountry adoption involves transfer beyond national borders, and the States involved may be within or outside the CoE framework.

This Issue Paper nonetheless attempts to review key questions in this area, and to propose certain steps that need to be taken within CoE membership in order to uphold the internationally-recognised human rights of children for whom adoption may be envisaged.

I. The development of adoption of children in Europe³

Integration of orphaned children into “stranger households” is a centuries-old practice. However, adoption as we know it today – a legal decision to transfer definitive and absolute parental responsibility for a child, creating a new parent-child relationship as a result of which the child becomes a fully-fledged member of the adoptive family – has a history of well under 100 years in Europe.

It appears that the first European country to legislate on this “modern” form of adoption was the United Kingdom, in 1926. Initiatives on the subject by other nations were spread out over a subsequent half-century: France introduced its “*légitimation adoptive*” in 1939; Ireland, the Netherlands and Sweden⁴ enacted laws on full adoption in the 1950s; Poland in 1964; and the former West Germany only in 1977.⁵

All European countries now have adoption laws. However, not only do “differing views as to the principles which should govern adoption and differences in adoption procedures and in the legal consequences of adoption remain in these countries”,⁶ but also recourse to the practice in both its national and intercountry forms varies widely.

a. National (in-country) adoption

In several States, particularly in Central and Eastern Europe, public opinion would likely assess that there is no “adoption culture” at all. The few adoptions taking place have tended to be shrouded in secrecy, with some adoptive parents going to great lengths to hide the fact from others – by simulating pregnancy or moving to another town, for example – as well as from the child. As a result, children adopted in these countries are almost always babies or toddlers. In some such countries, efforts to promote national adoptions face special difficulties, the more so for older children and those with even minor disabilities.

Nonetheless, countries such as Moldova, the Russian Federation and Ukraine have recently had some success in increasing the number of their citizens that are willing to adopt. Ukraine declared 2008 to be a “Year of National Adoption”, and secured 2,066 adoptive placements that year, up from a low of 1,492 in 2004. Russia improved its figures from 7,767 in 2006 to 9,537 the following year.

Although adoption is generally now well accepted throughout Western Europe, various factors influence the extent to which it is used as an in-country child protection measure. In addition to differing rates of relinquishment, which are themselves dependent in part on the incidence of, and attitudes towards, teenage pregnancy and the possibility of anonymous childbirth, these factors include, importantly, the ease with which parents may be stripped definitively of their rights and responsibilities in cases of neglect and abuse.

Disparities in national adoption rates in countries in this sub-region are indeed vast. Thus, while over 3,000 children are being adopted annually from alternative care settings in England &

³ Unless otherwise specified, sources of data throughout this Section are the relevant government departments or Central Authorities.

⁴ Sweden’s first Adoption Act in fact dates back to 1917, but it did not confer fully-fledged family membership on the adopted child. This was remedied in 1959.

⁵ Prior to this, although the adopters became the legal parents of the child, the latter did not have the same status as a “birth child”. As a result, he/she legally remained part of the birth family and no relationship was created with any members of the adoptive family bar the parents themselves.

⁶ European Convention on the Adoption of Children (Revised) (CETS No. 202), Preamble.

Wales, less than 1,000 national adoptions have taken place each year in France, despite its higher population. Towards the lower end of the scale, figures for the Netherlands point to just 25 national adoptions having been completed in 2009. It also appears that national adoptions in Western Europe have been in constant decline. In Switzerland, for example, they fell from over 1,000 in 1980 to only 192 in 2008; and in the Netherlands from 1,209 in 1970, 259 in 1980, and 25 in 2008.

In general, national adoption today seems far less susceptible to problems than its intercountry counterpart, but it has certainly not been exempt from them. In Italy in 1984, for example, the Italian police uncovered a child trafficking network in Marsala, Sicily, where babies were bought from prostitutes and sold to childless couples,⁷ and in March 1988 it was reported, with confirmation by a juvenile judge, that some thirty cases of children “sold into adoption” had occurred within a few weeks in Palermo alone.⁸

b. Intercountry adoption

Intercountry adoption (ICA) involves the transfer of a child from his or her country of origin to another country for adoption. It has an even shorter history, having begun in the USA following the Second World War, when children from certain war-torn European countries and Japan were sent there for adoption, quickly followed by “Amerasian” children from Korea in the early 1950s. The practice gradually gained a foothold in Western Europe through the 1960s, when it was viewed particularly as a humanitarian response to the situation of children of the continent’s ex-colonies. It developed further during the 1970s and 1980s, more especially in relation to Asia and Latin America.

The demise of communist regimes in Central and Eastern Europe brought with it a major shift, at the very start of the 1990s, towards adopting from many countries there, including Romania, Bulgaria, the Baltic States, Ukraine and the Russian Federation. For the great majority of these States, this was an entirely new phenomenon – only Poland and, to a lesser extent, Hungary had previously allowed children to be adopted in other countries to any significant degree. Not surprisingly, the degree of ability to handle the sudden, massive flow of adoption applications appropriately proved to vary considerably, and some of the countries concerned began to place stricter limits on the adoption of their children.

With greater restrictions progressively taking hold in Central and Eastern Europe as well as in certain other “countries of origin” – such as Argentina, Paraguay, Thailand, the Philippines and China – around the turn of the century prospective adopters began looking more closely at possibilities on the African continent. The vertiginous rise in adoptions from Ethiopia in recent years is one of the results of this.

The worldwide trend in ICA was one of fairly systematic growth until 2004, when annual numbers peaked at over 42,000, with more than half of the children involved going to the USA.⁹ Since then, figures have fallen each year, dropping to less than 30,000 in 2009. Adoptions by the USA alone diminished by some 10,000 in that period, including a reduction of almost 5,000 from 2008 to 2009. This has increased the proportion of intercountry adoptions to European “receiving countries” somewhat in recent years, but in most countries there has been a decline in absolute numbers.

In percentage terms, the reduction in Norway appears to have been the largest (more than 50%, from 706 in 2004 to only 344 in 2009), closely followed by the Netherlands (-48%) and Spain (-45%). For France the reduction was 25%. In Denmark and Sweden, by contrast, numbers decreased temporarily, but had almost returned to their mid-decade highs by 2009. The only receiving country to have clearly reversed the downward trend is Italy: after reduction from a peak of 3,402 intercountry adoptions in 2004 to 2,874 in 2005, its total climbed back steadily to nearly 4,000 in 2008 and 2009.

⁷ AFP newswire, 4 January 1984

⁸ La Repubblica, 24 March 1988.

⁹ 22,884 according to the US State Department.

Receiving countries – and their authorities – have very different attitudes towards ICA. Italy, for example, has a similar population to the UK (approximately 60 million), but takes in at least 10 times more foreign adoptees per year. Ireland, with a population of only 4.2 million, has been adopting at least as many children from abroad as the UK in recent years, and has had the second-highest per capita adoption rate in the world – 9.45 per 100,000 population in 2008 – just behind Sweden with more than 10. In many countries ICA is less widespread, and therefore less of a political issue. In 2008 the corresponding rate for Germany was 1.51, and for the UK, in contrast to its having one of the highest domestic adoption rates, was an exceptionally low 0.37.¹⁰

A similarly heterogeneous picture emerges for Baltic and Central and Eastern European countries, most of which have been “countries of origin” since the early 1990s.

At one end of the spectrum, with by far the most striking experience, is Romania. An estimated 10,000 children were adopted abroad in the two years after the start of its “transition”, many if not most in circumstances that fell short of international standards. After imposing two moratoria in 1991 and 2000, both intended to improve procedures and safeguards, the Romanian authorities finally decided to ban ICA as from 2005, other than in the exceptional case of adoption by grandparents living abroad.

Albania was potentially a significant country of origin, though on a smaller scale, in 1991 – but within a year it became clear that the majority of intercountry adoptions from the country were the result of contacts made directly with families. A moratorium was ordered in March 1992, new legislation and structures were put in place, and in recent years the number of intercountry adoptions of Albanian children has averaged less than 20 per year.

In contrast, other countries, including the Russian Federation and Ukraine, quite quickly became, and have continued to be, very significant “countries of origin”, though now with lower total numbers than at their peak in 2004 (in the case of the Russian Federation about 50% less, but still around 4,000). ICAs from Bulgaria reached over 700 annually in 2003, but have now dropped to less than a third of that figure.

Poland, the only country that was already a significant “country of origin” before the transition period, continues to rely on ICA for the permanent care of some 400 children per year, essentially those with special needs. Hungary, which was already a source of intercountry adoptions in the 1980s, is still placing about 100 children for adoption abroad each year. In both cases the majority are being adopted in Italy.

However, most other Central European countries – including the Czech Republic, “The former Yugoslav Republic of Macedonia”, Slovakia, and especially Slovenia – have little recourse to ICA. Among the Baltic States, Latvia and Lithuania still average 100 ICAs each per year, while Estonia’s overall total since the beginning of the century is only about 150. It seems likely that some of these states will become “net receiving countries” in the coming years.

II. The international and regional legislative framework

At global level, it is of course the Convention on the Rights of the Child (the “CRC”) that now constitutes the basic standard-setting text on adoption. Intercountry adoption is specifically regulated by the 1993 Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption (the “HC”), which has now been ratified by more than 80 States. There is no corresponding global binding text specifically on national adoption, but this topic is covered by the new European Convention on the Adoption of Children (Revised) of 2008. Additionally, the 1986 UN Declaration on National and International Adoption and Foster-care is a non-binding but useful reference text.¹¹

¹⁰ Figures in this paragraph are from the Australian Inter-Country Adoption Network (AICAN).

¹¹ 1986 Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, UN Doc. A/RES/41/85.

Both the HC and revised European Convention replace treaties of the 1960s¹² that had not only been inadequately ratified but were also considered to be obsolete in their content and main focus, in light of the significant developments in the field of adoption since they were drafted.

The approach of international legislators to adoption changed at the end of the 20th century as a result of serious concerns on adoption-related abuses that were being increasingly expressed at that time.

The first revised draft of the **Convention on the Rights of the Child**, submitted by Poland and provisionally adopted by the UN drafting group in 1980, noted simply that States Parties “shall undertake measures so as to facilitate adoption of children...”.¹³ Within two years, that text had been substantially developed and already laid out many of the safeguards that were to figure in the final (1989) version of the CRC, notably replacing the focus on “facilitating” by an emphasis on “protecting”. When making the final review of the text, taking account of the 1986 Declaration approved in the meantime, and of still growing concerns, the drafters determined that the protection of the child had to be given even clearer priority. Hence the opening line of CRC Article 21, which reads: “States Parties [...] shall ensure that the best interests of the child shall be the paramount consideration...”

CRC Article 21 includes the obligation to “ensure that the child concerned by intercountry adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption.”¹⁴ This pre-HC concern indeed reflects the realities of the 1980s, but conformity with the HC would in fact now imply the reverse in many countries, where standards for national adoptions should rather be brought up to the level of those that are to be applied to ICAs.

Article 21 of the CRC must be seen in the context of the treaty as a whole. The CRC places major emphasis on the importance and role of the parents and family as the child’s primary caregivers, and requires States first and foremost to assist them when they have difficulty in fulfilling their responsibilities appropriately. Only when, despite such efforts, the child is “deprived of his or her family environment”, or cannot be allowed to remain therein in light of his or her best interests, does the obligation of the State to “ensure alternative care for the child” become operative.¹⁵ And it is only when, in that case, the State is unable to ensure that the child is “placed in a foster or an adoptive family” or is cared for “in any suitable manner in the child’s country of origin” that intercountry adoption “may be considered”. In many respects this echoes the principles in the 1986 Declaration; it constitutes the fairly wide basis for what is known as the “subsidiarity” of ICA to domestic adoption and other “suitable” in-country care solutions.¹⁶

The Committee on the Rights of the Child, which is the treaty body monitoring compliance with the CRC, has expressed concerns over violations of ICA standards in the case of many countries, and systematically recommends strongly to all States involved in intercountry adoption that they ratify the Hague Convention as one means of addressing the problems.

The drafters of the **1993 Hague Convention** took inspiration from the way that the CRC drafting exercise had broached the issue. Mindful too of continually emerging reports of abuses, such as those related to Romania, and demands from certain other countries of origin, particularly in Latin America, they agreed to focus on putting in place the strongest possible procedural safeguards as they developed the cooperation mechanism that would regulate ICA. The fact that the full title of the treaty gives prominence to “the protection of children... in respect of intercountry adoption” is particularly significant.

Indeed, the Hague Convention sets out to do two main things, both unequivocally directed towards protecting the child from illicit practices related to ICA, rather than to promoting the practice as such: “to establish safeguards to ensure that intercountry adoption takes place in the

¹² The 1965 Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions and 1967 European Convention on the Adoption of Children (“Strasbourg Convention”), ETS-058.

¹³ UN Doc. E/CN.4/1349.

¹⁴ Convention on the Rights of the Child, Article 21(c).

¹⁵ Convention on the Rights of the Child, Article 20.

¹⁶ For a comprehensive analysis of CRC Article 21, see S. Vité & H. Boéchat, “Article 21. Adoption” in A. Alen *et al.* [Eds], *A Commentary on the United Nations Convention on the Rights of the Child*, Martinus Nijhoff Publishers, Leiden, 2008.

best interests of the child and with respect for his or her fundamental rights as recognised in international law”; and “to establish a system of cooperation among Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children.”¹⁷ In many ways, it is therefore an implementing treaty for the CRC as regards intercountry adoption. Thus, as a private law instrument, it puts in place guarantees, procedures and mechanisms that facilitate States’ compliance with, in particular, their obligations under the relevant CRC provisions.

The system of cooperation established by the HC revolves around a governmental “Central Authority” in each country to oversee adoptions and to serve as focal point on ICA issues with its counterparts in other States. The treaty foresees that “adoption bodies”, or agencies, duly accredited by the Central Authority in the receiving country can carry out a range of tasks related to the adoption process, notably regarding assistance to adoptive parents before, during and after the adoption takes place. If also specifically authorised by the Central Authority in the country of origin, the adoption body can also provide such assistance directly in that country.

The HC notably puts in place concrete application of the “subsidiarity principle”, setting out procedures based on the fact that a child may be considered for ICA only if “possibilities for placement of the child within the State of origin have been given due consideration.”¹⁸ Other particularly important elements of the HC include: the requirement to determine the fitness of applicants to proceed with an adoption; the implicit prohibition of non-regulated and private adoptions, since all prospective adopters are to undertake the process through the Central Authority or an accredited agency; prohibition of contact between prospective adoptive parents and the child’s parents or other caregiver/s before the child has been pronounced adoptable and valid consents have been obtained; commitment to ensuring free and informed consent for adoption with no inducement of any kind; automatic recognition of Hague-compliant adoptions by all States Parties; and the requirement to combat any “improper or other financial gain” (a term taken mainly from the CRC) by anyone involved.

Formal monitoring of the operation of the HC is entrusted to a “Special Commission” which comprises all Contracting States.¹⁹ It has so far met three times, in 2000, 2005 and most recently in June 2010. Although the recommendations it makes are advisory in nature, the issues they cover demonstrate very clearly the subject matter and level of concerns that surround ICA practice today, for example: procurement of children for adoption; transparent and independent determination of adoptability; separation of ICA from contributions, donations and development assistance; and the necessary application of HC safeguards (thus including prohibition of independent adoptions) in Contracting States’ relations with States that are not parties to the treaty.²⁰

As regards national adoption, **the 2008 European Convention** takes up a number of matters not previously broached at the supranational level: it specifies that the father’s consent is required in all cases, including when the child was born out of wedlock; and it explicitly covers adopters who are heterosexual unmarried couples in a registered partnership, as well as allowing States to extend adoptions to homosexual and same sex-couples living together in a stable relationship. It requires that the minimum age of the adopter be set between 18 and 30, with a preferred age difference between adopter and child of at least 16 years. In addition, the European Convention not only reaffirms that the child’s consent is necessary if he or she has sufficient understanding to give it, specifying that consent must be required at a minimum as of age 14, but also introduces an obligation to consult with the child even where formal consent is not required, reflecting CRC Article 12 in a very explicit manner. It also places greater emphasis on the right of adopted children to know their identity as opposed to the right of the biological parents to remain anonymous.

While the focus of this new Council of Europe Convention is clearly on national adoption, it does deal with “international adoption”, where the nationalities of the adopter and adoptee are different, although they may reside in the same country, as well as requests for information from one State

¹⁷ Hague Convention, Preamble and Article 1.

¹⁸ Hague Convention, Article 4.

¹⁹ Special Commission on the Practical Operation of the Hague Convention of 29 May 1993.

²⁰ Special Commission, Conclusions and Recommendations, 2010, http://www.hcch.net/upload/wop/adop2010concl_e.pdf

Party to another. It is expected that “the Convention as a whole will exert an important influence on international adoptions. It will provide an effective complement to the Hague Convention of 1993, notably by ensuring that adoptions which are not covered by the Hague Convention of 1993 are regulated in such a manner as to comply with the underlying aims of any adoption”.²¹

In this connection, a notable feature of the 2008 European Convention is its reaffirmation of the need to prevent a child becoming stateless as a result of adoption, a concern already addressed in the 1997 European Convention on Nationality.²² Thus, States are required to facilitate the acquisition of their nationality for children adopted by one of their nationals, and loss of nationality as a consequence of adoption must never result in a child’s statelessness.²³ These principles are further reinforced by a subsequent Recommendation on the nationality of children, which also extends similar protection to any child who is in a State Party for the purpose of adoption, or whose adoption has been revoked or annulled, if the child concerned has legally and habitually resided there for at least five years.²⁴

The European Court of Human Rights has been called upon to adjudicate on a number of cases concerning the adoption of children. These have essentially concerned issues relating to compliance with Article 8 of the European Convention on Human Rights (ECHR) regarding respect for private and family life. In this context, the Court has determined, for example, that “foster-care” of a child for 19 months during the initial important stages of her life fulfilled the conditions of “family life”, enabling an application by the carers to adopt the child to go ahead instead of that of another couple who had sought to adopt her.²⁵ It has also clarified the rights of fathers of children born out of wedlock who claimed that they had been insufficiently involved in, or completely excluded from, decisions to place their child for adoption.²⁶ The Court has dealt with allegations of discrimination against prospective adopters on the basis of sexual orientation (see below).

An adoptee’s right of access to information on his or her origins has also been considered by the Court, notably in the case of an adult woman applicant, adopted at the age of 4, whose mother had claimed anonymity on giving birth, under the French system of “*accouchement sous X*”.²⁷ The Court recognised the basic right of people to know their origins, but equally deemed that the mother had a legitimate interest in remaining anonymous. Noting that French legislation attempted to “strike a balance and to ensure sufficient proportion between the competing interests”, and that in this instance the applicant had received “non-identifying information about her mother and natural family that enabled her to trace some of her roots”, the Court refused to uphold her complaint.

A particularly significant case on the intercountry level concerned two adoptive couples from Italy who alleged that Romania’s non-execution of adoption orders in relation to two Romanian girls violated their right to family life.²⁸ The Court found that, although the girls had never lived with, and had not even met, the prospective adopters, “family life” in principle existed in these cases by virtue of those orders and the fact that, despite many efforts over a three-year period, the couples had been prevented from proceeding to take the children into their homes. While declaring the case admissible from that standpoint, the Court noted that, in this case, “it was the expressed desire of the girls to remain where they were, and that ‘their interests lay in not having imposed upon them against their will new emotional relations with people with whom they had no biological ties and whom they perceived as strangers.’”²⁹ Taking due account of the children’s views (they were by then 13 years old), the Court ruled that no violation of “family life” had taken place.

²¹ Explanatory Report, paragraph 19.

²² European Convention on Nationality (ETS No. 166), Articles 6.4.d and 7.

²³ European Convention on the Adoption of Children (Revised), Article 12.

²⁴ Recommendation CM/Rec (2009)13 of the Committee of Ministers on the nationality of children, 9 December 2009.

²⁵ European Court of Human Rights, *Moretti and Benedetti v. Italy*, Application No. 16318/07, Judgement of 27 April 2010.

²⁶ For example, European Court of Human Rights, *Görgülü v. Germany*, Application No. 74969/01, Judgement of 26 February 2004, *Keegan v. Ireland*, Series A no 290, Judgement of 26 May 1994, *W. v. UK*, Series A no. 121, Judgement of 8 July 1987.

²⁷ European Court of Human Rights, *Odièvre v. France*, Application No. 42326/98, Judgement of 13 February 2003.

²⁸ European Court of Human Rights, *Pini and Bertani & Manera and Atripaldi v. Romania*, Application Nos. 78028/01 and 78030/01, Judgement of 22 June 2004.

²⁹ Press Release issued by the Registrar of the ECHR, available at:

<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=801296&portal=hbk&source=externalbydocnumbe&table=F69A27FD8FB86142BF01C1166DEA398649>

Finally, on a general level, it is worth pointing out that the Court has in its findings repeatedly underlined the fact that the European Convention on Human Rights does not guarantee a right to adopt. Furthermore, it has maintained that the right to respect for family life as provided by Article 8 presupposes the existence of a family, and does not protect the “mere desire” to start a family.

III. Respecting children’s rights in the adoption procedure

Most of the human rights of children relating to adoption that are set out in international and European standards – and the procedures to which they give rise – are well accepted. However, a number of issues are still proving to be controversial, and this has implications for the implementation of these standards.

a. The “right” to a family

It is commonly asserted that every child has a “right” to a family, and by implication therefore, *inter alia*, to be adopted. Thus, a text from the European Parliament, for example, states that “all international conventions on the protection of children’s rights recognise the right of abandoned children and orphans to have a family”.³⁰ This affirmation is in fact groundless. Quite to the contrary, “children have a right under a variety of treaties to respect for family life, and to protection against unlawful interference with the family, but children, as with adults, understandably do not have a right to a family *per se* under international law.”³¹

Under the CRC, the child has “as far as possible, the right to know and be cared for by his or her parents”, not to be cared for by “parents” in general.³² Certainly, securing stable family-based care is a well-accepted and positive policy objective when children cannot be looked after by their parents, and the preamble to the CRC states that “for the full and harmonious development of his or her personality, [the child] should grow up in a family environment, in an atmosphere of happiness, love and understanding”. But it is misleading and even dangerous to construe this valid statement as constituting a “right”, and all the more so to invoke this supposed right as a requirement to provide for and proceed with adoption.

b. The best interests of the child

Despite significant and growing literature on the question of “best interests” and their determination, the concept remains the subject of widespread misunderstanding, and manipulation, particularly in the fields of alternative care and adoption.³³

“Best interests” are often cited as a justification for ICA – sometimes even in those cases where it has been carried out under somewhat questionable circumstances – in that the child concerned will be “better off” in a family home in the receiving country.

This view notably fails to recognise that the “best interests” principle is not designed to be a kind of “trump-card” or “super-right”, on the basis of which subjective determination of those “interests” should hold sway. It is, in contrast, a requirement for deciding on the most appropriate implementation of all the child’s other rights. “Best interests” cannot be used to override other rights, for example when determining whether or not a child should be considered “adoptable”. Thus, while best interests must clearly underscore decisions on withdrawal of parental responsibility, which could open the doors to adoptability, the decision-making process on adoptability itself depends on a number of set and clear rights-based criteria that cannot be modified by other considerations. The best interests criterion does, however, constitute the basis for identifying the most suitable outcome for an individual child who is indeed “adoptable”, and its interpretation must conform to all his or her other rights in the CRC and other relevant

³⁰ European Parliament resolution of 16 January 2008: Towards an EU Strategy on the Rights of the Child, paragraph 109.

³¹ Geraldine van Bueren (1998) “The International Law on the Rights of the Child”, Martinus Nijhoff Publishers, p. 93.

³² Convention on the Rights of the Child, Article 7.

³³ See, for example, “Inter-country Adoption and the Best Interests of the Child Principle”, UNICEF Innocenti Research Centre (forthcoming).

instruments. This determination process involves the assessment of a wide range of factors, but those factors have nothing to do with a child being ostensibly “better off elsewhere”.³⁴

c. Subsidiarity

There are those who contend that adoption, because of its legalised and – in principle – permanent nature, is inherently a better solution for a child than various forms of family-based foster-care and traditional informal coping strategies (notably within the extended family or close community) which give fewer formal guarantees. Some proponents of this view go as far as to consider that children in long-term foster care and various informal care arrangements should not be seen as being in “a suitable family”³⁵, or as being cared for “in a suitable manner”³⁶, in the country of origin – settings which in principle preclude envisaging their intercountry adoption. In other words, they contest the idea that ICA should be “subsidiary” to virtually anything other than legalised domestic adoption.

This is of course a highly “Western-centric” approach, in three main senses. First, it denies the fact that legal adoption is almost or completely unknown as a child protection measure in a large swathe of societies. Second, it sees any solution that is not formal and legally binding as automatically inferior in terms of the long-term best interests of the child. Third, it applies a single vision of “suitability” to contexts where other visions may prevail.

Among other things, the principle of subsidiarity clearly places, as it should, sole responsibility for determining a child’s possible need for ICA upon the competent authorities of the country of origin. It is a principle that is at the core of both the rights of the child and the operation of the HC, and consequently one that must be strenuously and systematically upheld.

d. Are potentially adoptable children not being identified?

It is quite possible that, in many countries, a number of children who would in principle benefit from and be eligible for adoption, in their home country or abroad, are not being identified and legally recognised as such, due to lack of resources in that country’s social welfare, legal and judicial systems. Full respect for the relevant administrative and legal procedures, and the conditions attached to them, is of course vital, and no child can be considered “adoptable” unless this is done. Consequently, the response to such concerns can only lie in assisting the development of the relevant systems and procedures.

That said, the term “adoptable child” must never be confused with the terms “orphan” or “child currently in out-of-home care”. The frequently heard statement that there are “millions of orphans” in the world who could be adopted is quite simply untrue.

First, the overwhelming majority of the estimated 16.2 million double-orphans in sub-Saharan Africa, Asia, and Latin America and the Caribbean are looked after by grandparents, other kin or families in the immediate community.³⁷

Second, the proportion of children who are orphans increases with age, so that older orphans greatly outnumber younger ones: thus more than half (55%) of those orphans are aged 12 years or over, so few of those who might need adoption and be declared legally adoptable would be likely to find adoptive homes. Only 12 per cent (i.e. approximately 2 million) are aged 5 or under and “their developmental needs are best met through efforts and interventions that strengthen family care and community support.”³⁸

Third, only a small proportion of children in residential care facilities – too often generically misnamed “orphanages” – are in fact orphans. A recent report from Save the Children notes that 98% of children in residential care in Central and Eastern Europe have at least one living parent,

³⁴ For an example of the kind of factors and process involved, see UNHCR Guidelines on Determining the Best Interests of the Child, Geneva, May 2008.

³⁵ The term used in the preamble to the 1993 Hague Convention.

³⁶ Convention on the Rights of the Child, Art 21(b).

³⁷ Children on the Brink, 2004, UNAIDS, UNICEF, USAID.

³⁸ Ibid.

as do 94% in Indonesia and 90% in Ghana.³⁹ Even in Liberia, still emerging from its internal conflict, the figure is up to 80%, with the result that, when “children’s homes” have been closed down because of poor conditions or illegal activities, most of the children concerned are found not to need “alternative placements” – and even less adoption – but actually return to the care of their families.⁴⁰

e. Children with special needs

It is understandable that relatively few prospective adopters are both willing and deemed apt to care for a child with special needs. The category includes those with a disability or serious illness, those in sibling groups, and older children (generally older than 6 or 7). These children are “hard to place” and the number of offers or requests to adopt them, both nationally and internationally, is well below the number of children who are legally determined to be adoptable.

For example, Ukraine is now applying the subsidiarity principle by giving priority to national adoptions and, as a result, has declared that no child under the age of 3 needs intercountry adoption abroad and that, in the 4–6 age group, only those who have special needs can be considered for ICA. On 1 January 2009, while some 32,000 children were on its adoption register, nearly 95% (28,438) were in the “hard to place” age range of 5 to 18.⁴¹

A similar situation, though with much lower absolute figures, is found in many other countries – accounting for the fact that the average age of adopted children arriving in Italy from Hungary, Lithuania, Poland and Ukraine is no less than 8 years (Italy currently takes in over half of all children adopted from this sub-region).⁴² In addition, Italian figures for 2009 show that over 30% of children adopted from the Russian Federation and Ukraine, and 18% of those from Bulgaria, had special needs.

More and more countries worldwide are indeed finding that they are able to place their youngest children nationally. As a result, increasing priority is also being given by many non-European countries of origin, such as Chile and Peru, to securing ICA for older children and those with other special needs. China, for example, even though it has placed no formal prohibition on intercountry adoption of younger children and those without diagnosed medical conditions, has reported a decrease in the availability of healthy children, with the result that “some prospective adoptive parents are transferring to the waiting list for special needs children”.

These developments bring with them a number of dangers. The first is that major reliance on ICA as a means of finding families for hard-to-place children may be unrealistic, since receiving countries themselves often face a similar problem in identifying prospective adopters for such children within their own country. Second, in order to fulfil their adoption plan, prospective adoptive parents may see no option but to agree to care for a child with special needs, perhaps with a degree of resignation that might not necessarily augur well for their future relationship with the child. Third – at least under the less scrupulous and less well-regulated systems – information on the special needs of a child may be hidden from the prospective adoptive parents, who may find after the adoption that they cannot cope, with a heightened risk of the placement breaking down.

IV. Necessary procedural safeguards

A number of procedural challenges have to be tackled to ensure that adoptions are compliant with human rights and other obligations. State authorities have the duty to ensure that all actors respect these standards throughout the adoption process, and this duty also applies fully and without exception in difficult or crisis situations.

³⁹ Keeping Children Out of Harmful Institutions, Save the Children UK and the Save the Children Child Protection Initiative, 2009.

⁴⁰ See, for example, “Liberia: Fake orphans to attract donor funds”, IRIN, 17 May 2007.

⁴¹ Ukrainian Ministry of Family, Youth and Sports, 13 April 2009.

⁴² Commissione per le Adozioni Internazionali (CAI) 2009.

a. Assessment of prospective adoptive parents, and matching

Some people question the need for an in-depth assessment process to determine fitness to adopt. They see this as a bureaucratic and inherently suspicion-laden intrusion into their family life to which, indeed, intending birth-parents are not subjected. Even more prospective adoptive parents feel they should be able to “choose” their adopted child, on the basis of a spontaneous affective reaction on their part,⁴³ rather than being matched with a child whom they have never met and by a professional team that has access only to papers in their application file.

Nonetheless, assessment and matching are key processes in adoption according to international standards, for reasons that not only are based on the protection of the rights of the child but that also clearly safeguard the interests of prospective adoptive parents.

Carried out appropriately, the assessment process enables prospective adopters to review their plans and expectations in a supportive context, at least to the same extent as it allows for certain people to be refused permission to adopt.⁴⁴ A professional and objective assessment makes it possible to determine the strengths and limitations of prospective adopters, especially in terms of their willingness and perceived ability to care for harder-to-place children. This enables the information in their application file to correspond as closely as possible to their capacity to adopt children with given needs and characteristics, which is the basic criterion in the matching process.

Initial matching is based on comparison between the fullest possible information on a child’s needs and characteristics and the appropriateness of the capacities of prospective adopters, as described in their file. It is designed as the essential prelude to a process during which the degree of bonding between the child and the prospective adoptive parents can be evaluated by all concerned. This clearly requires the presence of the prospective adopters in the country of origin for a certain time. If bonding is successful – the result of the great majority of cases when matching has been properly conducted – the specific adoption plan goes ahead; if not, it is terminated and another plan can be considered.

Unless assessment and matching follow this course and are carried out on the basis of accurate and complete information, there are serious dangers that the child will find himself/herself in the care of adoptive parents who are unable to cater to the child’s needs, despite their best intentions. Alternatively, adoptive parents may subsequently discover that they cannot cope with the needs of a child towards whom they had nonetheless experienced initial instinctive affection. Experience has shown that the results of both situations can seriously endanger the adoptive relationship and jeopardise the child’s welfare.

This explains why it is necessary to prohibit or change systems which allow for an element of “self-selection” on the part of prospective adopters – as is the case in many independent routes – but which fail to provide, or take account of, adequate information about them and/or the child.

b. Adoption by same-sex couples, or by single gay or lesbian persons individually

As noted previously, the protection of private and family life under Article 8 of the European Convention on Human Rights does not include a right to adopt children. All prospective adopters must be assessed for their suitability, and then matched with a child according to the child’s best interests, on a case-by-case basis. Assessment and matching for homosexual applicants, however, frequently gives rise to allegations of *prima facie* discrimination against such applicants.

In the case of *E.B. v. France*⁴⁵, the applicant, a woman living in a relationship with another woman, had applied for adoption as a single parent. The Court noted that she was rejected with reference to, *inter alia*, her “lifestyle” as a homosexual, even though her “undoubted personal

⁴³ This is one of the main reasons for advocating an “independent” adoption process.

⁴⁴ Overall, only a small minority of applicants are denied permission to adopt as a result of the assessment, although some withdraw their application during or following the exercise.

⁴⁵ European Court of Human Rights, *E.B. v. France*, Application no. 43546/02, Judgement of 2 January 2008 paragraphs 70-98.

qualities and an aptitude for bringing up children” had been acknowledged. Since “French law allows for single persons to adopt, thereby opening up the possibility of adoption by a single homosexual”, the Court held that the domestic authorities had made a distinction regarding her sexual orientation that violated the principle of non-discrimination in conjunction with the right to family life.⁴⁶

The Committee of Ministers recommended in 2010 that Council of Europe member states whose national legislation permits single individuals to adopt children should ensure that the law is applied without discrimination based on sexual orientation or gender identity.⁴⁷ A number of member states already enable gay and lesbian persons, individually or jointly, to adopt a child. Second-parent adoption⁴⁸ and joint adoption by these persons are both currently possible in Belgium, Denmark, Iceland, the Netherlands, Norway, Spain, Sweden and the United Kingdom; second-parent adoption is possible in Finland and Germany.

c. Applications to adopt and the number of “adoptable children”

While the global number of ICAs has fallen substantially in recent years, this is not a reflection of lessening interest on the part of prospective adopters – indeed, the contrary seems to be true.

Overall, adults interested in intercountry adoption significantly outnumber children deemed to require it. For example, the China Centre for Adoption Affairs stated in late 2009⁴⁹ that 30,000 families were awaiting a match with a Chinese adoptee, while less than 6,000 intercountry adoptions had been processed the previous year. The French Central Authority (SAI) noted in late 2008 that over 1,100 applications had been received to adopt from Cambodia, whereas only 26 adoptions from that country to France had taken place in 2007.

More generally, the SAI commented on the “strong pressure” exerted on ICA, in that “the number of applicants has increased considerably... whereas the number of adoptable children is in constant decline.”⁵⁰ All such statements on this question point in the same direction. Norway observed that, while ICA had “more than halved” between 2005 and 2008, this was “mainly due to the fact that more and more countries are trying to find solutions for the children in their own country [...] while the number of people who wish to adopt is increasing”.⁵¹ The Finnish Adoption Board noted a continuing decline in ICAs, from 218 in 2006 to 157 in 2008, whereas “the interest for international adoption continues to be great both in Finland and elsewhere in the world. Indeed in 2008 the Adoption Board processed 553 applications for adoption.”⁵²

Most prospective adopters, both nationally and internationally, are not unnaturally looking to adopt a child as young and as healthy as possible. Many of the traditionally-regarded “countries of origin”, however, are finding it increasingly possible to place babies and toddlers with adoptive parents domestically. Some are therefore setting minimum age limits for ICAs: in 2009 the Philippines declared a moratorium on cross-border adoption of children aged two or less, whether or not they have medical or developmental concerns.⁵³ In contrast, like Guatemala before its suspension of ICA in 2008, several countries still allow children less than 1 year old to be adopted abroad. These include China, Mali and Viet Nam.

Despite the ever-diminishing opportunities, the extent of interest in cross-border adoption of younger children can be gauged from the data made available by certain (but regrettably all too

⁴⁶ A recent application, in which a same-sex couple complained they had been subjected to discrimination in relation to their right to family life due to a refusal of a child’s adoption by the non-biological parent, was declared admissible by the Court. The case is *Gas and Dubois v France*, Application No. 25951/07, decision of 31 August 2010.

⁴⁷ Recommendation CM/Rec(2010)5 of the Committee of Ministers on measures to combat discrimination on grounds of sexual orientation or gender identity, 31 March 2010, paragraph 27.

⁴⁸ Second-parent adoption is when a person adopts the biological child of his/her partner. Joint adoption is when a couple, together, adopt a child of whom they are not biological parents. Where there is no possibility of second-parent adoption, this may have significant consequences for the parents and the child involved. The main implications include the lack of rights of the child and the non-biological parent in the event of divorce, separation, death of the biological parent, or other circumstances that would prohibit the parent from carrying out parental responsibilities.

⁴⁹ At a meeting with the UK Central Authority, the DCFS, on 15 October 2009.

⁵⁰ Website announcement of 27 November 2008 and Information Letter of January/February 2010.

⁵¹ Statistics Norway, available at: http://www.ssb.no/english/subjects/02/02/10/adopsjon_en/

⁵² Finnish Adoption Board, Annual Report 2008.

⁵³ Philippines Inter-Country Adoption Board (ICAB), 23 April 2009.

few) receiving countries. In 2008, no less than one-fifth of adoptions to France involved babies of 12 months or less, and 67% of all ICAs were of children aged 4 or less.⁵⁴ In Finland in the same year, although the figure for adoptees less than 1 year old was lower, at about 8%, its total for the 0–4 age group was a massive 81%.⁵⁵ Italy had a similar figure (7.2%) for those less than 12 months old in 2009, though a total of only 41.7% for the 0–4 group as a whole.⁵⁶

A legitimate fear is that the increasing imbalance between the number of people seeking to adopt from abroad and that of adoptable children in countries of origin may be exacerbating the illegal and unethical practices to which ICA has regrettably been so prone. It is no longer taboo to talk of how “supply” of children has tended to respond, albeit apparently insufficiently, to the “effective demand” expressed by prospective adopters, whether directly, through their adoption agencies or via their governments.

In the worst cases, authorities not only allow this to happen, they even foster it by submitting unwarranted numbers of applications to countries of origin or, on behalf of their citizens, “inviting” those countries to increase the number of children made available for ICA. The grave problems that countries of origin consequently experience in protecting the rights of children actually or potentially involved in ICA have led to the unfortunate series of “stop-go” policies (suspensions, restrictions, moratoria), quotas, and ill-conceived laws, structures and procedures into which countries of origin have been pushed, especially since the early 1990s. It is difficult to see how current problems in ICA can be tackled effectively unless “demand” in this form is prevented from reaching the countries of origin.

d. Non-regulated and private adoptions

Non-agency adoptions are not in line with the Hague Convention. The possibility of undertaking them was indeed deliberately excluded from the treaty because it was already known, at the time of its drafting, that they involve a particularly high risk of malpractice from a variety of standpoints. Consequently, all adoptions between HC Contracting States have to be carried out through accredited agencies or, exceptionally, under the direct and constant supervision of the Central Authority.

In adoptions from countries that are not parties to the HC, however, practice in Europe varies widely between countries.

Some receiving countries, such as Italy or Sweden, require all ICAs to be conducted through accredited agencies, regardless of the Hague status of the country of origin. In contrast, others such as France and Switzerland currently put few restrictions on independent adoptions by their citizens, provided that they have certificates of fitness to adopt and that the country of origin in question has not ratified the HC and also allows this practice. Yet others fall in between: Belgium, for example, has a system of “independent” adoptions that are in principle supervised by its Central Authority.

Similarly, some of the few countries of origin in the region that are not yet parties to the HC allow non-regulated and private adoptions. In Ukraine, for example, legislation specifically prohibits in-country operation of accredited and authorised agencies from other countries. Prospective adoptive parents are accompanied on the spot by unsupervised facilitators, often “interpreters”, whom they either choose directly or are assigned by their agency.

The Special Commission on the HC has called for a total “prohibition on private and independent adoptions,”⁵⁷ and indeed their existence is indefensible from the point of view of children’s rights. At the same time, agency involvement is not a guarantee in itself, and a “Good Practice Guide” issued by the Hague Conference⁵⁸ recognises the need for stricter accreditation and authorisation of agencies involved in ICA, with special attention to the professional quality and scope of the

⁵⁴ Service de l’Adoption Internationale (SAI).

⁵⁵ Finnish Board of Inter-Country Adoption Affairs, Annual Report 2008.

⁵⁶ Commissione per le Adozioni Internazionali (CAI) report 2009.

⁵⁷ Special Commission 2010, Conclusions and Recommendations, 1.g.

⁵⁸ “Accreditation and Adoption Accredited Agencies: General Principles and Guide to Good Practice”, Hague Conference, available (currently in draft form) at http://www.hcch.net/upload/wop/adop2010_pd02e.pdf

services they provide and to ensuring that their numbers are not greater than those needed. The main European grouping of such accredited agencies, Euradopt, has also developed ethical guidelines to which its membership commits.⁵⁹

e. Adoptions from non-Hague countries

Although the HC has been in force for more than fifteen years, and despite the ever-growing number of countries that have ratified it, the majority of intercountry adoptions still take place outside the framework it provides.

For example, five of the seven countries of origin from which more than 100 children were adopted in Spain in 2008 had not ratified the HC. A similar degree of reliance on non-Hague countries of origin is seen elsewhere: 78 per cent of adoptions to the Flanders region of Belgium (in 2008) were processed outside the Hague framework, as were 72 per cent to France. The corresponding figure for Italy was considerably lower, however, at 54%, and adoption from non-HC countries is now less than half of total ICAs to Switzerland.

The reasons for, and potential implications of, this situation pose serious questions.

On the one hand, countries of origin that ratify the HC and therefore, in principle, start to promote and apply the subsidiarity principle more systematically, are likely to see a significant fall in the number of their children requiring ICA. Over 14,000 children were adopted from China in 2005, constituting roughly one third of all ICAs worldwide that year. However, in part due to the fact that China became a party to the HC on the first day of 2006, within just three years that figure had fallen to less than 6,000.⁶⁰

On the other hand, non-Hague countries whose adoption procedures continue to be subject to less stringent conditions may well be more open to allowing growing numbers of their children to be adopted abroad: for example, ICAs from Ethiopia continued to grow substantially throughout the past decade, from a few hundred per year at the start to over 4,000 in 2009.

For receiving countries that seek as far as possible to meet their citizens' expectations, non-Hague countries therefore tend to be relatively attractive partners for ICA. If this turns out to result in ever-increasing pressure on those countries to institute or further develop ICA to "compensate" for reductions in Hague-compliant counterparts, rather than genuine instigation to ratify the treaty, the true aims of adoption, including intercountry adoption, would once again be severely compromised.

f. Systemic problems or isolated violations?

Adoption, like any other domain of human activity, is not immune to people who will seek to circumvent or ignore the law, and clearly every effort must be made to apprehend those guilty of such acts.

However, in some quarters the problems associated with ICA are presented as being essentially isolated incidents, perpetrated by individuals whose detection and arrest would thus resolve the issue. In this vein, they tend to favour of the *status quo* in terms of regulation, and contest any need for in-depth review and reforms that might require, *inter alia*, temporary suspension of ICA, arguing that the interests of children still needing adoption would thereby be compromised.

This is far from being the case: most of the major problems encountered in the intercountry adoption process concern activities that have become quasi-generalised not only in the absence of effective supervision and repression, but more particularly because of the legislation and system in place in the country concerned – which may be either a country of origin or a receiving country. It is these systemic lacunae that need to be tackled at their roots. The following are some examples:

⁵⁹ http://portal.euradopt.org/index.php?option=com_content&view=article&id=6&Itemid=15&lang=en

⁶⁰ 2005-2009 annual adoption statistics notified by China to the Hague Conference on Private International Law, available at http://www.hcch.net/upload/wop/adop2010pd05_cn.pdf

- Systems where the required process for declaring the adoptability of a child is neither transparent nor thorough.
- Systems that do not allow duly accredited and authorised agencies to operate, and/or permit independent adoptions.
- Systems that do not provide for screening facilitators and other intermediaries in the adoption process.
- Systems that allow prospective adopters and/or their agencies to have direct contact with residential child care facilities and, more or less directly, to “select” a child.
- Systems where agencies or individuals are required or allowed to make donations to the residential child care facility from which they adopt, or to provide other humanitarian assistance or financial support to the child protection system.

Where systems such as these exist, it is almost inevitable that the financial advantage of adopters and their agencies in relation to those involved in the country of origin will result in illicit activity. This is of course exacerbated by the fact that the number of foreign applicants to adopt is considerably greater than the number of “adoptable” children.

g. Costs and contributions

If national adoptions are to be promoted, particularly in countries where this constitutes a special challenge, one essential initiative is that financial hurdles to adopting be removed. In many cases, administrative charges and the travel costs involved in completing the adoption process are perceived as prohibitive by people who would otherwise be both willing and fit to adopt.

In ICA, financial issues are also indisputably at the heart of most major problems that have been and are still encountered, but from a different standpoint.

Over and above the issue of illicit and “unofficial” cash payments during the adoption process – neither their existence nor the need to react effectively to them is in doubt – two questions in particular need to be addressed.

First, the costs involved in an adoption must be clearly stated and justified.

In the receiving country, one important condition of accreditation – and re-accreditation – of agencies offering adoption-related services must be transparency in relation to the cost of the services they provide and the fees and any other charges that they will cover in the country of origin. Publicly accessible information as to the charges, fees and costs of agencies in CoE countries is generally wholly insufficient. In addition, total costs quoted by European agencies for adopting from any given country can vary considerably, highlighting the need to be able to determine the validity of the reasons for the differences.

Equally, the official amounts charged to foreign adoptive parents by countries of origin can vary by a factor of ten or more, and the disparities do not necessarily reflect purchasing power considerations. The bases on which such charges are determined need to be clarified.

The second area of concern on the financial front is that of donations and contributions which prospective adopters or their agencies may be expected, “invited” or required to make to the facility from where they adopt, or to the wider child protection system.

There may seem to be a justification in requesting foreign adopters, directly or indirectly, to support the “children left behind” or “preventive” services in the country of origin, and many do so more than willingly. However, the sums involved are often quite considerable, and can constitute a motivation, within the country of origin, to respond by all means to requests to adopt. This is a concern clearly espoused, at the outset, by the Special Commission on the HC.⁶¹ Certainly support to child welfare services in countries of origin is necessary, but this must be assured by other channels of bilateral and multilateral assistance, not by those involved in an intercountry adoption – including prospective parents and their agencies.

⁶¹ See, for example, Recommendations 9 and 10 from its 2000 meeting at <http://hcch.e-vision.nl/upload/scrpt33e2000.pdf>

h. Adoption following disasters

The agreed policy of all major international agencies concerned⁶² is now that ICA should not be envisaged during or in the immediate aftermath of disaster situations, a position reflected by Guidelines adopted by the United Nations in 2009.⁶³ A 1994 recommendation related to the HC already established that principle as regards the potential adoption of child refugees.⁶⁴ The main concern underlying this approach is that considerable time is needed to ascertain whether children who may apparently be orphaned or abandoned have in fact simply been separated involuntarily from their parents or other family members as a result of the disaster.

Although this principle has been generally followed by European receiving countries in recent years (and indeed by countries of origin, as evidenced by those affected by the 2004 *tsunami*), the January 2010 earthquake in Haiti demonstrated the fragility of its application. In addition to the fact that Haiti is not a party to the HC, and that its adoption system was already known to be at unacceptable variance with international standards, four major factors contributed to the problems encountered in this specific case:

- adoption orders regarding hundreds of children had already been granted at the time of the earthquake, but travel documents for these children had not been issued, and hundreds of other children were at some stage in the adoption process or had simply been preliminarily and unofficially identified as adoptable;
- the Haitian authorities were in disarray and vulnerable, with many civil servants and judges killed, government buildings destroyed and archives lost;
- the authorities of many receiving countries were under intense pressure to “expedite” adoptions; and
- receiving countries took differing stances in relation to the status of the children they were prepared to evacuate, and how this was to be done.

The result was that even the inadequate normal procedures and safeguards were widely circumvented, so that it was not only legally adopted children whose transfer abroad was expedited but also many whose adoption was hurriedly “signed off” administratively, under pressure, including some who had not even been matched with prospective adopters.⁶⁵

Emergency situations constitute a “stress test” for international cooperation and respect for standards and obligations. In the case of Haiti, many seem to have failed that test, and it will be vital to learn from that experience in order to safeguard the rights of children in any future disaster situation.

V. Conclusions

The current picture of adoption within, to and from European countries is one of very widely varying realities, but the background against which it takes place has some clear features.

Over the past fifty years, growing numbers of people have sought to meet their legitimate desire to found a family, or to take in a child who needs an alternative stable family environment, through adoption. In most cases, they have understandably been looking to adopt a very young child. To do so, people in many European countries have found it increasingly necessary to rely on opportunities to adopt a child from a country other than their own. However, the number of people seeking to adopt children considerably outweighs the number of young children who are in need of adoption and are declared “adoptable”. In contrast, older children and those with

⁶² Including UNICEF, UNHCR, ICRC, the Hague Conference on Private International Law, Save the Children, and International Social Service.

⁶³ Guidelines for the Alternative Care of Children, UN Doc. A/RES/64/142.

⁶⁴ Recommendation concerning the application to refugee children and other internationally displaced children of the Hague Convention of 29 May 1993, adopted 21 October 1994.

⁶⁵ For a full account and analysis of how inter-country adoption from Haiti took place during the months after the earthquake, see “Haiti: ‘expediting’ adoptions in the aftermath of a natural disaster... preventing future harm”, International Social Service, Geneva, August 2010, available at <http://www.iss-ssi.org/2009/assets/files/Haiti%20ISS%20final-%20foreword.pdf>

disabilities for whom adoption could be envisaged remain hard to place, and their numbers are far greater than those of people both willing and able to cater to their special needs.

The point has long since been reached where the wholly laudable willingness or legitimate desire to adopt a child often metamorphoses into unrealistic expectations that are expressed as “effective demand” for that relatively rare adoptable child. The pressures exerted, wittingly or unwittingly, because of the desire to adopt young children have led to increasingly documented instances of such children being procured for adoption by illegal means and for financial gain, particularly in the framework of intercountry adoption. Many of the systems and procedures that are in place at best do nothing to prevent these abuses, and at worst may even facilitate them.

As a result, international agreements have been developed to address this changing face of adoption.

The standards and safeguards they establish are essentially directed towards ensuring four things:

- i) **that the adoptability of children is always determined in the right way.** This means not only that full investigations have been carried out on the child’s identity, background and circumstances, and all necessary “free and informed” consents obtained, but also that transparent procedures have been strictly followed for their adoptability to be legally established. Of special concern here is the protection of the rights of birth parents, lack of support to those who only resort to giving up a child for adoption because of material poverty, and the advantage that may be taken of the vulnerability of many such parents.
- ii) **that intercountry adoption is considered and carried out for the right reasons.** In practice, the subsidiarity of intercountry adoption to appropriate domestic solutions is not always respected, with few real attempts being made to find a suitable care option for children in their own country. Many countries of origin still feel under pressure to make more children available for adoption abroad. Thus, there is cause for concern, for example, when babies and toddlers are adopted abroad from countries where alternative homes can usually be found for children of that young age. In some cases, young children are “reserved” for intercountry adoption by various means. They may be allowed to by-pass registration for domestic adoption, or be virtually guaranteed rejection by a local adopter, for example due to medical records fabricating the existence, or exaggerating the seriousness, of an illness or disability.
- iii) **that each child is adopted by the right person(s).** Professional matching of a child with adoptive parents who have the aptitude to cater to his or her specific characteristics and needs is vital. Many prospective adopters have an “ideal image” of the child they wish to adopt and are not adequately prepared for (or suited to) the fact that children available for intercountry adoption in many countries increasingly have some degree or form of “special need”. Given this developing reality, which is rapidly changing the face of intercountry adoption, it will be particularly important for the assessment of applicants to be even better tailored to determining their true willingness and ability to take on the generally more difficult task of caring for an older child or a child with disabilities, since some may feel that doing so constitutes their only option for adopting. Of special concern are instances where information regarding a child’s medical or other background is falsified or deliberately withheld from the potential adopters, which can easily lead to subsequent inability to cope and rejection.
- iv) **that the adoption is carried out in the right way.** Fundamental to this is that applications to adopt should be submitted and considered only in response to real needs, so that prospective adoptive parents offer a home to an adoptable child rather than taking the initiative, directly or indirectly, to find such a child. Non-regulated and private adoptions, without assistance from accredited agencies and usually with minimal or no oversight by the authorities of the receiving country, must be prohibited. They are not in conformity with the Hague Convention but are still commonly taking place from non-Hague countries. They involve demonstrably greater risks of illicit practice than those carried out through accredited agencies.

These goals correspond to efforts to protect the human rights of the child, with application of the principle that the child's best interests must be given "paramount consideration" in decisions to initiate adoption proceedings and in carrying them through. Determination of those interests involves thorough assessment of a wide range of factors, and has to be carried out with full respect for all other rights. This process also enables the rights of birth parents to be preserved, and the interests of prospective adopters to be respected.

Not only are the changes required to achieve these goals substantial, but they also cannot be brought about through the initiatives of one type of actor alone. The effectiveness of any measures taken by countries of origin will be jeopardised if pressures continue to be exerted by receiving countries. Unless agencies systematically refuse to operate in the framework of systems that are in clear violation of international norms, they may find themselves complicit in abuses. If prospective adopters do not receive accurate and dispassionate information on intercountry adoption needs, they will not be able to adjust their plans and expectations accordingly. Thus, each actor in the process carries a particular responsibility, and all need to, and must, seek cooperation with one another to maximise the impact of their efforts.