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Intercountry adoption: ensuring that the best interests of the child are upheld

Report[1]
Committee on Social Affairs, Health and Sustainable Development
Rapporteur: Ms Marlene RUPPRECHT, Germany, Socialist Group

Summary

Intercountry adoption concerns many countries across the world, be it as "sending" or "receiving" countries. Those most concerned, however, are the children, for whom intercountry adoption represents a "mixed blessing". It may, on the one hand, be the best care option for many children without parental care. On the other hand, it also represents an interference with the fundamental rights and personal identity of a child. Generally intended as a humanitarian act, transferring a child to a foreign country and new family is necessarily a traumatising experience and needs to be handled with utmost care. It is also necessary to recall that the main aim of adoption is to find a family for a child and not a child for a family.

Against the background of international standards, and in the light of persisting reports of intercountry adoption cases where the best interest of the child has not always been the primary consideration, the Parliamentary Assembly should call for committed action both at international and national level to protect the children concerned. Member States of the Council of Europe should adopt and implement a stringent set of rules ensuring that the fundamental rights of children are upheld at all stages of intercountry adoption procedures.

1. Reference to committee: Doc. 12597, Reference No. 3778 of 20 June 2011.

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A. Draft resolution[2]

1. Intercountry adoption is one of several possible care options for children without parental care. It may be the option of choice for children without parental care whose safety cannot otherwise be ensured (in particular for children who, in their home countries, face extreme poverty, neglect, exploitation and/or conflict situations).

2. However, intercountry adoption also represents an interference with the fundamental rights and personal identity of a child. Above all intended as a humanitarian act, transferring a child from the context of its biological family and home country to a foreign country and a new family is necessarily a traumatising experience and needs to be handled with utmost care and sensitivity for the child's individual situation.

3. In this context, the Parliamentary Assembly points to the central role of the United Nations Convention on the Rights of the Child of 1989 providing that the best interests of children shall be a primary consideration in all decisions concerning them. Children should grow up in a family environment, in an atmosphere of happiness, love and understanding. The main object of adoption is to find a family for a child and not a child for a family.

4. The Assembly is concerned by persisting reports of cases of intercountry adoption where the best interest of children has evidently not been the paramount consideration or where their human rights have been severely violated. Certain children fall victim to "child laundering" practices, involving the abduction and sale of children, the coercion or manipulation of birth parents, falsification of documents and bribery. Both sending and receiving countries involved in intercountry adoptions must therefore live up to their responsibilities to prevent and fight such criminal activities at a global level.

5. The Assembly draws attention to the main legal references in this field: the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993) and, at Council of Europe level, the European Convention on the Adoption of Children (revised) (CETS No. 202). The Assembly has regularly looked into the situation of children in intercountry adoption procedures, such as in its Recommendation 1443 (2000) "International adoption: respecting children's rights" and Recommendation1828 (2008) on the disappearance of newborn babies for illegal adoption in Europe.

6. In view of recent trends which continue to make intercountry adoption a possible and interesting care option for many children, the Assembly reiterates its call to Council of Europe member States to reinforce their relevant policies to pursue the practice of intercountry adoption under secure conditions while respecting the best interests of the child, by:

6.1. if they have not yet done so, signing and ratifying the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption and the European Convention on Adoption (revised) as complementary texts, with a view to effectively protecting children in the framework of intercountry adoptions;

6.2. if they have not yet done so, signing and ratifying the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) as well as the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201), with a view to protecting children against crimes which may be related to intercountry adoption;

6.3. developing coherent national policies aimed at establishing fully supervised procedures of intercountry adoption involving a public central authority, which may – thanks to a sufficient level of resources – function as a competence centre and ensure a certain supervision of adoption standards and practice;

6.4. developing strict rules and standards for the setting up, operation and supervision of specialist child adoption agencies in order to prevent their unregulated multiplication and competition from leading to insufficiently supervised adoption procedures or other unsafe practices;

6.5. ensuring that the origins and personal identity of children are fully documented throughout the adoption process and beyond and that children have the possibility of accessing all information concerning them at the age of 18 at the latest;

2. Draft resolution adopted unanimously by the committee on 2 October 2012.

6.6. ensuring that adoption services and agencies work in a child-friendly manner as promoted by Recommendation CM/Rec(2011)12 of the Committee of Ministers on children's rights and social services adapted to children and families, in particular with a view to the participation of children in decisions concerning them;

6.7. establishing a formal framework for regular international exchanges and solid co-operation in this field in order to effectively combat criminal activities related to intercountry adoption and prosecute offenders;

6.8. as regards countries receiving adoptive children in particular, conceiving national adoption policies and procedures according to the following principles:

6.8.1. developing strong national adoption systems, as a means of responding to the interest of prospective adopters in the most secure manner and preventing them from turning to non-accredited agencies or independent adoptions which could expose them to illegal activities;

6.8.2. establishing authorisation procedures ensuring that prospective adopters are suitable to adopt and obliged to follow specific training preparing them to welcome a foreign child, possibly even a child with special needs (due to illness or disability);

6.8.3. ensuring that foreign children being adopted are fully monitored well before, during and after the actual legal act of adoption for an adequate number of years, and that families receive support throughout and after the adoption process;

6.8.4. declaring moratoria if, for whatever reason (humanitarian disasters for example), safe adoption procedures can no longer be ensured, but maintain open lines of communication between central authorities involved to avoid legal vacuums and traumatising uncertainties for the children;

6.9. as regards the sending countries in particular, conceiving national adoption policies and procedures according to the following principles:

6.9.1. establishing authorisation procedures ensuring that children foreseen for intercountry adoption are truly in need and that no better care alternative exists in their country of origin;

6.9.2. reinforcing family planning services and improving the living conditions of families living in extreme poverty and the support provided to them in order to avoid their considering intercountry adoption as a care option for their children and thus exposing them to the risk of being drawn into "child laundering" activities;

6.10. at Council of Europe level, where children's rights are promoted through various texts and activities, ensuring that the issue of intercountry adoption be considered in the work related to the Strategy on the Rights of the Child (2012-2015) and the Action Plan proposed for its implementation;

6.11. wherever appropriate, participating in and promoting international exchanges aimed at assisting countries in need in developing national alternative care options for children without parental care as well as effective child protection services, including for children with special needs (with illnesses or disabilities).

B. Explanatory memorandum by Ms Rupprecht, rapporteur

1. Introduction

1. Intercountry adoption involves the transfer of a child from his or her country of origin ("sending country") to another country ("receiving country") for the purpose of adoption,[3] namely in order to be received by a new family as its own child via a formal legal act. As with domestic adoption, parental rights and responsibilities are thus formally transferred from the biological parents to the adoptive parents. Ideally, intercountry adoption should be one of a number of care options considered for children who cannot be cared for by their families. It may be the best long-term care solution for some children whose safety cannot otherwise be secured and who risk remaining in institutional care in extreme poverty or, in the most serious cases, may be threatened by death, neglect or exploitation in their home countries. The Guide to Good Practice (2008) relating to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption of 29 May 1993[4] ("the Hague Convention") recommends that intercountry adoption should be part of a State's national childcare and protection strategy.[5]

2. Although intercountry adoption is generally seen as a mechanism which is beneficial for a child, the rights of children may sometimes be violated or threatened in the framework of the relevant procedures. These are sometimes insufficient to prevent unethical practices and outright crimes, such as the sale and abduction of children, coercion or manipulation of birth parents, falsification of documents and bribery – a series of crimes also designated as "child laundering" by international experts.

3. Even in cases where the rights of the child are respected and the child is welcomed by a loving family, children are often subjected to traumata linked to the departure from their home country and usual environment to a world that they do not yet know, to be received by strangers formally acting as their parents from now on. It therefore needs to be noted that intercountry adoption is also a serious interference with the fundamental rights of a child, whatever the final result of such an intervention may be. The biological family is under normal circumstances considered the best place for a child. Public policies undertaken with a view to the well-being of children should therefore firstly aim to maintain the child within his or her birth family context. Only if circumstances do not allow for this stability should alternative care arrangements be made.[6]

4. In the United Nations Convention on the Rights of the Child of 1989, the States parties to the convention recognise that "the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding" and provide that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".[7] From this, one can directly derive the right of a child to a loving family environment and the need to give priority to the best interest of children in any decision concerning them. However, no legal standard provides for a "right" of adults to a child of their own.

5. With the present report – prepared on the basis of my work as the Parliamentary Assembly's current General Rapporteur on Children, as a member of the German Bundestag and its permanent child commission, and as a children's rights activist in numerous charitable organisations at national level for many years – I would like to show how children's rights may be endangered in the framework of intercountry adoption procedures and what action is needed. I urge the Parliamentary Assembly to send out another strong signal and a call for committed action by Council of Europe member States with regard to legal and political measures to be taken. In doing so, I build upon previous work of the Assembly, such as its Recommendation 1443 (2000) "International adoption: respecting children's rights" and Recommendation 1828 (2008) on the disappearance of newborn babies for illegal adoption in Europe.

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3. Council of Europe Commissioner for Human Rights: Adoption and Children: A Human Rights Perspective, CommDH/Issue Paper(2011)2.
4. See www.hcch.net/upload/conventions/txt33en.pdf.
5. Hague Conference on Private International Law (HCCH): The implementation and operation of the 1993 Hague Intercountry Adoption Convention: Guide to Good Practice 2008, The Hague, 2008.
6. Parliamentary Assembly Resolution 1762 (2010) "Children without parental care: urgent need for action".
7. United Nations Convention on the Rights of the Child, preamble and Article 3 respectively: http://www2.ohchr.org/english/law/crc.htm.

6. To illustrate some of the practical issues involved at national level, I would like to briefly present the situation in my own country, Germany. I was, in particular, in a position to obtain up-to-date information on intercountry adoption challenges, as perceived in Germany as a receiving country, at the annual conference of the Federal Central Office for International Adoption (*Bundeszentralstelle für Auslandsadoption – BZAA*) in Bonn on 23 and 24 November 2011.

2. Intercountry adoption: development and controversy

2.1. History of intercountry adoption and current trends

7. Although adoption has existed informally for many centuries, intercountry adoption is a comparatively new practice. A trend towards international adoptions developed as a humanitarian response to the number of children orphaned by the Second World War. In some countries, such as the United Kingdom, this situation even led to particularly painful chapters of international adoption. After a long history of sending British children abroad for adoption, starting with one hundred children being shipped from London to Richmond, Virginia, in 1618, the last incidences were observed just after the Second World War era when approximately 3 300 children were sent to Australia, while New Zealand, Rhodesia (today Zimbabwe since 1980) and Canada received a total of 1 000 children.[8] The fate of these children has been covered by a number of documentaries which showed the suffering experienced by many of these "lost children" who were deported, submitted to mistreatment or abuse or denied access to information on their true origins and identity.[9] Even though such large-scale "child laundering" would encounter more difficulties under modern social welfare programmes, communication tools and law enforcement conditions, it is important to keep past cases in mind and remain aware of children's vulnerability in such situations.

8. Child migration for adoption purposes could also be observed at the end of the Vietnam war: facing famine and the siege of Saigon by the Vietcong, during the so-called "Operation Babylift" about 2 000 children were flown to the United States, and a further 1 300 to Canada, Europe and Australia in 1975; a great number of these children were apparently not orphans but had been abandoned at birth because their fathers were American GIs.[10] Some years before, the wish to save children who had been wounded during the war had amongst other things led to the creation of *Terre des Hommes*–Germany in 1967, which also facilitated the adoption of some of these children.[11]

9. More recently, there was a surge in the number of adoptions in the early 1990s when countries in central and eastern Europe opened up and were subsequently flooded with couples and agencies from western Europe and the United States seeking to adopt children from orphanages of the region. Since the mid-1990s, the number of intercountry adoptions worldwide has increased every year, peaking in 2004 with over 42 000 intercountry adoptions processed in that year alone.[12]

10. Certain trends and developments in modern societies lead to more people turning to intercountry adoption. In many countries the moment of family foundation tends to be postponed to later stages of life. Mothers and fathers, sometimes for reasons of professional development and careers, are on average much older than in previous generations. In the light of the resulting lower reproduction and fertility rates of older would-be parents (in Germany sometimes called the "involuntarily childless"), the option of intercountry adoption becomes more and more attractive in view of the, fully understandable, wish of the individual – and society as such – to reproduce.

11. In recent years, however, the number of intercountry adoptions has been in decline.[13] In 2006, the total number of intercountry adoptions had fallen to 40 000[14] and reached an estimated 25 000 in 2011. Countries that have seen large drops in the adoption of foreign children include Spain and France which fell by 48% and 14% respectively between 2004 and 2010.[15] These trends are said to be linked, at least partly, to changing

8. Child Migrants Trust, Nottingham, United Kingdom, www.childmigrantstrust.com.
9. Margaret Humphreys, *Empty Cradles*, Corgi, 1996.
10. Volker ter Haseborg, Die Kinder der Operation Babylift (The children of Operation Babylift), *Der Spiegel*, 8 April 2005, www.spiegel.de.
11. Website of Terre des Hommes–Germany, www.tdh.de.
12. Council of Europe Commissioner for Human Rights, see footnote 3.
13. UNICEF Guidance Note on Intercountry Adoption in the CEE/CIS Region, September 2009: www.unicef.org/ceecis/UNICEF_ICA_CEE_Guidance_WEB.pdf.
14. Save the Children: Policy Brief International Adoption 2010, www.savethechildren.org.
15. Margie Mason: International adoptions plummet globally, *The Guardian*, World News, 10 May 2012, www.guardian.co.uk.

attitudes and more restrictive government policies towards intercountry adoption. Globally, experts expect that, if ever the decline in global adoptions were to be reversed, the origin was likely to be Africa where Ethiopia has emerged in recent years as a "top source" of orphans "available" for foreign adoption.[16]

2.2. Intercountry adoption: controversy and ethical issues

12. Intercountry adoption is the source of much debate and is often surrounded by controversy. More than ever before, domestic care solutions are being sought for children; efforts that are much appreciated by child protection agencies wherever they truly improve the situation of children without parental care. UNICEF, for example, strongly promotes the "subsidiarity rule" set out by the Hague Convention (see below), meaning that intercountry adoption should never be carried out at the expense of appropriate domestic solutions. Along the lines of the Hague Convention, the United Nations agency even holds that receiving countries should support the development of family and child protection services in the country of origin.[17]

13. Certain experts are concerned that international adoption may divert resources away from the development of good-quality domestic care options.[18] In some cases, experts have found that the availability and prominence of intercountry adoption may have led some parents to abandon their children in residential care hoping that this would give them access to a better life in a western country.[19] Finally, some believe that "intercountry adoption is under siege by those claiming the human rights mantle" and that international adoption which "appropriately recognizes children as citizens of a global community with basic human rights entitlements" should not be handled too restrictively.[20]

14. Although the number of adoptions processed each year is in decline, the number of prospective adopters awaiting a child is not.[21] In fact, the "demand" for a child by way of intercountry adoption is stronger than ever leading to long waiting lists for prospective adoptive parents. This is a cause of great concern, as there is a fear that high demand creates supply, especially in the light of the vast amounts of money potential adopters are prepared to spend to secure an adoption. The unfortunate result is that fraud and malpractice are stimulated. The influx of western money into poorer countries makes the adoption "business" a very profitable one.

15. This poses a most serious risk to intercountry adoption, as well as to the rights of the children concerned. The most egregious misconduct encompasses "child laundering", that is to say the illegal transfer of children from birth families through child buying or kidnapping, to "launder" them through adoption systems as "orphans" and then "adoptees",[22] or even the "production" of children for adoption by way of "baby farms".[23] In these scenarios, the child is nothing more than a commodity to be sold to the highest bidder.

16. Many efforts have been undertaken in recent years to stop such illegal practices by suspending relations with certain sending countries. The United States of America, which historically received half of the world's annual international adoptions, saw a decline of more than 60% to just over 9 000 adoptions in 2011. Negative experiences with corruption, profiteering and child laundering in the case of Guatemala for example have led to the fact that intercountry adoptions from that country to the United States have declined from about 4 000 cases in 2008 to just 32 in 2011; Guatemala was moreover the first country (followed by others later) concerning which a number of receiving countries had expressed objections against its accession to the

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16. Ibid.
17. UNICEF Guidance Note on Intercountry Adoption in the CEE/CIS Region, see footnote 13.
18. Save the Children (2010), see footnote 14.
19. EveryChild: Adopting better care. Improving adoption services around the world. Positive care choices working paper 3, London, May 2012: www.everychild.org.uk.
20. Elizabeth Bartholet: International Adoption: The Human Rights Position, Global Policy Volume 1, Issue 1, London School of Economics and Political Science (LSE), January 2010.
21. UNICEF Guidance Note on Intercountry Adoption in the CEE/CIS Region, see footnote 13.
22. David Smolin: Abduction, Sale and Traffic in Children in the context of Intercountry Adoption, Information Document No. 1 for the attention of the Special Commission of June 2010 on the practical operation of the Hague Convention of 29 May 1993 on the Protection of Children and Co-operation in Respect of Intercountry Adoption, published by the Hague Conference on Private International Law (HCCH); full definition of "child laundering" in this report: "… a specialised form of the abduction, sale of, and traffic in children, in the context of adoption. The term child laundering refers to obtaining children illicitly through force, fraud, or funds (financial inducement), creating falsified paperwork that identifies the child as a legitimately abandoned or relinquished 'orphan' eligible for adoption, and then placing the child for adoption through the official channels of the intercountry adoption system."
23. International Social Service (ISS): The Grey Zones of Intercountry Adoption, Information Document No. 6 for the attention of the Special Commission of June 2010 on the practical operation of the Hague Convention of 29 May 1993 on the Protection of Children and Co-operation in Respect of Intercountry Adoption, published by the Hague Conference on Private International Law (HCCH).

Hague Convention due to the unacceptable conditions related to intercountry adoption. A number of years ago, illegal adoption practices were discovered in India by a group of German adoptive parents. In this and similar cases in India, it was found that sometimes even religious institutions were involved, which were justifying their actions as humanitarian acts.[24]

17. Despite international efforts to fight illegal activities, "child laundering" remains a "systemic problem in the contemporary intercountry adoption system"[25] and harmful to its legitimacy and viability. Like other criminal issues involved, "child laundering" inflicts unprecedented harm upon the families concerned. Abducted children suffer unnecessary separation from their original families, whilst all parties involved face psychological difficulties if they learn about the true identity of the child years later. In order to avoid "child laundering" practices, whether of larger scale as known from historical cases or on a more individual basis, it is of utmost importance that the origin and personal identity of children without parental care be documented in the most comprehensive manner before and after an adoption of any kind. Finally, another criminal offence threatening adoptive children, although such cases are apparently rare, is the sexual or physical abuse of children by their new parents on whom they entirely depend upon arrival in the new country.

18. Another unsolved issue of growing concern is the one of the "adoptability" of children with "special needs" for whom the number of people willing and able to adopt them is well below the level required. According to UNICEF, in 2005, Ukraine alone had some 24 000 children on its database of children legally available for adoption abroad; the vast majority of these children, however, had been diagnosed with a serious illness or disability, were part of a sibling group or had not been legally adoptable at a younger age – few of them are given a realistic chance of being adopted. Adoption processes regarding such children need to be particularly accountable to ensure that only applicants with appropriate authorisations are permitted to submit their dossiers.[26]

19. In view of the controversies and difficulties linked to intercountry adoption, I believe that a balanced stance should be taken by the Council of Europe member States: the intercountry adoption system should be strengthened wherever possible to respond both to the demand of an increasing number of people willing to adopt and to the need of children for whom intercountry adoption could be the best long-term care option, whilst ensuring that relevant procedures are as transparent as possible and that all stakeholders involved are protected from illegal and criminal activities.

3. Legal standards and procedures in the field of intercountry adoption

3.1. The Hague Convention on Intercountry Adoption

20. The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption sets out the framework for international co-operation in respect of intercountry adoption. It is based on Article 21 of the United Nations Convention on the Rights of the Child. The aim of the Hague Convention is neither to encourage nor dissuade persons from entering into intercountry adoptions; rather it sets out safeguards to regulate the process. The convention provides that, at all times, the paramount concern must be the best interests of the child, as set out in the very first line of Article 1: "The objects of the present Convention are … to establish safeguards to ensure that the intercountry adoptions take place in the best interests of the child with his or her fundamental rights as recognised in international law …".[27] It also aims to ensure that adoptions are transparent and ethical. The convention is binding only upon those countries which have ratified it; at present 58 countries. With further countries having acceded to the convention, the number of contracting parties is currently 89.[28,29] Amongst these are most member States of the Council of Europe.[30]

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24. David Smolin: Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping, and Stealing Children, The Wayne Law Review, Paper 749, Berkeley Electronic Press: http://law.bepress.com/expresso/eps/749.
25. David Smolin (2010), see footnote 22.
26. UNICEF Guidance Note on Intercountry Adoption in the CEE/CIS Region, see footnote 13.
27. Article 1 of the Hague Convention, see footnote 4.
28. Hague Conference on Private International Law (HCCH): Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, Status Table (as at 1 June 2012), www.hcch.net/index_en.php?act=conventions.status&cid=69.
29. Countries can notably become contracting parties to the convention via ratification or accession. According to Article 44 of the convention, the simple accession shall have effect only as regards the relations between the acceding State and those contracting States which have not raised an objection to its accession in the six months after the receipt of the notification.
30. Except for Bosnia and Herzegovina, Croatia, Serbia and Ukraine.

21. Concurrent with the overarching principle to act in the best interest of the child at all times, the Hague Convention enshrines the principle of subsidiarity. This means care options in the country of origin take precedence over intercountry adoption. Where possible, a child should be raised by his or her family or extended family; if this is impracticable, other forms of care in the country of origin should be considered, for example placing a child with a foster family. One consequence of increased ratification of the convention is the likelihood that the principles therein are becoming ingrained into national adoption policies of the Hague Convention countries, including Council of Europe member States. This has resulted in a shift in intercountry adoption trends. For example in 2005, 14 000 children were adopted from China; within three years of China ratifying the Hague Convention, this number had fallen to 6 000.[31]

22. In 2010, UNICEF issued a position paper in which it declared its support for intercountry adoption when pursued in conformity with the standards and principles of the Hague Convention.[32] Save the Children, a multinational non-governmental organisation (NGO), advocates that intercountry adoptions should only take place when both receiving country and the country of origin are signatories to the Hague Convention.[33] This would have the effect of ensuring that both country of origin and receiving country adhere to the best international standard, which prioritises the best interests of the child. Engaging in adoptions with non-Hague Convention countries cannot guarantee prioritisation of the child's best interests to the same degree.

3.2. The European Convention on Adoption and related Council of Europe texts

23. The first European Convention on the Adoption of Children (ETS No. 58) came into force in 1967. Due to the considerable social changes that have occurred within Council of Europe member States over the past forty years, it was felt the standards in this area were in need of revision. In 2008, the European Convention on the Adoption of Children (revised) (CETS No. 202) was opened for signature. To date, 15 member States are signatories to the revised convention, seven of which have ratified. The revised convention deals primarily with domestic adoption law. Its Articles 12 and 15 apply directly to intercountry adoption, and it is hoped the convention will provide an effective complement to the Hague Convention. Furthermore, the revised convention confirms that notably the overarching principle to act in the best interests of the child shall be applicable to all adoptions, both domestic and intercountry.

24. The continuous illegal activities which may be linked to intercountry adoption underline the importance of two further legal texts that should also be rigorously implemented by member States with a view to fully protecting children against such crimes: the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) and the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201), better known as the "Lanzarote Convention".

3.3. The best interests principle

25. "The child is the fixed star in the adoption constellation."[34] In acknowledgment of the fact that the child is the vulnerable party in an adoptive process controlled by adults, both the Hague Convention and the European Convention on the Adoption of Children (revised) provide that the best interests of the child shall be the paramount concern in the adoption process. It therefore needs to be kept in mind that the object of adoption is to find a family for a child and not a child for a family.

26. Although the best interests principle is of substantial importance, it remains the subject of widespread misunderstanding.[35] The Hague Convention recognises that in achieving the best interests of the child, namely that children should grow up in a family environment,[36] permanency is preferable to temporary measures[37] and that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin.[38] The misunderstanding lies in the perception that this interpretation of the best interests principle is some kind of "trump card" or "super right" which overrides all other rights. This is not the case.

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31. 2005-2009 Annual Adoption Statistics notified by China to the Hague Conference on Private International Law (HCCH), www.hcch.net/upload/wop/adop2010pd05_cn.pdf.
32. UNICEF's position on Intercountry adoption 2010, www.unicef.org/media/media_41918.html.
33. Save the Children Policy Brief, International Adoption 2010, op. cit.
34. R. Horgan and F. Martin: "The European Convention on Adoption 2008: Progressing the Children's Rights Polemic", September 2008, *International Family Law*.
35. Council of Europe Commissioner for Human Rights, see footnote 3.
36. Preamble to the Hague Convention, www.hcch.net/upload/conventions/txt33en.pdf.
37. Explanatory Report to the Hague Convention, www.hcch.net/upload/conventions/txt33en.pdf.
38. Preamble to the convention, see footnote 4.

27. In the case law of the European Court of Human Rights ("the Court"), the best interests principle is of prime importance. The Court has based some of its decisions concerning intercountry adoption on this very principle. The considerable weight the Court attaches to this principle serves to underline its prominence in the context of intercountry adoptions as the following examples show.

3.3.1. Pini and Bertani & Manera and Atripaldi v. Romania[39]

28. This case concerned applications by two adoptive couples from Italy. They claimed that Romania's refusal to execute adoption orders in respect of two Romanian girls violated their right to a family life under Article 8 of the European Convention on Human Rights (ETS No. 5, "the Convention"). The Court pointed to the desire of the children to remain where they were; this was compounded by the fact that they had never met their prospective adopters. The Court held 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". Thus no violation of the right to a family life could be found.

3.3.2. Wagner and JMWL v. Luxembourg[40]

29. This case concerned the decision of a Luxembourg court to refuse to recognise a Peruvian adoption order. The decision was rooted in the fact that the child in question had been adopted by a single woman. Such an order would have been recognised had the child been adopted by a married couple. As a result, the applicants encountered obstacles in their day-to-day lives and the child did not enjoy the legal protection which would have enabled her to fully integrate into her adoptive family. In coming to its decision on whether such a refusal constituted a violation of the Article 8 right to family life, the European Court of Human Rights held the refusal did not take into account the best interests of the child, which had to take precedence in this case.

30. It is promising to see in the *Pini* case that the Court prioritised the best interests of the child over the Article 8 right to family life, which is otherwise considered quite a robust protection under the Convention. The Court is exhibiting a real commitment to ensuring that the best interests of the child are protected. Via the further promotion of international standards, it must be ensured that national courts are doing the same. The same goes for the *Wagner* case, which put the best interests of the child before the special status granted to married couples in Luxembourg law.

3.4. Intercountry adoption procedures in theory and practice

3.4.1. The typical intercountry adoption procedure according to the Hague Convention

31. The convention itself contains quite detailed procedural provisions. In 2008, it was further complemented by the Guide to Good Practice (Guide No. 1) which may serve as a manual for the "implementation and operation" of the Hague Convention.[41] The main structure provided for by the Hague Convention, which new signatories must put in place, is a central authority with the responsibility for oversight of the adoption system and procedures within a country. In addition to responsibility for communication and co-ordination with central authorities of other Hague Convention countries, the network of central authorities is the primary mechanism for the reform of the intercountry adoption system that the Hague Convention sought to bring about. The central authority, directly or through public bodies, must prioritise the best interests of the child and "deter all practices contrary to the objects of the Convention".[42] The central authority, and those public bodies directly linked to it, is therefore the convention's front line defence against practices which subjugate the best interests of the child.

32. The intercountry adoption procedure prescribed by the Hague Convention (Articles 14 to 22; procedural requirements) involves several formal steps ensuring both the capability of prospective parents to adopt and the need of the adoptive child for this care option. It typically involves the formal application by prospective adopters to the central authority, the preparation of a report on their home situation and eligibility, the identification of a "matching" child, the verification that all conditions for formal adoption are fulfilled, the

39. Application No. 78028/01, judgment of 22 June 2004.
40. Application No. 76240/01, judgment of 28 June 2007.
41. Guide to Good Practice 2008, see footnote 5.
42. Article 8 of the Hague Convention, see footnote 4.

transfer of the child, the decision on any complementary measures required (such as bonding or probationary periods) and, if required, the decision on a new placement if the first family chosen was not the most appropriate placement in the best interest of the child.

33. In intercountry adoptions involving sending and receiving States which are both parties to the Hague Convention, adopters can generally rely on the fact that the selection of the child to be adopted by them, the so-called "matching" process, was undertaken according to the rules and procedures defined by the Convention. Of course, the typical procedure is adapted to the specific national context by public authorities of States Parties and may in some cases turn out to be insufficiently implemented or supervised. This may lead to problems representing threats to the best interest of the child (see below).

3.4.2. The example of Germany: the challenges of intercountry adoption as perceived at national level

34. Germany has been a party to the Hague Convention since March 2002; it has not yet ratified the European Convention on the Adoption of Children (revised). The central authority for intercountry adoption is the Federal Central Office for International Adoption (*Bundeszentralstelle für Auslandsadoption – BZAA*) belonging to the Federal Office of Justice (*Bundesamt für Justiz – BfJ*). It ensures regular follow-up of all accredited adoption agencies in the country. These comprise 12 public adoption offices run by the administrations of regional States (*Länder*), which play the role of agents of international adoption and are in charge of the authorisation and supervision of further adoption agencies, as well as 13 certified private adoption agencies (NGOs) in different German regions and cities. In Germany, public adoption agencies are obliged to deal with adoptions concerning States parties to the Hague Convention and may deal with non-party adoptions. Private adoption agencies may also deal with party and non-party adoptions according to the respective authorisations granted to them (for each country a specific authorisation is required).

35. An in-depth exchange between all German agencies held at their last annual conference in Bonn on 23 and 24 November 2011 at the invitation of the BZAA, provided me with an excellent insight into the current challenges of intercountry adoption as perceived by national stakeholders, which I would like to share with the other members of the Parliamentary Assembly. However, there is a lack of solid national data in this field. The only figure available (but which remains below the actual number of adoption procedures completed) is the number of adoptions recognised by German family courts (10 164 between 2002 and 2011). Private adoptions, for which no such formal recognition is required, never appear in any statistics. Nevertheless, it is known that the most important sending countries for adoptions to Germany were the Russian Federation, Kazakhstan, Ukraine, Thailand, Colombia, Turkey, Ethiopia, Haiti and South Africa, which were each involved in more than 300 adoption cases during the period concerned.[43]

36. Despite the existence of well-functioning institutions and mechanisms ensuring a transparent follow-up of intercountry adoption procedures, mostly accompanied by accredited bodies, a high number of private (and sometimes illegal) adoptions can still be observed every year (around 250-280 cases). Aware of the prevalence of such illegal activities, the BZAA strongly recommends that any potential adopters refrain from an international adoption which does not involve an accredited adoption agency. There are in particular grounds for suspicion if lawyers or other "experts" offer rapid and "unbureaucratic" help in exchange for considerable amounts of money.[44]

37. Some of the other trends and perceptions in the field of intercountry adoption currently observed in Germany are:

– there are far more applicants than children in need of and available for intercountry adoption;

– the age of parents or families searching to adopt is clearly on the rise;

– adoptive parents increasingly wish to adopt their "dream child" who must be as young as possible (ideally under one) and without any visible or expected pathologies;

– potential adoptive parents seem to think that they have got the legitimate right to adopt a foreign child;

– in view of some of the crisis situations to be observed throughout the world, potential adopters seem to believe that adopting a foreign child is a humanitarian act;

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43. Bundesamt für Justiz / Bundeszentralstelle für Auslandsadoption (BZAA): Familiengerichtliche Verfahren nach dem Adoptionswirkungsgesetz 2002-2010 (Family court procedures according to the law on the effect of adoptions), Bonn, November 2011.

44. Bundesamt für Justiz / Bundeszentralstelle für Auslandsadoption (BZAA): Internationale Adoption – Häufig gestellte Fragen (Intercountry adoption – Frequently asked questions), www.bundesjustizamt.de.

– there seems to be little awareness of and empathy with the trauma that an adoptive child will experience in the process;

– the perception by third parties is often very negative and not supportive of potential adopters ("How much did you pay for your child?").

38. These trends and perceptions represent particular challenges to be faced by adoption agencies. The high "demand" for adoptive children leads to the fact that many potential adopters are ready to pay large amounts of money to receive a child, which makes them an easy target for illegal and criminal activities and generally contributes to the global "commercialisation" of children.

39. For various reasons, many adults in Europe postpone starting a family until later stages of their life; this trend can also be observed in Germany, which had an overall fertility rate of 1.39% in 2010.[45] With an increasing wish for a child of their own, many "involuntarily childless" couples then turn to the option of intercountry adoption. This trend leads to the fact that potential adopters are increasingly older. There is no legal provision in Germany on the maximum age for adoption or the maximal age difference between adopters and an adoptive child. However, a maximum age difference of 40 years between adoptive parents and children has been strongly recommended by the federal working party of federal youth welfare offices *(Bundesarbeitsgemeinschaft der Landesjugendämter)*.

40. In a context where children are almost treated like a precious "commodity" for which large sums of money are exchanged in some cases, the expectations of prospective parents are increasingly high: they are looking for a child who is as young as possible and in good health. In practice, however, solutions for the care of very young children are more easily to be found in the national context (foster families, national adoptions) and it is sometimes in particular the older children who are in need of a new family abroad. The same applies to children with various health problems (such as the consequences of Foetal Alcohol Syndrome (FAS) increasingly observed in adoptive children coming from poorer countries) or disabilities for whom solutions are more difficult to find. Many prospective adopters exclude accepting a child who is sick. In some cases observed by agencies in Germany, adoptive parents even tried to be discharged of their responsibility for a child because they could not cope with the challenge of a sick child for which they had not been entirely prepared beforehand. For the child, having to leave an adoptive family is yet another traumatic experience.

41. According to the experience of German agencies on the ground, intercountry adoption procedures at national level should not be limited to a sheer "matching" process between available parents and available children. Both adoptive parents and children should receive comprehensive professional support, including psychological assistance, preparing them for this new life situation. Deceptions following the non-satisfaction of high expectations at the beginning of the process may be another traumatising experience both for children and parents. For this reason, it is considered very important that adoptive children are followed up well beyond the formal stage of adoption and as regards their integration into the new family and new cultural context.

4. Insufficiencies in legal and political action: threats to the best interest of the child

4.1. Improper implementation of the Hague Convention

42. Experts have identified ineffective implementation of the Hague Convention as the primary cause of the continuing incidence of abusive adoption practices; this also includes premature ratification of the convention, namely before internal mechanisms are brought up to date. Not only sending countries, where criminal acts of child laundering actually occur, are guilty of fundamental lapses of implementation, but receiving States, encompassing many Council of Europe member States, have failed children through a lack of thorough supervision of adoption processes.[46] Sending and receiving States must therefore, through close and continuous co-operation, jointly take responsibility for ensuring that the best interest of the child remains a primary consideration throughout any intercountry adoption procedure.

43. International adoption practice also shows that the mere existence of a central authority and other formal features of the Hague Convention are not always sufficient to prevent malpractices, in particular child laundering, as the example of India shows.[47] India continues to be plagued with adoption scandals, even after

45. Statistisches Bundesamt (Federal Office for Statistics), Geburten in Deutschland, Wiesbaden, 2012, www.destatis.de.
46. David Smolin, Abduction Sale and Traffic of Children in the context of Intercountry Adoption, see footnote 22 above.
47. For example, the Andhra Pradesh orphanage scandal, in which many children were abducted from their families and put up for adoption under false documentation. See David Smolin: The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals, 35 Seton Hall L. Rev. 403, 451 (2005).

the ratification of the Hague Convention in 2003. The Indian Central Adoption Resource Authority (CARA) issued a moratorium on adoptions on 1 July 2011 in order to submit its system to an in-depth reform. This example once again shows the importance of fully transparent adoption procedures, involving a complete file about the child and its origins and the right of the child to consult his or her file at the latest at the age of legal maturity.

4.2. Non-Hague country adoptions

44. Just as national practice does not forbid intercountry adoptions with non-Hague Convention countries (see the example of Germany above), the Hague Convention does not prohibit bilateral adoption agreements between Hague Convention countries and non-Hague Convention countries, so long as the agreement does not run contrary to the letter of the convention. For example, France has a lawful bilateral agreement with Cambodia concerning intercountry adoption. However, the safeguards in such agreements are not commensurate with those contained in the Hague Convention and should not be understood as appropriate substitutes.

45. Furthermore, the Hague Convention does not prohibit independent adoptions even if they are strongly advised against by many national central authorities. In an independent adoption, prospective adopters are approved as fit to adopt by the central authority but there is no further involvement by the central authority or another accredited agency. The prospective adopters source the orphanage hosting their future adoptive child and travel to the country independently, which involves many risks for them: without the expert guidance that an authorised agency provides, adopters may fall victim to dubious intermediaries and the legitimacy of the circumstances in which they find an "adoptable" child cannot be guaranteed.

46. UNICEF is against independent adoptions on the grounds there are no valid arguments in favour of independent adoptions from a child rights standpoint.[48] The Hague Convention Guide to Good Practice criticises independent adoptions as undermining the safeguards of the convention, in particular to protect the best interests of the child, and for that reason advocates their prohibition by Hague Convention countries.[49] Governments of all Council of Europe member States should be invited to establish procedures aimed at removing some of the threats generated by independent adoptions. Certain receiving countries prohibit their citizens from adopting in a foreign country without engaging the services of an accredited adoption agency. Similarly, certain countries of origin also require prospective adopters to engage a recognised adoption agency.[50]

4.3. Moratoria

47. A country of origin may temporarily suspend adoptions for a certain period. Moratoria are often issued in response to allegations or suspicions in relation to the legitimacy and transparency of national adoption systems. Moratoria also provide the State with the opportunity to conduct an investigation into, and reform of, the system. Likewise, intercountry adoption procedures may be suspended by receiving countries if they consider that the safety of children originating from certain distant countries is not fully ensured. This was, for example, the case after the 2010 earthquake in Haiti following which several European member States suspended intercountry adoption procedures with this country (see below).

48. While reforms of adoption processes are of huge benefit to the integrity of adoption systems in the long term, the suspension of adoptions may have substantial negative short-term consequences for children in a procedure at the time of the suspension. This is particularly so in the case of children who have already been deemed as adoptable by the central authority or an accredited body, and therefore in need of a family and long-term care solution. Such "pipeline cases" can sometimes be stalled for a lengthy period which is certainly not consistent with the best interests principle. In some cases, bonding between child and adopters may even have already taken place, and the adoption can be said to be at an advanced stage. To stop an adoption at this late stage could have unprecedented negative effects on a child in need of a loving family and prolong its suffering.

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48. UNICEF Guidance Note on Intercountry Adoption in the CEE/CIS Region, see footnote 13.
49. Guide to Good Practice 2008, see footnote 5.
50. Countries of origin which impose this requirement include Bolivia, China, Ethiopia and India, and receiving countries include Sweden, Norway, Finland, Denmark and Italy. Source: UNICEF Guidance Note on Intercountry Adoption in the CEE/CIS Region, see footnote 13.

49. The 2008 Hague Convention Guide to Good Practice (No. 1) acknowledges the balance that must be struck when issuing a moratorium and recommends that the best way to deal with these difficulties is to ensure open communication between central authorities. Therefore, if a moratorium is foreseen, this information will be conveyed to other central authorities and in this way adoptions in advanced stages may be fast-tracked before the moratorium begins.[51]

4.4. Humanitarian disasters

50. In the aftermath of a humanitarian disaster such as war or a natural disaster, very often a large number of children become separated from their parents. In such instances, tracing is of the utmost importance and intercountry adoption should only be considered after efforts to trace family for the child have been unsuccessful. Records from Haiti show that many adoptions were expedited in the aftermath of the 2010 earthquake.[52] Accordingly, the issue of humanitarian disasters has also been covered by the Parliamentary Assembly in its Resolution 1850 (2011) "What Europe can do for children in the aftermath of natural disasters and crisis situations: the examples of Haiti and Afghanistan".

51. In Haiti in particular, an American NGO, the New Life Children's Refugee Group had tried to "rescue" children and transport them to the Dominican Republic for institutional care. The group was eventually arrested by Haitian authorities and imprisoned for a number of crimes, including child abduction and trafficking.[53] This example illustrates that, in many crisis situations, there is a strong risk that children are declared "adoptable" despite the fact they have living family members because, due to the adoption process being "fast-tracked", there have been inadequate tracing efforts. This stance is shared by UNICEF, the Office of the United Nations High Commissioner for Refugees (UNHCR), the United Nations Committee on Rights of the Child, the Hague Conference on Private International Law, the International Committee of the Red Cross and international NGOs such as Save the Children and International Social Service (ISS).[54] At international level, a common stance on intercountry adoption in the wake of humanitarian disasters should be adopted.[55]

5. Conclusions

52. In certain circumstances, intercountry adoption may be an interesting long-term care option for children without parental care. Due to uncertainties linked to intercountry adoption procedures, the trend to adopt foreign children has rather been on the decrease, but remains an option considered by many in the western world where people are starting families increasingly late in life and where, subsequently, many people are "involuntarily childless" and happy to receive a foreign child as their own.

53. Substantial texts concerning intercountry adoption and national adoption exist, but have not been ratified by all Council of Europe member States and are not always implemented in the most rigorous manner through national legislation and policies. The practice of intercountry adoption shows that too many procedures still take place in an opaque or even illegal manner and do not fully respect the best interest of the child.

54. In some cases, children's human rights are clearly violated because they become victims of criminals abducting or trafficking children for the purpose of drawing financial benefits from illegal adoption procedures, of exploiting these children or of handing them over to people intending to do so. Especially in the context of humanitarian disasters or moratoria on intercountry adoption, children are not fully protected or may be left in "legal vacuums"; such situations further facilitate illegal practices related to intercountry adoption.

55. Despite numerous efforts already made, Council of Europe member States should once again be called on to further reinforce national legislation and policies in this field, taking into account specific problems arising from unsolved issues (such as the alternative care options open to children with special needs). They must also strengthen international co-operation in order to exchange best practices in intercountry adoption and be able to jointly and efficiently prosecute any criminal players in this field.

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51. Guide to Good Practice 2008, see footnote 5.
52. Executive Summary: Haiti: Expediting Intercountry Adoptions in the Aftermath of a Natural Disaster, Information Document No. 4 for the attention of the Special Commission of June 2010 on the practical operation of the Hague Convention of 29 May 1993 on the Protection of Children and Co-operation in Respect of Intercountry Adoption.
53. K. Smith Rotabi and K. Bergquist: Vulnerable Children in the Aftermath of Haiti's Earthquake of 2010: A Call for Sound Policy and Processes to Prevent International Child Sales and Theft, Journal of Global Social Work Practice, Volume 3, Number 1, May/June 2010, www.globalsocialwork.org.
54. UNICEF's position on Intercountry adoption 2010, see footnote 32.
55. International Social Service, The Grey Zones of Intercountry Adoption, see footnote 23.

56. National intercountry adoption procedures should follow the lines provided for by the Hague Convention – to be ratified by further countries, including Council of Europe member States – the recommendations of the Hague Convention Guide to Good Practice 2008 (No. 1), and the UNICEF Guidance note on Intercountry Adoptions in the CEE/CIS Region, as well as relevant recommendations put forward by the Council of Europe and its Parliamentary Assembly. This will ensure that these procedures are made watertight as regards the consideration of children's best interests and the protection of their rights. The substantial work undertaken in this field by international NGOs such as Save the Children must not be neglected either.

57. Strong procedures and policies should lead to a situation where the demand of prospective adopters for a child of their own is "matched" with the need of many children for a long-term alternative care option in the most balanced manner, ensuring respect for the best interests of the child in all steps of the process and also facilitating the search for care solutions for children with special needs, either by supporting national child protection policies in the countries of origin or by identifying prospective adopters ready to welcome such a child with special needs.

58. At Council of Europe level, member States should ensure that the issue of intercountry adoption be taken into consideration in the framework of the Strategy on the Rights of the Child (2012-2015) and its implementation process as one of the serious issues threatening the best interest and well-being of children. Relevant intergovernmental activities should also promote the exchange of best practice in this field and both support the development of strong national child care and protection policies in the countries of origin and allow countries to jointly develop strong and transparent intercountry adoption procedures.