

ADOPTION

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NOTE SUR LES ASPECTS FINANCIERS DE L'ADOPTION INTERNATIONALE

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NOTE ON THE FINANCIAL ASPECTS OF INTERCOUNTRY ADOPTION

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TERMINOLOGY ADOPTED BY THE EXPERTS' GROUP ON THE FINANCIAL ASPECTS OF INTERCOUNTRY ADOPTION

These definitions are descriptive in nature and should not be interpreted as approving or disapproving particular practices. All these definitions apply to States of origin and receiving States.

Co-operation projects: this term is used in the context of intercountry adoption when it refers to programmes or projects with the aim of strengthening the child protection system in a State of origin. These are mostly focused on capacity building and training of stakeholders, and should ideally be self-sustainable in the future. Without compromising other forms of co-operation projects, the co-operation projects discussed in this Note are considered as a category of development aid.

Contribution: two types of contributions are referred to:

Contributions *demand*ed by the State of origin, which are mandatory and meant to improve either the adoption system or the child protection system. The amount is set by the State of origin. These contributions are managed by the authorities or others appropriately authorised in the State of origin which decide how the funds will be used.

Contributions *demand*ed by the accredited body from prospective adoptive parents. These contributions may be for particular children's institutions (e.g., for maintenance costs for the child) or for the co-operation projects of the accredited body in the State of origin. The co-operation projects may be a condition of the authorisation of that body to work in the State of origin. The amount is set by the accredited body or its partners. The payment may not be a statutory obligation and accredited bodies may present the demand in terms of "highly recommended contribution", but in practice it is "mandatory" for the prospective adoptive parents in the sense that their application will not proceed if the payment is not made.

Costs (Art. 32(2) of the 1993 Hague Intercountry Adoption Convention): a collective term to refer to the amount requested to obtain a specific service or group of services (e.g., translation costs, administrative costs) to complete the adoption. In this Note the term "costs" may be used in conjunction or interchangeably with the term "**expenses**". Costs include fees and other amounts for specific services and for obtaining specific documents.

Development aid: aid in the form of money, technical assistance or essential supplies of goods or services, aiming to reduce inequalities and to help a developing nation become more self-sufficient in a mid and long-term perspective. The aid would normally finance sustainable actions involving major stakeholders of the targeted State. It is generally provided through official channels or receives official authorisation. The aid could be provided directly by government aid agencies, or through international intergovernmental and non-governmental organisations, foundations or other similar groups or professionals. In the context of intercountry adoption, this aid mainly focuses on child protection.¹

Donations: voluntary *ad hoc* payments or gifts of material goods from prospective adoptive parents or accredited bodies for the well-being of children in institutions. Donations are usually given to the orphanage or institution connected to the parents' adopted child. The donation might also be given by an accredited body to a specific fund in the State of origin.

¹ See Hague Conference on Private International Law, *The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: Guide to Good Practice*, Guide No 1, Family Law (Jordan Publishing Ltd), 2008, available on the Hague Conference website at < www.hcch.net > under "Intercountry Adoption Section" (hereinafter, "Guide to Good Practice No 1"), Chapter 6. This Chapter refers to the national child care context which includes: the child's entry into care, family preservation and reunification, prevention of abandonment, temporary child care, and national adoption.

Expenses (Art. 32(2)): an amount of money *spent* on a particular service to complete the adoption. Costs are charged and expenses are paid. A cost converts into an expense as soon as it is paid. Whereas all expenses are costs, not all costs are expenses.² This term is used with the term “**costs**” in the Convention and in this Note the two terms are used in conjunction or interchangeably.

Fees (Art. 32(2)): an amount that a person or entity charges for a particular service (*e.g.*, court filing fee). It generally takes the form of a lump-sum paid in one instalment for one particular service or group of services, but it might also be fixed on an hourly rate (*e.g.*, lawyers’ fees). It may be classified as a subcategory of the costs of the adoption. “Professional fees” referred to in Article 32(2) refer to the amount requested by professionals, such as lawyers, psychologists and doctors, for their work on a particular case.

Improper financial or other gain (Arts 8 and 32(1)): an amount of money or other material gain that is not justifiable because it is not in accordance with ethical practices and standards, including national and international legislation, and / or is not reasonable in relation to the service rendered. The usual meaning of improper is dishonest or morally wrong.³ In the area of intercountry adoption, improper financial or other gain results in illegal or unethical enrichment and often in improper influence on decisions regarding a child’s adoption.

Reasonable (Art. 32(2) and (3)): may refer to fees or remuneration that adequately compensate the service rendered (*e.g.*, the remuneration of accredited body management and employees), measured in relation to the circumstances and the living standards in a specific State and other child welfare services. The list of factors to assess whether a fee or remuneration is reasonable is discussed in Chapter 8.6 of the Guide to Good Practice No 2⁴ and further considered in Chapter 5.3 of this document. This term may be applied to other financial aspects of intercountry adoption when the amounts involved are not excessively high.

Remuneration (Art. 32(3)): an amount that directors, administrators, and employees of bodies involved in an adoption may be paid for their work. In practice, remuneration may come in the form of a salary or may, exceptionally, be paid on a case-by-case basis, or on a standard hourly rate.

² See Business Dictionary, available at < www.businessdictionary.com >.

³ See Oxford Advanced Learner’s Dictionary, 7th Edition, Oxford University Press, 2005.

⁴ Hague Conference on Private International Law, *Accreditation and Adoption Accredited Bodies: General Principles and Guide to Good Practice*, Guide No 2, Family Law (Jordan Publishing Ltd), 2012, available on the Hague Conference website at < www.hcch.net > under “Intercountry Adoption Section” (hereinafter, “Guide to Good Practice No 2”).

INTRODUCTION⁵

1. The *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* (the “1993 Hague Intercountry Adoption Convention”, the “1993 Hague Convention” or the “Convention”) establishes standards and guarantees for the protection of children who are adopted across national borders. To reach these standards and fulfil these guarantees, a number of professionals need to be involved in the adoption process. It is reasonable to anticipate that payments will be necessary for such professionals whether working in government or non-government offices. The Convention therefore allows authorities, accredited bodies and approved (non-accredited) persons and bodies⁶ in receiving States and States of origin to charge reasonable and lawful fees for services provided.⁷

2. However, the lack of clarity and consistency in deciding what is “reasonable” has led to situations where prospective adoptive parents are required to pay excessive amounts to complete an adoption. Although the Convention clearly prohibits improper financial or other gain,⁸ regrettably, this still sometimes occurs and has been shown to be often linked with, in particular, the procurement⁹ of children for adoption. In extreme cases, more usually in the context of intercountry adoptions from non-Convention States of origin, this may involve the abduction, the sale of, and the traffic in children for intercountry adoption.

3. In light of this background, in April 2011 the Council on General Affairs and Policy of the Hague Conference on Private International Law recommended the formation of an Experts’ Group to examine the question of costs in intercountry adoption.¹⁰ This recommendation was made as a result of concerns expressed over many years,¹¹ and

⁵ The coordination of this project, as well as the drafting of a number of sections of this Note, was undertaken by Ms Laura Martínez-Mora (Principal Legal Officer). Ms Carine Rosalia (former Legal Officer) and Ms Emmanuelle Harang (former Senior ICATAP Co-ordinator) also participated in the drafting process. Special thanks are due to Ms Jennifer Degeling (former Secretary) for her guidance in drafting this Note, as well as for her valuable comments; to Mr William Duncan (former Deputy Secretary General) for reading a previous draft and providing valuable comments; and to Ms Hannah Baker (Senior Legal Officer) for assisting with the finalisation of the Note. All the references mentioned in this Note were last verified in December 2013, unless stated otherwise.

⁶ The focus of this Note is on issues regarding the activities of authorities and accredited bodies and not approved (non-accredited) persons and bodies as they are not widely used for Convention adoptions. Approved (non-accredited) persons designate the person (or body) who (or which) has been appointed in accordance with Art. 22(2) of the Convention to perform certain Central Authority functions. The person or body is not accredited in the sense of Arts 10, 11 and 12 of the Convention, but must meet the minimum standards required by Art. 22(2) of the Convention. See Guide to Good Practice No 1, *supra*, note 1, Glossary and Chapter 4.4 and Guide to Good Practice No 2, *supra*, note 4, Chapter 13.

⁷ See Art. 32(2) of the Convention. See also Guide to Good Practice No 1, *supra*, note 1, para. 225.

⁸ Art. 32 of the Convention and see G. Parra-Aranguren, Explanatory Report on the *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, Hague Conference on Private International Law, *Proceedings of the Seventeenth Session*, Tome II, “Adoption - co-operation”, The Hague, SDU Ed., 1994, pp. 539-651, para. 528, available on the Hague Conference website at < www.hcch.net > under “Intercountry Adoption Section” then “Explanatory documents” (hereinafter, “Explanatory Report”).

⁹ The term “procurement of children for adoption” is used in this Note to refer to all means, legal or illegal, by which children are actively sought out for intercountry adoption. See as well “Discussion Paper: Co-operation between Central Authorities to develop a common approach to preventing and addressing illicit practices in intercountry adoption cases” drafted by the Australian Central Authority with the support of the Hague Conference. This Discussion Paper explores ways in which Central Authorities may prevent and address those problematic practices. It is available on the Hague Conference website at < www.hcch.net > under “Intercountry Adoption Section”.

¹⁰ See “Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (5-7 April 2011)”, available on the Hague Conference website at < www.hcch.net > under “Work in Progress” then “General Affairs” then “2011”, para. 25. See also “Report of the Council on General Affairs and Policy of the Conference (5-7 April 2011)”, drawn up by the Permanent Bureau, Prel. Doc. No 1 of September 2011 for the attention of the Council of April 2012 on General Affairs and Policy of the Conference, available on the Hague Conference website at < www.hcch.net > under “Work in Progress” then “General Affairs” then “2012”.

¹¹ See, for example, the responses to question Nos 11(3) and 11(6) of the “Questionnaire on the practical operation of the 1993 Hague Intercountry Adoption Convention”, drawn up by the Permanent Bureau, Prel. Doc. No 1 of March 2005 for the attention of the Special Commission of September 2005 on the practical operation of the 1993 Hague Intercountry Adoption Convention (hereinafter, “2005 Questionnaire”) and question No 55 of the “Questionnaire on accredited bodies in the framework of the 1993 Hague Intercountry Adoption Convention”, drawn up by the Permanent Bureau, Prel. Doc. No 1 of August 2009 for the attention of the Special Commission of June 2010 on the practical operation of the 1993 Hague Intercountry Adoption Convention (hereinafter, “2009 Questionnaire”). The 2005 and 2009 Questionnaires and the State responses are available on the Hague Conference website at < www.hcch.net > under “Intercountry Adoption Section”.

specifically at the last meeting of the Special Commission on the practical operation of the Convention (“2010 Special Commission”), held in June 2010, that standards and practices in relation to the financial aspects of intercountry adoption vary so widely that a special focus on the issue is warranted.

4. The Experts’ Group was constituted in 2012. The experts invited represented Central Authorities of States of origin and receiving States from various geographical regions and legal systems (Australia, Brazil, Canada, China, Dominican Republic, France, Germany, Italy, Kenya, Lithuania, Netherlands, Philippines, South Africa, Sweden, Switzerland and United States of America). The African Committee of Experts on the Rights and Welfare of the Child, UNICEF, the International Social Service (ISS), EurAdopt and several independent experts were also invited to join the Group.

5. The Experts’ Group met for the first time in The Hague on 8 and 9 October 2012.¹² In preparation for the meeting, the Permanent Bureau drafted and disseminated a previous version of this document, at that time called a “Discussion Paper”.¹³ The purpose of this Discussion Paper was to assist the members of the Experts’ Group to reflect on ways to more effectively and comprehensively address the issues related to the financial aspects of intercountry adoption, including costs, contributions, donations and development aid.

6. The goals of the 2012 meeting of the Experts’ Group included to:

- agree on definitions of key concepts and on tools to gather comprehensive and relevant data (see Terminology and Chapters 5.1, 5.2, 8.1 and 8.2 of this Note);
- discuss and consider possible solutions to important issues concerning the financial aspects of intercountry adoption by engaging in a dialogue concerning the problems and existing good practices in both receiving States and States of origin. The Discussion Paper and the previous work undertaken by the Hague Conference in the form of the Guides to Good Practice and Conclusions and Recommendations from previous Special Commission meetings provided a starting point for this discussion;
- examine the desirability and the feasibility of developing further practical tools, such as the ones suggested in Chapter 8 of this Note, to improve standards and practices.

7. The Experts’ Group had fruitful and constructive discussions during the meeting and this resulted in nine Conclusions and Recommendations.¹⁴ These establish, subject to Permanent Bureau resources and the directions given by the Council on General Affairs and Policy of the Hague Conference,¹⁵ recommended “next steps” for work in this area, including the development of several practical tools to assist States. In this regard, the Group recommended that the Permanent Bureau revise the paper presented to the Experts’ Group in light of the discussions at the meeting and the further comments received from experts, States Parties to the 1993 Hague Convention and Member States of the Hague Conference, and publish the final document as a “Note”.¹⁶ This Note, welcomed by the Council on General Affairs and Policy of the Hague Conference on Private International Law at its meeting in April 2014,¹⁷ responds to this request.

¹² See “Conclusions and Recommendations of the Experts’ Group Meeting on the Financial Aspects of Intercountry Adoption (8-9 October 2012)”, available on the Hague Conference website at < www.hcch.net > under “Intercountry Adoption Section” (hereinafter, “Conclusions and Recommendations of the 2012 Experts’ Group”).

¹³ Available on the Hague Conference website at < www.hcch.net > under “Intercountry Adoption Section” then “Expert and Working Groups”.

¹⁴ Conclusions and Recommendations of the 2012 Experts’ Group, *supra* note 12.

¹⁵ The “Council on General Affairs and Policy of the Hague Conference” is the governing body of the Hague Conference on Private International Law which decides on the work programme for the Organisation.

¹⁶ Conclusions and Recommendations of the 2012 Experts’ Group, *supra* note 12.

¹⁷ “Conclusions and Recommendations of the Council on General Affairs and Policy of the Hague Conference (8-10 April 2014)”, available on the Hague Conference website at < www.hcch.net > under “Work in Progress” then “General Affairs”, para. 18 a).

8. At the date of publishing this Note, three other practical tools recommended by the Experts' Group have also been finalised:

- the "Terminology adopted by the Experts' Group on the financial aspects of intercountry adoption" (included in this Note);
- the "Tables on the costs associated with intercountry adoption" and
- the "Summary List of Good Practices on the financial aspects of intercountry adoption".

9. These tools are available for consultation on the specialised "Intercountry Adoption Section" of the Hague Conference website. The other tools recommended by the Group, including those currently in development, are further discussed in Chapter 8 of this Note which looks to the future.

10. The long term objective in establishing an Experts' Group is to assist States with properly legislating, controlling and monitoring the financial aspects of intercountry adoption in accordance with the 1993 Hague Intercountry Adoption Convention. In other words, it was anticipated that the work of the Group may assist States with effectively upholding their obligation to "take directly, or through public authorities all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention."¹⁸ To this end, some more specific matters which may be considered by the Experts' Group in future include: eliminating incentives and profiteering; avoiding the creation of dependency on income from intercountry adoption; avoiding improper competition between receiving States and / or adoption accredited bodies within intercountry adoption; establishing what should be considered as "reasonable"; and better regulation of accredited bodies. All these measures will help to better protect children, birth families and adoptive families as well as help protect intercountry adoption against commercialisation¹⁹ (see Chapter 8 of this Note).

11. The financial issues of intercountry adoption are a complex problem with no single solution and they are at the heart of most major problems related to intercountry adoption.²⁰ A multifaceted approach is therefore needed. It is a huge challenge to make fundamental changes in social structures in States and to eliminate incentives for improper financial or other gain. Although this is beyond the scope of the work of the Experts' Group, it is important to raise awareness of this issue with the appropriate authorities.

12. This Note is structured as follows:

- Terminology on the financial aspects of intercountry adoption;
- Chapter 1 recalls the existing international legal framework and standards;
- Chapter 2 analyses who are the main victims of financial abuses;
- Chapter 3 presents the main perpetrators of financial abuses;
- Chapter 4 explains the challenges in the global context;
- Chapter 5 summarises the problems and good practices relating to costs, contributions and donations;
- Chapter 6 addresses the specific problems and possible good practices relating to contributions and donations;

¹⁸ Art. 8 of the Convention.

¹⁹ See "Good Practice in Economic Matters in Intercountry Adoption", Info. Doc. No 1, September 2005, submitted by EurAdopt and the Nordic Adoption Council for the attention of the Second Meeting of the Special Commission on the practical operation of the 1993 Hague Intercountry Adoption Convention (17-23 September 2005) (hereinafter, "EurAdopt Good Practices in Economic Matters"), Chapter 1 "Aims".

²⁰ See International Social Service (ISS), *Intercountry Adoption – the Financial Aspects*, Fact Sheet No 47, 2007, available at < www.iss-ssi.org > (hereinafter, "ISS Fact Sheet"); N. Cantwell, *Adoption and Children: A Human Rights Perspective*, Commissioner for Human Rights, Council of Europe, 2010, available at < www.coe.int/t/commissioner > under "documents" then "issue papers" (hereinafter, "N. Cantwell (2010)"), p. 20; and African Child Policy Forum (ACPF), *Intercountry Adoption: An African Perspective*, Addis Abeba, 2012, available at < www.africanchildforum.org/ipc/ > (hereinafter, "ACPF"), p. 20.

- Chapter 7 studies the problems related to improper financial or other gain and some of the good practices to address them;
- Chapter 8 describes the practical tools recommended by the Experts' Group to assist States in this area, as well as the work which has been undertaken, or is ongoing, to respond to these recommendations. It ends with a section on the longer-term future of the Experts' Group.

1. INTERNATIONAL LEGAL FRAMEWORK AND STANDARDS

1.1 The 1989 United Nations Convention on the Rights of the Child and its 2000 Optional Protocol on the Sale of Children

13. The 1989 *Convention on the Rights of the Child* (CRC) which, at June 2014, has 194 States Parties, establishes some broad principles and norms in relation to intercountry adoption, one of them being that States Parties are obliged to take all appropriate measures to ensure that the adoption placement does not result in improper financial or other gain for those involved.²¹

14. The 2000 *Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography* which, at June 2014, has 167 States Parties, establishes that States Parties shall ensure that improperly inducing consent for the adoption of a child is fully covered by their criminal or penal law.²²

1.2 The 1993 Hague Intercountry Adoption Convention

15. The 1993 Hague Intercountry Adoption Convention refines, reinforces and augments the principles and norms laid down in the CRC by adding substantive safeguards and procedures.²³ In relation to financial issues the Convention sets out, among others, the following rules and requirements:

- Contracting States and Central Authorities have the obligation to take all appropriate measures to prevent improper financial and other gain in connection with an intercountry adoption and to deter all practices contrary to the objectives of the Convention;²⁴
- competent authorities of the State of origin have to ensure that the consent of the child (having regard to his / her age and degree of maturity) and of the persons, institutions and authorities whose consent is necessary for adoption "have not been induced by payment or compensation of any kind".²⁵ One way of ensuring this is by prohibiting early contacts between the prospective adoptive parents and the child's parents or any other person who has care of the child until the consent is properly given according to the Convention;²⁶
- costs and expenses, including reasonable professional fees of persons involved in the adoption, may be charged or paid;²⁷
- no one shall derive improper financial or other gain from an activity related to an intercountry adoption;²⁸

²¹ Art. 21 d) of the *1989 United Nations Convention on the Rights of the Child*: "States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall: (...) d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it." Available at < www.ohchr.org >.

²² Art. 3(1) a) ii of the *2000 Optional Protocol to the CRC on the sale of children, child prostitution and child pornography*, available at < www.ohchr.org >. See also Art. 3(5) of the Protocol and Guide to Good Practice No 1, *supra*, note 1, para. 87.

²³ See Guide to Good Practice No 1, *supra*, note 1, para. 20.

²⁴ Art. 8 of the Convention.

²⁵ Art. 4 d) (4) and Art. 4 c) (3) of the Convention.

²⁶ According to the Explanatory Report, *supra*, note 8, para. 497: Art. 4 c) (3) and Art. 4 c) (4) should be linked with Art. 29 that prohibits early contacts between the parties to the intercountry adoption in particular "to prevent the circumstances in which improper payment or compensation of the consents required by Art. 4 c) is most likely to occur".

²⁷ Art. 32(2) of the Convention.

²⁸ Art. 32(1) of the Convention.

- Central Authorities are bound to co-operate to carry out their obligations, including those obligations mentioned above relating to the financial aspects of intercountry adoption.²⁹ Co-operation may take place in the form of the exchange of information relating to a specific instance³⁰ or information sharing about general experiences on how to implement the standards of the Convention;³¹
- accredited bodies shall pursue only non-profit objectives; their financial situation has to be subject to supervision by competent authorities of their State; and staff remuneration shall not be unreasonably high in relation to the services rendered;³²
- approved (non-accredited) persons and bodies who undertake adoption for profit are subject to the general prohibition on improper financial or other gain (Art. 32(1)) as is every person involved in intercountry adoptions under the Convention. Approved (non-accredited) persons and bodies may only charge for the actual costs and expenses associated with the intercountry adoption, including reasonable fees.³³

1.3 Recommendations from the meetings of the Special Commission on the practical operation of the 1993 Hague Intercountry Adoption Convention

16. The financial aspects of intercountry adoption have been discussed at length in all Special Commission meetings on the practical operation of the Convention.

17. In 2000, the responses of Contracting States to a Questionnaire on the practical operation of the Convention showed very wide variations in the costs and charges paid by adoptive parents, including excessive charges for certain services provided by some accredited bodies. Regarding financial issues, the Special Commission recommended that:³⁴

- an itemised list of the costs and expenses likely to arise should be provided in advance to prospective adoptive parents;
- information concerning the costs, expenses and fees charged by accredited bodies should be made available to the public;
- donations by prospective adoptive parents to bodies concerned in the adoption process must not be sought, offered or made;
- accredited bodies should have a sound financial basis and an effective internal system of financial control, as well as external auditing, and maintain accounts in order to be accredited;
- receiving States be encouraged to support efforts in States of origin to improve national child protection services, including programmes for the prevention of abandonment. However, this support should not be offered or sought in a manner which compromises the integrity of the intercountry adoption process, or creates a dependency on income deriving from intercountry adoption.

18. In 2005, the Special Commission reaffirmed the first four of the above recommendations. It also recommended that the Permanent Bureau, in consultation with Contracting States and non-governmental organisations, collect information on issues including the financial aspects of intercountry adoption with a view to the possible development of future parts of the Guide to Good Practice.³⁵

²⁹ See Art. 7 of the Convention.

³⁰ Art. 9 *a)* and *e)* of the Convention.

³¹ Art. 9 *d)* of the Convention.

³² Art. 11 *a)* and *c)* and Art. 32(3) of the Convention. See also Guide to Good Practice No 2, *supra*, note 4, Chapter 8.3.2.

³³ See Guide to Good Practice No 2, *supra*, note 4, Chapter 13.

³⁴ See "Report and Conclusions of the Special Commission on the practical operation of the Convention (28 November – 1 December 2000)", in *Proceedings of the Nineteenth Session*, Tome I, *Miscellaneous matters*, pp. 481 *et seq.*, available on the Hague Conference website at < www.hcch.net > under "Intercountry Adoption Section" (hereinafter, "Report of the 2000 Special Commission"), Recommendations Nos 6 to 10.

³⁵ See "Conclusions and Recommendations of the Second Meeting of the Special Commission on the practical operation of the Convention (17-23 September 2005)", available on the Hague Conference website at < www.hcch.net > under "Intercountry Adoption Section" (hereinafter, "Conclusions and Recommendations of the 2005 Special Commission"), Recommendations Nos 2 and 5.

19. At the 2010 Special Commission, a special day was dedicated to the theme of abduction, sale and traffic in children and their procurement. It was recognised that regulated, reasonable and transparent fees and charges are essential features of a well regulated system and will help to prevent the procurement, abduction, sale and traffic in children for intercountry adoption.³⁶

20. As a tool to set up regulated, reasonable and transparent costs, the Special Commission recommended that the Permanent Bureau examine the feasibility of posting on its website tables indicating for each Contracting State the costs associated with intercountry adoption and the charges imposed on prospective adoptive parents. The tables included in Guide to Good Practice No 2 are cited as a basis for such tables.³⁷

21. The 2010 Special Commission meeting took a narrower view than the 2000 meeting on the topic of contributions, donations and development aid aimed at supporting efforts in States of origin to improve national child protection services. It emphasised the need to establish, in all cases, a clear separation between intercountry adoption on the one hand and contributions, donations and development aid on the other hand.³⁸

22. The three Special Commissions recommended that Contracting States, in their relations with non-Contracting States, should apply as far as practicable the standards and safeguards of the Convention. In 2010, a specific reference was made in this regard to the requirements concerning the suppression of improper financial or other gain.³⁹

1.4 Other international standards and guidelines

23. EurAdopt and the Nordic Adoption Council drafted a document entitled *Good Practice in Economic Matters in Intercountry Adoption*⁴⁰ which sets up different guidelines regarding financial issues. This document was presented at the 2005 Special Commission. In addition, the African Child Policy Forum has recently published its draft *Guidelines for Action on Intercountry Adoption of Children in Africa*⁴¹ which also includes reference to financial matters. These documents have been useful sources for this Note.

24. *Guide to Good Practice No 1 on the Implementation and Operation of the 1993 Hague Intercountry Convention* establishes guidelines regarding costs, contributions and donations related to intercountry adoptions. *Guide to Good Practice No 2 on Accreditation and Adoption Accredited Bodies* supplements the discussion of good practice on these areas focusing on the standards applicable to accredited bodies.⁴² The relevant parts of both Guides applicable to this discussion are mentioned in this Note.

2. THE VICTIMS OF FINANCIAL ABUSES

25. The problems surrounding the financial aspects of intercountry adoption directly affect children, biological parents and prospective adoptive parents. The 1990 van Loon Report affirmed that “child trafficking means profit making by intermediaries at the expense literally of the biological parents and the adopters (to the extent that they act in good faith), and in a broader sense also of the child”.⁴³

³⁶ See “Conclusions and Recommendations of the Third Meeting of the Special Commission on the practical operation of the Convention (17-25 June 2010)”, available on the Hague Conference website at < www.hcch.net > under “Intercountry Adoption Section” then “Special Commissions”, (hereinafter, “Conclusions and Recommendations of the 2010 Special Commission”), Recommendation No 1.

³⁷ *Ibid.*, Recommendation No 4.

³⁸ *Ibid.*, Recommendations Nos 1 h) and 14.

³⁹ *Ibid.*, Recommendations Nos 36 and 37 e).

⁴⁰ EurAdopt Good Practices in Economic Matters, *supra*, note 19.

⁴¹ Fifth International Policy Conference on the African Child (IPC), *Draft Guidelines for Action on Intercountry Adoption of Children in Africa* (Addis Ababa, 29-30 May 2012), available at < www.africanchildforum.org/ipc/ > under “5th International Policy Conference” (hereinafter, “IPC draft Guidelines”).

⁴² See Guide to Good Practice No 1, *supra*, note 1, Chapter 5 and Guide to Good Practice No 2, *supra*, note 4, Chapters 8 and 9.

⁴³ J.H.A. van Loon, “Report on intercountry adoption”, Prel. Doc. No 1 of April 1990, Hague Conference on Private International Law, *Proceedings of the Seventeenth Session, 1993, Tome II, Adoption – co-operation*, (hereinafter, “van Loon Report”), pp. 11-119, para. 81.

Adoptable and adopted children

26. The abuses in relation to the financial aspects of intercountry adoption affect, above all, the best interests and the rights of children. Children are procured for the purpose of intercountry adoption because of their general vulnerability to poverty, disaster, civil war, weak legal systems and non-existent social infrastructures. If the principle of subsidiarity was respected and if children and their families had the necessary support, many of these children could be raised by their own family.

27. As a result, children who are not necessarily in need of intercountry adoption (e.g., healthy babies for whom a domestic placement can be identified) end up being adopted because they meet the expectations of foreign prospective adoptive parents, who sometimes are even ready to "pay more".⁴⁴ As emphasised by Professor Smolin, monetary incentives for intercountry adoption have the capacity to draw children into institutional care unnecessarily.⁴⁵ In contrast, and although an increasingly significant percentage of children adopted intercountry are special needs children, many children in real need of adoption (often those with special needs) are not adopted and stay in institutional care until adulthood.

28. Children adopted through abusive procedures may experience problems later in life when they realise or discover the circumstances surrounding their adoption, especially if they become aware of the fact that their adoptive parents knew or did not do their utmost to check their origins and ensure that the adoption procedure was legal and ethical. Malpractice has also been shown to impact children who were not adopted through abusive procedures by causing these children to question the procedures used in their own adoption.

Biological parents

29. Some biological parents, and specifically birth mothers, are victims of financial abuse and malpractice in part because of the absence or the weakness of effective family preservation and reunification services in the States of origin. As a consequence, birth families may be deprived of their children because they are not well informed and counselled.

30. In addition, some biological families (isolated mothers and impoverished families) are induced by unscrupulous people to give their consent for adoption through payment or other compensation, or even to produce or bear children for the purpose of intercountry adoption.⁴⁶ Biological families in dire situations may accept, or in some cases even request, such payment or compensation to provide for their immediate needs, often unaware of the long-term consequences of such a decision, and without the proper support to cope with the resulting psychological effects.

31. If adoptive and biological parents meet, even after the adoption is finalised, and if adoptive parents give donations (not necessarily money) to biological parents, adoptive parents should be aware that this practice may prompt other biological parents to consider adoption by creating expectations of some form of compensation after the adoption.

32. Biological families may also be led to believe that the child that they are placing for adoption will come back when he / she grows up and may even contribute to the family's income. Desperate biological families may even pay an intermediary who claims to take

⁴⁴ *Ibid.*, para. 79: Considerations such as "health, weight, sex, colour of eyes, social origin may all influence the price of a child". Some websites propose different "prices" for children depending on their attractiveness on the global "market" of intercountry adoption. As an example, an Haitian institution publicly states on its website that "Adoptive parents who ask to have a newborn child which is 0 – 12 months old at the time of the referral, these parents will have to pay an additional fee of \$2,000, because it costs more money to care for the newborns, and their waiting period for referral may be as long as two (2) months or longer". See "New life link" at < www.newlifelink.org > under "Adoption Process".

⁴⁵ See the Debate between E. Bartholet and D. Smolin, extract from *Intercountry adoption: Policies, Practices and Outcomes*, edited by J.L. Gibbons and K. Smith Rotabi, Contemporary Social Work Studies, Ashgate LTD, June 2012 (hereinafter, "Debate between E. Bartholet and D. Smolin"), p.395.

⁴⁶ This was a common situation in Guatemala, Cambodia and Vietnam under the previous legal systems and remains a problem in other countries. A similar risk exists when local representatives of accredited bodies are paid on a case-by-case basis, which can create an incentive to "search" for children and induce birth parents consent, or resort to fraudulent means. See Guide to Good Practice No 2, *supra*, note 4, para. 77 and Chapter 8.3.2.

the child to a boarding school for education, when the intermediary is instead facilitating the intercountry adoption of the child.⁴⁷

Prospective adoptive parents and adoptive parents

33. (Prospective) adoptive parents pay for the majority of the expenses arising from an intercountry adoption, from the commencement of the adoption process right through to the post-adoption services. Some of them are prepared to invest a lot of personal effort and material resources to adopt a child, and therefore are not too inclined to scrutinise how much they spend, and even less to consider whether costs, contributions and donations are justified, arguing that "a child has no price". Others may voluntarily or involuntarily close their eyes to the dark side of adoption and do not want to know how exactly their adopted child became adoptable.⁴⁸

34. However, (prospective) adoptive parents can also be victims of the lack of regulation of the financial aspects of intercountry adoption or its defective implementation. They are specifically victims when, acting in good faith, they are not aware of the abuses behind the declaration of adoptability of the child and they end up adopting a child who has been procured for adoption.

35. In addition, most prospective adoptive parents need to know that they are not paying inflated costs and that the payments they make are appropriate and do not lead to the "purchase of a child". They should be made aware that any doubt or concerns which they have in relation to the financial aspects of an adoption may affect the relationship with their adoptive child and their attachment to him or her (or vice versa).

36. Prospective adoptive parents may also be discriminated against based on their income. Although a minimum appropriate level of financial stability should be one criterion to assess their suitability, in some cases (especially when the matching is not done by a multidisciplinary and professional team in the State of origin), prospective adoptive parents with a higher income are given preference.⁴⁹

37. In some instances, (prospective) adoptive parents are exposed to pressure to make payments that were not initially planned, for example under the cover of donating to a child institution. Sometimes they are coerced in the final stages to pay more money or risk having the adoption blocked or stopped.

The reputation and legitimacy of intercountry adoption as an option in the possibilities for alternative care

38. Finally, another victim of financial abuses is the reputation of intercountry adoption itself. Some States prohibit intercountry adoption or establish *de facto* moratoria after having suffered abuses, including the abduction, sale of, or trafficking in children for adoption. In some cases prohibitions or moratoria are inevitable and the only way to address such serious violations.

39. After such scandals and abuses, intercountry adoption may not be seen as a legitimate child protection measure and intercountry adoptions may not be re-started. However, there may still be children who cannot be reunited with their birth or extended family and for whom a suitable permanent family solution in their State of origin cannot be found; in these cases, intercountry adoption might be the best solution for them.

3. A VARIETY OF PERPETRATORS

40. Persons involved at different stages of an intercountry adoption might be motivated by pecuniary gain. The perpetrators of the abuses are potentially numerous. Some operate in the shadows while others use their function or title to profit from the system. As the

⁴⁷ See *Terre des hommes* International Federation, film "Paper orphans" in Nepal, presented at the 2010 Special Commission Meeting.

⁴⁸ See EurAdopt Good Practices in Economic Matters, *supra*, note 19.

⁴⁹ Of course, a higher income for prospective adoptive parents may be necessary if the child has certain special needs and will require extensive medical treatment.

1990 van Loon Report points out, “the profiteers are generally neither the biological parents nor the adoptive parents but the intermediaries – lawyers, doctors and others.”⁵⁰

41. The perpetrators may be persons who act independently or who provide services to adoption accredited bodies such as lawyers acting as intermediaries to procure a child when they charge excessive legal fees;⁵¹ notaries who perform adoptions in systems that allow such proceedings;⁵² social workers in charge of the investigations into a child’s adoptability who do not undertake proper investigations; doctors who do not support the birth mother at the birth of the child and encourage her to relinquish her child instead; or public officials who accept a bribe to produce false documents, to give a judgment in favour of an adoption which is not in the best interests of the child or to accelerate a slow process such that it would give an unfair advantage to individuals with more means and slow down the process for others.⁵³

42. Although the involvement of accredited bodies in intercountry adoption is now the norm, and accreditation of adoption agencies is accepted as one of the important safeguards introduced by the Convention,⁵⁴ sometimes it may be the adoption accredited body itself that is managed by unscrupulous and unethical people, is poorly monitored and has transformed its services from helping prospective adoptive parents into a real business for its directors seeking personal enrichment.

43. Another problem arises when accredited bodies fail to properly monitor the work of their representatives in the State of origin, or do not provide them with sufficient training. This may lead to unethical practices. In other cases the adoption accredited body may turn a blind eye to illegal or unethical activities in its desire to obtain children for adoption by any means. In these situations, the accredited body may risk losing its accreditation and / or authorisation to continue to provide adoption services.

44. Several States believe that these concerns may be exacerbated in the case of approved (non-accredited) persons and bodies, which are not bound to pursue only non-profit objectives.⁵⁵

45. This kind of behaviour, motivated by lucrative opportunities, also exists among the directors of orphanages who might put a “price” on certain categories of children and seek the most financially rewarding children for the global market of intercountry adoption.⁵⁶ The fact that an orphanage will receive more money for an intercountry adoption than for a domestic adoption is also a common incentive for seeking children with the best chance of being adopted abroad, contrary to the principles of the Convention.

46. In addition to the perpetrators of abuses directly involved in the adoption procedure, there are other persons and companies which are not involved directly in the adoption procedure but are linked to the “market around adoption” (see Chapter 4.6 of this Note). These persons and companies may influence the actors involved in the adoption procedure as they have an interest in ensuring that the “market around adoption” continues. In addition, in many cases, they are not subject to the same degree of monitoring as the actors directly involved in the adoption procedure despite the fact that their services are, to some degree, indispensable to the adoption.

⁵⁰ Van Loon Report, *supra*, note 43, para. 79 and Explanatory Report, *supra*, note 8, para. 527.

⁵¹ See Report of the 2000 Special Commission, *supra*, note 34, para. 37.

⁵² This was the case for Guatemala under the prior adoption system, where the great majority of intercountry adoptions were approved by notaries.

⁵³ See IPC draft Guidelines, *supra*, note 41, Art. 64.

⁵⁴ See Guide to Good Practice No 2, *supra*, note 4, para. 36.

⁵⁵ See Art. 22(2) of the Convention. Approved (non-accredited) persons and bodies are nevertheless required to meet certain standards of integrity, professional competence, experience and ethics. A State of origin may declare, by filing a declaration in accordance with Art. 22(4), that it will not permit adoptions of its children by States which allow approved (non-accredited) persons and bodies to perform the functions of Central Authorities in Chapter IV of the Convention. See also Guide to Good Practice No 1, *supra*, note 1, paras 217-219.

⁵⁶ See ACPF, *supra*, note 20, p. 20.

4. CHALLENGES IN THE GLOBAL CONTEXT

47. This Chapter presents the challenges concerning the financial aspects of intercountry adoption in the global context, applicable to the majority of States. Additional or different issues may be relevant to each State.

4.1 The general imbalance of wealth

48. International adoption involves amounts of money that may be disproportionately large in relation to developing countries' economies.⁵⁷ As Cantwell explains "the tremendous potential power of prospective adopters in the "North", whose earnings may easily be 100 times greater than officials and others in the "South", is a breeding ground for manipulation and corruption if those adopters and / or their agencies decide to take advantage of that power, or agree to additional financial considerations, in order to realise their dream of adopting a child".⁵⁸ For example, Professor Smolin estimates that between 2002 and 2008 at least 371 to 495 million US dollars were transferred to Guatemala for intercountry adoptions of children to the United States of America.⁵⁹

49. Abuses, including the abduction, sale of, and trafficking in children are more likely to occur in poverty-stricken States where money may induce criminals and unscrupulous persons to take children away from their family, falsify birth documents, place them within an orphanage or match them with a foreign family. The fact that in some States corruption of officials involved in procedures of intercountry adoption is widespread may also promote abuses.⁶⁰

50. Global inequalities lead to situations where children are placed for intercountry adoption because, although their families are willing, they are financially incapable of providing for the child's needs. The State also encounters problems in supporting families due to, among other factors, a weak child protection system, with very scarce resources. However, poverty should not in itself be a reason to declare a child adoptable and refer him or her for adoption to a materially wealthier State.⁶¹

4.2 Pressure and competition to find children

51. Financial issues are also linked with the pressure exerted on States of origin by receiving States whose prospective adoptive parents are eager to adopt. The fact that money has been or will be paid inevitably and understandably leads to an expectation on the part of the prospective adoptive parents that they will receive a child. This, in turn, adds pressure to the whole system.⁶²

52. Critical management of the demand is also lacking in some receiving States. Too many prospective adoptive parents are approved to adopt and too many accreditations are granted to adoption bodies in comparison to the number of children in need of intercountry adoption. These problems are known sources of pressure. This also leads to competition among receiving States, accredited bodies and prospective adoptive parents in order to find adoptable children (see Chapter 6 for further discussion on competition in relation to contributions and donations).

⁵⁷ *Ibid.* See also E.J. Graff, "The Baby Business", *Democracy*, Issue No 17, Summer 2010, available at < www.democracyjournal.org > under "Archive".

⁵⁸ N. Cantwell, *Key Principles of the 1993 Hague Convention and the Current Realities of Intercountry Adoption*, Presentation at *Kind en Gezin Consultation*, Brussels, 14 December 2009 (hereinafter, "N. Cantwell (2009)"), p. 3. See also Everychild, *Adopting better care: Improving adoption services around the world*, London, 2012 (hereinafter "Everychild"), p. 11.

⁵⁹ Guatemalan lawyers charged between US\$ 15,000 and US\$ 20,000 per adoption, and there were over 24,000 intercountry adoptions to the United States of America in the period mentioned. See Debate between E. Bartholet and D. Smolin, *supra*, note 45, p. 386.

⁶⁰ See Everychild, *supra*, note 58, p. 15.

⁶¹ As N. Cantwell states "While a minimum level of material welfare is clearly necessary for a child's development, material poverty does not justify removing a child from his family, community or country, or accepting the relinquishment of that child". See N. Cantwell (2009), *supra*, note 58, p. 3.

⁶² *Ibid.*, "there are far more people who would like to adopt – and, particularly, who would like to adopt a healthy baby or young child – than the number of such children who really need to be moved from their community and country to benefit from a stable family-based life" and the reference to a case where prospective adoptive parents, after paying a "contribution for humanitarian aid" in a State of origin, "quite naturally expect that a young child would be 'made available'".

4.3 Lack of political will and governmental impediments to the elimination of profiteering

53. A lack of political will to eliminate profiteering may take different forms. For example: the Convention is not signed and ratified or acceded to, or there are many delays in doing so; legislation to implement the Convention at domestic level is not approved; the laws implementing the Convention are inadequate or do not fully incorporate the safeguards of the Convention; bilateral agreements on intercountry adoption are concluded which explicitly require, allow or promote activities and financial arrangements which contravene international standards in relation to the financial aspects of intercountry adoption; there are failures in law enforcement due to, among other factors, a lack of resources being allocated to this task; there is a failure to systematically prosecute abuses, child procurement and child laundering.⁶³ Without any real political commitment to correctly implement the Convention, raise standards at the national level through legislation, and increase accountability, any Contracting State may continue to close its eyes to abuses, corruption and malpractices. Sometimes the lack of political will exists because senior officials themselves are benefiting financially from intercountry adoption.

54. States may not consider the financial aspects of adoption as a priority and, when they do, they may have to counter the forces of influential lobbies that would prefer that adoption remain a business from which personal benefit can be derived.

55. In receiving States, adoption lobby groups, adoption accredited bodies and prospective adoptive parents may pressure politicians to ensure that they support intercountry adoptions from a certain State and, if there are already many intercountry adoptions from one State, that they ensure retaining the *status quo*. In States of origin, the pressure may come from foreign accredited bodies, governments of receiving States and prospective adoptive parents. An ethical politician or decision maker may be pressured by a colleague who is influenced by others interested in intercountry adoptions.

56. Money in intercountry adoption can have a "corrupting influence on financially strapped third world countries."⁶⁴ Indeed, fighting against corruption is one of the major challenges in this area, especially when bribery of officials and others is common practice in a State and salaries are very low. However, receiving States should also properly inform prospective adoptive parents and accredited bodies about corruption. Regrettably, corruption can easily lead to major problems such as procuring children for intercountry adoption.

57. Proper information and training of the different actors involved in the adoption procedure, including politicians, is one of the tools to change the situation, eliminate profiteering and remove incentives for improper financial or other gain. Informing them of the risks associated with improper financial or other gain in adoption, including the impact on victims, may be one of the ways to change the political will. In the past, trainings and meetings with parliamentarians to explain the issues in detail and the need to improve the situation have proved to be a successful way to secure the necessary support for a new law on adoption that better protects the rights of the children.

4.4 Creating dependency on the funds linked to intercountry adoption

58. Intercountry adoption, specifically when large sums of money are involved, may "create income opportunity that many will understandably seek to preserve and develop regardless of the real need of children."⁶⁵ In some cases, the income from intercountry adoption in a specific State of origin can be significant. If, for example, prospective adoptive

⁶³ D. Smolin provides the following definition of child laundering: "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". See D. Smolin, *Abduction, sale and traffic in children in the context of intercountry adoption*, Info. Doc. No 1, for the attention of the Third Meeting of the Special Commission on the practical operation of the 1993 Hague Intercountry Adoption Convention (June 2010), p. 5, available on the Hague Conference website at < www.hcch.net > under "Intercountry Adoption Section" (hereinafter, "D. Smolin").

⁶⁴ Parents for Ethical Adoption Reform (PEAR), comments submitted by Gina M. Pollock, document ID USCIS-2007-0008-0056, available at < www.regulations.gov >.

⁶⁵ ACPF, *supra*, note 20, p. 22.

parents have to pay 10,000 Euros in a State of origin, and there are around 2,000 intercountry adoptions per year, this represents some 20,000,000 Euros paid to that State of origin for intercountry adoption in one year. This is a significant amount for certain States of origin.

59. In addition, some States of origin finance (part of) their adoption system through the costs and fees paid, and parts of their child protection system through contributions and donations (see Chapter 6). States wanting to ensure a steady flow of external funds to support their adoption system and their child protection efforts may feel obliged to ensure that children are “supplied” for intercountry adoption or impose services that are not necessary for the adoption or may be excessive.⁶⁶ This obviously creates dependency. For example, authorities, adoption bodies, children institutions and other actors expect to receive money if adoptions are carried out. Therefore, they may promote the abandonment of children⁶⁷ and hinder the correct implementation of the subsidiarity principle. As the African Child Policy Forum recognises “money determines not only the way (...) adoptions are carried out, but also the reasons for which many are initiated.”⁶⁸

4.5 The risks associated with private, independent and non-Convention adoptions

60. Financial abuses occur more readily in private adoptions because these adoptions generally take place in circumstances where there is more limited oversight by authorities.⁶⁹ The fact that the arrangements are made directly between biological parents in one State and prospective adoptive parents in another State is one reason for a variety of abuses and pressures. In most of the cases, both the biological parents and the prospective adopters are not well-informed or counselled, and might end up agreeing to the sale of the child or to another type of illegal or abusive arrangement which will not be in the best interests of the child. It may lead some people, overwhelmed by their desire to adopt, to be more likely to offer money in exchange for the facilitation of the adoption process. In many States, private adoptions are prohibited (*e.g.*, Guatemala, Panama).⁷⁰

61. In the case of independent adoptions (where prospective adoptive parents are approved as eligible and suited to adopt by their Central Authority or accredited body and then travel independently to a State of origin to find a child to adopt, without the assistance of a Central Authority or accredited body in the State of origin),⁷¹ abuses may also occur. Prospective adoptive parents are more vulnerable to all sorts of exploitation, pressures and threats exerted by unscrupulous intermediaries, because of the lack of guidance and protection in the State of origin. Even if in Contracting States, Central Authorities or competent authorities intervene at one point of the process, independent adoptions do not offer the same safeguards as when a Central Authority or an accredited body guides prospective adoptive parents from beginning to end, provided that the accredited body complies with the Convention.

62. In light of the above, the 2010 Special Commission concluded that private and independent adoptions are not compatible with the Convention and recommended their prohibition.⁷²

63. In fact, more States are choosing to prohibit independent adoptions (*e.g.*, Italy and Norway) and to make the involvement of accredited bodies compulsory in order to increase the level of control and supervision over the adoption and therefore limit the risk of abuses

⁶⁶ For example, one Central Authority of a receiving State raised concerns that some States of origin may be dependent on the income generated by the legalization (or over legalization) of documents. This also results in excessive costs to prospective adoptive parents.

⁶⁷ See EurAdopt Good Practices in Economic Matters, *supra*, note 19, Chapter 4.

⁶⁸ ACPF, *supra*, note 20, p. 23.

⁶⁹ See Guide to Good Practice No 1, *supra*, note 1, Chapter 8.6.6.

⁷⁰ See Art. 10 (b) of the 2007 Adoption Law of Guatemala (Decree 77-2007) and Art. 14 (2) of the 2008 General Adoption Law of Panama (Law 61, 12 August 2008).

⁷¹ See Guide to Good Practice No 1, *supra*, note 1, Chapter 8.6.6.

⁷² Conclusions and Recommendations of the 2010 Special Commission Meeting, *supra*, note 36, Recommendations Nos 1 and 22 to 24.

and unprofessional practices, in particular regarding the financial aspects of the adoption.⁷³ Today, adoption through a qualified and ethical accredited body can provide many benefits, including the opportunity to work with a multi-disciplinary team of qualified and experienced professionals who can assist prospective adoptive parents with understanding and navigating the intercountry adoption process, including its financial aspects.

64. In addition, the risk of financial abuses and the procurement of children tend to be greater in States which are not Party to the Convention precisely because private and independent adoptions take place more frequently. Furthermore, the lack of a Central Authority, designated under the Convention, to supervise the adoption procedure is also a source of problems. Even if States Parties should, as far as practicable, apply the standards and safeguards of the Convention to the arrangements for intercountry adoption which they make with States which have not yet joined the Convention⁷⁴ (including financial issues, see chapter 1.2 of this Note) in practice, this is very often not done.

4.6 A market around adoption

65. Intercountry adoption is transforming in some cases “into nothing short of a market”.⁷⁵ In some States, a whole business has been built around adoption. For example: marketing firms help prospective adoptive parents to prepare biographies; hotels offer special facilities to prospective adoptive parents; travel agencies offer special packages to prospective adoptive parents while they wait for the final adoption decision in the State of origin; special insurance policies exist for prospective adoptive parents to reimburse expenses paid to a birth family that then changes its mind.⁷⁶ Therefore there are many hidden economic interests behind intercountry adoption and many people are affected when adoptions decrease or stop in a particular State.

5. COSTS, CONTRIBUTIONS AND DONATIONS: PROBLEMS AND GOOD PRACTICES

5.1 Definitions of key words

A. *Problem: Lack of harmonised definitions*

66. The financial aspects of intercountry adoptions involve a number of key terms mentioned in the 1993 Hague Intercountry Adoption Convention (*e.g.*, improper financial or other gain, costs, fees, expenses and remuneration) or deriving from practice (*e.g.*, contributions and donations). The fact that the Convention does not define key words and the lack of harmonised and accepted definitions may lead to ambiguity, confusion, and inconsistent interpretations within and among Contracting States (*e.g.*, the determination of matters such as what is “improper” financial or other gain⁷⁷ or what are “reasonable” fees becomes more challenging in such circumstances).⁷⁸ In addition, the study and

⁷³ See I. Lammerant and M. Hofstetter, *Adoption: at what cost? For an ethical responsibility of receiving countries in intercountry adoption*, Lausanne, *Terre des hommes*, 2007, p. 29, available at < www.terredeshommes.org > under “Resources and Press” then “Research”.

⁷⁴ See Guide to Good Practice No 1, *supra*, note 1, Chapter 10.3. For example, in the United States of America, the new Accreditation Act of 2012 (UAA), which becomes effective on 14 July 2014, requires that all USA agencies or persons providing adoption services to be accredited in compliance with the USA standards for Hague accreditation.

⁷⁵ Parliamentary Assembly of the Council of Europe, Rec. 1443 adopted by the Assembly on 26 January 2000 (5th sitting), available at < www.assembly.coe.int > under “Documents” then “Adopted texts”.

⁷⁶ See K. Watson, “Who cares if people are exploited by adoption”, American Adoption Congress, available at < www.americanadoptioncongress.org > under “Education” then “Best practices”. See also Chapter 3 of this Note.

⁷⁷ See ACPF, *supra*, note 20, p. 21 and the African Child Policy Forum, *Africa: The New Frontier for Intercountry Adoption*, Addis Ababa, 2012, available at < www.africanchildforum.org/ipc/ >.

⁷⁸ This is obvious from the answers to the Hague Country Profiles regarding the measures taken against improper financial or other gain in some States of origin and receiving States. See States’ responses to question No 9 of the 2010 Country Profile, available on the Hague Conference website < www.hcch.net > under “Intercountry Adoption Section”. For example, the terms “contribution” and “donation” are often used interchangeably to define a payment that is not a “normal adoption fee” and aims (or is supposed to aim) at strengthening the child protection system, globally or locally. The research work on this question also reflects this confusion: for example a “contribution” might be requested by an accredited body without any request from the State of origin in order to be seen by this State as a “good partner”. The use or destination of contributions also exemplifies the confusion. Depending on the State, contributions can be used for administrative “costs”; for structural financing (strengthening the Central Authorities);

discussion of financial issues becomes more difficult when there is no clarity concerning the definition of key terms.

B. Good practices: Use of the harmonised terminology developed by the Experts' Group

67. Finding solutions to the problems regarding the financial aspects of intercountry adoption should start with an agreement on common definitions of the main concepts. Harmonised terminology is a very useful tool to encourage consistency in usage and practice and to avoid confusion and uncertainty. The terminology defined and used in this Note, and approved by the Experts' Group, may serve as a tool to address this issue (see Terminology at the beginning of this Note and also Chapter 8.1).

5.2 Transparency

A. Problem: Lack of transparency

68. Often costs are not fully disclosed or, even if disclosed, are not easy to access and / or up-to-date. This is due, in part, to a lack of commonly accepted tools to record and compare data, the existence of taboos, the unwillingness of some authorities or bodies to disclose financial details, and, consequently, inadequate publicity of the costs. The lack of transparency is evident when Central Authorities in receiving States are not aware of the costs required in a State of origin. This may lead to the prospective adoptive parents being misinformed. Prospective adoptive parents often visit the websites of accredited bodies as one of their first steps before applying to adopt a child. However, the websites of many such bodies do not provide detailed information on costs. Providing detailed information to prospective adoptive parents at an early stage could prove of assistance to them in their selection of an adoption accredited body.

69. The lack of transparency is also linked to the reluctance to speak about the financial issues and to disclose information. For example, many (prospective) adoptive parents are reluctant to think about financial aspects inherent to the adoption and to talk openly about those matters, perhaps because they consider themselves as "victims of a system that they feel they have to some extent involuntarily contributed to".⁷⁹ Decency, discretion, pride and sometimes even shame might be reasons for the silence on this topic.

70. It is particularly important for prospective adoptive parents to fully understand what they are obliged to pay (*e.g.*, a cost for service) from what may be voluntary (*e.g.*, a donation). "Unofficial" adoption fees are sometimes requested to move the required paperwork through the adoption process. Some adoption bodies may urge prospective adoptive parents to pay incentives to officials or orphanage directors who make the placement decisions.⁸⁰ Without an indication of what payments are voluntary, prospective adoptive parents may not know that they have an opportunity to refuse a payment. As a result, prospective adoptive parents may have to pay large amounts that do not correspond to the real costs of an adoption in a State of origin and may be easily taken advantage of.

71. The use of cash and the absence of receipts make the prospect of discovering where or to whom the money is going virtually impossible.

72. Lack of transparency makes it difficult to know what the money will actually be used for and may lead to corruption. The intended use of contributions and donations may not be clear: for example, it may be unspecified or specified in a very general manner. The amounts donated are often kept secret by the persons providing them and those receiving them. The destination of the donation can also be hidden or blurred. It may be unclear which part of the total amount paid goes directly to a State of origin or to an accredited

to support child protection and family preservation programmes; as "donations" to institutions; as reimbursement for the maintenance charges of the children; as support to non-adoptable children (*e.g.*, in Burkina Faso, Madagascar and the Philippines). See responses to questions No 8 or No 9 of the Country Profile for States of origin.

⁷⁹ Agence française de l'adoption, "Cahier Psy No 12 : L'argent dans l'adoption internationale", available at < www.agence-adoption.fr > under "Vous et votre enfant" then "Les cahiers Psy AFA", p. 2.

⁸⁰ See Guide to Good Practice No 1, *supra*, note 1, paras 236 and 237.

body that will channel the money to the Central Authority of the State of origin or to a local institution for children.

73. The lack of co-operation between States may also be problematic. For example, when a State of origin makes every effort to communicate information concerning costs, contributions and donations but such information is not relayed to the prospective adoptive parents,⁸¹ or when receiving States do not explain to authorities in the States of origin how accredited bodies are financed and how they establish their fees.⁸²

B. Good practices for achieving transparency

Gathering comprehensive data

74. States have different methods and ways of gathering financial data on intercountry adoption. The Tables on costs, developed by the Experts' Group and approved by the Council on General Affairs and Policy of the Hague Conference, are designed to increase transparency by compiling the information on costs available in States of origin and receiving States.⁸³ The Tables do not aim to provide a definite, "total cost" for an intercountry adoption. Rather, they aim to make available a range of costs which may be considered reasonable. Once completed and published, the Tables will offer a reference point for prospective adoptive parents and other actors and will enable them to identify if the costs which they encounter are of a nature, and within the range, provided in the Table (see Chapter 8.2 of this Note).

Provide accurate and up-to-date information

75. Central Authorities should disclose details of the costs associated with their adoption services and, if applicable, the contribution that they require. This is the case for Switzerland which indicates the fixed fee generally charged by the administration for each adoption case and an additional fee that can be charged when the process is particularly long or requires further additional fees for the transmission of the file.⁸⁴ Burkina Faso lists in its handbook on domestic and intercountry adoption process the compulsory fees for social investigation of the child, maintenance charges of the child in the institution and the treatment of the files.⁸⁵

76. Accredited bodies should disclose details of the costs of adoption services and contributions for each of the States for which it is accredited and authorised, for example, on their website.⁸⁶ Central Authorities of States of origin and receiving States should be informed of the costs. Central Authorities should also be in a position to inform any person of the costs charged by all accredited bodies working in their territory. The Central Authority's monitoring function in this context is critical. Accredited bodies should be required to report this financial information to the Central Authority regularly. The Central Authority of Italy publishes a document for each accredited body with the different costs that the accredited body charges.⁸⁷ The information provided should clearly distinguish between the different types of fees and costs associated with each service offered (*e.g.*, administrative, judicial, medical) both in the receiving State and the State of origin.⁸⁸ A

⁸¹ For example, in Latvia, the Central Authority has information available on planned costs during the adoption process but does not know whether partner receiving States disclose this information to accredited bodies and prospective adoptive parents, see the response of Latvia to question No 49 of the 2009 Questionnaire, *supra*, note 11.

⁸² See the response of Brazil to question No 47 and the response of the Philippines to question No 48 of the 2009 Questionnaire, *supra*, note 11.

⁸³ The Tables on costs may be consulted on the specialised "Intercountry Adoption Section" of the Hague Conference website < www.hcch.net >.

⁸⁴ See website of the Central Authority of Switzerland, available at < www.bj.admin.ch > under "Adoption" then "Emoluments".

⁸⁵ Response of Burkina Faso to question No 8 of 2010 Country Profile, *supra*, note 78, and to question No 50 of the 2009 Questionnaire, *supra*, note 11.

⁸⁶ For example, the United States of America's accredited body Children's Hope provides the total costs for adoptions in the States where it works, see < <http://adopt.childrenshope.net/> >.

⁸⁷ See website of the *Commissione per le Adozioni Internazionali*, available at < www.commissioneadozioni.it > under "*I costi dell'adozione*".

⁸⁸ See Guide to Good Practice No 2, *supra*, note 4, Chapter 8. See also the Report of the 2000 Special Commission, *supra*, note 34, Recommendation No 8.

distinction should also be made between costs and contributions: *i.e.* between the amounts which are directly connected with the adoption services provided for the specific case, and the amounts intended to contribute to strengthening the child protection system in the State of origin in general. A clear distinction should also be drawn between the amounts which are mandatory and those which are optional (*e.g.*, the services of a lawyer in some countries).⁸⁹

77. Central Authorities and accredited bodies should obtain information about actual costs, including any costs for processing documents by the competent authority in their State, and any changes in costs. Central Authorities and accredited bodies of receiving States should also gather information related to the different costs and payments that need to be made in the different States of origin.

78. Central Authorities and accredited bodies should ensure, as far as possible, that the costs and other payments which they publish are accurate and up-to-date.⁹⁰ In order to avoid the information becoming obsolete, the updates should be made at least annually, and the date of the last update should be indicated. For example, the Philippine Central Authority (Intercountry Adoption Board, ICAB) has created a unit that regularly checks foreign accredited bodies' websites: when a detailed documentation on fees is available, ICAB uses its monitoring powers to immediately request explanations for the fees charged.⁹¹ The Brazilian Central Authority may also request information from accredited bodies about costs when those costs are seen to be too high. However, it should be noted that costs may vary greatly and higher costs may be justified in certain circumstances depending on the nature and level of services that accredited bodies provide. In such cases, it is important for the accredited body to clearly explain the reasons for the higher costs.

Wide publicity

79. Publicity can be achieved through different means. Several Central Authorities publish on their websites, sometimes in several languages, the costs related to the adoption (*e.g.*, Italy,⁹² Lithuania,⁹³ the Philippines,⁹⁴ and Switzerland⁹⁵) or, if it is the case, explain that the Central Authority does not charge anything for the adoption (*e.g.*, Colombia⁹⁶ and Peru⁹⁷). Other Central Authorities provide such information in written form (such as a brochure) given to prospective adoptive parents at the beginning of the procedure (*e.g.*, Burkina Faso⁹⁸). When applicable, some Central Authorities of States of origin also publish the contributions that they charge. For example, ICAB provides on its website that "The ICAB also supports the request of the Association of the Child Caring Agencies of the Philippines to increase its Child Care Support Fund from 500.00 to 1,000.00 US Dollars per placement."⁹⁹

80. The use of the internet to publish information on the financial aspects of intercountry adoption should be promoted. Central Authorities or accrediting authorities should regularly monitor the information on the websites of their accredited bodies and / or the foreign accredited bodies authorised to work in their country in order to ensure that the costs published are accurate. Setting standards in relation to how adoption accredited bodies working in the same State of origin should calculate and present their costs would provide more clarity on this matter. For example, in Colombia, the Central Authority is

⁸⁹ For example, in some States of origin, the services of an attorney or a lawyer are not compulsory to help the prospective adoptive parents for the legal procedure. See for example the response of Burkina Faso to question 54 of the 2009 Questionnaire, *supra*, note 11.

⁹⁰ See Guide to Good Practice No 2, *supra*, note 4, para. 307.

⁹¹ *Ibid.*, Annex 2, "Philippines".

⁹² See website of the *Commissione per le Adozioni Internazionali*, available at < www.commissioneadozioni.it > under "*I costi dell'adozione*".

⁹³ See website of the Central Authority of Lithuania, available at < www.ivaikinimas.lt >.

⁹⁴ See website of the Central Authority of the Philippines, available at < www.icab.gov.ph > under "Fees, charges and assessments".

⁹⁵ See website of the Central Authority of Switzerland, *supra*, note 84.

⁹⁶ See website of the *Instituto Colombiano de Bienestar Familiar* (ICBF), available at < www.icbf.gov.co > under "*Familia y Sociedad*" then "*Programa de Adopciones*".

⁹⁷ See website of the Central Authority of Peru, available at < www.mimp.gob.pe > under "*Secretaría Nacional de Adopciones*" then "*Preguntas frecuentes – Question 3*".

⁹⁸ See response of Burkina Faso to question No 50 of the 2009 Questionnaire, *supra*, note 11.

⁹⁹ See website of the Central Authority of the Philippines, *supra*, note 94.

required by law to publish on its website the detailed costs of each foreign accredited body.¹⁰⁰ The Central Authority checks these bodies' websites with specific attention to the published costs for services provided during the adoption process in Colombia. In Ecuador, the Central Authority publishes the costs charged by foreign accredited bodies after having given its approval for such costs during the authorisation process.¹⁰¹ In certain States, accredited bodies are required by the Central Authority to publish their service fees. For example, in China (Hong Kong Special Administrative Region), this publication must be made in the accredited bodies' service pamphlets.

81. In addition, Central Authorities in States of origin are encouraged to compare the information on costs published by accredited bodies working in their States in order to assess what can be considered reasonable and to identify possible abuses. Central Authorities of receiving States should exchange information on the costs of their accredited bodies in order to try to understand the general practices. This would allow States to identify whether costs charged by a specific accredited body far exceed what other bodies are charging, and the reasons, if any, for the higher costs. This type of information-sharing may alert States more easily to possible abuses.

Notify prospective adoptive parents in advance of all costs that they will incur

82. Notifying prospective adoptive parents of all costs and contributions (and the conditions relating to their payments, including whether they can be waived, reduced and refunded) before they complete any steps relating to the adoption and start working with an accredited body, allows them to make an informed choice concerning whether to pursue the adoption process, which accredited body to work with and how to plan their budget. For example, in the United States of America, accredited bodies and approved (non-accredited) persons and bodies provide prospective adoptive parents prior to application with a written schedule of expected total fees and estimated expenses and an explanation of the conditions under which fees or expenses may be charged, waived, reduced or refunded and of when and how the fees and expenses must be paid.¹⁰² In Quebec (Canada), it is compulsory to include the expected costs in the contract signed by the prospective adoptive parents and the accredited body. The Central Authority then verifies, annually, that the payments received by the accredited body correspond with what it is established in the contracts with the prospective adoptive parents for that period.

Propose a timetable of payments to prospective adoptive parents

83. It is important for prospective adoptive parents to know at what stage of the adoption process they will be required to pay certain fees. For example, the Central Authority of Quebec (Canada) encourages adoption accredited bodies to include a "timetable of payments" in the contract signed with prospective adoptive parents. In France,¹⁰³ the accredited bodies assist prospective adoptive parents with planning their intercountry adoption and no fee can be requested by the body before the plan has been finalised.

84. If prospective adoptive parents are required to pay fees at different stages of the process, prospective adoptive parents should be given a timetable of payments, such as the one drawn up by the Philippine Central Authority. This timetable specifies that a fee is paid to the Central Authority upon filing the adoption application and the processing fee and possible pre-adoptive placement costs are paid upon the acceptance of the matching proposal.¹⁰⁴

¹⁰⁰ See website of the Central Authority of Colombia, *supra*, note 96 and Law 1098 of 2006. In addition, the Central Authority of Colombia (ICBF) decided in May 2012 that adoption accredited bodies should publish their costs and fees in a model form that ICBF would provide. This model form is being drafted following the model form proposed by the Experts' Group on financial issues of the Hague Conference.

¹⁰¹ Response of Ecuador to question No 49 of the Questionnaire of 2009, *supra*, note 11.

¹⁰² This is one of the standards of accreditation, with which accredited bodies and approved (non-accredited) persons and bodies must substantially comply. See Title 22 of the US Code of Federal Regulations §96.40 (a) available at < www.ecfr.gpoaccess.gov >.

¹⁰³ *Code de l'action sociale et des familles*, Art. R 225-41, available at < www.legifrance.gouv.fr > under "Accueil" then "les codes en vigueur".

¹⁰⁴ See website of the Central Authority of the Philippines, *supra*, note 94.

Payments through recorded transaction and if applicable, channelled through accredited bodies

85. States may impose limitations on the means through which payments should be made in order to be traceable such as making compulsory the payment through a bank transfer to a specified bank account,¹⁰⁵ and requiring that the amount transferred does not exceed the amount fixed by the relevant authority or body. Laws and regulations should prohibit payments in cash by all actors. Prospective adoptive parents should not carry and hand over large sums of cash in exchange for adoption services. In South Africa, the Children's Act prohibits giving and receiving any consideration in cash or in kind for the adoption of a child; in the Philippines the Central Authority website requests that all payments should be done through company cheque or international bank draft.¹⁰⁶

86. An additional guarantee is to require payments to be made through the accredited body and not directly by the prospective adoptive parents.¹⁰⁷

87. Another option, proposed by ISS, would be to involve Central Authorities more in cost management and, specifically, transfers of money. The simple model (admittedly theoretical) would involve the Central Authority of the State of origin invoicing the Central Authority of the receiving State for the entire cost of the adoption procedure. Once the procedure ends, the Central Authority of the receiving State would then, entirely or partly, re-invoice these costs to the adoptive parents. A "pilot project" with a few willing States which are Party to the Convention would test the feasibility of this model. However, a prerequisite for this option would be to have a strong Central Authority and a robust regulatory scheme. On the other hand, for some receiving States, the involvement of the Central Authorities in financial transactions with prospective adoptive parents may not be legal or consistent with the prevailing role of government.

Promote the practice of the dissemination of official receipts and detailed invoices

88. When a payment is requested of the prospective adoptive parents, the request should be accompanied by a written statement (invoice). Once the payment is made, it should also be confirmed in writing (receipt). Greater transparency may be achieved if official receipts in the name of the applicant family could be issued for all activities requiring payments in both States when an accredited body or its representative or co-worker provides a service.¹⁰⁸

89. In Ireland, the Central Authority now has a policy of monitoring all payments and it reserves the right to seek evidence, by way of documentary proof, of the amounts of all payments. Prospective adoptive parents may have to provide original and detailed invoices and receipts. When it becomes apparent to the Central Authority that unreasonable levels of payments have been incurred, and / or where it appears that undocumented cash transactions may have taken place, the Central Authority may refuse to register the adoption in the Register of intercountry adoptions.¹⁰⁹ However, as stated in Chapter 7.5 of this Note (para. 169), this kind of measure should be used sparingly and only when it does not adversely affect the best interests of the child.

Ensuring transparency in the final use of the money

90. It is important to know the real destination of money. In the case of the costs of the adoption, the money should be used to pay for a particular adoption service. For example, representatives and co-workers of foreign accredited bodies in States of origin should be

¹⁰⁵ This is the case in Canada (Quebec). See also the Guide to Good Practice No 1, *supra*, note 1, para. 246.

¹⁰⁶ Children's Act 38 of 2005, Section 249(1)(a), see website of the Government of South Africa at < www.gov.za > under "Documents" then "Acts" and "2005"; see website of the Central Authority of the Philippines "All payments (...) shall be in the form of a company check or international bank draft and shall be made payable to the Inter-country Adoption Board. Personal checks, travelers' checks or cash will not be accepted", *supra*, note 94.

¹⁰⁷ See EurAdopt Good Practices in Economic Matters, *supra*, note 19, p. 26. See also "Policy Proposals for Fairer International Adoption Practice", Schuster Institute for Investigative Journalism, rec. 2, p. 1.

¹⁰⁸ This is the case in Canada (Quebec). See Guide to Good Practice No 1, *supra*, note 1, para. 238 and Guide to Good Practice No 2, *supra*, note 4, para. 393.

¹⁰⁹ See website of the Central Authority of Ireland, available at < www.aai.gov.ie > under "How to register an Intercountry Adoption".

requested to clearly account to the accredited bodies for which they work concerning how the money paid for the services provided during the adoption procedure has been spent. In this regard, the accredited bodies from Quebec require that their representatives in States of origin closely monitor and record all financial transactions which take place in the State of origin. At the end of each adoption procedure, the representatives are required to provide the accredited body with a detailed account of every service provided (whether provided by themselves or other co-workers), the hours spent providing the service and the monies paid for that service. In addition, for every payment made, a receipt must be issued which details both the work undertaken and the amount paid. This practice enables the accredited body to supervise the financial transactions in the State of origin more effectively and, ultimately, leads to improved transparency and accountability.

91. In the case of contributions and donations, the final use of the money needs to be clarified (see Chapter 6.3 of this Note) in order to prevent improper financial or other gain.

92. The use of contributions and donations should be clearly explained to prospective adoptive parents. The money should be used for the child protection system, including the adoption system, and not solely for children's institutions involved in intercountry adoption.¹¹⁰

93. Central Authorities, or the responsible competent authorities, should closely monitor how money is used by the bodies and persons receiving a specific payment. For example, several States request yearly audits from accredited bodies.¹¹¹ Central Authorities should request that all financial transactions be recorded, and be the subject of detailed financial reporting. Detailed criteria regarding the supervision of the financial aspects of all actors might be developed by each State.

94. States of origin which have received contributions and donations should report on the status of programmes of child protection that are financed by these contributions and donations. In China the Central Authority publishes annually the list of projects developed and purchases made thanks to the contributions given by foreign accredited bodies.¹¹²

95. Full accountability for the disbursement of the funds should be sought. Reports from the receiving institutions could also be requested by the Central Authority of the State of origin on an annual basis. It is also possible to envisage that the Central Authority of a State of origin could provide a list of accepted purposes (limited in number) to which contributions and donations could be put. This list should reflect the real needs of the particular State's child protection system.

96. When satisfactory clarity about the purpose or use of the money cannot be obtained, co-operation should be ceased.¹¹³

Ensure co-operation between States and other stakeholders regarding transparency

97. Strong co-operation between States¹¹⁴ is essential to achieving transparency. Some States of origin may wish that Central Authorities of receiving States would co-operate more frequently and effectively on the issue of costs in order to facilitate information handling, especially with States where Central Authorities have delegated the complete

¹¹⁰ In some States of origin a two-tier system of orphanages has developed: those that are involved in intercountry adoptions have more money to provide services and material goods to their children, while those that are not involved in intercountry adoption have less money and therefore cannot provide the same quality of care to their children. In certain States, some orphanages are demanding more money than others and the requests for "donations" are escalating.

¹¹¹ In some States this audit is done by the Central Authority while in others it is the responsibility of accredited bodies to arrange for audits to be conducted by certified auditors. See, in general, responses to questions Nos 11, 34 and 51 of the 2009 Questionnaire, *supra*, note 11. See also the response of Canada (British Columbia, Manitoba and Quebec) to question No 34 and the response of Spain to question No 51 of the 2009 Questionnaire.

¹¹² See China Centre for Children's Welfare and Adoption, available at < www.cccwa.cn >.

¹¹³ See the recommendation mentioned in EurAdopt Good Practices in Economic Matters, *supra*, note 19, p. 5.

¹¹⁴ For example, at the 2010 Seminar "Cross-Frontier Children Protection in the Southern and Eastern African Region – The Role of the Hague Children's Conventions" (Pretoria, 22-25 February 2010), high officials, judges, academics, researchers and other experts from various countries, unanimously agreed that "receiving countries and countries of origin should co-operate in the exchange of information about the actual costs involved in processing an adoption". The Conclusions and Recommendations of the Seminar are available on the Hague Conference website at < www.hcch.net > under "Intercountry Adoption Section" then "Seminars".

administration of the adoption programme to accredited bodies.¹¹⁵ States could also share their respective experiences and tools to achieve transparency.

98. When evaluating the reliability of the intercountry adoption procedure in certain States of origin and the start or continuation of co-operation, receiving States should consider the financial impact which the development of intercountry adoption has had, or will have, in the respective State.¹¹⁶ As was mentioned in Chapter 4.4 of this Note, in some cases, the income derived from intercountry adoption in a specific State of origin can be so significant that the State may become dependent on the funds or may, at least, have a real incentive to continue receiving such funds.

5.3 Reasonability

A. *Problem: Wide variation and absence of limits, specifically on fees and costs*

99. There are wide variations in the fees and costs charged between States of origin; between receiving States; in States themselves; and in the costs charged by accredited bodies. For example, prospective adoptive parents may pay between 10,000 Canadian Dollars and 40,000 Canadian Dollars in British Columbia (Canada), between 12,100 Euros and 22,000 Euros in Denmark, between 3,000 Euros and 15,000 Euros in France and between 9,000 Euros and 30,000 Euros in the Netherlands.¹¹⁷ Several studies have also noted variations in the sums that adoptive parents pay to complete an adoption from the same State of origin, ranging for example from 3,500 Euros to 17,000 Euros in India or from 4,000 Euros to 21,000 Euros in Colombia.¹¹⁸ In many cases, the amount may be far in excess of the justified costs and reasonable fees which should be charged by actors.

100. As summarised by ISS, "the fees requested, the costs of certain services or documents, the honorarium for the professionals' services, the donations to institutions, the gifts, the tips, etc. are in many cases exaggerated, sometimes to the point of being unacceptable."¹¹⁹

101. The Convention refers to "reasonable professional fees" but does not specify what may be considered reasonable. It is, instead, up to States to identify what may fall within the "reasonable" category. Not all Contracting States have succeeded in providing set figures or a calculation method to recommend or establish fixed costs for adoption services. In some cases, Central Authorities do not have the mandate or legal authority to undertake such a task. This leaves it up to the accredited bodies to determine what to charge for their services.¹²⁰ As a result, different actors may benefit from the absence of laws and regulations limiting costs and may increase the amounts that they charge.

102. The higher the amounts involved in the process, the more lucrative the adoption practice will be seen to be, and the more it will attract individuals or bodies more interested in the business aspect of the adoption practice. Therefore, allowing professionals to set their fees without any oversight leaves room for unethical financial practices. For example, some adoption accredited bodies may invite prospective adoptive parents to "pay more"

¹¹⁵ It is for example a wish from the Central Authority of Colombia. See Guide to Good Practice No 2, *supra*, note 4, Annex 2 under "Colombia".

¹¹⁶ For example, in Guatemala, it was mentioned that, at the time when the country had high numbers of intercountry adoptions, the income derived from adoption was the second major source of income in the country. This was calculated taking into account the average cost of each intercountry adoption and the monies paid to the different actors in the adoption procedure. The costs of staying in the State of origin during the adoption procedure were also taken into account.

¹¹⁷ Responses of Canada (British Columbia), Denmark, France and the Netherlands to question No 8(b) of the 2010 Country Profile, *supra*, note 78.

¹¹⁸ See Study on adoption costs presented by the Central Authority of Italy (CAI) for the "17th Meeting of European Central Authorities" (Rome, 1-2 December 2011). Documents are available upon request. These documents presented the costs demanded by several accredited bodies of several European States for adoptions taking place in a selection of States of origin. See also ACPF, *supra*, note 20, pp. 21-22.

¹¹⁹ ISS Fact Sheet, *supra*, note 20.

¹²⁰ For example, in Brazil, Finland, Germany, New Zealand, Portugal and the United States of America, accredited bodies themselves determine what to charge for their services. See the responses of Brazil and the United States of America to question No 48 of the 2009 Questionnaire, *supra*, note 11.

to secure a quicker adoption, saying they work with a facility or partner that can "expedite" intercountry adoptions for an increased fee.¹²¹

103. However, as EurAdopt and the Nordic Adoption Council point out, "reasonable" is not to be seen as equivalent to "as little as possible."¹²² When a limit is too low, fees and costs may no longer adequately compensate for the amount of work that has been provided and may have the effect of discouraging qualified people to enter into the profession. For example, low remuneration may suppress the motivation of social workers if they are not allowed to sufficiently take into account the time dedication and the risks to which they are sometimes exposed.¹²³ It is legitimate to expect that quality services will be remunerated accordingly. Failing to do so may also lead professionals to resort to illicit means to supplement their income (*e.g.*, accepting a bribe), or to take too many jobs which could divert them from their initial mission and create potential conflicts of interests.¹²⁴

B. Good practices to limit fees and costs

Prohibit charging for certain types of services

104. States may prohibit payments for specific steps or services. For example, they may prohibit payments which seek to expedite the process¹²⁵ or they may expressly forbid accredited bodies from charging for services which a State ordinarily provides to prospective adoptive parents free of charge.¹²⁶

Limit amounts and determine a range of costs and fees

105. Laws and regulations may include limits on the costs of services provided by accredited bodies, professionals and other authorities to avoid the risks arising when they are free to set their own fees, such as the inflation of costs.¹²⁷ For example Israel's 1998 Child Adoption Regulations set the ceiling at 20,000 US Dollars, for fees for an intercountry adoption excluding travel and accommodation expenses.¹²⁸ In the French Community of Belgium, an accredited body's costs for services to prospective adoptive parents after the suitability evaluation cannot exceed 2,500 Euros.¹²⁹ Being subject to a maximum of total costs, accredited bodies will seek the best value from the professionals they work with (*e.g.*, interpreters and lawyers) because they know that they will not be able to charge these costs to the prospective adoptive parents.¹³⁰

¹²¹ For example, prior to the ratification of the Convention by Haiti, the agency Wasatch International Adoptions (WIA) stated on its website that "WIA works with an orphanage in Haiti that is able to expedite the adoption process. However, the fees paid to this orphanage are more costly than the standard orphanage costs and are \$16,000 compared to the standard \$8,000 to \$9,600 the other orphanages in Haiti charge. However, because this particular orphanage is able to expedite the adoption process, cases are usually completed in 12 to 14 months rather than the normal 18 to 24 month timeline", (source < www.wiaa.org/haiti.asp >, last visited 25 February 2010).

¹²² EurAdopt Good Practices in Economic Matters, *supra*, note 19, p. 30.

¹²³ See Guide to Good Practice No 2, *supra*, note 4, para. 463 for a discussion on the lack of social workers in certain States. Social workers can be exposed to safety concerns when they have to work in remote areas or have to work in a private home with no one else present.

¹²⁴ For example, an accredited body employee who is also working with orphanages in the State of origin may be torn between competing interests (working towards finding a domestic placement for the child and assisting foreign prospective adoptive parents to adopt the same child). See Guide to Good Practice No 2, *supra*, note 4, para. 228.

¹²⁵ See Guide to Good Practice No 2, *supra*, note 4, para. 349 and IPC draft Guidelines, *supra*, note 41, Art. 69.

¹²⁶ See Guide to Good Practice No 2, *supra*, note 4, para. 352: Guide to Good Practice No 2 refers to some cases where accredited bodies have charged for work that is actually done for free by the Central Authority of the State of origin.

¹²⁷ See IPC draft Guidelines, *supra*, note 41, Art. 68.

¹²⁸ Response of Israel to question No 10(2) of the 2005 Questionnaire, *supra*, note 11. See also the response of Germany to question No 10(2) of the 2005 Questionnaire, indicating that pursuant to section 5 of the Regulation on the Accreditation of Adoption Mediation Agencies and Costs, the fees for adoption mediation agencies (not accredited) are set at €2,000 (€1,200 is for the preparation of the sociological report and €800 for the adoption procedure).

¹²⁹ Response of Belgium (French Community) to question No 8 (b) of the 2010 Country Profile, *supra*, note 78. This maximum will be re-adjusted at the end of 2012 with a maximum of €2,800 for intercountry adoption and €3,500 for domestic adoption.

¹³⁰ See Guide to Good Practice No 2, *supra*, note 4, paras 383, 387 and 397.

106. If the establishment of limits cannot be achieved through legislation because of the need for flexibility that derives from the fluctuation of the costs, Central Authorities may set a *range* for the amounts that may be charged for each service.¹³¹ The range should be limited so as not to leave too much room for discretion.

107. Central Authorities should work together with accrediting authorities and professional boards to regulate their respective costs and to determine the acceptable range of costs.

108. In the case of professionals, the range should take into account the fees that the same professionals charge for similar services in the same region. Only fees that meet the following points should be considered reasonable:

- fees allowed under the laws of the State in which the payment is made and the service provided;
- fees commensurate with the number of hours, qualifications and experience necessary to complete the service as well as its complexity and overhead costs associated with it;
- fees that do not exceed the costs for services by similar bodies or professionals, considering the number of hours, qualification and experience necessary to complete the service, the complexity and overhead costs associated with it; and
- fees that are set taking into account the salaries prevailing where it is performed, both for local staff and for foreigners, including supplements based on custom (such as particular holidays and welfare benefits) or required by law, the fees paid to professionals for services provided in the States of origin similar to those required for a national adoption case, and general macro-economic data.¹³²

109. In the case of accredited bodies, if Central Authorities and the accrediting authorities have established an appropriate range, they could request that accredited bodies to whom the range applies consult with them (at the time of accreditation / licensing, renewal and when changes occur) to ensure that the costs fall within the permissible range.¹³³ Central Authorities, accrediting authorities and professional boards could request notification of any change to the fees and require a justification for the change.

110. In addition, in order to avoid economic ties and dependency between accredited bodies and professionals who often work closely together, the relevant authorities in the States of origin may maintain a referral list of professionals (*e.g.* translators, lawyers, and drivers) who observe the established range of costs and fees. Professionals who charge fees above the range could be removed from the list.

Set standards for the remuneration

111. States may request that authorities and bodies respect certain limits when setting the salary of their staff, representatives and their co-workers.¹³⁴ For example, the remuneration should not be contingent on the number of adoptions or the characteristics of the child placed for adoption. Remuneration on a monthly basis would be the best option, where the number of adoption cases allows for this.¹³⁵ However, taking into account the decrease in the number of intercountry adoptions, this is becoming more and more difficult in practice. Therefore, when it is not possible to pay salaries on a monthly basis, remuneration may be in the form of a service fee or an hourly compensation. However,

¹³¹ See, for example, the response of Burkina Faso to question No 48 of the 2009 Questionnaire, *supra*, note 11. In Burkina Faso, costs are set by the Central Authority and endorsed in the law.

¹³² See Guide to Good Practice No 2, *supra*, note 4, para. 386 for an example relating to the medical profession. Fees for adoption cases may not exactly match that of a divorce case or an abduction case, but may be a good point of comparison. Discrepancies may be reasonable if they are due to the complexity and number of hours involved in the case, or because the number of years of experience and the languages spoken.

¹³³ See the response of Burkina Faso to question No 48 of the 2009 Questionnaire, *supra*, note 11.

¹³⁴ For further explanation of the terms "staff", "representatives" and "co-workers", as used in this Note, see Guide to Good Practice No 2, *supra*, note 4, Chapter 6.

¹³⁵ See Guide to Good Practice No 2, *supra*, note 4, para. 376.

remuneration should never be dependent upon the 'success' of an adoption or the number of successful adoption cases undertaken. The amount should also be reasonable.

112. It is also important that the accredited bodies clearly specify in advance the remuneration their staff, representatives and/or co-workers will receive.

113. The remuneration should be comparable to the remuneration rates in the State where the professional is working, taking into account tasks to be performed, the skills required and the local employment standards in force in that State for similar positions.¹³⁶ In that respect, accredited bodies should be fully aware of the rates for remuneration in both States,¹³⁷ and at a more local level if necessary.¹³⁸ For example, the remuneration may follow the methodology of compensation of local staff of embassies in a given country.¹³⁹

114. Local comparable remuneration data then allows determination of a proper level of compensation for a given position for that country. Remunerations should also not be so low that they fail to compensate appropriately for quality services.

Mitigation of the financial pressure felt by (prospective) adoptive parents

115. If costs are reasonable, (prospective) adoptive parents will face less financial pressure. ISS proposes the following measures, for consideration, to achieve this aim:

- spend sufficient time discussing the issues of costs and possible illicit practices during the preparation sessions of prospective adoptive parents, and more specifically underline the potential risks involved;
- encourage the prospective adoptive parents to systematically keep their adoption accredited body and/or the authority in charge of their file updated regarding any financial requests they receive or any other type of potential abuse they experience during the procedure;
- provide a "hotline service" to prospective adoptive parents (phone, e-mail), allowing them to report a possible abuse, if necessary anonymously; and
- insert a simple check-list in each prospective adoptive parents' file which would outline the various stages of the adoption procedure in the State of origin and request that prospective adoptive parents list the amounts they have paid in the course of the procedure at these various stages, and in particular any additional expenses not specified in the contract with the adoption accredited body. This document would then be sent for review to the adoption accredited body (and / or the competent authority) with copy to the Central Authorities of the receiving State and the State of origin.

116. In addition, when the adoption is mediated by an adoption accredited body, the risk of financial pressure can also be reduced. The accredited body should clearly state the costs from the beginning and it should handle all the payments. As a result, there should be no pressure on the prospective adoptive parents to pay more than what was originally stated. If the prospective adoptive parents are requested to pay any additional amounts they should contact their accredited body immediately.

6. CONTRIBUTIONS, CO-OPERATION PROJECTS AND DONATIONS: PROBLEMS AND RECOMMENDATIONS

6.1 Contributions, co-operation projects and donations and their links with the adoption process

A. Problem: the risks arising from the link

117. The link between contributions, co-operation projects and donations and the adoption process is problematic in many ways because of the impact that it may have on the process

¹³⁶ *Ibid.*, para. 377.

¹³⁷ *Ibid.*, para. 402.

¹³⁸ For example, remunerations in the capital may be different from remunerations in the province.

¹³⁹ See Guide to Good Practice No 2, *supra*, note 4, para. 377.

and the potential for unethical practices in the State of origin. The most serious impacts are noted below.

Influencing the process

118. Contributions, especially when they are not transparent and well-regulated, and donations, may undermine the integrity of a safe adoption procedure. Among other things, they may have the effect of prioritising intercountry adoption over national solutions and, therefore, they may result in insufficient support being provided to the birth family and an absence of, or deficient, investigations being undertaken into the adoptability of the child and / or the availability of domestic alternative care solutions (*i.e.*, the subsidiarity principle may not be respected).¹⁴⁰

119. In the case of donations, even if they take place after the finalisation of the adoption, and / or are made with the agreement of the Central Authority of the State of origin,¹⁴¹ and / or the amounts are limited, they may still influence the adoption process.

Creating dependency and expectations

120. Contributions and donations create a dependency on the part of States of origin on the funds provided through these sources and raise expectations that they will continue to receive them. States wanting to ensure a steady flow of external funds to support child protection efforts may feel obliged to ensure that children are supplied for intercountry adoption.¹⁴²

121. For example, in some States of origin child institutions depend on contributions and donations related to intercountry adoption for their proper functioning. In many cases, these institutions do not promote the reunification of children with their biological families and / or the finding of national alternative care solutions for the children in their care. They are more interested in children being adopted intercountry because they know that they will receive more money this way.

Encouraging competition¹⁴³ between prospective adoptive parents, adoption bodies and receiving States

122. Contributions, donations and co-operation projects to States of origin may lead to an open competition between:

- prospective adoptive parents: they may be selected depending on the sums that they are ready to pay, or what their accredited body offers or provides to the States of origin. In the worst case scenario this means that the adoptive candidates that pay "more" will receive the younger and healthier children. In addition, the adoption procedure may be "quicker" for those willing to pay more;
- foreign accredited bodies: bodies supporting larger projects may be favoured. Some accredited bodies, especially those having limited means, lament this kind of bidding war where in the end the bigger donors are favoured in the allocation of adoptable children;¹⁴⁴
- and receiving States: States providing larger co-operation projects may be favoured.

123. The fact that contributions demanded by accredited bodies and donations usually do not have a pre-fixed and limited amount may exacerbate this problem of competition.

¹⁴⁰ *Ibid.*, Chapter 9.5. and ISS Fact Sheet, *supra*, note 20.

¹⁴¹ For example, in Ecuador and in Georgia. See responses to question No 8 g) of the 2010 Country Profiles of States of origin, *supra*, note 78.

¹⁴² See ISS Fact Sheet, *supra*, note 20.

¹⁴³ See Guide to Good Practice No 2, *supra*, note 4, para. 351.

¹⁴⁴ See e.g. B. Mathieu, "L'argent, premier écueil et dernier tabou de l'adoption", *L'Expansion*, 1 October 2008, available at < www.lexpansion.lexpress.fr > under "Recherches" then "Adoption" then "Trier par pertinence".

B. Good practices to ensure the separation of contributions, donations and co-operation projects from the adoption process

124. States should make clear to the adoption community that contributions and donations are not “costs” of adoption¹⁴⁵ because they are not payments for specific steps or services. Therefore contributions and donations should be distinguished from the total costs of the adoption and from the intercountry adoption process as a whole.

125. Similarly, co-operation projects should be dissociated from the intercountry adoption process. Some States already do this through their legislation. In Sweden, the law requires this separation and an accredited body supporting co-operation projects must have a separate unit for these projects in its own structure, with separate accounts and personnel to manage the projects. In China, the Central Authority “advocates the principle that humanitarian aid and projects are not to be connected with intercountry adoption”.¹⁴⁶

126. In order to avoid the risk of unduly influencing adoption work, some countries, such as the Philippines, prohibit foreign accredited bodies from operating co-operation projects directly: they may only operate through local non-governmental organisations. A written co-operation agreement (including terms setting out how the co-operation will be put into practice) between a receiving State and a State of origin is another method to emphasise the requirement that any project must be kept separate from intercountry adoption. In the Philippines, foreign accredited bodies may make contributions to Philippine child caring agencies.¹⁴⁷ However, if they do so, prospective adoptive parents adopting through that foreign accredited body are not allowed to adopt a child who lives in the particular Philippine child caring agency to which they have made the contribution.

6.2 The legitimacy of contributions and co-operation projects to support child protection systems in States of origin

A. Problem: are contributions and co-operation projects a legitimate way to support child protection systems in States of origin?

127. Contributions and donations (often requested by accredited bodies if they are undertaking a co-operation project in the State) may be required or expected from prospective adoptive parents and / or accredited bodies in order to support the child protection system. Some States of origin have established a mandatory contribution for development aid¹⁴⁸ or request accredited bodies to participate in co-operation projects.

View that contributions and co-operation projects are not a legitimate way to support child protection systems in States of origin and should therefore be disassociated from intercountry adoptions (View No 1 of Chapter 9 of Guide to Good Practice No 2)

128. Some defend the complete separation of activities and therefore do not consider contributions and co-operation projects, whether through or by adoption accredited bodies or prospective adoptive parents, to be a legitimate way to support a child protection system on the basis that contributions and co-operation projects in relation to adoption may influence the process, create dependency and encourage competition, as explained above.¹⁴⁹

129. Supporters of this view also argue that the usual area of expertise of accredited bodies is adoption and not co-operation projects and, therefore, they may not have the capacity, experience and professionals needed to properly implement the co-operation projects. In addition, some projects are run without co-ordination with the relevant child protection authorities in the State of origin who complain that they are not informed about

¹⁴⁵ See EurAdopt Good Practices in Economic Matters, *supra*, note 19, Chapters 4.3 and 4.4.

¹⁴⁶ Response of China to question No 73 of 2009 Questionnaire, *supra*, note 11.

¹⁴⁷ Child caring agencies in the Philippines take care of surrendered, abandoned, neglected and abused children. These institutions are responsible for matching the child with the prospective adoptive parents.

¹⁴⁸ For example, Vietnam: approved adoption bodies must provide a substantial “humanitarian aid” to the Vietnamese orphanages and provinces they collaborate with. See also ACPF, *supra*, note 20, p. 22.

¹⁴⁹ For example, Brazil, Colombia and Uruguay. See for example, the discussion in the ISS Report, “Adoption from Vietnam: Findings and recommendations of an assessment”, November 2009, Chapter 5.3.2, pp. 57-65.; available from ISS upon request at < www.iss-ssi.org >.

the projects being undertaken and by whom. In this type of situation, States of origin cannot enforce the recommended separation between development and humanitarian aid projects, and intercountry adoption. Furthermore, the State of origin may not have adequate resources to co-ordinate, supervise or monitor these activities or projects, and they may not correspond with the State's child protection policy.

Views about creating specific "funds" in the State of origin

130. Some States have created a "National Fund for Child Protection" to which foreign accredited bodies, prospective adoptive parents as well as receiving States can contribute. The funds could then be redistributed within the country taking into account the needs, and respecting the national strategies in place to strengthen the child protection system.¹⁵⁰ In Brazil, accredited bodies donate through the "National Fund for the Child and Adolescence"¹⁵¹ and in the Philippines donations can be made after the finalisation of the adoption process to the "Child Care Support Fund" for the benefit of Child Caring Agencies (NGOs) regulated by a board.¹⁵²

131. There is a view that this kind of fund can constitute a good practice under certain conditions, such as: specifying in advance the purpose of the contributions in a detailed and pragmatic manner; identifying the authority or body regulating and monitoring the fund; regular reporting by States of origin on the use of such funds to assure donors that the funds are used for the benefit of children and not for other purposes. These practices are implemented in Brazil and the Philippines.

132. However, this type of fund can often involve dangers and risks, particularly when the fund is not administered properly and is not the subject of careful oversight by the relevant competent authorities. This illustrates that strong regulation of these funds is of paramount importance.

133. In addition, these funds can create expectations on the part of accredited bodies and on the part of prospective adoptive parents especially when the amount is paid before the matching is undertaken or the adoption is finalised.

134. Furthermore, in UNICEF's view, these types of funds should not be the way in which support is provided from other countries for the development of child protection services and alternative care services in States of origin. When contributions to such funds are mandatory in order for intercountry adoptions to be carried out, the contributor may have little or no influence over the kind of projects financed and, in particular, may have no information concerning whether or not the projects conform to internationally approved policy guidelines in this sphere. Consequently, contributions of this nature cannot automatically be considered as a desirable form of 'development aid'.

B. Good practices to support child protection systems

Providing support through agencies and organisations specialised in development aid

135. Development aid through official channels is an appropriate way to improve child protection systems.¹⁵³ This approach requires that the government aid agencies of receiving States and other organisations specialised in development aid take responsibility for supporting measures to improve child protection systems in States of origin. An effective child protection system provides the foundation for an ethical intercountry adoption system. The aid could focus on organising trainings and helping to improve the functioning of the State's structures. However, the challenge sometimes is that development aid bodies may not be aware of the need for capacity building to improve the

¹⁵⁰ The idea of implementing a Fund is currently examined in Madagascar.

¹⁵¹ Response of Brazil to question No 52 of the 2009 Questionnaire, *supra*, note 11.

¹⁵² Response of the Philippines to question No 52 of the 2009 Questionnaire, *supra*, note 11. On the contrary, other Central Authorities, such as the one of the Macao Special Administrative Region of China, do not accept donations.

¹⁵³ See Guide to Good Practice No 2, *supra*, note 4, paras 443 and 445; and N. Cantwell (2010), *supra*, note 20, p. 20.

operation of the child protection system, and more particularly the implementation of the 1993 Hague Intercountry Adoption Convention, or may give priority to projects in other fields (particularly if resources are limited).

136. Central Authorities in receiving States may therefore report to their respective development bodies on the needs of States of origin in this regard and the assistance which States of origin may require, in particular when the needs relate to the child protection system as a whole. The key priority is to ensure that development aid bodies provide specific support for child protection programmes.

View that some projects may meet the needs of States of origin and may be legitimate if they are properly monitored (View No 2 of Chapter 9 of Guide to Good Practice No 2)

137. Supporters of this view defend contributions, donations and co-operation projects and believe that they are needed and that it would be irresponsible not to fund good programmes. According to this view, what is needed is a much closer monitoring of projects. For example, all projects developed by accredited bodies should be supervised by the Central Authority of the receiving State in close co-operation with the Central Authority of the State of origin.¹⁵⁴

View that successful projects of accredited bodies must be acknowledged and supported, and therefore they may be legitimate (View No 3 of Chapter 9 of Guide to Good Practice No 2)

138. This view defends the fact that small, well-thought through projects of accredited bodies designed for a specific community to address a specific need can be legitimate as they may be very successful and make a huge difference to the well-being of that community. Some States of origin face important challenges in ensuring the implementation of the principle of subsidiarity. Many accredited bodies have handled successful projects to strengthen the child protection system in some States of origin. For example, accredited bodies from Quebec (Canada) that have worked in a specific State of origin for a long time (10-20 years) are, in some cases, engaged in small projects with specific communities and / or child institutions in order to respond to very specific, pre-identified needs.

139. The main challenge is to keep these projects separate from the adoption section of the accredited body.¹⁵⁵ In addition, it is important to make sure that the projects match the real needs of the State of origin and co-operation with the relevant Ministry can be sought in this regard.

6.3 The amounts of contributions

140. Where contributions are demanded by a specific State or accredited body, despite the considerations set out at 6.1 and 6.2 above, they should, at the least, take into account the following:

A. Problem: not fixed and unclear amounts

141. Contributions demanded by the State of origin tend to be fixed and clear. However, this is not always the case for contributions demanded by accredited bodies, which can vary considerably from one accredited body to another, and from State to State.

B. Recommendations: regulating the amounts and informing the public

142. If a State or accredited body decides to request contributions despite the concerns raised in Chapter 6.1 and 6.2, the following practices are recommended:

- in the case of contributions required by a State of origin, the amount should be fixed, publicly known and identical for all receiving States working in that State of origin.

¹⁵⁴ See Guide to Good Practice No 2, *supra*, note 4, para. 448.

¹⁵⁵ See for example Burkina Faso, which promotes co-operation with the Ministry of Social Affairs. See its response to question No 9(f) of the 2012 Country Profile, *supra*, note 78.

For example, in Madagascar, legislation mandates that the fixed amount received by the Central Authority (800 Euros) must be distributed as follows: 5% of the contribution is retained to cover the Central Authority service fees and the rest is transferred by the Central Authority to the institution which takes care of the child until his or her adoption;¹⁵⁶

- in the case of contributions demanded by the accredited body (*e.g.*, for maintenance charges for a child in an institution), the amount should be fixed by the State of origin itself and not by the institution;¹⁵⁷
- the amounts of contributions should be notified in advance to prospective adoptive parents. For example, in France, the Central Authority informs prospective adoptive parents of the amount requested as a contribution in the State of origin's respective information page.¹⁵⁸

6.4 Specific issues regarding donations

143. If donations are allowed in a specific State despite the concerns set out at Chapter 6.1 above, the following problems and recommendations should be taken into consideration.

A. Problems

144. Some of the specific problems related to donations are: the risks of making donations to biological families (which easily becomes "buying" children or influencing consent); the fact that authorities are not aware of the donations and their amount; the lack of traceability and accountability regarding their use; and the lack of, or deficient, control and monitoring of donations.

B. Recommendations: regulating donations

145. To address the above-mentioned problems, the following practices are recommended:

- donations should never be given to biological families of adoptable children;¹⁵⁹
- donations by prospective adoptive parents to bodies concerned in the adoption process must not be sought, offered or made;¹⁶⁰
- Central Authorities should be systematically notified or even be involved in setting the amount of such payments (*i.e.*, limiting the amounts of the donation);¹⁶¹
- adoptive parents should request receipts for and report on the donations made during their stay in the State of origin;
- donations made to an orphanage should be intended to provide for other children's ongoing care or other activities intended to strengthen programmes on family preservation, prevention of abandonment, or similar child protection projects;
- accredited bodies and child institutions receiving donations, should clearly indicate the type of donation that they accept and the specific use;

¹⁵⁶ Decree No 2006-596 of 10 August 2006 implementing the Law 2005-014 of 7 September 2005 and the *Circulaire d'application de la loi n° 2005-014 du 6 septembre 2006*, available on the website of the Central Authority of Madagascar < <http://aca.site50.net/index.php> > under "*Les textes juridiques de référence*".

¹⁵⁷ For example, in Madagascar, institutions are forbidden to require and perceive directly any amount prior to the adoption. Any violation would be considered as "improper gain" and might be the subject of criminal prosecution. See Decree No 2006-596 of 10 August 2006 of application of Law 2005-014 of 7 September 2005.

¹⁵⁸ See *Fiche pays d'adoption* Vietnam, available at < www.diplomatie.gouv.fr > under "*Adoption Internationale*" then "*Les fiches pays*" then "Vietnam".

¹⁵⁹ For example, in Colombia, Art. 74 of the 2006 Children and Adolescence Code prohibits any type of reward to the parents for the relinquishment of their child for adoption.

¹⁶⁰ Report of the 2000 Special Commission, *supra*, note 34, Recommendation No 9. Recommendation No 9 was reaffirmed by the Conclusions and Recommendations of the 2005 Special Commission, *supra*, note 35, in its Recommendation No 5.

¹⁶¹ See for example China Centre for Children's Welfare and Adoption at < www.cccwa.cn > under "Love and devotion" which asks to be notified for every donation made.

- donations in kind should be preferred;¹⁶²
- the foreign exchange rate and purchasing power parity (PPP) should be determined in order to know the real value of the donation in terms of local receiving State currency.

146. In any case, pre-adoption donations should be prohibited.¹⁶³ Colombia,¹⁶⁴ the Czech Republic, France and Italy forbid donations prior to the finalisation of the adoption. In the Philippines, donations before the official match are prohibited and there is a limit on the amount of the donation (1,000 US Dollars per placement).

7. IMPROPER FINANCIAL AND OTHER GAIN:¹⁶⁵ PROBLEMS AND GOOD PRACTICES TO PREVENT IT

7.1 Different approaches to financial issues

A. Problem: reactive approach

147. Many States have a reactive approach in relation to malpractices and abuses in adoption procedures and tend to wait until problems are really pervasive before addressing them.¹⁶⁶ For example, cases of manifest serious malpractices entailing scandal at the global level often lead to States rushing to react¹⁶⁷ and declare that the Convention should be strictly respected. However, other abuses may go unnoticed and continue day after day without effective reaction.

B. Good practice: preventive approach

148. States should do their best to have a preventive, rather than a reactive, approach. One of the first steps should be to establish an adequate legal framework, including in relation to the financial aspects of intercountry adoption, and to ensure proper implementation of this legal framework.¹⁶⁸ In order to ensure proper implementation, the necessary funds and human and material resources need to be allocated (see Chapters 4.3 and 7.3 of this Note).

149. Another tool is to properly inform the adoption community and counsel prospective adoptive parents on the financial aspects of intercountry adoption, in order for them to be best prepared and to develop a critical and protective approach.

150. Adoption bodies should be properly accredited, authorised and supervised by the competent authorities. The authorities should verify that their bodies are, among other things, hiring ethical and competent persons (including those hired or working with or in the State of origin), explaining the limits of the employee's authority in a contract, developing a statement of understanding of what constitutes a violation, providing continuous training, and constantly monitoring the employee's actions.¹⁶⁹

151. In addition, professionals involved in the adoption procedure should have the necessary licenses to practice;¹⁷⁰ should be held to the highest standards of their profession; and should have followed specific training, including in ethics and professionalism.¹⁷¹ Central Authorities may maintain and encourage accredited bodies and

¹⁶² In Estonia, for example, prospective adoptive parents may give small gifts to the children's homes. See the response of Estonia to question No 51 of the 2009 Questionnaire, *supra*, note 11.

¹⁶³ Report of the 2000 Special Commission, *supra*, note 34, Recommendation No 9.

¹⁶⁴ Law 1098 of 2006 and the response to question No 8 (g) of the Country Profile of 2010, *supra*, note 78.

¹⁶⁵ See Guide to Good Practice No 2, *supra*, note 4, para. 74 for examples of improper financial or other gain.

¹⁶⁶ See Parents for Ethical Adoption Reform (PEAR), *Ethics, transparency, support: what all adoptions deserve*, available at < www.brandeis.edu/investigate/adoption/ > under "Baby Business".

¹⁶⁷ This was the case in Romania and Guatemala, where after discovering cases of sale of and traffic in children, a moratorium was declared and then new laws and procedures were approved.

¹⁶⁸ See IPC draft Guidelines, *supra*, note 41, Arts 63 and 71. See also the "Communiqué adopted by the participants of the Fifth International Policy Conference on the African Child" (Addis Abeba, 29-30 May 2012)", available at < www.africanchildforum.org/ipc/ >.

¹⁶⁹ See Guide to Good Practice No 2, *supra*, note 4, Chapter 7.

¹⁷⁰ For example, attorneys and doctors should have passed the relevant exams and be in good standing with their respective licensing boards.

¹⁷¹ Central Authorities may, for example, develop, or identify specific courses available through professional training or ethics seminar at social work conferences.

prospective adoptive parents to work with professionals from a specific list which have the above-mentioned requirements.

7.2 Legal framework governing financial issues

A. *Problems: the international legal framework is too general; the domestic legal framework does not adequately raise international standards*

152. According to some experts, abusive practices and procurement of children are widespread due to the lack of strict limits and regulation on costs, contributions and donations. At an international level, these experts argue that further regulation is desirable¹⁷² as the CRC and the 1993 Hague Intercountry Adoption Convention only set minimum standards with regard to financial issues.

153. At a domestic level, States are responsible for implementing the international standards and may even implement higher standards. However, in many cases financial issues are not dealt with directly in the legislation on adoption, are poorly regulated or even not regulated at all. The consequence is that malpractice continues, for example, in relation to payments to biological families or payments that are made to channel children towards particular States, orphanages, accredited bodies or officials.

B. *Good practices for developing further legislation*

154. Without ignoring the need for higher and more detailed standards at an international level, States should first of all adequately implement the existing legal framework. States need to develop the minimum standards and necessary safeguards established internationally by approving the necessary legislation at the domestic level. This is particularly important when a State becomes a Party to the Convention.¹⁷³ A State should have a clear view of its duties and responsibilities. In many cases, the law could regulate the more general and important prohibitions, while regulations may establish more detailed issues and offer tables with maximum costs (which may be updated regularly). For example, the Civil Code of Belgium establishes that payment shall not be made to induce consent and provides the specific maximum costs for adoption services.¹⁷⁴

155. It is also important that the legislation applies to every person, body or authority involved in adoptions.¹⁷⁵

7.3 Implementation of the Convention and the domestic legislation

A. *Problem: inadequate implementation*

156. Inadequate implementation of the Convention may lead to the creation or development of an adoption system which fails to prevent the procurement of children for adoption.¹⁷⁶ This is due to, among other reasons, a deficient or lack of appropriate human and material resources; inadequate co-ordination; an insufficient or lack of planning; and a lack of training of the relevant actors. This is one of the major challenges in many States of origin, as well as in receiving States, as the budgets allocated to social welfare issues are limited.

B. *Good practices to implement the legal framework*

157. Adequate human and material resources are needed to properly implement and enforce legislation. The key question is how to ensure that there are sufficient human and material resources for implementation. In order to avoid dependency and the creation of problems, each State should be able to provide the necessary resources to its authorities and bodies in order that they are able to comply with their obligations. However, this is

¹⁷² See D. Smolin, *supra*, note 63.

¹⁷³ The Permanent Bureau offers a technical assistance on drafting domestic legal instruments through its Intercountry Adoption Technical Assistance Programme (ICATAP).

¹⁷⁴ Belgian Civil Code Art. 361.4 e) and the response of Belgium (French Community) to question No 8 (b) of the 2010 Country Profile, *supra*, note 78.

¹⁷⁵ See IPC draft Guidelines, *supra*, note 41, Art. 66.

¹⁷⁶ See D. Smolin, *supra*, note 63.

one of the main problems in many States. In some cases, States have very good domestic legislation but the lack of resources makes implementation and enforcement of this legislation impossible. Another good practice in order to implement the legal framework is to limit intercountry adoptions in light of the available resources. Experience demonstrates that allowing relevant services to become completely overwhelmed by increased numbers of intercountry adoptions can lead to fraud, corruption and unethical adoptions in general.

158. Adequate planning and co-ordination are also very important to correctly implement the legal framework. A key factor to ensure the proper implementation of the Convention is to develop an implementation plan before becoming Party to the Convention.¹⁷⁷ Part of the implementation plan includes designating a Central Authority¹⁷⁸ and providing it with the necessary human and material resources. Central Authorities carry the responsibility of ensuring compliance with the standards of the Convention and the domestic laws and regulations implementing the Convention,¹⁷⁹ including provisions to prevent improper financial or other gain.¹⁸⁰

159. Providing training to the relevant actors who have to implement the legal framework is a key element. For example, the Brazilian Central Authority has reported that providing regular training to the staff of the court dealing with intercountry adoption matters has been a key aspect of the development of good practices and safer standards. It has directly impacted the implementation of the Convention as the courts play a central role in the adoption process.¹⁸¹

7.4 Increased accountability through greater control

A. Problem: the lack or inadequacy of control

160. Lack of accountability on financial issues is also quite common, mainly due to the inexistence of regulation on this issue, inadequate control (including monitoring and supervision), lack of resources and the lack of political will to address issues relating to the financial aspects of intercountry adoption.

B. Good practices for proper supervision and monitoring

161. States should develop strict control mechanisms for financial issues, which may be achieved through monitoring and supervision of the activities of different actors. States are encouraged to implement certain good practices regarding the supervision of the different actors involved in an adoption procedure, such as:

- enact and enforce regulations concerning control or supervision that are precise and transparent, including, among others, the need for regular reporting;¹⁸²
- clearly state the authorities¹⁸³ which are in charge of the control and supervision;
- effectively communicate those regulations to the adoption community, to other States and to the public at large to encourage transparency and accountability;
- retain State control of supervision functions;
- provide adequate and appropriate resources to perform these functions;

¹⁷⁷ See the possible model of an Implementation Plan, Guide to Good Practice No 1, *supra*, note 1, Annex 2.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*, para 173.

¹⁸⁰ See Art. 8 of the Convention.

¹⁸¹ The Central Authority of Brazil explained during the 2012 October meeting of the Experts' Group that applications for adoption are first registered at the State Committees for Intercountry Adoption (CEJA) of the State Court of Justice and only then submitted to the judges with jurisdiction over the adoption upon the judge's request and after the CEJA has determined that the prospective adoptive family is suitable to meet the needs of the child to be adopted. This approach was developed to minimize the risk that a prospective adoptive family would pressure authorities to place the child with them.

¹⁸² This is the case for adoption accredited bodies in Canada (Quebec).

¹⁸³ See Guide to Good Practice No 2, *supra*, note 4, para. 288, also citing to the responses to question No 18 of the 2009 Questionnaire, *supra*, note 11.

- retain control or supervision of the parts of the adoption process that are most prone to abuse or exploitation;¹⁸⁴ and
- control authorities responsible for the adoption process (i.e., through a system of inspection¹⁸⁵ and by subjecting decisions to a process of review or appeal).

7.5 Enforcement: increased sanctions

A. *Problem: weak sanctions and ineffective deterrents*

162. The Convention does not have an enforcement mechanism and leaves States to determine the sanctions that will apply to actors who violate the Convention. The level to which States have adapted their internal legislation to enforce the Convention through sanction mechanisms varies significantly.¹⁸⁶ The laws may be too limited in scope.¹⁸⁷ For example, in one State, the definition of trafficking in their penal law is limited to the movement of children for “the purpose of forced labour”. This means that cases of child laundering¹⁸⁸ for the purpose of adoption are likely to fall outside the ambit of this law.¹⁸⁹ The laws may also be too narrow because they do not sanction all types of violations or all actors involved.

163. Sanctions are often too low to have a truly dissuasive impact on offenders.¹⁹⁰ B. Mezmur calls attention to the lack of “severe enough [penalties] to deter persons who target children for purposes of abduction, trafficking and sale, or other forms of exploitation”.¹⁹¹ As a result, the prevention of abuses is weakened and undermined because offenders may continue unethical or illegal practices without fear of the consequences.¹⁹²

164. Similarly, laws may have a limited reach because it may be difficult for persons to prove a violation. In addition, States may not have the necessary resources to investigate claims and prosecute offenders. This can be complicated and costly because the abuses often involve more than one State. Without reinforced co-operation between States, investigations can be difficult. For example, a State investigating suspicions of child laundering may not be able to pursue the investigation if the authorities in the other State refuse to produce records and deny access to key witnesses.¹⁹³

165. Although there have been very significant convictions in the context of intercountry adoption,¹⁹⁴ there are not many when one considers the number of reports of alleged

¹⁸⁴ Guide to Good Practice No 1, *supra*, note 1, para. 207.

¹⁸⁵ See Art. 278 of the Vietnam Penal Code, No 15/1999/QH10, available at < <http://moj.gov.vn> > under “Legal Normative Documents”.

¹⁸⁶ See responses to question No 9(b) of the 2010 Country Profile, *supra*, note 78.

¹⁸⁷ See B. Mezmur, “The Sins of the ‘Saviours’”, Info. Doc. No 2 for the attention of the Third Meeting of the Special Commission on the practical operation of the 1993 Hague Intercountry Adoption Convention (June 2010), available on the Hague Conference website at < www.hcch.net > under “Intercountry Adoption Section” (hereinafter, “B. Mezmur”), p. 13.

¹⁸⁸ See D. Smolin, *supra*, note 63, p. 5.

¹⁸⁹ See Art. 597 of the Ethiopian Revised Penal Code.

¹⁹⁰ Monetary sanctions are set under US\$ 5,000 in Austria and France. See response to question No 11(1) of the 2005 Questionnaire, *supra*, note 11.

¹⁹¹ B. Mezmur, *supra*, note 187, pp. 12-13. See also IPC draft Guidelines, *supra*, note 41, Art. 99.

¹⁹² See B. Mezmur, *supra*, note 187, p. 14.

¹⁹³ See for example the situation that occurred in Nepal prior to the United States of America’s suspension of adoption of children claimed to be orphans. “Investigations of children reported to be found abandoned are routinely hindered by the unavailability of officials named in reports of abandonment. Police and orphanage officials often refuse to co-operate with consular officers’ efforts to confirm information by comparing it with official police and orphanage records.” See “Joint Statement of Suspension of Processing for New Adoption Cases based on Abandonment in Nepal”, 2 August 2010, available at < www.state.gov > under “Press Releases: 2010”.

¹⁹⁴ Some of most notable convictions include, but are not limited to:

- Galindo case (intercountry adoptions between Cambodia and the United States of America): L. Galindo was sentenced by a US Court to 18 months in prison, 3 years of supervised release and 300 hours of community service and more than US\$ 60,000 in restitution after she admitted that she organised the scheme whereby several Cambodian children were taken from their families and represented on immigration forms as orphans. See US Department of Justice notice of 19 November 2004.

- Illegal adoptions in Guatemala: several people have been convicted for illegal adoption, including Valle Flores de Mejia and Noriega Cano who were respectively sentenced by a Guatemalan Court to 21 and 16 years in prison after having been found guilty of human trafficking, document fraud, and criminal enterprise. See “Asociación Primavera lawyer, director found guilty of human trafficking in ‘Karen Abigail’ case” available at < www.findingfernanda.com > under “Clip Library” then “2011”.

abuses. There is still much work to be done by States to ensure that improper financial or other gain as a result of intercountry adoption is always efficiently prosecuted and sanctioned.

B. Good practices for increased sanctions

Effective sanctions

166. The existing accounts of convictions show that it is possible and effective to use sanctions to confront certain types of illicit activity. In order to do so, laws or regulations should define what constitutes a violation and what the corresponding sanctions are. For example, the 2012 International Policy Conference on the African Child recommended that “States shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether such offences are committed domestically or transnationally or on an individual or organized basis: a) the sale of children; b) improperly inducing consent for the adoption of a child in violation of applicable international legal instruments on adoption; c) child laundering; d) falsification of documents; and e) improper financial gain.”¹⁹⁵

167. Sanctions may be most effective if they:

- target all violations related to improper financial or other gain (and are not limited to the most serious offenses, such as the sale of children);
- sanction all persons, authorities and bodies participating in the violation to limit impunity (including those who failed to stop or report the violation if they had such responsibility); and
- are commensurate with the violation, yet are sufficiently strict to have a dissuasive effect and therefore participate in the prevention efforts.

168. In addition, laws and regulations should specify the different ways to prove that a violation has taken place and take into account the difficulty of gathering evidence from another State when setting the standard of proof.¹⁹⁶ It should be possible to prove that someone committed a violation even when it is not possible to gather many supportive documents because the State in which the violation took place does not maintain consistent records.

169. The sanctions that States have implemented in their legislation vary widely in degree: from the temporary suspension of accreditation¹⁹⁷ to imprisonment for certain cases involving corruption, or child trafficking. The main types of sanctions are:

- Monetary fines and sanctions: many States have legislation which provides for monetary penalties to sanction violations. For example, Western Australia’s laws provide a penalty of 25,000 Australian Dollars for a person who receives payment to influence the consent to a child’s adoption.¹⁹⁸ Monetary penalties for improper

- Zoe’s Ark (intercountry adoptions between Chad and France): six persons involved with the Zoe’s Ark case were sentenced by a Chad Court to 8 years imprisonment for kidnapping and fraud after attempting to fly 103 African children to be adopted in France after the biological families had been misled. See B. Mezmur, *supra*, note 187, p. 14.

- Hunan Case in China: A Chinese Court sentenced 3 persons to 15 years in prison and a fine of ¥ 50,000, and another 6 to between 3 and 13 years in prison after investigations for child buying. See P.J. Meier and X. Zhang “Sold into Adoption: the Hunan baby trafficking scandal exposes vulnerabilities in Chinese adoptions to the United States”, 2009, available at the Washington and Lee Law School website at < <http://lawlib.wlu.edu/> >, under “Table of contents of Law Journal” then “Cumberland Law Review”, Vol. 39, No 1, 2008-2009.

- Child trafficking in Madagascar: in 2004 five child trafficking networks were dismantled and 30 people were arrested and convicted. See report of 15 September 2004 of the Child Trafficking Research Hub < www.childtrafficking.org > under “Documents”.

¹⁹⁵ IPC draft Guidelines, *supra*, note 41, Art. 95.

¹⁹⁶ For example, prospective adoptive parents may not be able to show with 100% certainty that an accredited body has committed a violation because they do not have the means to gather evidence in the State of origin. To take into account the balance between the parties, States may consider requiring a showing that it is *more likely than not* that an accredited body committed a violation.

¹⁹⁷ This may be the case in the United States of America, for example. See Title 22 of the US Code of Federal Regulations §96.75 (a), *supra*, note 102.

¹⁹⁸ Response of Australia to question 8 of the Questionnaire on the practical operation of the 1993 Hague Intercountry Adoption Convention, prepared by William Duncan, Deputy Secretary General, Prel. Doc. No 1 of

financial or other gain may vary significantly. For example, 251 Euros (Luxembourg)¹⁹⁹ and up to 250,000 US Dollars (United States of America).²⁰⁰ Monetary penalties may be higher if the offence is committed by an authority.²⁰¹

- Loss of licence to practise or of accreditation and authorisation: a judge, or a professional board, may remove a professional's licence to practise and remove a professional's name from a referral list if the underlying improper financial or other gain also violated the standards applicable to their profession.

In the case of accredited bodies, the authority granting accreditation may refuse to renew, temporarily suspend or permanently cancel an accredited body's accreditation or authorisation. Specific arrangements have to be made for the adoptions that are in process while the measure is taken and it should be made widely known that the accredited body ceased to work.²⁰²

- Imprisonment: some States also impose imprisonment for the gravest types of offences. This is the case of Western Australia, Canada (Alberta), Cyprus, France, Lithuania, Luxembourg, Mexico, Romania and United States of America. The time may range from 8 days (Luxembourg) to 7 years (Romania) or 8 years (Lithuania).²⁰³
- Refusing to recognise the adoption decision: in the case of major violations in the adoption procedure, States may consider refusing to recognise the adoption decision.²⁰⁴ Article 24 of the Convention provides that this may be the case if the adoption is manifestly contrary to public policy, taking into account the best interests of the child.²⁰⁵ This sanction should be used with caution, especially when the child has been with the adoptive parents for some time, because of the consequences that it will have on the child who is also the victim of the abuse.²⁰⁶ States should work together to find pragmatic solutions in such cases. Some States may also have legislative provisions that would allow the parties to the adoption to annul or revoke the adoption.

Co-operation between authorities and between States to enforce sanctions

170. Co-operation between authorities and between States²⁰⁷ is central to any investigation work and prosecution leading to the sanction of offenders. For example, States may establish a clear procedure to report breaches. The system should specify how and to whom the breaches should be reported. States may also assist one another in locating an offender across the border, or by allowing access to records which would assist in an investigation.

July 2000 for the attention of the Special Commission Meeting of November / December 2000 on the practical operation of the 1993 Hague Intercountry Adoption Convention. See also 1994 Western Australia Adoption Act, Section 122 (c). Australia's other states and territories have similar provisions, although the sanctions may differ. These penalties can only be applied for offences occurring in Australia; the state and territory laws do not apply extraterritorially to Australian actors overseas.

¹⁹⁹ Response of Luxembourg to question No 11 of the 2005 Questionnaire, *supra*, note 11.

²⁰⁰ Response of the United States of America to question No 11 of the 2005 Questionnaire, *supra*, note 11. See also Section 404(c) of the United States of America Intercountry Adoption Act of 2000, PL 106-279.

²⁰¹ In Canada (Quebec), Art. 135.1 of the Law for Youth Protection establishes penalties from 10,000 to 100,000 CAN\$ for individual persons but, if the offence is committed by an authority, the penalty will vary from 25,000 to 200,000 CAN\$.

²⁰² See Guide to Good Practice No 2, *supra*, note 4, Chapters 7.4.5 and 7.6 for more information regarding accredited bodies.

²⁰³ See responses to question No 11 of the 2005 Questionnaire, *supra*, note 11.

²⁰⁴ For example, the laws of France include a provision for the non-recognition of the adoption in problematic cases, see *Code de l'Action Sociale et des Familles*, Arts 225-33 and 225-38, *supra*, note 103. The General Attorney in Canada (Quebec) has already used this power to revoke an adoption decision.

²⁰⁵ Art. 24 of the Convention.

²⁰⁶ Art. 32 does not state the consequences of its violation, but undoubtedly the refusal of automatic recognition of the adoption would be too much in many cases. See Explanatory Report, *supra*, note 8, para. 529.

²⁰⁷ For example, the Ministry of Justice may work in collaboration with the Ministry of Foreign Affairs to have representatives in the States of origin searching for evidence of the improper financial or other gain.

171. Authorities may improve co-operation by identifying clear channels to transfer information. In this regard, States may use the assistance of international organisations such as Interpol.²⁰⁸

8. LOOKING TO THE FUTURE

172. As discussed in the Introduction to this Note, one aim of constituting an Experts' Group on the financial aspects of intercountry adoption was to examine the desirability and feasibility of developing practical tools to assist States with improving standards and practices in this area.²⁰⁹ Following its 2012 meeting, several recommendations were made by the Experts' Group in this regard²¹⁰. The Group focused on pragmatic ways forward and defined priorities, noting that the engagement of the Permanent Bureau in the development of these tools would be subject to the availability of resources and other work priorities, as well as the budgetary constraints of States.

173. **Section A** of this Chapter explains the recommendations made by the Experts' Group in relation to the development of new practical tools and provides information concerning the work already undertaken, or to be undertaken in future, to develop these tools.

174. **Section B** of this Chapter continues with a brief discussion of the longer-term future for the Experts' Group and concludes by outlining the areas relating to the financial aspects of intercountry adoption which remain open for further consideration and work.

A. The practical tools recommended and developed by the Experts' Group in its 2012 meeting

8.1 Harmonised terminology

Recommendation

175. As stated in Chapter 5.1 above, the financial aspects of intercountry adoption involve a number of key terms mentioned in the 1993 Hague Convention or deriving from practice. The fact that the Convention does not define key terms and the lack of harmonised and accepted definitions can lead to ambiguity, confusion and inconsistent interpretations within Contracting States. The study and discussion of financial issues also becomes more difficult in this situation.

176. As a first step, the Experts' Group therefore discussed and adopted common definitions of the main terminology relating to the financial aspects of intercountry adoption in order to minimise the potential for misunderstanding when determining the way forward and developing practical tools such as the ones discussed below.

Outcome

177. Following circulation to States Parties to the 1993 Convention and Members of the Hague Conference for comments, these harmonised definitions have been finalised and are available in the terminology section of this Note. The harmonised terminology has also been published as a separate document on the specialised "Intercountry Adoption Section" of the Hague Conference website.

178. The Experts' Group recommended that this terminology be used in future work on this topic.²¹¹

²⁰⁸ Interpol is a large international police system that counts 190 members. Its mission of "preventing and fighting crime through enhanced international police co-operation" may prove particularly valuable to States. See < www.interpol.int >.

²⁰⁹ See Conclusions and Recommendations of the 2010 Special Commission, *supra*, note 36, Recommendation No 4.

²¹⁰ See Conclusions and Recommendations of the 2012 Experts' Group, *supra*, note 12.

²¹¹ *Ibid.*, Recommendation No 1.

8.2 Tables on costs

Recommendation

179. In view of the need for maximum transparency concerning the financial aspects of intercountry adoption (see Chapter 5.2 above) and consistent with Recommendation No 4 of the 2010 Special Commission,²¹² the Experts' Group gave its general endorsement at its 2012 meeting to two draft Tables on costs:

- Table I "Costs and contributions associated with an intercountry adoption in a State of origin".
- Table II "Costs, contributions and financial assistance associated with an intercountry adoption in a receiving State".

180. These Tables aim to enable the actual costs of an intercountry adoption to be elicited. In addition, the Experts' Group recognised the value of the Tables on costs regarding adoption accredited bodies' activities, which are already included in Guide to Good Practice No 2.²¹³

181. In relation to data collection for the Tables, the Experts' Group discussed the potential value of external "experts" within each State (e.g., well instructed university students) assisting with the collection of financial data as suggested by the 2001 Working Group in its recommendations to the 2005 Special Commission.²¹⁴ However, the Experts' Group concluded that it may be more appropriate for external experts to focus on the analysis of the data, rather than the collection of data, since Central Authorities should retain some control over the latter.

182. It was noted that the efficacy of the Tables will depend upon States submitting the relevant information on a regular basis, as well as upon the Permanent Bureau having the resources to ensure that States are prompted to keep this information up-to-date.

Outcome

183. The Tables on costs were circulated to the Experts' Group for testing, further revised by the Permanent Bureau in light of the feedback and subsequently submitted to all States Parties to the 1993 Hague Convention and all Members of the Hague Conference for a final review. Following this consultation, the Tables have been finalised and can be consulted on the specialised "Intercountry Adoption Section" of the Hague Conference website.

184. The Experts' Group is to continue its discussions concerning the best method of collecting data for the Tables, as well as where and how the Tables should be published once completed by States.

8.3 Summary list of good practices

Recommendation

185. In order to ensure that the good practices concerning the financial aspects of intercountry adoption recommended in this Note and in the existing Hague Conference Guides to Good Practice No 1 and 2 on the 1993 Hague Convention are readily accessible, the Experts' Group recommended the drawing up of a "Summary list of good practices on the financial aspects of intercountry adoption".²¹⁵ The Summary list is intended to be a helpful reference point for States Parties seeking to improve their practices concerning the

²¹² Conclusions and Recommendations of the 2010 Special Commission Meeting, *supra*, note 36, Recommendation No 4.

²¹³ See Conclusions and Recommendations of the 2012 Experts' Group, *supra*, note 12, Recommendation No 2. See also Guide to Good Practice No 2, *supra*, note 4, Chapter 8, Annex B.

²¹⁴ In 2001, a former Working Group developed tables which sought to collect: the entity or person (protagonist) in charge of each adoption service or function (Form I); the amount charged for each service or function per protagonist (Form II); and the estimated reasonable amount for each service of function per protagonist (Form III). However, these forms yielded a low number of responses, primarily because they were deemed too extensive, detailed and complex. The forms were focused on all actors, included many sub-categories (e.g., for the evaluation of the case: civil registration of the child, search of the family of origin, evaluation of the family of origin, evaluation of the child) and aimed to make a comparison of what should be the reasonable amount for each service.

²¹⁵ Conclusions and Recommendations of the 2012 Experts' Group, *supra*, note 12, Recommendation No 4.

financial aspects of intercountry adoption and a valuable and simple tool to assist States seeking to join the Convention.

Outcome

186. This Summary list has been developed and finalised in light of comments from experts, States Parties to the 1993 Hague Convention and Members of the Hague Conference and is now available for use on the specialised “Intercountry Adoption Section” of the Hague Conference website.

8.4 Model survey for adoptive parents

Recommendation

187. The Experts’ Group agreed on the utility of undertaking a Model Survey for adoptive parents in order to collect information from them on the actual costs involved in an intercountry adoption, with a view to ensuring transparency. The Group recommended that, resources permitting, the Permanent Bureau, with the support of a small group of States, should develop a draft Model Survey.²¹⁶

188. The Model Survey could include the amounts paid for the adoption (before, during and after the adoption) and, if applicable, the adoptive parents’ experiences of the accredited body and the State of origin regarding the financial aspects of the adoption.

189. Each receiving State would be responsible for disseminating the survey to the prospective adoptive parents, analysing the results, and potentially responding to reported problems. This tool may be adapted and co-ordinated between the two concerned States when considering current or future co-operation.

190. This Model Survey could be a useful tool to reinforce transparency and to provide a clearer picture of the real costs involved in intercountry adoption. Respect for confidentiality should be ensured and the reasons for this Survey should be clearly explained in order to “break the taboo” surrounding financial matters in intercountry adoption. In addition, an analysis of the results of the Survey could be very valuable for drafting Guidelines or a Guide to Good Practice on this subject in the future.

Outcome

191. In accordance with the recommendation of the Experts’ Group, the Model Survey will be developed by the Permanent Bureau, in conjunction with the Experts’ Group, and will be circulated to all States Parties to the 1993 Hague Convention and Members of the Hague Conference for comments before finalisation.

8.5 Information brochure for prospective adoptive parents

Recommendation

192. The Experts’ Group considered whether an Information Brochure on the financial aspects of intercountry adoption, addressed to prospective adoptive parents, should be developed by the Hague Conference.

193. However, the Group noted the publication by ISS of the brochure entitled “Intercountry adoption and its risks: A guide for prospective adopters” as an already available existing tool and therefore saw no need to develop a similar brochure at this point. The ISS Brochure assists (prospective) adoptive parents in understanding the costs of an intercountry adoption and encourages them to be vigilant. It identifies the questions prospective adoptive parents should ask an accredited body, recommends that they keep records of expenses and explains how to recognise suspicious solicitations and to report problems. It also underlines why it is in everyone’s best interests to eliminate profiteering.

194. Other information resources developed by Central Authorities, such as the policy papers on “Donations and pre-placement contact”, “Donations and Contacts by Intercountry Adoption Support Organisations” and “Sending Gifts and Care Packages” developed by the Australian Central Authority, can provide additional useful and concise

²¹⁶ *Ibid.*, Recommendation No 5.

information to assist prospective adoptive parents with answering many of the questions on this sensitive topic.²¹⁷

Outcome

195. No further action was recommended concerning this tool.

8.6 Questionnaire on the financial aspects of intercountry adoption for Contracting States

Recommendation

196. Contracting States have provided numerous responses to questions regarding the financial aspects of intercountry adoption as a result of answering several Questionnaires drawn up by the Permanent Bureau, such as the 2010 Country Profile or the 2009 Questionnaire on accreditation.

197. The Experts' Group discussed the utility of elaborating a comprehensive questionnaire dedicated to costs and other financial aspects, including specific challenges in this field. The responses may be a good source of information for drafting future tools such as Guidelines and / or a Guide to Good Practice (see Chapter 8.7 below). However, the Experts' Group concluded that a questionnaire focusing on the financial aspects of intercountry adoption may not be necessary at this stage because of the material which already exists, as well as the fact that the drafting of Guidelines and / or a Guide to Good Practice was not considered a priority at this stage.²¹⁸

Outcome

198. No further action was recommended concerning this tool at this stage. However, the Experts' Group may discuss the need for this questionnaire if a decision is taken in the future to develop Guidelines and/or a Guide to Good Practice.

8.7 Guidelines and / or Guide to Good Practice on financial issues

Recommendation

199. The possibility of developing Guidelines on the financial issues related to intercountry adoption and / or the drafting of a new Guide to Good Practice on the Financial Aspects of Intercountry Adoption, as recommended at the 2005 Special Commission,²¹⁹ were also discussed. It was considered that this Note and the other tools mentioned in this Chapter, specifically the completed Tables on costs, could serve as the basis for the drafting of such Guidelines or Guide.

200. However, the Experts' Group did not see the drafting of Guidelines and / or a Guide to Good Practice as a priority at the current time due to the need to focus on the development of the other recommended tools first.²²⁰

Outcome

201. As the Experts' Group did not consider the drafting of Guidelines and/or a Guide to Good Practice as a priority, no further work has been undertaken to date. The Experts' Group may further discuss the need for this tool in the future. If the Experts' Group recommends the development of such a tool, as suggested by some States, this would also need to be considered by the Council on General Affairs and Policy of the Hague Conference.

²¹⁷ See "General Policies and Documents", available at < www.ag.gov.au/intercountryadoption > under "Intercountry adoption policies and key documents".

²¹⁸ Conclusions and Recommendations of the 2012 Experts' Group, *supra*, note 12, Recommendation No 7.

²¹⁹ See Conclusions and Recommendations of the 2005 Special Commission, *supra*, note 35, Recommendation No 2.

²²⁰ Conclusions and Recommendations of the 2012 Experts' Group, *supra*, note 12, Recommendation No 7.

8.8 Checklist on the assignment of responsibilities

Recommendation

202. Each stakeholder in the intercountry adoption system (Central Authorities, public and competent authorities, accredited bodies, as well as other actors, including the prospective adoptive parents) has a role to play in implementing the good practices discussed in this Note based on their respective obligations, functions and expertise.²²¹

203. The Experts' Group recognised the potential value of a checklist on the assignment of responsibilities similar to the one available in Annex 6 of Guide to Good Practice No 1 (Organisation and responsibility under the 1993 Hague Intercountry Adoption Convention) to enable Contracting States to form a clearer picture of the assignment of responsibilities within the State.²²² By clearly separating the duties of each actor regarding the financial aspects of intercountry adoption and the prevention of improper financial or other gain, the checklist would allow States to self-evaluate their practices. However, the Experts' Group decided that this was not a current priority and that other tools should be developed first.²²³

Outcome

204. In the process of developing the Summary list of good practices (see Chapter 8.3 above), it was established that it would be possible to *combine* the listing of good practices with a tool which would enable States to verify and self-evaluate the assignment of responsibilities for implementing those good practices. The right-hand column of the Summary list of good practices, which asks States to indicate (in tick-box format) which party is responsible for the recommended action, therefore, to a degree, fulfils the role envisaged for the checklist.

8.9 The promotion and use of the practical tools, once finalised

Recommendation

205. The Experts' Group emphasised the need for effective promotion of the recommended tools, once developed, so that all States Parties to the 1993 Hague Convention, as well as States considering becoming Party to the Convention, are aware of them and use them in practice.

Outcome

206. The finalised tools have been (and for those still in development, will be) circulated to all States Parties to the 1993 Hague Convention and Members of the Hague Conference and published on the specialised "Intercountry Adoption Section" of the Hague Conference website. In addition, the use of such tools will be promoted by the Permanent Bureau in its daily Secretariat work (*e.g.*, in communications with relevant authorities and during seminars, conferences and trainings). Finally, these tools will be presented to the next Special Commission on the practical operation of the Convention which will meet in June 2015.

²²¹ The assignment of responsibilities would be based on the general roles and responsibilities set out in the Convention and key characteristics such as:

- **Central Authorities:** for example, Central Authorities bear the responsibility to take all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention. Central Authorities in the receiving States should regulate the costs of the accredited bodies providing services to the prospective adoptive parents (such as the preparation of the application to adopt, including the home study), while Central Authorities of States of origin should monitor the practices of orphanages relating to improper financial or other gain;
- **competent authorities** other than the Central Authorities may be responsible for functions relating to particular financial aspects of intercountry adoption, such as the prosecution of corrupted persons, and the licensing of adoption attorneys;
- **accredited bodies** may, among others, inform and counsel prospective adoptive parents on the financial aspects of the process to increase their awareness and vigilance; should charge reasonable costs; and should publish all their costs.

²²² Conclusions and Recommendations of the 2012 Experts' Group, *supra*, note 12, Recommendation No 8.

²²³ *Ibid.*

207. In addition to this standard promotional work, the Experts' Group may continue to consider how best to undertake further, specific promotional work in relation to these tools.

B. The longer-term future for the Experts' Group and some outstanding issues for consideration

208. As mandated by the Council on General Affairs and Policy of the Hague Conference,²²⁴ the Experts' Group will continue to work with the Permanent Bureau on the development and finalisation of the practical tools identified in **Section A** above in the next period.

209. In the longer-term future, it is envisaged that this Experts' Group may remain active and may consider further issues relating to the financial aspects of intercountry adoption. In particular, the Group may assist the Permanent Bureau with the development of additional tools which might be recommended.

210. In relation to the further issues concerning the financial aspects of intercountry adoption which might be considered by the Experts' Group in future, it is important to note that, whilst this Note proposes some good practices to address the main issues related to the financial aspects of intercountry adoption, some broader questions also remain, including how to:

Develop tools which will provide further clarity on certain key issues:

For example:

- identifying what further guidance, if any, can be provided to determine what constitutes "reasonable professional fees" for persons involved in an intercountry adoption (Art. 32(2));
- identifying what constitutes an appropriate measure to prevent improper financial or other gain;
- identifying what may constitute an appropriate sanction against an abuse;

Ensure action by all States

For example:

- ensuring the prompt and effective investigation of *bona fide* allegations of malpractice within all States, especially where the malpractices appear to be systemic;
- improving the co-operation between States to prevent and solve problems in relation to the financial issues arising in intercountry adoption;
- promoting further awareness of the financial issues which arise in relation to intercountry adoption in all States and consequently "breaking the taboo" which has surrounded this topic for so long;
- avoiding improper competition within intercountry adoption and the resulting pressure on States of origin, as well as prospective adoptive parents and other adoption actors.

Bring about further changes at State-level

For example:

- further encouraging and supporting the political will required to take steps towards finding solutions in relation to these matters;
- encouraging States which have not yet done so to approve laws and regulations regulating the financial aspects of intercountry adoption;
- ensuring that the appropriate human and material resources are allocated to *implement* such laws and regulations;
- eliminating incentives for improper financial or other gain and profiteering;

²²⁴ Conclusions and Recommendations of the 2014 Council, *supra*, note 17, para. 18 a).

- avoiding the creation of dependency on income from intercountry adoption.

Improve the practices of adoption accredited bodies in relation to financial issues

For example:

- ensuring that adoption accredited bodies comply with the standards of the Convention and apply good practices regarding the financial aspects of intercountry adoption;
- improving the monitoring of adoption accredited bodies regarding financial issues.