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AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

CONSULTATION PAPER
ON
THE IMPLEMENTATION OF THE HAGUE CONVENTION
ON PROTECTION OF CHILDREN AND
CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION, 1993

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INTRODUCTION

1. Adoption is a practice recognised in some form in most societies, ancient and modern.¹ In general, it involves the establishment of a new legal relationship of parent and child, which does not depend on natural family ties. It has been defined as "the institutionalised social practice through which a person, belonging by birth to one family or kinship group, acquires new family or kinship ties that are socially defined as equivalent to biological ties and which supersede the old ones, either wholly or in part."² Adoption may have many functions: the strengthening of family ties; the provision of an heir to a childless couple; or, what has been more central to adoption in contemporary Western society, the promotion of the welfare of the child.

2. The effects of adoption may also vary from state to state. In some jurisdictions, including Ireland, adoption will completely sever the legal relationship between the child and its natural parents; however in other states that relationship may continue in some form.³

3. In recent years, the number of children placed for adoption in Ireland has declined dramatically. This is partly a result of changing social attitudes to births outside marriage. Even more significant, perhaps, has been the improvement in the economic position of women, and in particular the provision, since 1973, of a social welfare allowance for unmarried mothers. Since the early 1970s, the percentage of non-marital children placed for adoption has reduced from over 80% to under 20%. It is as a result of this trend that, increasingly, couples who wish to adopt have turned to intercountry adoption.

4. Figures released by the Adoption Board show that between four and six hundred adoptions take place within the State each year.⁴ Amongst these are many that have a foreign element. In 1995, the Board received 102 applications for recognition of adoptions effected abroad, 57 of them from persons resident outside the State, and 45 from persons resident in Ireland. That year, a total of 93 foreign adoptions were recognised by the Adoption Board. As of 2 October

1 J H A van Loon, *Report on Intercountry Adoption*, Preliminary document no.1 of April 1990, in Proceedings of the 17th Session of the Hague Conference, Tome II at paras. 26-33. Provision for the adoption of foundlings is found in the Code of Hammurabi (section 106). Adoption was also provided for in ancient Hindu law and in Roman law, and features in many customary African laws. The first modern legislative system of adoption was that contained in the Code Napoléon of 1804. The principal exception to the rule is Islamic society, which does not recognise any form of adoption.

2 J H A van Loon, *op cit.* fn.1, at para.26.

3 Law Reform Commission, *Report on The Recognition of Foreign Adoption Decrees*, Chapter 2 at paras. 5-7; Van Loon, *op cit.* fn.1, paras.26-35. See generally, Eliezer D Jaffe, ed., *Intercountry Adoptions: Laws and Perspectives of 'Sending' Countries*.

4 Less than half of these are adoptions outside the child's family. In 1995 there were 490 adoption orders; in 1994, 424; in 1993, 500; in 1992, 523; in 1991, 590. See Reports of An Bord Uchtála, 1991-1995.

1996, a total number of 665 foreign adoptions had been recognised by the Adoption Board since the introduction of legislation on the recognition of foreign adoptions in November 1991.⁵

5. The increasing number of Irish couples adopting children from abroad represents a striking reversal of Ireland's role in intercountry adoption. In the 1940s and 1950s, many Irish children, for whom homes could not be found in Ireland, were adopted by foreign nationals and brought to live abroad, most commonly in the United States.⁶ A number of these adoptions were of doubtful legality. Ireland's experience during this time highlights the need for careful regulation of intercountry adoption.

6. The *Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, 1993*, provides for international co-ordination and regulation of intercountry adoptions on a multilateral basis. As such, it is of importance to countries such as Ireland, where a significant number of adoptions take place across State boundaries. Ireland signed the Convention on 29 May 1993, but has not yet ratified it. The Department of Health strategy document entitled "Shaping a Healthier Future" contains a commitment to introduce changes in adoption law and procedure to bring current legislation into line with the Convention.⁷ Ireland's first national report on the *United Nations Convention on the Rights of the Child, 1989*, reiterates Ireland's intention to ratify the Hague Convention as soon as the necessary legislative measures are in place.⁸

7. Since the decision has already been taken to ratify the Hague Convention, the present paper differs from the usual form of a Law Reform Commission Consultation Paper. Its primary purpose is not to evaluate the merits or demerits of the Convention of 1993, but rather to outline the extent to which the present law is compatible with it, and to examine the legal implications of its implementation. **So that the Commission's final Report may be available as soon as possible, those who wish to do so are requested to make their submissions in writing to the Commission by 20 December 1997.**

5 *Report of An Bord Uchtála, 1995.* The Eastern Health Board deals with the largest number of applications to adopt abroad. Between November 1991 and 15 November 1996 it has received 1100 written enquiries, and 524 formal applications. 132 of these were received between January and July 1996. Of the applications received, the Eastern Health Board recommended 104 for approval and 14 for refusal. 155 were deferred or withdrawn and the remainder are currently in assessment or awaiting assessment.

6 Mike Milotte, *Banished Babies: the Secret History of Ireland's Baby Export Business* (1997)

7 At p.59.

8 *United Nations Convention on the Rights of the Child: First National Report of Ireland* (1996), at para.258.

CHAPTER 1: CURRENT LAW

*Domestic Adoption in Ireland: The Adoption Acts 1952 - 1988 and the Adoption (No. 2) Bill, 1996*¹

1.01 Adoption has been statutorily regulated since 1952, when the Adoption Act of that year introduced a regulatory framework, and established the Adoption Board. In subsequent years there have been a number of amending acts.

1.02 The *Adoption Act, 1952* provides for a system of "full" adoption, or *adoptio plena*, which involves the permanent transfer of all parental rights and duties from the natural parents of the child to the adoptive parents.² The child is to be considered "as the child of the adopter or adopters born to ... them in lawful wedlock".³

1.03 The 1952 Act establishes the structure for the administration of the adoption process. The Act establishes the Adoption Board (An Bord Uchtála) which has the sole authority to grant or refuse adoption orders.⁴ All adoption societies are required to register with the Board, which is responsible for their supervision.⁵ Under the 1952 Act, only adoption societies registered with the Board, as well as health boards, are authorised to place children for adoption.⁶

Eligibility to adopt

1.04 The legislation sets out limitations on persons in whose favour adoption orders can be made: orders may be granted to a married couple living together, to the mother, natural father or relative of the child, to a widow or a widower.⁷ An order may also be granted in favour of a married person alone, provided that person's spouse consents to the adoption; however, the consent of the spouse will not be necessary if the couple are separated.⁸ Where the Adoption Board is satisfied that the "particular circumstances" make it desirable, an adoption order

1 *Adoption Act, 1952; Adoption Act, 1964; Adoption Act, 1974; Adoption Act, 1976; Adoption Act, 1979; Adoption Act, 1988; Adoption Act, 1991.*

2 Section 24.

3 Section 24 (a).

4 Section 8.

5 Section 35 requires the Adoption Board to keep an Adoption Societies Register. Section 36 sets out the criteria for a society to be registered by the Adoption Board. Section 38 requires adoption societies to furnish the Adoption Board with any information it requests, and to permit it to inspect the books of the society.

6 Section 34. The parent of a child, or a third party, may also place a child for adoption, if the prospective adoptive parent is a relative or a spouse of a relative of the child (1974 Act, section 6).

7 1991 Act, section 10 (1).

8 The couple must be living apart under a decree of divorce *a mensa et thoro*, a decree of judicial separation, or a deed of separation; or the spouse must have deserted the applicant or behaved in such a way as to justify the applicant leaving: 1991 Act, section 10 (4).

may be granted in favour of any other person.⁹ There are also minimum age requirements for adoptive parents.¹⁰ An applicant for adoption must have been ordinarily resident in the State for one year prior to the making of the adoption order.¹¹ Under the 1952 Act, the Adoption Board may not make an adoption order unless it is satisfied that the applicant(s) are suitable to adopt, in that they are of "good moral character", have sufficient means to support the child, and are "suitable person[s] to have parental rights and duties in respect of the child."¹²

Eligibility to be adopted

1.05 In order to be eligible for adoption, a child must be at least six weeks and not more than 18 years old.¹³ Originally, only orphans or children born outside of marriage were adoptable; however, the rule has been somewhat relaxed since 1952. The *Adoption Act, 1964* provides that a child whose parents marry subsequent to his or her birth, may be adopted, provided that the natural father consents to the adoption.¹⁴ The *Adoption Act, 1988* also allows for the adoption, subject to an order of the High Court, of marital children, in "exceptional" circumstances, where the natural parents have failed in their duty towards their child.¹⁵

Consent

1.06 The 1952 Act requires the consent of the natural mother of the child, the child's guardian, or any person having control or charge of the child, before the adoption order can be made.¹⁶ Section 39 of the Act requires that an adoption society, before it accepts a child for adoption, shall inform the natural mother or guardian of the effects of an adoption order, and ensure that she understands these effects. The courts have demanded that the requirement of consent be strictly adhered to, and that consent should be fully informed and freely and

9 1991 Act, section 10 (2).

10 1991 Act, section 10 (5).

11 1991 Act, section 10 (8).

12 Section 13 (1).

13 *Adoption Act, 1974*, section 8.

14 Section 10 (c) of the *Adoption Act, 1952* specifies that, to be adoptable, children must be either born outside marriage, or be orphans. Section 2 (1) (a) of the *Adoption Act, 1964* amends this.

15 *Adoption Act, 1988*, section 3 (1).

16 Section 14.

willingly given.¹⁷ These requirements are underpinned by sections 3 and 4 of the *Adoption Act, 1976*. Consent is normally given in two stages. First there is the agreement to place the child for adoption; then there is the final consent which must be sworn before a Commissioner of Oaths and subsequently confirmed in the presence of an authorised person. This final consent may be withdrawn at any time prior to the making of the final adoption order.¹⁸

1.07 Consent may be dispensed with in some circumstances. The *Adoption Act, 1974* allows the Adoption Board, on the authorisation of the High Court, to dispense with the consent of the mother where she has given her agreement to the placement for adoption and has subsequently failed to give her final consent or, having given her final consent, has withdrawn it, provided that the High Court is satisfied that dispensing with the mother's consent is in the best interests of the child.¹⁹ In addition, the procedures for the adoption of marital children in exceptional circumstances, under the 1988 Act, also allow for consent to be dispensed with in exceptional circumstances.²⁰

1.08 Where the child is a non-marital child, the present law does not require that the natural father of the child consent to the adoption (unless he has been appointed a guardian of the child or is a person having "charge or control of the child"), or that he be heard during the adoption process.²¹ In the case of *Keegan v Ireland*,²² however, the European Court of Human Rights held that a situation which permitted the placing of a child for adoption without the knowledge or consent of the natural father of the child was in breach of Article 8 of the European Convention on Human Rights. The *Adoption (No. 2) Bill, 1996* has been prepared in order to rectify the law on this matter.

1.09 Under section 4 of the 1996 Bill, the father of a child may notify the Adoption Board of his wish to be consulted about the placement of a child for adoption, or an application by the mother or any relative of the child to adopt him or her. Where an adoption agency proposes to place a child for adoption, it must ask the Adoption Board for a copy of any notice which the father may have lodged with it. The Adoption Board informs the agency whether or not a notice has been lodged, and provides the agency with a copy of any notice.

17 *G v An Bord Uchtála*, [1980] IR 32. See *infra* on Article 4 of the Convention, paras. 4.27 and 4.43. In *McL v An Bord Uchtála* and *AG* [1977] IR 287, it was held that an adoption was invalid, where the mother had given her consent to the placement but had not been informed that her consent could be withdrawn at any time prior to the making of the adoption order. As a result of this ruling, the *Adoption Act, 1976* was introduced to retrospectively validate adoption orders which would otherwise have been invalid. See also *M O'C v Sacred Heart Adoption Society* [1998] 1 ILRM 297, where the Supreme Court held that a mother cannot be said to have given her fully informed consent to an adoption unless all its possible consequences were made clear to her, but that she did not have to be told that her rights over the child were constitutional in nature.

18 See generally O'Halloran, *Adoption Law and Practice*, (1992) at pp.86 - 88.

19 Section 3 (1).

20 Section 3 (1).

21 See *Nicolaou v An Bord Uchtála* [1998] IR 567.

22 18 European Human Rights Reports [1994] 342.

1.10 Under the 1996 Bill, in any case where an agency proposes the placement of a child for adoption, and where the identity of the child's father is known to the agency, it has a duty to take "reasonably practicable" steps to consult the father, so as to inform him of the placement, explain to him its legal implications, and ascertain his attitude towards it. This includes, *inter alia*, cases where the father has lodged a notice with the Adoption Board.²³

1.11 Where the father objects to the placement, the 1996 Bill provides that the agency must notify both parents that it is deferring the placement for a specified period. During this period, the father may make an application under the *Guardianship of Infants Act, 1964*,²⁴ for guardianship or custody of the child. If no such application is made by the father within the specified period, the agency may proceed to place the child for adoption. If, on the other hand, the natural father is given guardianship or custody of the child, his consent will be necessary for the adoption to go ahead.

1.12 Confidentiality is central to the adoption system in Ireland, and this is manifested in the limitations placed on access to information identifying the natural parents of an adopted child. An adopted person may obtain information on his or her background from the relevant health board or adoption society, but has no right of access to his or her birth records. Under section 22 of the 1952 Act, the Adoption Board must keep an index to make traceable the connection between the register of adopted children and the register of births; however, information from this register may only be released by an order of the Adoption Board, or a court order.²⁵

The Impact of the Constitution

1.13 The Adoption Acts operate against the background of the constitutional guarantees relating to personal rights, parental rights and the rights of the family. The central place of the family based on marriage in the Irish constitutional structure has led to an emphasis on family and parental rights, rather than on the rights of the individual within the family.²⁶ Against the background of the Constitution, there has been a reluctance to allow for more than a minimum of interference with the family by the adoption or health authorities. In particular, there has been concern, based on Article 41.1.1 and Article 42, as to the constitutionality of any legal provision that would allow for the adoption of

23 Section 4, *Adoption (No. 2) Bill, 1996*

24 As amended by the *Status of Children Act, 1987*, section 13.

25 1952 Act, section 22 (5). In *CR v An Bord Uchtála*, [1994] ILRM 217, the High Court held that section 22 imposed an obligation to decide the application on its individual merits, rather than on the basis of a blanket policy of refusal. See further *infra* paras.5.05 - 5.07, on Article 30 of the Convention.

26 *Murray v Ireland* [1985] IR 552; *L v L* [1992] 2 IR 77. See also the *Report of the Constitution Review Group*, at p.323: "The Review Group considers that the present focus of Articles 41 and 42 emphasises the rights of the family to the possible detriment of individual members."

marital children;²⁷ the prohibition on the adoption of such children has been only slightly modified by the 1988 Act,²⁸ whose provisions were found not to be unconstitutional by the Supreme Court.²⁹

1.14 Although the Constitution does not contain a detailed list of the rights of the child, these rights are recognised in Article 42.5 and have been considered by the courts.³⁰ In *In re Article 26 and the Adoption (No. 2) Bill, 1987*³¹, Finlay CJ held that the rights of a child who is a member of a family are not confined to those identified in Articles 41 and 42, but also find their origins in the guarantees of personal rights in the Constitution.³²

1.15 Finlay CJ also held in that case that the rights of the family guaranteed in the Constitution could not operate to deny personal rights to a member of that family. Therefore, a statute could make provision for the restoration of personal rights to a member of a family, even where it was necessary, in the process of restoring those rights, to disturb or alter the constitution of the family. He held that the protection afforded to the family by the Constitution benefits the children of the family; however, where that benefit fails, it may be replaced by the incorporation of the child into an alternative family.³³

International Instruments

1.16 Irish adoption law must also be viewed in the context of the international instruments to which Ireland is a party. The *United Nations Convention on the Rights of the Child, 1989*, which was ratified by Ireland on 21 September 1992, is of particular significance. Article 21 of that Convention deals with the issue of adoption, including intercountry adoption. Because of the importance of this Article to both Irish adoption law and to the *Hague Convention 1993*, it is appropriate to quote it here in full.

"Article 21

States Parties that recognise and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

27 *Report of the Constitution Review Group, op cit. fn.28, p.324.* The Review Group recommended the inclusion in the Constitution of a guarantee of respect for the individual's family life, modelled on Article 8 of the ECHR.

28 See *supra* para. 1.05

29 *In re Article 26 and the Adoption (No. 2) Bill, 1987* [1988] ILRM 266.

30 In *G v An Bord Uchtála*, the Supreme Court recognised certain personal rights of the child, under Article 40.

31 *op cit.*, f.n.26.

32 The Constitution Review Group, *op cit. fn.26* at p.328, recommended that "Article 41 should contain an express inclusion of those rights of a child which are not guaranteed elsewhere and are peculiar to children, such as the right to be reared with due regard for his or her welfare."

33 At p.272.

- (a) Ensure that the adoption of a child is authorised only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;
- (b) Recognise that intercountry adoption may be considered as an alternative means of child care, if the child cannot be placed in a foster or adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
- (c) Ensure that the child concerned by intercountry adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
- (d) Take all appropriate measures to ensure that, in intercountry adoption, the placement does not result in improper financial gain for those involved in it;
- (e) Promote, where appropriate, the objects of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs."

1.17 Article 21 states the important principle that the interests of the child must be the paramount consideration in all adoptions. Since the child's interests are not the sole consideration, however, other interests, such as those of the natural parents, must also be given consideration. Article 21 must be read in the context of Article 9, which stipulates that children must not be separated from their parents against their will, except where separation is determined to be in the best interests of the child. It must also be read in conjunction with Articles 11 and 35, which impose obligations on states to take measures to prevent child trafficking.

1.18 Although Article 21 (b) recognises the importance of intercountry adoption, it is important to note that it is recognised only as a subsidiary option, with preference being given to adoption or fostering within the child's own country. The subsidiary nature of intercountry adoption is underlined by Article 20 (3), which stipulates that, when solutions to child-care problems are being considered, "due regard shall be paid to ... the child's ethnic, religious, cultural and linguistic background."

1.19 Article 21 (c) is also significant. It contains a guarantee of equality of treatment for intercountry adopted children. This entitles them to have the same standards and safeguards applied in the course of their adoption as are applied in domestic adoptions, and to have a status equal to that of domestically adopted children, once the adoption is completed.

Foreign Adoptions

1.20 In Ireland, prior to 1991, there were no statutory rules regulating the recognition of foreign adoptions. The legal position at common law was based on domicile, primarily that of the adoptive parents.³⁴ This was the view taken in *MF v An Bord Uchtála*³⁵, where MacKenzie J stated the common law position as being that an adoption made in another jurisdiction and valid according to the law of that jurisdiction would be recognised by the State if, at the time of the adoption, the adopter was domiciled in the foreign jurisdiction.

1.21 In that case, MF gave birth to a child in England, but had always intended to return to Ireland. It was held that, in these circumstances, she had retained an Irish domicile of origin. Therefore, the adoption order which had been granted to MF in an English court was not recognised in Irish law, and the Adoption Board had jurisdiction to make a further adoption order in respect of the child.

The Adoption Act, 1991 and The Adoption (No. 2) Bill, 1996

1.22 In the 1970s and 80s, the decline in the number of children available for adoption in Ireland led to an increase in the number of couples adopting children from abroad. In its 1989 *Report on the Recognition of Foreign Adoption Decrees*, the Law Reform Commission recognised the growing importance of intercountry adoption in Ireland. Although stating that it would at that time be premature to deal with the issue of intercountry adoption, the report acknowledged that it should be dealt with separately at a later date.³⁶

1.23 In 1991, the dramatic increase in the number of adoptions of Romanian children by Irish couples, following the political upheavals in that country, prompted legislative action.³⁷ The *Adoption Act, 1991* provided for the recognition of adoptions effected outside the State. The *Adoption (No. 2) Bill, 1996* proposes amendments to the 1991 Act.

1.24 The *Adoption (No. 2) Bill, 1996* has two main elements. The first relates to the consent of the natural father of a non-marital child, and is a response to the judgment of the European Court of Human Rights in the *Keegan* case. The Bill would amend the 1952 Act so as to provide a new statutory procedure for consulting the father of a child born outside marriage, before the child is placed

34 Law Reform Commission, *Report on The Recognition of Foreign Adoption Decrees*, p.7 at para.15. William Binchy, *Irish Conflicts of Law*, (1988) pp.372-374.

35 [1991] ILRM 399.

36 At para.5.

37 Speech by Rory O'Hanlon, TD, then Minister for Health, in Dáil Éireann on 12 February [1991]. Reprinted in 1991 Irish Law Times 88. Between August and July 1991, over 10,000 Romanian children were adopted by foreign nationals. See Dr. Alexandra Zugravescu, *Quelques considerations sur la pratique de l'adoption internationale dans les pays de l'Europe de l'est et centrale*, in ed., Jaap Doek, Hans van Loon and Paul Vlaardingebroek, *Children on the Move* (1990).

for adoption.³⁸ The second aspect to the 1996 Bill is its amendment of the 1991 Act to allow for the recognition under Irish law of adoptions effected in countries whose laws permit the revocation or termination of adoptions in certain circumstances.

1.25 Section 1 of the 1991 Act defines the type of foreign adoption which may be recognised under Irish law. The adoption must be in respect of a child who is under 18 years, or if the adoption is effected before the commencement of the 1991 Act, 21 years. The adoption must have been made in accordance with the laws of the State concerned. In addition, the section requires that five main conditions be satisfied:

- (1) that the consent of every person whose consent was required, under the law of the State where the adoption was effected, has been obtained;
- (2) that the adoption has "essentially the same legal effect", with regard to the termination of the parental rights of the natural parents and the permanency of the relationship with the adoptive parents, as an adoption effected under Irish law.

It should be noted that the *Adoption (No. 2) Bill, 1996* proposes the alteration of this provision. The amended provision would require that "the adoption has, for so long as it is in force, substantially the same legal effect as respects the guardianship of the child" as an Irish adoption.³⁹ This amendment is designed primarily to facilitate the recognition of adoptions such as those effected in China, which allow for the adoption to be revoked in certain circumstances, but which are otherwise similar to adoptions under Irish law. The inclusion of the qualifying phrase "for so long as it is in force" allows these adoptions to be recognised. In fact, the decision of the Supreme Court in *An Bord Uchtála v B and B*⁴⁰ appears to have made this amendment unnecessary.⁴¹

- (3) that there was a legal obligation, under the law of the place where the adoption was effected, to carry out an enquiry into the natural parents, the child, and the prospective adopters;
- (4) that there was a legal obligation to give due consideration to the interests and welfare of the child.

38 On the consent provisions in the 1996 Bill, see *supra* paras.1.09-.11.

39 Section 10 (a) (ii)

40 Supreme Court, 25 July 1996

41 See *infra* para.1.37-1.39.

Again, the *Adoption (No. 2) Bill, 1996* proposes an amendment here. The amended subsection would require that the adoption "was effected for the purpose of promoting the interests and welfare of the child."⁴²

- (5) that there were no improper payments made or received in respect of the adoption.

1.26 Although there must remain some uncertainty as to how the amended definition of a recognisable foreign adoption set out in the 1996 Bill will be interpreted by the courts,⁴³ it appears that it does not cover simple adoptions which allow the natural parents to retain some of their parental rights. Amongst these would be some adoptions effected in the countries of South and Central America. In order to allow some means by which these adoptions may be recognised, the 1996 Bill amends the requirements of the 1991 Act in relation to consent. Under the 1991 Act, all necessary consents must be obtained at the time the adoption order was effected. Under the 1996 Bill, if the original adoption was a simple adoption, consents may also be obtained subsequent to the adoption, so as to convert it to a full adoption which terminates the rights of the natural parents.⁴⁴ This provision allows the conversion of the adoption to take place in the State of origin only. No provision is made for conversion to a full adoption in the Irish courts. The amendment would mean that parents who have adopted under a simple adoption in a State which recognises both simple and full adoptions could have the adoption recognised in Ireland if it is converted to a full adoption under the law of the State of origin.

The recognition process

1.27 The 1991 Act provides for three classes of circumstances in which adoptions effected in other jurisdictions will be recognised. In relation to each of these, differing standards must be met and different procedures followed.

1.28 The first class of recognisable foreign adoptions are those which have been effected abroad in a state where either or both of the adopters were, at the time when the adoption was effected (a) domiciled; (b) resident; or (c) ordinarily resident.⁴⁵ These adoptions are deemed to be valid in Ireland, provided that they satisfy the definition of an adoption in section 1 of the Act, and are not contrary to public policy.

42 Section 10 (a) (iii)

43 "Guardianship" is not defined in the Bill. Guardianship is defined in section 10 of the *Guardianship of Infants Act, 1964* as including guardianship of the person of the infant (which imports the right to exclusive custody), and guardianship of the estate of the infant, which imports the possession, control and management of all property of the infant.

44 Section 10 (a) of the 1996 Bill, amending section 1 of the 1991 Act.

45 Sections 2, 3 and 4.

1.29 The second and third classes relate to adoptions effected abroad in favour of persons ordinarily resident in Ireland. The second class concern adoptions of this type which took place prior to the commencement of the Act, or in respect of which the adopting parents applied to the Minister, prior to the commencement of the Act, for an assurance that the child the subject of the adoption could be admitted to the State.⁴⁶ In such cases, the adopters must show that they are eligible to adopt, in terms of section 10.⁴⁷ The Adoption Board must declare in writing that it is satisfied that the prospective adopters meet the requirements of section 10.

1.30 The third class of recognisable adoptions is the most significant. It consists of adoptions effected after the commencement of the Act, where the adopters are ordinarily resident in the State. In these cases, the requirements and procedures which must be adhered to by prospective adopters are much more stringent than for adoptions effected prior to 1991.

1.31 In addition to showing eligibility under section 10, prospective adopters must obtain a report from their health board or adoption society, based on an assessment, stating that they are suitable persons in respect of whom an adoption order may be made, having regard to their moral character, as well as their ability to support the child.⁴⁸ The report is then submitted to the Adoption Board, which must declare in writing that, having regard to the report, the applicants are suitable persons in favour of whom an adoption order may be made.⁴⁹

Registration of foreign adoptions

1.32 All foreign adoptions recognised by the Board under sections 2 and 5 of the 1991 Act must be entered on the Register of Foreign Adoptions, which it is the responsibility of the Adoption Board to maintain.⁵⁰ A copy of the entry on the register in respect of an adoption is deemed proof that the adoption is one validly effected.⁵¹

Proof of foreign adoptions

1.33 Section 9 of the 1991 Act sets out the standards of proof required of adoptions effected outside the State. An adoption effected in another state is

46 The 1991 Act, in section 5, stipulates that the adopters must have applied to the Minister of Justice for recognition prior to July 1991. The *Adoption (No. 2) Bill, 1996* would extend the deadline to July 1992.

47 Sub-section (2). See *supra* at para.1.04.

48 These criteria are set out in section 13 of the 1952 Act. On assessments, see *infra* paras.2.04-2.08.

49 Section 5 (1) (iii) (B).

50 1991 Act, Section 6.

51 *ibid.*, Section 6 (7).

presumed to have been effected in accordance with the law of that place, unless the contrary is shown.⁵² An authenticated copy of the adoption order will be accepted as a true copy and will be admissible as evidence of the adoption.⁵³

Caselaw Concerning Intercountry Adoption

1.34 The case of *TM and AM v An Bord Uchtála*⁵⁴ involved an application for an adoption order in Ireland in respect of a foreign child. The Supreme Court decided that the *Adoption Act, 1988*, which allows, under certain circumstances, for the adoption of a marital child, did apply to a child born outside the jurisdiction to non-Irish parents.

1.35 Finlay CJ held that it was within the capacity of the courts, in cases of adoption of children born outside the jurisdiction, to set appropriate guidelines and standards of proof to determine whether the adoptive parents knew the identity of the natural parents of the child, and whether they had taken all appropriate measures to ascertain the identity of the natural parents, as required under section 4(4) of the 1988 Act. Here, the adoptive parents had taken all possible measures to ascertain the identity of the natural parents.

1.36 The Court also held that it was possible to determine whether non-Irish parents had "failed in their duty towards the child", so as to have abandoned their parental rights. The High Court had ruled that differing parental standards of care in different cultures would make such a determination impossible. Finlay CJ held, however, that total abandonment of the child shortly after birth, as had occurred in this case, would constitute a failure in parental duty in any culture.

1.37 In *An Bord Uchtála v B and B*,⁵⁵ the Supreme Court considered the issue of the recognition of a foreign adoption which differed in character from an adoption effected under Irish law. The case concerned the proposed adoption by three Irish couples of children from the Peoples' Republic of China. Following enquiries from the applicants, the Adoption Board stated that it could not recognise adoptions effected in China since, having regard to the adoption law of China, adoptions effected there could not be deemed "foreign adoptions" under the Irish *Adoption Act, 1991*. Under the Chinese law, an adoption may be terminated by agreement between the parties to it. The Adoption Board interpreted this as lacking in the quality of permanence which was fundamental to an adoption under Irish law.

52 *ibid.*, Section 9 (4).

53 *ibid.*, Section 9 (1).

54 [1993] ILRM 577.

55 Supreme Court, 25 July 1996.

1.38 The Supreme Court applied the test contained in the 1991 Act: whether the adoption had the "same legal effect" as an Irish adoption.⁵⁶ Murphy J, in his judgement, accepted that in practical terms, the likelihood of a Chinese adoption being terminated by the parties to it was extremely small. He then examined the Irish Adoption Acts of 1991 and 1952, and found that the legislation recognised that, in some circumstances, an adoption order might be set aside, or annulled. Accordingly, "the concept of permanence as an incident of adoption is not absolute in this jurisdiction."⁵⁷ Murphy J held that the possibility of termination did not deprive the adoptive relationship of the character of an adoption. An adoption under Chinese law had a sufficient degree of permanency to equate to an adoption under Irish law.

1.39 The case raised the possibility that the Irish courts might be willing to recognise some "simple" adoptions, *i.e.* adoptions which do not necessarily terminate all legal ties between the child and the natural parents. How far the courts might be prepared to go in this direction is a matter of speculation, particularly in the light of the proposed amendment of the 1991 Act.⁵⁸

56 See *supra* para. 1.25.

57 At p.19.

58 By the *Adoption (No. 2) Bill, 1996*. See *supra* paras. 1.22-1.28.

CHAPTER 2: CURRENT PRACTICE AND PROBLEMS IN INTERCOUNTRY ADOPTION

The Administrative Structure

2.01 The body with responsibility for the administration of the adoption process is the Adoption Board, which has been in existence since 1953.¹ In practice, the administration of the adoption process is shared between the Adoption Board, the health boards, and the adoption societies. The *Child Care Act, 1991* requires that health boards ensure the availability of an adoption service in their area.² The degree of direct involvement of health boards is variable, however; while some effect a high level of placements for adoption, others make virtually no placements, and delegate the work of placement for adoption to voluntary adoption societies.³ Health boards are not subject to the supervision of the Adoption Board, but the Board does exert some influence, and it has set out guidelines regarding intercountry adoption to be followed by health boards.

2.02 Voluntary adoption societies are subject to supervision by the Adoption Board.⁴ They also comply with minimum Council of Europe standards.⁵ In practice, adoption societies have employed differing methods in their work, and the standard which their work has attained has varied.⁶ This has led to criticism of the Adoption Board's supervision; the Review Committee of 1984 noted the lack of rigour with which the Adoption Board policed voluntary adoption societies.⁷ Irish adoption societies are not at present involved in intercountry adoption, although some have expressed an interest in becoming involved in the area.

The Intercountry Adoption Process

2.03 The initial stages of the adoption process will vary according to the particular health board concerned. The Eastern Health Board, which deals with the largest number of applications for intercountry adoption, begins by organising a series of group meetings with prospective adoptive parents. These meetings are aimed at informing the prospective adopters about intercountry adoption, and

1 The Adoption Board was established by the Adoption Act, 1952, section 9. See *supra* para.1.03.

2 Section 6.

3 Kerry O'Halloran, *Adoption Law and Practice*, (1992), at p.30.

4 *supra* para.1.03, f.n.5.

5 These are set out in the *Council of Europe Convention on the Adoption of Children*, which Ireland ratified on 25 January 1988. Article 9, section 3 provides that enquiries concerning the applicants and children "shall be entrusted to a person or body recognised for that purpose by law, or by a judicial or administrative body. They shall, as far as practicable, be made by social workers who are qualified in this field as a result of either their training or their experience."

6 O'Halloran, *op cit.*, p.30.

7 *Report of the Review Committee on Adoption Services*, (1984), p.48.

preparing them for it. Prospective adoptive parents will normally attend six such preparation sessions. The group will discuss the implications of adopting a child from a different ethnic and cultural background, and the special needs of many intercountry adopted children.

Assessments

2.04 Those who wish to pursue an intercountry adoption will then be assessed by the health board social workers.⁸ The assessment usually involves 10 home visits and takes about six months. The assessment addresses the character and motivation of the prospective adoptive parents, their relationship, their expectations of placement, and their parenting capacity.

2.05 The assessment procedure differs according to whether the adoption is to be effected in Ireland or abroad. If the child is to be placed with the prospective adoptive parents in the country of origin, and then brought to Ireland for adoption here, the procedures for domestic adoptions under the 1952 Act would apply. The assessment would be carried out by the health board and the decision as to whether the applicants are eligible to adopt would be made by the placement committee of the health board.

2.06 If the child is to be adopted abroad and subsequently brought back to Ireland by the adoptive parents, the procedure under the 1991 Act will apply. Under the 1991 Act, all applicants are entitled to an assessment for intercountry adoption, so long as they are eligible to adopt in accordance with section 10 of the same Act.⁹ As a result, health boards are obliged to assess every person who applies to them for an assessment. They will furnish a report, based on the assessment, to the Adoption Board, on the basis of which the Adoption Board decides whether to make a declaration in respect of the applicants, stating that they are suitable adoptive parents. A copy of the declaration or refusal is sent to the assessor, who then informs the prospective adopters.

2.07 The majority of assessments for intercountry adoption are positive; the numbers of applicants declared unsuitable to adopt are small.¹⁰ However, a significant number of applicants abandon their interest in intercountry adoption at some stage during the assessment process.

2.08 Our research and consultations revealed a perception among some of those professionally involved in the adoption process that the standards applied to prospective adoptive parents for intercountry adoption may be less rigorous than those for domestic adoption. A discrepancy arises as a result of the

8 This is required by section 5 (1) (iii) (ii) (B) of the 1991 Act. Prospective adoptive parents are assessed according to criteria set out in section 13 (1) of the 1952 Act: see *supra* para.1.04.

9 Section 5 (3) (b)

10 See statistics *supra* in Introduction, para.6, f.n.5.

statutory right to an assessment for intercountry adoption, which does not exist in relation to domestic adoption. Different emphases may also result from a feeling that the sometimes desperate situation of children available for adoption in developing countries justifies a less rigorous scrutiny of their prospective parents.

Delays

2.09 Long delays in the assessment procedure are a significant problem in the intercountry adoption process; in some areas assessments can take up to 18 months.¹¹ The prolonged waiting period for an assessment results sometimes in a 3 year delay before the adoption can take place. As some countries have low age limits for adoptable children, the lapse of time may in effect bar the adoption from going ahead.

2.10 Delays in the assessment process are in part the result of a lack of adequate resources. The statutory right to an assessment for intercountry adoption is also a significant factor.

2.11 Health boards are required, by section 8 (1) of the 1991 Act, to process assessments "as soon as practicable". In a recent Supreme Court case, *MC and MD v Eastern Health Board*,¹² it was held that, despite the serious delays, the Eastern Health Board was fulfilling this obligation, in processing assessments to the best of its ability, taking into account the small number of personnel available to it and the large number of applications.

2.12 The case concerned prospective adoptive parents who wished to adopt children from China. They were informed by the Eastern Health Board that they would have to wait seven to eight months for an assessment, and that the assessment itself would then take a further year. Keane J, in his judgement, held that "as soon as practicable" did not mean "as soon as possible". The purpose of the "as soon as practicable" requirement was rather to ensure that prospective adoptive parents "would not be subjected to unnecessary anxiety and uncertainty by the prolongation of the assessment procedure beyond a period that was reasonably required so as to ensure that the interests and welfare of the child to be adopted were fully protected." He held that the legislature must be presumed to have taken into account that the resources and personnel available to the health boards were limited.

11 The Eastern Health Board, which deals with the largest number of inter-country adoptions, had previously kept to a six month waiting list. Since November 1995, however, an unprecedented number of applications for assessments has led to the waiting list lengthening considerably.

12 176/96 Supreme Court 29 July 1996.

Immigration Clearances

2.13 Once the Adoption Board has issued a declaration that the prospective adopters have met the legislative criteria, and a copy of this has been sent, where required, to the child's country of origin, the authorities in the country of origin will decide whether to grant the adoption order.

2.14 After the declaration has been granted, the adoptive parents must obtain an "entry clearance" from the Department of Justice, to allow the child to enter the State. The Department of Justice will consult with the Adoption Board, and will only issue a clearance if the Adoption Board confirms that the adoptive parents have met the legislative criteria as to suitability.

2.15 Significant problems have arisen in relation to immigration control of children entering the State on foot of a clearance from the Department of Justice. In many cases the clearances are not checked on entry into the State, and this creates a situation where the authorities are unaware of whether the child has been brought into the State or not. The child is, in effect, invisible to the authorities. There is also concern that a clearance, issued in respect of a single child, may be used to bring more than one child into the country, unknown to the authorities. This is possible because the clearance, even where it is checked by the immigration authorities, is not marked in any way to show that the child has now been brought to the country, but is merely returned to the holder.

Recognition of Foreign Adoptions

2.16 If an adoption has been effected abroad, the adoptive parents can apply to the Adoption Board, on their return to Ireland, for recognition of the adoption in Ireland, under the *Adoption Act, 1991*.¹³

2.17 Due to the restrictive definition of a recognisable adoption under the 1991 Act, many adoptions from states of origin which allow for simple adoptions are not recognisable here.¹⁴ Adoptive parents who have adopted children from countries such as Paraguay and Guatemala have been unable to obtain recognition in Ireland, in the absence of consent by the natural parents to the termination of their rights over the child. In some cases, adoptive parents in this situation have had to use the complex provisions of the 1988 Act to "re-adopt" the child on the grounds that the natural parents have abandoned their parental rights over the child.¹⁵

13 See *supra* paras. 1.29-1.30.

14 The Adoption Board operates on the basis of a list of states from which adoption orders can be recognised. See Appendix III.

15 See *supra* para. 1.05

Obtaining Legal Advice

2.18 The Adoption Board has experienced difficulties obtaining legal opinions in foreign jurisdictions on local adoption laws. Before a foreign adoption can be recognised, the Board requires an independent legal opinion from a lawyer, practising in the area of adoption in the relevant country, concerning the legal issues raised by section 1 of the *Adoption Act, 1991*. This is particularly difficult to obtain in countries where the governmental, administrative and legal infrastructure is fragile or has broken down, and where letters to bodies such as bar associations may elicit no response. Automatic recognition under the Hague Convention should alleviate this problem in respect of countries party to the Convention.

Availability of Information

2.19 One deficiency in the current administration of the adoption process is that there is a dearth of information available on intercountry adoption. Some information is provided by independent adoptive parent support groups, and by the health boards.¹⁶ The amount of information provided by health boards is limited, and it must be borne in mind on this issue that there is certain information which it would not be desirable to provide, such as the names and addresses of private adoption agencies operating in countries of origin which are associated with abuses or poor practice.

2.20 The lack of information on the compatibility of foreign adoptions with Irish law has led to serious problems in some cases. Couples have adopted under simple adoptions from countries such as Paraguay, under the mistaken belief that the adoption would be recognised in Ireland, and have only discovered that this is not the case when the adoption has already been completed, or the process has reached an advanced stage. The consequences of this for the child is that his or her legal status may be left ambiguous for some time.

Post-adoption Care and Monitoring

2.21 At present, there is only a limited degree of post-adoption supervision by the authorities. Such supervision and monitoring as does occur is on a voluntary basis, subject to the consent of the adoptive parents. The Adoption Board has asked the health boards to obtain signed undertakings from prospective adopters stating that they will contact the health board on their return to Ireland with the child, and allow the health board to supervise the placement. These arrangements often work well, but adoptive parents may refuse to allow any supervision.

16

See Irish Foreign Adoption Group, Information Pack, (January 1997).

Bilateral Agreements¹⁷

2.22 Ireland is party to a bilateral agreement on intercountry adoption with Romania.¹⁸ The Agreement sets out a comprehensive framework for the regulation of adoptions of Romanian children by Irish residents. The agreement recognises as its "guiding principles" those set out in the *United Nations Convention on the Rights of the Child, 1989*.¹⁹ For the purposes of the Agreement, the relevant authorities in the two countries are the Irish Adoption Board and the Romanian Committee for Adoptions.²⁰ All applicants to adopt under the agreement must have been assessed and approved in Ireland by a health board or registered adoption agency.²¹ The Agreement provides that the Adoption Board is to co-operate exclusively with the Romanian Committee for Adoptions in the administration of Irish-Romanian adoptions.²²

2.23 The Agreement makes detailed stipulations as to the eligibility of applicants, and of children.²³ It requires that the Adoption Board furnish the Romanian Committee with extensive documentation, including a "homestudy" prepared by a health board or adoption society, giving a detailed assessment of the applicants' motivation and family circumstances.²⁴ The Romanian Committee will in its turn forward to the Adoption Board information on the child's social and medical history.²⁵

2.24 If the match is successful, the applicants sign a Declaration of Intent to Adopt.²⁶ They then travel to Romania to complete the adoption.²⁷ They must undertake to provide follow up reports describing the adjustment of the child into the family.²⁸

2.25 In practice, the agreement has not always worked smoothly. There continue to be some difficulties in Romania with corruption and dubious practice by independent operators, who may demand large payments in order to facilitate an adoption.

17 The only bilateral agreement on foreign adoptions that Ireland is party to at present is that with Romania. A similar agreement with China is in the course of being prepared.

18 See Appendix 3. The agreement was signed in 1994. Romania has now ratified the *Hague Convention 1993*. On adoption law and practice in Romania, see Dr. Alexandra Zugrovescu, *Quelques considerations sur la pratique de l'adoption internationale dans les pays de l'Europe de l'est et centrale*, in ed. Doek, van Loon and Vlaardingerbroek, *Children on the Move* (1990) See also Zugrovescu and Iacovescu, *The Adoption of Children in Romania*, in Elizer Jaffe, ed., *Intercountry Adoption: Laws and Perspectives of Sending Countries*.

19 Article 4.

20 Article 1, Article 3.

21 Article 7.

22 Article 8.

23 Annex to the Agreement, Articles 1 and 2.

24 *ibid.*, Article 3.

25 *ibid.*, Article 5.

26 *ibid.*, Article 7.

27 *ibid.*, Article 9

28 *ibid.*, Article 8.

Non-recognition as a Sanction. The Need for Co-operation

2.26 An underlying difficulty with the *Adoption Act, 1991* is in the use of non-recognition as the sanction for failure to comply with certain requirements relating to foreign law. Thus, for example, if appropriate consents are not obtained abroad, or if there has been payment of bribes, or if the adoption which is granted does not equate sufficiently to an Irish adoption, the result is that the adoption cannot be recognised. The problem is that this usually involves closing the door after the horse has bolted. When recognition becomes an issue, the child will usually already have been brought to Ireland by the adoptive parents and will have begun to settle in his or her new home. There will often be no realistic alternative for the child other than to remain in the care of the adoptive parents. In these circumstances it is generally not in the interests of the child to refuse recognition to the adoption.

2.27 Of course, non-recognition must be retained as an ultimate sanction, especially where the rights of the natural family have been violated, and restoration of the child is possible. But, where restoration of the child is not sought and not possible, the effect of non-recognition is to have the child in a legal limbo, in which his or her status is unclear, a situation which can only be remedied by re-adoption in Ireland, if, that is, the conditions for an Irish adoption can be met.

2.28 Good adoption practice requires that everything possible should be done to ensure that all the legal and other conditions of adoption have been met before the child is placed with the prospective adoptive parents, and, in the intercountry context, before the child is transferred from one country to another. It is difficult to achieve this without close co-operation between authorities in the two states concerned, the State of the child's origin and the State in which the adoptive parents are resident. This is not provided for in the 1991 Act, and therein lies its weakness. The 1991 Act was an attempt to regulate intercountry adoption unilaterally, whereas effective regulation requires bilateral co-operation, especially prior to and at the time of the decision on placement. This is not to denigrate the 1991 Act, which was a necessary product of its time. What is now needed is to move on to a system of regulation based on co-operation between the states concerned; and this brings us to consideration of the *1993 Hague Convention*.

CHAPTER 3: THE HAGUE CONVENTION 1993

The Development of the Convention

3.01 The *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* was concluded and signed on 29 May 1993. The Convention was the product of five years' preparation by the Hague Conference on Private International Law.¹ The Conference established a Special Commission on Intercountry Adoption, which first met in 1990.² Over 65 States, 6 Inter-governmental Organisations, and 11 Non-governmental Organisations were involved in the preparation of the Convention at the Special Commission, and at the later Diplomatic Commission.³ Of particular importance was the participation of many developing countries, many in Asia and Latin America, which are most frequently "countries of origin" in intercountry adoptions.⁴

The Need for Regulation

3.02 Since the late 1980s, the adoption of children across national boundaries has become increasingly common, the result of a decrease in the numbers of children available for adoption domestically in wealthier countries, and of continuing poverty and instability elsewhere. Each year, some 20,000 children are the subjects of intercountry adoption, and the numbers appear likely to increase still further.⁵ The Hague Conference, in identifying intercountry adoption as an area in need of regulation, stated that this increase had occurred "to such an extent that intercountry adoption had become a worldwide phenomenon, involving migration of children over long geographical distances and from one society and culture to another very different environment."⁶

3.03 Associated with this increase in adoption across frontiers are many legal and social problems, as well as some serious abuses. The lack of safeguards and regulation has allowed the falsification of birth records, the coercion and bribery of natural parents, and in some cases the sale and abduction of children, to feature.⁷ The more serious abuses aside, there is the more general concern that,

1 G Parra Aranguren, *Explanatory Report*, in *Proceedings of the Seventeenth Session of the Hague Conference on Private International Law*, Tome II, p.543, at para.1.

2 *Ibid.*, para.9.

3 William Duncan, *The Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption* (1993) Vol. 17 No. 3 Adoption and Fostering 8.

4 *Explanatory Report*, *op cit.* fn.1 at para.5. Previous attempts to regulate intercountry adoption on a regional basis, such as the *Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors, 1984* enjoyed only limited success because they did not involve the majority of states of origin. See J H A van Loon, *Report on Intercountry Adoption*, Preliminary Document no.1 of April 1990, in *Proceedings of the Seventeenth Session of the Hague Conference on Private International Law*, Tome II, para.6.

5 William Duncan, *op cit.* fn.3.

6 *Explanatory Report*, *op cit.* fn.1, para.6.

7 See Defence of Children International, International Federation "Terre des Hommes", and International Social Services, *Preliminary Findings of a Joint Investigation into Independent Intercountry Adoptions* (March 1991); also, Defence of Children International, *Protecting Children's Rights in Intercountry Adoptions: Selected Documents on the Problem of Trafficking and Sale of Children* (June 1989).

in unregulated intercountry adoption, the interests of the adoptive parents may become paramount, and obscure those of the child.⁸ Where unilateral regulation has been attempted, it appears that, in many cases, intercountry adoptions have not been subject to the same stringent standards as domestic adoptions.

The Aims of the Convention

3.04 The Hague Conference identified a need for legally binding standards in relation to intercountry adoption, combined with a system of supervision to ensure that these standards are observed. It addressed the need to open channels of communication between countries of origin of adopted children and receiving countries, and to foster co-operation between these countries.⁹ Regulation and co-operation were seen as the best means of reducing abuses of intercountry adoption, and ensuring that the best interests of the child prevailed.

3.05 The Convention sets out a framework for such regulation and co-operation between states. Its primary, though not its exclusive, focus, is on the process of adoption, rather than on subsequent recognition. Article 1 of the Convention lists its objects as the establishment of safeguards and of a system of co-operation, and the securing of recognition by states parties of adoptions made in accordance with the Convention.

3.06 The Convention is strongly influenced by the *United Nations Convention on the Rights of the Child*, which is referred to in the preamble. The Convention is in part an elaboration of the principles and objectives set out in Article 21 of the *Convention on the Rights of the Child*, which stipulates that adoption shall be carried out in the best interests of the child, and refers to the need for bilateral and multilateral agreements between states, in relation to intercountry adoption. Other international instruments also influenced the content of the Convention, and the preamble refers in particular to the *United Nations Declaration on Social And Legal Principles relating to the Protection and Welfare of Children with Special Reference to Foster Placement and Adoption Nationally and Internationally*.¹⁰

3.07 The Convention establishes a framework within which differing national adoption laws can be accommodated. It does not set out to establish a uniform international law of adoption. It is based on a recognition that there are diverse national laws on adoption, and it lays down the minimum universal requirements. In their implementation, states may surpass these minimum standards.

8 William Duncan, *The Protection of Children's Rights in Intercountry Adoption*, in Liz Heffernan, ed., *Human Rights, A European Perspective*. (1990); Kish Beavers, *Intercountry Adoption of Unaccompanied Refugee Children*, (1997) 9 *Child and Family Law Quarterly* 131.

9 *Explanatory Report*, *op cit.* fn.1 para.7.

10 General Assembly Resolution 41/85, of 3 December 1986.

Requirements for Adoption

3.08 The requirements which must be met before adoption can take place are set out in Chapter II of the Convention. Responsibility for meeting these requirements is divided between the sending and receiving states. Under Article 4, the sending State must ensure, that the child is adoptable; that it has been determined, after due consideration has been given to the possibility of the child remaining in the country of origin, that an intercountry adoption is in his or her best interests; that all the necessary consents have been given; that, where relevant, the child has consented to the adoption, and his or her wishes have been taken into consideration. Article 5 enumerates the responsibilities of the receiving State. It must determine that the prospective adopters are eligible and suitable to adopt; that, if necessary, they have been counselled; and that the child will be authorised to enter the receiving State and reside permanently there.

Adoption Procedures

3.09 Chapter III stipulates that there must be a Central Authority in each state, and provides for a system of co-operation and exchange of information between Central Authorities. Central Authorities have stipulated responsibilities in relation to specific adoptions, some of which may be delegated to accredited bodies, such as adoption agencies.¹¹ Individuals may also be involved in the adoption process, under supervision.¹²

3.10 The Convention, in Chapter IV, sets out procedures for the preparation of reports on the natural parents, the adoptive parents, and the child.¹³ Procedures are also set out for obtaining the consent of the various parties, and for obtaining permission for the child to enter the receiving country. An important provision is contained in Article 17, which regulates the placement of the child with the prospective adoptive parents, (the "entrustment" of the child to the prospective parents). The emphasis is on the need to ensure, from the perspectives of both states concerned, that the essential prerequisites for adoption have been met before placement of the child occurs. The Article also ensures that neither state can be compelled to involve itself in an arrangement of which it disapproves.¹⁴ Article 19 strengthens this provision by prohibiting the transfer of the child to the receiving country until the conditions of Article 17 are met.

11 Article 6, Article 8, Article 9.

12 Article 22. See *infra* para.3.16.

13 Article 15; Article 16.a., Article 17.d.

14 Duncan, *Conflict and Co-operation: The Approach to Conflicts of Law in the 1993 Hague Convention on Intercountry Adoption*, in Nigel Lowe and Gillian Douglas, ed., *Families Across Frontiers* (1996) pp.577-591.

Recognition of Convention Adoptions

3.11 Chapter V states that adoptions effected under the Convention shall be automatically recognised by Contracting States¹⁵, except where this would be manifestly contrary to the public policy of the State.¹⁶ This leaves very little scope for the non-recognition of Convention adoptions by Contracting States, and is based on the view that recognition of an adoption is, in general, in the best interests of the child.¹⁷

3.12 Article 26 of the Convention deals with the particularly difficult issue of recognition of the effects of Convention adoptions in other states. The issue is problematic because of the differing legal effects of adoption in different states. While some states recognise only "full" adoptions, others also provide for "simple" adoptions, in which legal ties between the child and the natural family may remain. The aim of the Convention as a whole is to be inclusive in the number and variety of adoptions it recognises: Article 2 states that the Convention covers adoptions which create a "permanent parent - child relationship" without stipulating any condition as to the termination of the natural parent-child relationship. The provisions concerning recognition of effects attempt to achieve the same inclusivity and flexibility. Article 26.1.a states that recognition of an adoption entails recognition of the legal parent - child relationship between the child and the adoptive parents. However, in order to take account of simple adoptions, Article 26.1.c provides that the termination of the legal relationship between the child and the natural parents need only be recognised if the adoption had the effect of terminating that relationship in the Contracting State where it was made.

3.13 The *Convention on the Rights of the Child, 1989* guarantees the equal treatment of all adopted children. However, where foreign adoptions creating very different legal effects may be recognised in a state, guarantees of the equal treatment of all adopted children become problematic. Therefore the Convention, in Article 26.2, guarantees children adopted abroad "rights equivalent" to children adopted domestically, but only where the child has been adopted through a full adoption, where the transfer of parental rights is permanent. This provision was the result of compromise, and represents the minimum consensus that could be reached among states on this issue. However, as with all the provisions of the Convention, it represents only a minimum standard, and states may elaborate and develop it further in their implementation, dealing more comprehensively with the legal position of the adopted child.¹⁸

15 Article 23.

16 Article 24.

17 William Duncan, *op cit.* fn.14, p.587.

18 *Explanatory Report, op cit.* fn.1, para.439; Duncan, *op cit.*, p.590.

Other Provisions

3.14 In an effort to prevent undue pressure being put on the natural parents, the Convention places restrictions on contact between the prospective adopters and the natural parents of the child, before the adoption process has got underway.¹⁹

3.15 Article 30 stipulates that information regarding the child's origin, in particular information relating to the identity of the natural parents, and medical records, must be preserved by the relevant authorities. There is no requirement that this information be disclosed in all cases. The only requirement is to ensure access by the adopted child to the information, in so far as is permitted by the law of the State. In addition, under Article 16, the State of origin may withhold information as to the identity of the natural parents from the receiving State.

Independent Adoptions

3.16 The issue of adoptions arranged by "independent" persons was also problematic during the preparation of the Convention.²⁰ Such independent adoptions have been associated with some of the worst abuses of intercountry adoption.²¹ It proved impossible to reach agreement on a strict prohibition on their activities. Under Article 22.2 of the Convention, states may impose a prohibition on delegation of Central Authority activities to independent intermediaries. However, a state may also allow independent intermediaries to operate within their jurisdiction, subject to supervision, and to their meeting criteria of integrity, professional competence and qualification, experience and accountability.²²

19 Article 29.

20 *Explanatory Report*, op. cit. fn.1, para.373 et seq.: "The solution approved represents a reasonable compromise between antagonistic positions."

21 Defence of Children International et al., *Joint Investigation*, op. cit. fn.7. Many countries of origin (for example, Korea, Thailand and India) have taken measures to restrict adoptions by independent operators. See J H A van Loon, op. cit. fn.4, para.66.

22 Article 22.2

CHAPTER 4: IMPLEMENTATION OF THE CONVENTION : CHAPTERS I AND II

4.01 Ireland has signed but not ratified the *Hague Convention 1993*. Before Ireland can ratify, implementing legislation will be necessary to bring Irish law into line with the Convention, and to provide for the procedures and co-operation between states detailed therein. *While the Convention itself and key elements of its implementation should be set out in the implementing Act, much of the detail of the procedures to be followed by the various authorities could be set out in regulations.*¹

4.02 The Convention leaves considerable scope as to how its provisions should be implemented. In its implementation, Ireland will need to allocate the responsibilities that arise under the Convention amongst the various authorities, public and private. An efficient structure of administration and supervision must be created, in which each body has its own clearly defined functions. The practices and procedures which Ireland establishes to implement the Convention must facilitate its smooth working, and ensure that the standards it sets are upheld.

Preamble

4.03 The influence of the *United Nations Convention on the Rights of the Child, 1989* is evident in the text of the preamble to the 1993 Convention. The text emphasises the principle of the primacy of the best interests of the child, and the need to respect his or her fundamental rights. Family rights and parental rights are not in themselves given prominence. Although paragraph one refers to the importance of the child growing up in a family environment, this is to be understood as a right that accords to the child as an individual, rather than as a right reposing in the family itself. The Explanatory Report states that: "[t]his is in recognition of the right of the child to a family, where his or her personality is formed and developed."²

4.04 Ireland has ratified the *United Nations Convention on the Rights of the Child, 1989*. The provisions of the Irish Constitution, however, contrast with its child-centred approach; the Constitution gives preeminence to parental rights and duties, and the rights of the family.³ Irish adoption law has developed within this context. Although the law must still be viewed in the light of the family rights guarantees in the Constitution, in recent years there has been a tendency,

1 This has been the approach favoured by England, which has decided on a course of an implementing Act providing for regulations, which will contain most of the detailed provision for the implementation of the Convention. See The Department of Health, Welsh Office, *Adoption - A Service for Children: A Consultative Document* (March 1996).

2 G Parra Aranguren, *Explanatory Report*, in *Proceedings of the Seventeenth Session of the Hague Conference on Private International Law*, Tome II, at para.37.

3 Articles 41 and 42 of the Constitution. See *supra*, paras.1.13-1.15.

judicial and legislative, towards greater recognition of the rights of the child.⁴ The courts have attempted to incorporate the concept of children's rights and interests within the existing framework of parental rights.⁵ It should also be noted that the 1993 Convention is consistent with Irish law in the manner in which it respects the rights of the birth parent or parents within the adoption process.⁶

Article 1

4.05 There is nothing in the objects of the Convention, set out in Article 1, which would be problematic in relation to Irish law. The principle of the primacy of the best interests of the child is central to Irish adoption law. Section 2 of the *Adoption Act, 1974* makes the interests of the child central to the adoption system; it provides that the welfare of the child shall be the first and paramount consideration in all decisions of the Adoption Board or any court. The Convention, like Irish adoption law and practice, is based on the assumption that adoption is an institution geared primarily towards finding a suitable family for the child, rather than finding a suitable child for adoptive parents.

Article 2.1

4.06 Article 2 outlines the circumstances to which the Convention applies. It contains a definition of "intercountry adoption" for the purposes of the Convention. Under Article 2.1, neither nationality nor domicile is determinative of the application of the Convention to a particular case. Rather, the important factor is the "habitual residence" of the child in one Contracting State, and of the adoptive parents in another. The adoption will only be within the scope of the Convention where both the child and adoptive parents reside in Contracting States. The Convention will not apply where either the child or the adoptive parents reside in a non-contracting state.

4.07 Despite these limitations on the application of the Convention, consideration should be given, in Ireland's implementation of the Convention, to extending some of the Convention principles to non-Convention cases. This matter will be dealt with in a separate section below.⁷

4.08 Article 2 does not define "habitual residence" for the purposes of the Convention. The prevailing view is that the concept should not be strictly

4 *In re. JH, an Infant, infra*. See also *In re. Article 26 and the Adoption (No. 2) Bill, 1987*, [1989] ILRM 266. A child-centred approach is also evident in recent legislation: see the *Child Care Act, 1991*.

5 William Duncan, *the Constitutional Protection of Parental Rights*, in *Report of the Constitution Review Group*, Appendix, p.612.

6 Article 4.c and Article 29 of the Convention.

7 See *infra* Chapter 8.

defined, but that its interpretation should be left to the good sense of those who have to apply it.⁸

4.09 The Convention is also largely silent on the issue of what categories of persons may adopt under its provisions.⁹ There was considerable discussion, during the course of the preparation of the Convention, as to whether the Convention should confine recognition to adoptions made by married couples, or heterosexual couples.¹⁰ The final text of Article 2.1 refers to adoption by "spouses or a person". The use of the word "spouse" would seem to give primacy to adoptions by married couples, although adoptions by single persons are also clearly within the ambit of the Convention.¹¹ With regard to adoptions by homosexual couples, married or unmarried, the text of the Convention is ambiguous, but the Explanatory Report states that the word "spouses" refers to a heterosexual couple.¹²

4.10 The Convention avoids dealing with this issue in detail, given the diverging domestic laws. Since both the State of origin and the receiving State will have to agree to the adoption going ahead, under Article 17.c, any difficulties may be dealt with, as they arise in each case, between the authorities of the two states.¹³

Ireland as a receiving State

4.11 Under the present Irish law, adoptions may be made in favour of a married couple, a widow or widower, or a relative of the child; they may also be made in favour of other persons, at the discretion of the Adoption Board, where the "particular circumstances" warrant it.¹⁴ If the Irish authorities so wish, they are in a position to insist upon the application of these requirements when determining the eligibility of adopters under Article 5.a. This is already the position under the 1991 Act.

8 See for example, the *Hague Convention on Civil Aspects of International Child Abduction, 1980*, and the Irish implementing legislation, the *Child Abduction and Enforcement of Custody Orders Act, 1991*, where habitual residence is also left undefined. On habitual residence generally, see W. Binchy, *Irish Conflicts of Law*, (1988) pp.98 - 100.

9 Although the authorities in the Receiving State must deem the prospective parents eligible and suited to adopt, under Article 5; see *infra* paras.4.47- 4.48.

10 *Explanatory Report*, *op. cit.* fn.2, para.80 et. seq.

11 The Report of the Special Commission made it clear that Article 2 is not to be seen as implying that adoptions by single people are in any way "abnormal", only that adoption by a married couple is the most common form of adoption. See *Explanatory Report*, *op. cit.* fn.2, at para. 80.

12 *Explanatory Report*, *op. cit.* fn.2, at para.84. However, a suggested amendment by Korea, altering the word "spouse" to "husband and wife" in order to exclude homosexual married couples, was rejected.

13 See *infra* para.1.04.

14 1991 Act, Section 10. See *supra*, para.1.04.

Ireland as a State of origin

4.12 If Ireland is the State of origin, the same eligibility requirements can in effect be insisted upon in the context of the agreement which is necessary under Article 17.c.¹⁵

Article 2.2

4.13 Article 2.2 provides that the Convention covers only adoptions which create a permanent parent-child relationship. The definition of adoption and its legal effects differ widely between states, and within some states different forms of adoption are possible. The Convention definition is minimal, and is intended to be inclusive and to bring within its ambit both full and simple adoptions.

4.14 While it is clear that the Convention does include adoptions that do not necessarily terminate preexisting legal relationships between the child and his or her natural family, there remains some ambiguity in the expression "a permanent parent-child relationship". The English wording was thought to reflect as nearly as possible the French expression "*lien de filiation*".¹⁶ The word "permanent" should probably not be read as "irrevocable". In other words, it may include situations, such as those described by the Supreme Court in *An Bord Uchtála v B and B*,¹⁷ whereby a full transfer of parental rights and responsibilities occurs, but where the adoptions may in certain exceptional circumstances be subject to revocation.

Ireland as a receiving State

4.15 Article 2.2 raises the issue of the recognition of simple adoptions in Irish law. Whilst, traditionally, Irish law has recognised only full adoptions, there has recently been a move, in the *An Bord Uchtála v B and B* and in the *Adoption (No. 2) Bill, 1996*, towards the recognition of adoptions in which the legal ties between the child and the natural parents are not irrevocably severed.

4.16 The *Adoption (No. 2) Bill, 1996* allows for the recognition of some simple adoptions, and to this end, would modify the 1991 Act's definition of a recognisable adoption. The effect of the Bill is discussed above.¹⁸ Although the definition of adoption in the Bill is more inclusive, it is similar to the 1991 Act in that it sets out a detailed definition of a recognisable adoption under Irish law. Under both the 1991 Act and the 1996 Bill, the measuring of adoptions against a definition of a recognisable adoption is the primary means by which

15 See *infra* para.5.66.

16 *Explanatory Report, op cit.* fn.2, at paras.87-94.

17 Supreme Court, 25 July 1996. Discussed *supra* paras.1.37-1.39.

18 *Supra* paras.1.24-1.26.

intercountry adoptions are regulated. In contrast, the Convention regulates intercountry adoptions through co-operation between state authorities and through the imposition of checks and safeguards at every stage of the adoption process. Thus, under the Convention system, any differences and tensions between the adoption systems of the receiving State and the State of origin may be dealt with in the early stages of the adoption process. By the time the placement is made, both states must have agreed to the adoption under Article 17.c, and therefore, by the time recognition of the adoption becomes an issue, any difficulties should have already been resolved. Article 23 provides for the automatic recognition of Convention adoptions.

4.17 It is because of this emphasis on carefully regulated procedure that Article 2 adopts such a wide definition of adoption. The altogether more stringent definition in the 1991 Act and the 1996 Bill sits uncomfortably with this. More importantly, it is contrary to the requirement in Article 23 that Convention adoptions be granted automatic recognition. Quite apart from the issue of whether the Irish authorities should agree under Article 17.c to simple adoptions proceeding, it is contrary to the Convention to impose a restrictive definition of adoption at the recognition stage. It should be remembered also that the Convention's recognition provisions apply to all adoptions made under the Convention and not just those involving parents or children resident in Ireland. The incorporation of the Convention into Irish law will, for the purposes of Convention adoptions, substitute the definition of adoption in Article 2 for the present definition of a foreign adoption in the 1991 Act. Consequential amendment of the Acts will be necessary.

Article 3

4.18 Article 3 presents no problems of implementation. It stipulates that the Convention will not apply to adoptions which have not been agreed to by the authorities of both states, in terms of Article 17.c, by the time the child is 18. Under Irish legislation, adoptions may only be made in respect of children under the age of 18. There is a further requirement that the child, in order to be adoptable, be at least 6 weeks old.¹⁹

Article 4

4.19 Article 4 outlines the responsibilities of a country of origin, or sending country, in an intercountry adoption. These responsibilities are expressed as conditions which must be met before an adoption may take place. Although Ireland's main involvement in intercountry adoptions is as a receiving country, it

¹⁹ 1974 Act, section 8; 1988 Act, section 6. See *supra* para.1.05.

is possible that, from time to time, Ireland will be a country of origin, and provision must be made for this.²⁰

Ireland as a State of origin

4.20 Article 4 applies to all adoptions "within the scope of the Convention". These would include:

1. An adoption effected in the State of origin, following which the child is sent to the receiving State.
2. A case where the child is first sent from the State of origin to the receiving State, and then adopted in the receiving State.
3. A case where the adoption is effected in the receiving State, and the child is only subsequently sent from the State of origin to the receiving State.
4. A case where the child is first sent from the State of origin to the receiving State, and subsequently the adoption order is made in the State of origin.

4.21 In regard to Ireland as a country of origin, it is important to note section 10 (6) of the 1991 Act. That section provides that, in order for an adoption to be made, the prospective adopters must be ordinarily resident in the State for at least one year prior to the date on which the adoption order is made. This section would obviously prove an obstacle to prospective adopters resident abroad who wished to adopt a child in Ireland to be brought to live with them abroad. However, section 10 does not create an obstacle to implementation of the Convention, as a Contracting State is not obliged to allow children to be adopted by persons resident in another state. The requirement of a year's residence does not apply to cases where a child is taken from Ireland to be adopted in another state.

4.22 Also of importance is section 40 of the 1952 Act, which states that: "no person shall remove out of the State a child under seven years of age who is an Irish citizen, or cause or permit such removal."²¹ The section goes on to qualify this by providing that children may be removed from the jurisdiction by or with the approval of their parent, guardian or relative.²² Under the 1952 Act, the

20 In the past, the few cases where Ireland has been a sending country have arisen where children were placed in care with a foster family, which foster family resided in Northern Ireland or the UK. The foster families have then applied to adopt the children, through a Northern Irish or UK adoption society.

21 Section 40 (1).

22 Section 40 (3). A stipulation in the same section to the effect that an illegitimate child under one year old could not be removed from the jurisdiction, even with the approval of the parent or guardian, but only with the approval of the natural mother for the purposes of residing with a relative outside the State, was declared to be unconstitutional in *The State (M) v Attorney General* [1979] IR 73.

consent of one parent only is necessary for the child's removal.²³ Where the child is a non-marital child (as will be the case where the child is to be sent abroad for adoption) the consent of the natural father will not suffice to allow the child to leave the jurisdiction.²⁴ Under the *Guardianship of Infants Act, 1964*, where the parents are married, the general rule is that both parents must consent to the removal of the child from the jurisdiction.²⁵ Where one parent objects, the child can only be removed from the jurisdiction if the parent seeking to remove the child obtains a court order under the 1964 Act, permitting him or her to apply for a passport and remove the child from the country.²⁶ This would apply even where there is a separation agreement or divorce, since in such circumstances the parents remain the joint guardians of the child.²⁷

4.23 Where a child is adopted within Ireland and then taken to reside abroad with the adoptive parents, this section should not cause any difficulties. Where a child is entrusted to prospective adoptive parents and taken outside the jurisdiction for adoption abroad, it would be necessary, under section 40, to obtain the consent of the natural mother to the child's leaving the State. The section would not apply, however, in the case of a child who is not an Irish citizen. *The Commission provisionally recommends that the rule should apply to all children, who are habitually resident in the State.*

4.24 The requirement in Article 4.a of the Convention that the authorities of the State of origin establish, prior to adoption, that the child is "adoptable", is, in relation to adoptions taking place in Ireland, met by Irish law. The legislation provides that the Adoption Board shall not make an adoption order unless the child is of a specified age and status.²⁸

4.25 These provisions are in respect of adoptions made in Ireland under Irish law. Where a child is entrusted to prospective parents living outside the State, and subsequently adopted in a foreign jurisdiction, it is still the responsibility of Ireland, as the State of origin, to ensure that the child is adoptable. At present, under Irish law, there are no criteria of adoptability for children sent from Ireland to be adopted abroad. In the past, children have sometimes been sent abroad for adoption precisely because they would not have been eligible for adoption in this country, usually because they were children of married parents. The Convention does not require any particular standards of adoptability to be applied; under Article 17.c, Ireland would be free to insist on whatever standards

23 *Cosgrave v Ireland* [1982] 2 ILRM.

24 By section 3 of the 1952 Act, "parent" does not include the natural father of an illegitimate child. Section 3 also provides that, where the child is non-marital, "relative" refers only to maternal relatives, which may include "grandparent, brother, sister, uncle or aunt, whether of the whole blood, the half-blood, or by affinity".

25 *Cosgrave v Ireland* [1982] 2 ILRM 48.

26 Under section 11 (10) of that Act.

27 *Family Law (Divorce) Act, 1986*, section 10 (2).

28 1952 Act, section 10; 1964 Act, section 2 (1) (a); 1988 Act, section 3. See *supra* para.1.05. The *Explanatory Report (op cit. fn.2)* states that adoptability is to be determined "according to the criteria of the national law as well as psycho-social and cultural factors".

it felt to be appropriate.²⁹ *The Commission's provisional view is that the same criteria of adoptability should be applied to such children as are applied to children in domestic adoptions. We would welcome submissions on this issue.*

Article 4.b

4.26 Article 4.b sets out the principle of the subsidiarity of intercountry adoption, which requires that the authorities of the State of origin must examine the possibilities of adoption within the State before determining that an intercountry adoption would be in the best interests of the child. Where Ireland is a State of origin, the relevant adoption society or health board will be required to give consideration to other possibilities, before intercountry adoption is decided upon, in the best interests of the child. It will be necessary to adjust procedures regarding adoption societies and health boards accordingly.

Article 4.c

4.27 Article 4.c sets out the obligations of the State of origin in relation to consent. The State of origin must ensure that all those whose consent is necessary for the adoption have been counselled and informed of the effects of their consent. Where the adoption takes place in Ireland, Irish statutory provisions require that the consent of all relevant persons must be obtained, that those persons be informed of the effects of an adoption order and that they must understand its effects.³⁰ Walsh J, in the case of *G v An Bord Uchtála*,³¹ stated that a person's consent must be "such as to amount to a fully informed, free and willing surrender or abandonment of [their] rights ... a consent motivated by fear, stress or anxiety, or consent or conduct dictated by poverty or other deprivations cannot constitute a valid consent." Under present Irish law, the consent of the natural father to the adoption is not required. Under the amendments proposed by the *Adoption (No. 2) Bill, 1996*, there would be a duty to consult with the father, where possible, and to allow him time to make an application for guardianship or custody.³² If this were granted, he could refuse consent to the adoption. The limited requirements for the consent of the father in Irish law do not create problems of compliance with the Convention, since the "persons' ... whose consent is necessary" referred to in Article 4.c (1) are determined by the applicable national law.³³

29 *Infra* para.5.86.

30 1952 Act, section 14, section 39; however, consent may be dispensed with under certain circumstances: see *supra*, paras.1.06 - 1.07.

31 [1980] IR 32

32 *Supra* paras.1.09-1.11.

33 *Explanatory Report, op cit.* fn.2, para.129.

4.28 Although there is no statutory provision as to counselling, in practice, natural parents are fully counselled prior to the making of an adoption order, in a manner sufficient to satisfy Article 4.c (1). The stipulation in Article 4.c (2), that the consent be in writing, also has its equivalent in Irish law.³⁴

4.29 Article 4.c (3) requires that the consents must not have been induced by payments or compensation. This requirement echoes the more general provision in Article 32, that no one shall derive improper financial or other gain from adoption.³⁵ Payments in respect of adoption are prohibited in Irish law by section 42 of the 1952 Act.

4.30 Article 4.c (4) requires the consent of the mother to have been given only after the birth of the child. Irish law is in conformity with this: section 15 (1) of the 1952 Act, as amended by section 8 of the *Adoption Act, 1974*, states that a consent shall not be valid unless it is given after the child has attained the age of six weeks.

4.31 The above legal provisions apply only where the adoption is to take place within Ireland. Where a child is to be sent from Ireland for adoption in another Contracting State, there is no requirement that the natural parents consent to the adoption. The only requirement would be that, under section 40 of the *Adoption Act, 1952*, the natural mother consent to the child's leaving the State. *The Commission provisionally recommends that the basic requirements for consent in domestic adoptions be extended, in the implementing legislation, to cover the sending of a child for adoption abroad.*

Article 4.d

4.32 Article 4.d. deals with the consultation with the child, and the consideration to be given to his or her wishes. It adopts a flexible approach, making the child's participation conditional on age and degree of maturity, and allowing national laws to stipulate in which cases consent is required. This Article should be read in the light of Article 12 of the *United Nations Convention on the Rights of the Child, 1989*, which requires states parties to "assure the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child." Article 12 goes on to stipulate that children should have a particular right to be heard in any judicial or administrative proceedings that affect them.

4.33 Article 4.d requires that, having regard to the age of the child, he or she is to be counselled, and consideration is to be given to his or her wishes and opinions.³⁶ The consent must be given freely, must be evidenced in writing, and must not have been induced by any payment.

34 Article 4 (2); 1952 Act, section 14 (5).

35 See *infra*, paras.7.09 - 7.10.

36 Article 4.d (1) and (2).

4.34 In Ireland, where a child who is the subject of an adoption application is over 7 years of age at the time of the making of the application, the Adoption Board is under a statutory duty to "give due consideration" to the wishes of the child, having regard to his or her age and understanding.³⁷ The Adoption Board Welfare Officers will discuss the proposed adoption with the child, and the child is also consulted at the Adoption Board hearing. Although there is no statutory requirement to consult a child under the age of seven, in practice Welfare Officers will consult children under seven in a manner which would satisfy Article 4.d. There is no statutory duty to counsel a child of any age, or to inform them of the effects of adoption. The duty to consult and counsel the child in cases of Convention adoptions will need to be clarified in Irish law. *The Commission provisionally recommends that the duty to consult the child where appropriate should be set out in legislation and should apply to all adoptions in which Ireland is the State of origin, whether the adoptions are made in Ireland, or are to be made abroad.*

Ireland as a receiving State: Article 4.a and 4.b

4.35 Where Ireland is a receiving State, there may be instances where the Irish authorities object to the State of origin's determination of the child's eligibility to be adopted, or to its determination that intercountry adoption is in the best interests of the child. Two situations need to be distinguished:

1. where the child is adopted in the State of origin and is to be subsequently transferred to Ireland with a view to residence here; and
2. where the child is transferred from the State of origin and subsequently adopted within Ireland.

4.36 Where the adoption takes place outside Ireland, and the Irish authorities view the child as ineligible for adoption, they could in theory use the power of veto, under Article 17.c, to prevent the placement from taking place. The Article 17.c procedure is discussed below.³⁸

4.37 Where the adoption is to take place within Ireland, objection could again in theory be made, at the Article 17 stage, to the State of origin's determination of eligibility. In a case where transfer of the child to Ireland is envisaged before the "entrustment" of the child to the prospective adopters, Article 19 provides a similar possibility of veto by the Irish authorities. The transfer cannot take place until the requirements of Article 17 have been met.

37 1964 Act, Section 3 (2). Section 5 of the *Adoption (No. 2) Bill, 1996* amends Section 16 of the 1952 Act so as to allow a child a right to be heard on an application for an adoption order.

38 *infra* paras. 5.61 - 5.65.

4.38 The Convention thus provides for the possibility of the Irish authorities insisting upon the application of the Irish eligibility criteria in all cases where Ireland is the receiving State. The question arises whether the Irish authorities should so insist. This is a particularly important question in relation to the adoption of marital children. In Ireland, under the 1988 Act, marital children can only be adopted where the parents have failed in their duty towards the child such as to have completely abandoned their parental rights.³⁹ This principle at present applies in the first situation described above, where a child is brought from abroad to be adopted in Ireland. However, where the adoption takes place abroad, and the child is subsequently brought to Ireland, then under *Adoption Act, 1991*, the fact that the child would not have been eligible for adoption in Ireland does not prevent the adoption from being recognised here.

4.39 Where the adoption of a child from abroad is to take place in Ireland, is there a case for a more flexible approach to the domestic eligibility requirements? Suppose, for example, a case in which the foreign parent, a widower, has freely consented to the adoption, but has not satisfied the strict "abandonment" requirement under the 1988 Act. Were the Irish authorities to accept such a child for adoption, the concern would be that the consequent extinguishment of the natural parents' rights would be contrary to the constitutional guarantees of the family based on marriage.⁴⁰ However, in a case where both the child and the natural parents are resident outside the State, there arises the question of whether constitutional provisions as to the rights of the marital family would apply.⁴¹

4.40 Considerations of the child's interests and of practicality would seem to us to favour a more flexible approach, in cases of intercountry adoption. This approach would respect the laws of the State of origin as to the eligibility of its children for adoption. For example, where the law of a particular State of origin permits the adoption of marital children, their eligibility for adoption would be accepted by the Irish authorities, provided the necessary consents were in place. This would respect the policy underlying the 1993 Convention, that the primary responsibility for determining a child's eligibility rests with the authorities of the State of the child's habitual residence. It would moreover avoid the very considerable practical problems that may arise in applying the complex provisions of the *Adoption Act, 1988* to children and parents resident abroad. *We provisionally recommend that, as a general principle in the case of Convention adoptions, where Ireland is a receiving State, the determination of the child's eligibility for adoption made by the competent authorities of the State of origin*

39 See *supra* para.1.05.

40 Article 41 of the 1937 Constitution.

41 On the application of the Constitution to non-Irish citizens, see *The State (Nicolaou) v An Board Uchtála*, [1966] IR 567; *Northhampton County Council v ABF and MBF*, [1982] Vol 2 ILRM 164; *Saunders v Mid-Western Health Board*, *The Irish Times*, 24 April 1987; *EHB v An Board Uchtála*, *op. cit.* On the extra-territorial application of the Constitution, see *Re. Article 26 and the Criminal Law (Jurisdiction) Bill*, [1977] IR 129; *The People (DPP) v Campbell*, (1983) 2 Frewen 131; See generally Kelly, *The Irish Constitution* (1994) pp.435-436, 487-490, and W Binchy, *Irish Conflicts of Law*, (1988), pp.334-339.

under Article 4.a, should be accepted by the Irish authorities. This would apply where the Adoption Board makes an adoption order as well as where the adoption takes place abroad. The Irish authorities should not, as a general principle, object to the adoption proceeding, under Article 17.c, on the sole ground that the child is not eligible for adoption under Irish domestic law. We recognise that, for constitutional reasons, some flexibility in the drafting of these principles may be necessary.

Ireland as a receiving State: Article 4.c and 4.d

4.41 Similar issues arise in relation to consent requirements. It is the function of the State of origin under the Convention to determine whether the necessary consents are in order. However, in a case where Ireland, as a receiving State, had serious doubts as to the validity of a consent to an adoption, it could again in theory make use of its veto under Article 17.c.⁴² As is the case in relation to Article 4.a and 4.b, the procedure will vary according to whether the child is:

1. adopted in the State of origin with a view to residence in Ireland; or
2. transferred from the State of origin with a view to adoption in Ireland.

4.42 Where, as in the first type of situation, the adoption is to take place abroad, Ireland could dispute the adequacy of the consents at the "entrustment" stage, under Article 17.⁴³ Where the adoption is to take place in Ireland, as in the second situation set out above, the Irish authorities could again apply a veto at the entrustment stage. Similarly, where the transfer of the child to Ireland is to take place before the entrustment stage, the objection could be made prior to the transfer, under Article 19.⁴⁴

4.43 Consideration must be given to possible reservations by the Irish authorities to consents which have been determined to be adequate by the competent authorities of the State of origin under Article 4.c or d. Under the Irish law concerning domestic adoptions, the standard of consent to an adoption by the natural parents is a high one.⁴⁵ The procedures for ensuring the adequacy of consent are complex, involving an initial consent to the placement of the child, and a final consent to the adoption, with the possibility that consent may be withdrawn at any stage prior to the final consent. Constitutional issues also arise, particularly in relation to the rules which permit dispensing with the consent of the natural mother. Many states of origin have rules and procedures different to those of Ireland and the possibility of conflict therefore arises.

42 See *infra*, para.5.65.

43 See *infra* paras.5.61-5.65.

44 See *infra* para.5.72

45 *Supra* paras.1.06-1.08.

4.44 Irish consent rules and procedures were designed with domestic adoption in mind. As a matter of practicality, it is not always easy to apply the Irish procedures to children and parents resident abroad. The rules may also in certain respects be unsuitable to intercountry adoption. For example, they allow the possibility that the natural parents' consent be withdrawn at a stage when the child has already been transferred to the receiving State and placed with prospective adoptive parents there; the disruption to the child consequent on a withdrawal of consent at that stage would be best avoided.

4.45 Care must be taken in all cases to ensure that a child is not placed for intercountry adoption without the consent of the natural parents. There must be no possibility that lower standards of consent be applied to intercountry adoption, than apply to domestic adoptions. This need not preclude, however, an adaptation of the procedures for the giving of consent to meet the particular needs of intercountry adoption. Since the Convention depends on co-operation between the competent authorities of Contracting States, it would be in accordance with the spirit of the Convention to accept the State of origin's determination of the sufficiency of consents, in all but the most unusual cases. This flexible approach should apply both in cases where the adoption takes place in the State of origin, and in cases where the adoption is to take place in Ireland, subsequent to the transfer of the child from the State of origin. *On balance, we provisionally recommend that, where Ireland is the receiving State under the Convention, the determination of the competent authorities of the State of origin in accordance with Article 4.c and d, of the sufficiency of consents should, as a general principle, be accepted by the Irish authorities. This should be the case whether the adoption is to be effected in Ireland or in the State of origin.*

Article 5.

Ireland as a receiving State

4.46 Article 5 outlines the responsibilities of the receiving State, which must be fulfilled in each case before an adoption can take place, either in the State of origin or in the receiving State. Since Ireland is most frequently involved in intercountry adoptions as a receiving State, it is of particular importance that there be procedures to implement Article 5 effectively.

Article 5.a

4.47 Under sub-paragraph a, the receiving State must have determined that the prospective adoptive parents are suitable to adopt. This reflects the Irish law.⁴⁶ Where a child is to be adopted in Ireland, having already been brought from abroad, the procedure under the 1952 Act applies. The adoption agency

⁴⁶ Section 13 of the 1952 Act states that the Adoption Board shall not make an adoption order unless satisfied that the applicants are of good moral character, can support the child, and is a suitable person to have parental rights and duties over the child.

or health board will carry out an assessment and, based on this, determine the suitability of the prospective adoptive parents. The assessment will be carried out by a social worker and will consist of a series of interviews. It will address issues of the prospective adoptive parents' motivation, the stability of their marriage, and their capacity to provide for the child. The assessment will then be submitted to the health board or adoption society's placement committee, which will decide on whether to approve the applicants.⁴⁷

4.48 Where the adoption is to take place abroad, in the State of origin, the 1991 Act makes provision for the making of a declaration by the Adoption Board that the applicants are suitable adoptive parents, based on an assessment and report by a health board or adoption agency.⁴⁸

Article 5.b

4.49 Article 5.b stipulates that receiving states must ensure that prospective adoptive parents have received all necessary counselling. Although there is no Irish statutory requirement as to counselling of prospective adopters, in practice, social workers do provide some counselling. *The Commission provisionally recommends that the provision of counselling services to prospective adoptive parents be placed on a statutory footing, in order to comply fully with Article 5.b, and that an obligation should be placed on health boards and accredited agencies to inform prospective adoptive parents of the availability of counselling services.*

Article 5.c

4.50 Article 5.c requires receiving states to ensure that the child will be authorised to enter and reside permanently in the State. The Irish practice is that prospective adopters will usually apply, on the advice of the Adoption Board, for an immigration clearance from the Department of Justice. Where the Adoption Board has already granted a declaration in respect of the eligibility of the prospective adopters, an immigration clearance will usually be granted.⁴⁹

4.51 A significant defect in the Irish system of intercountry adoption is the lack of control or monitoring of the number of children, adopted abroad, being brought into the country by their adoptive parents. The child is brought into the State on foot of the Department of Justice clearance. However, the immigration authorities at airports and ports often do not check these clearances, and, where couples return to Ireland via the UK, there is no immigration control at all in respect of children. Thus, the child can enter Ireland without the knowledge of the authorities, and can remain in Ireland, invisible to the authorities.⁵⁰

47 See *supra* paras.2.04-2.08.

48 1991 Act, section 5 (3) (b).

49 *Supra* para.2.14

50 *Supra* para.2.15

4.52 This situation has several ramifications. It raises obvious concerns for child welfare. From the point of view of children, it means that they may not receive the benefit of the services to which they are entitled. The adoptive parents, for their part, may not know of the back-up and support services available.

4.53 Further, there is ambiguity as to the number of children whom it is possible to bring into the country on foot of an immigration clearance granted to adoptive parents. An immigration clearance is valid for twelve months. Since clearances are often not checked, and are not marked or endorsed by the immigration authorities, it is possible to enter Ireland with more children than the clearance covers, or to enter a number of times during the twelve month period with children legally adopted abroad. Therefore, children may be brought into the State who do not, in fact, have authorization to enter or remain here.

4.54 The adoptive parents will have received the immigration clearance in respect of an assessment that they were suitable to adopt a given number of children. Where, for example, adoptive parents have been assessed as suitable to adopt one child, serious issues relating to the welfare of the child arise where the couple either bring back a number of children at one time, or travel abroad a number of times within the one year, bringing back the "permitted" number of children each time. In addition, there is clearly the possibility that the present laxity in immigration control could facilitate the trafficking or sale of children.

4.55 It is not clear whether a clearance lapses after it has been used once. This needs to be clarified, preferably in legislation. The clearance should become invalid after it has been used to bring the permitted number of children into the country. *We provisionally recommend:*

(a) *that a separate clearance should be issued in respect of each particular child to be brought into the country (this should apply whether the child is to be adopted abroad or in the State);*

(b) *that, upon entry into the State with the child, the (prospective) adoptive parents should be under a legal obligation to inform the authorities of the identity of the child; and*

(c) *that it should be an offence to fail to furnish information in accordance with (b) above, or to use or attempt to use an immigration clearance to obtain entry for more than one child.*

4.56 Greater involvement of the various adoption authorities is also desirable. This is considered further in relation to Article 18.⁵¹ In Convention adoptions, the adoption should not take place where the granting of permission for the child to enter the receiving State is ambiguous.

51 See *infra* paras.5.68-5.71.

4.57 With regard to the child's right to permanent residence in Ireland, if one or both of the adoptive parents are Irish citizens, the child will automatically become an Irish citizen on the making of the adoption order, and will therefore have the right to reside permanently in the State.⁵² If, on the other hand, the adoptive parents are habitually resident in Ireland, but are not Irish citizens, the child would not have the right to reside permanently in Ireland. The present practice by the Department of Justice is that, before the Department will grant an immigration clearance, it requires to see the passports of the prospective adopters. Thus, it appears that a child will not be given permission to enter the State where the adoptive parents are not Irish citizens.

4.58 Under Article 2, the Convention applies to all persons "habitually resident" in Contracting States, rather than to citizens of those states. Under the present system, however, prospective adoptive parents habitually resident in Ireland, who were not Irish citizens, could not adopt under the Convention, as no immigration clearance would be granted, and no assurance could be given - as is required by Article 5.c - that the child they adopt would be allowed to reside permanently in Ireland.

In case of such an adoption, a course open to the Irish authorities would be to veto the placement under Article 17.c. This situation is unsatisfactory. *It is provisionally recommended that provision be made for the granting of a right of permanent residency to children adopted by foreign nationals habitually resident in Ireland, subject to such safeguards as may be necessary to avoid abuse of the immigration process.*

52 *Irish Nationality and Citizenship Act, 1956, section 11 (1).*

CHAPTER 5: ADMINISTRATION AND PROCEDURES

Article 6.

5.01 Under this Article, each Contracting State must designate a Central Authority for intercountry adoption. The Central Authority has the primary responsibility for ensuring that co-operation under the Convention works effectively. However, many of the functions assigned to it may be delegated, to public authorities, accredited agencies or, in some cases, under supervision, to independent bodies or persons.¹ The only functions which must be performed by the Central Authority itself are co-operation with other Central Authorities, the provision of information to the Central Authorities of other states, the elimination of obstacles to the operation of the Convention,² and also, under Article 33, ensuring that appropriate measures are taken where there is a suspected breach of the Convention.

5.02 On the question of the identity of the Central Authority, there are two principal options:

1. The Department of Health could constitute the Central Authority, delegating some of its functions to the Adoption Board and others, particularly in regard to specific adoptions, to health boards and accredited agencies.
2. The Adoption Board itself could become the Central Authority, retaining some of its functions in respect of specific adoptions, while delegating others to health boards and accredited agencies.

5.03 In principle, there is no reason why the Department of Health should not perform the functions to be carried out directly by the Central Authority under Article 7. It should be noted that under the *Child Abduction and Enforcement of Custody Orders Act, 1991*, which implements the *Hague Convention on Civil Aspects of International Child Abduction, 1980*, the Central Authority for the purposes of that Convention is the Minister for Justice.³ There are, however, several reasons why the Adoption Board would be best placed to act as the Central Authority.

5.04 First, the Adoption Board has been at the centre of the adoption system in Ireland since 1953, and already has experience of dealing with intercountry adoption. Under the *Adoption Act, 1991*, it is responsible for making declarations of eligibility and suitability, and for the recognition of foreign adoptions, including intercountry adoptions.

1 Article 22.2

2 Article 7.

3 *Child Abduction and Enforcement of Custody Orders Act, 1991*, Section 8. The relevant Minister was for a time the Minister for Equality and Law Reform.

5.05 Second, the Adoption Board is well placed to act as a channel of information concerning adoption services in this country, and is in a good position to keep under review the operation of the Convention, and to identify problems in its application.

5.06 Third, the Adoption Board will, regardless of whether it is designated the Central Authority, almost certainly be performing a number of key functions under the Convention. We will be provisionally recommending that the Adoption Board have the following responsibilities:

1. To receive all applications for intercountry adoption under Article 14.
2. To act as the competent authority under Article 5, where Ireland is the receiving State.
3. To act as the competent authority under Article 4, where Ireland is the State of origin.
4. To determine that the placement is in the best interests of the child under Article 16.d.
5. To be responsible for agreements under Article 17.c.
6. To be responsible for the preservation of information concerning the child's origin, and for ensuring appropriate access to such information, in accordance with Article 30.
7. To be responsible for matters of accreditation under Articles 10, 11 and 12.
8. To make adoptions under the Convention, and to make the certification provided for in Article 23.
9. To be responsible for the conversion procedure in Article 27.

5.07 If the Adoption Board is to be given this very broad range of responsibilities under the Convention, it is appropriate that it should become the Central Authority. This would be consistent with its central role in domestic adoption. As with domestic adoption also, it would seem appropriate that many of the functions which the Convention confers on the Central Authority in respect of particular adoptions should be delegated to health boards, and / or accredited agencies. *We therefore provisionally recommend that the Adoption Board be made the Central Authority for Ireland, with delegation of some of its functions to health boards and accredited agencies.*

Article 7.

5.08 Article 7.1, which provides for co-operation between Central Authorities, is unproblematic.

5.09 Article 7.2 imposes duties on the Central Authority, which must be discharged directly, and not by delegation. Regarding the provision of information by the Central Authority to the Central Authorities of other states, on domestic adoption law and practice (Article 7.2.a), there should likewise be no difficulties. This function could be performed by the Adoption Board itself.

5.10 Article 7.2.b stipulates that Central Authorities must keep one another informed about the operation of the Convention in their states, and "as far as possible, eliminate any obstacles to its application." The latter requirement raises the issue of the scope of the powers of enforcement enjoyed by the Adoption Board; this issue is dealt with in detail below in relation to Article 33.⁴ Article 7.2.b does not place any very onerous duties on the Central Authority. According to the Explanatory Report, the Article does not impose a duty on the Central Authority "to eliminate directly any obstacles to the application of the Convention, but to take all appropriate measures for that purpose."⁵ So, for example, were a child brought to Ireland to be adopted under the Convention, and the Adoption Board suspected the child might be at risk from abuse by the prospective adoptive parents, the Adoption Board would not be under a duty to take action itself, but would have to alert the relevant health board, which could then take the appropriate action.

Article 8.

5.11 Article 8 obliges the Central Authority to take measures to prevent "improper financial gain" in connection with Convention adoptions. This function may be delegated only to "public authorities", which could be judicial or administrative.⁶ The duty to prevent improper gain would apply in cases where Ireland is a receiving country, as well as where Ireland is the country of origin.

5.12 Irish law prohibits all improper payments made in relation to adoptions. Section 42 of the 1952 Act stipulates that neither adopters, parents or guardians, nor any third party who makes arrangements for the adoption of a child, shall receive or make payments in respect of the adoption. Contravention of this provision is an offence punishable by a fine or one year's imprisonment.⁷

4 See *infra* paras.7.11-7.14.

5 G Parra Aranguren, *Explanatory Report*, in *Proceedings of the Seventeenth Session of the Hague Conference on Private International Law*, Tome II, at para.213.

6 Explanatory Report, *op cit.* fn.5, at para.216.

7 Section 42 (4).

5.13 The Irish practice is that the Adoption Board reports any third party placements, not made through the correct channels, to the office of the Chief State Solicitor, from where the matter may be referred to the Director of Public Prosecutions. Where it appears that there has been an improper payment made, the Adoption Board has at present the power to refuse to make an adoption order, or to refuse to recognise an adoption.⁸

5.14 Under the 1952 Act, the Adoption Board has powers to police the activities of adoption societies.⁹ Where there is any concern, therefore, that an adoption agency is involved in the making of improper payments, the Adoption Board may inspect any relevant documents, and, ultimately, could deregister the society. These powers would be sufficient to allow the Adoption Board to comply with Article 8 where Ireland was a sending country.

5.15 Where a child is adopted in another jurisdiction, and then brought back to Ireland, the Irish authorities, and in particular the Adoption Board, have little control over, or knowledge of, whether payments have been made in connection with the adoption. Adoptive parents who have brought a child back to Ireland will be asked to swear an affidavit to the effect that they did not pay any money in respect of the adoption, aside from normal expenses. Beyond this, the Irish authorities would have to rely on the Central Authority of the State of origin to ensure that no payments were made.

Article 9.

5.16 Article 9 ascribes further duties to Central Authorities, of both the State of origin and the receiving State. These duties may be performed either by the Central Authority itself, or delegated to public authorities or accredited agencies. Article 9.a states that Central Authorities have a duty to "collect, preserve and exchange" information about the child and the prospective adopters, so far as may be necessary to complete the adoption. There would be no obstacle to such exchange of information; under the Irish agreement with Romania, exchange of information already takes place.¹⁰

5.17 Article 9 must be read in the light of Articles 15 and 16, under which reports must be exchanged between the sending and receiving states. It is important to note Article 16.2, under which the State of origin, when transmitting reports on the child to the receiving State, must ensure that it does not reveal the

8 1952 Act, section 13 (1). 1991 Act, section 1 (e). It should be noted that this is not mentioned as an express ground for refusal of recognition under the Convention. See Articles 23 and 24, discussed *infra*, paras.6.01 - 6.04.

9 *Supra* para.1.03.

10 Annex to the Agreement, section 3 (d) - (j); See *supra* para.2.22.

identity of the natural parents of the child, where it would be contrary to the law of the receiving State to do so.¹¹

5.18 Article 9.b requires that Central Authorities, directly or by delegation, "facilitate, follow and expedite" the adoption proceedings. Under the present procedures, the Adoption Board's role does not extend to supervision of the entire adoption proceedings. Once there has been an assessment by the health board or adoption society, and the Adoption Board has made a declaration as to the suitability of the adoptive parents, the prospective adopters are largely left to fend for themselves.¹² The Adoption Board has no further function, unless and until recognition of a foreign adoption is required.

5.19 Clearly, the Convention demands that the Central Authority play a much more substantial role in the adoption process than does the Adoption Board at present. In Ireland, part of this role could be delegated to the health boards or accredited agencies, which could monitor and facilitate the progress of individual adoptions.

5.20 By sub-paragraph c, the Central Authority is obliged to take measures to promote the development of adoption counselling and post-adoption services in the State. Although limited adoption counselling is available at present, there is no adequate provision for post-adoption services.¹³ Such services are particularly important in cases of intercountry adoption, as in many cases children may come from difficult backgrounds, and may have physical, psychological or behavioural problems. Also, since Irish law does not require that the child be placed with the adoptive parents for a probationary period prior to the adoption, post-adoption care is especially needed. It is essential that adequate support services be provided to the family after the adoption has been completed, in order to minimise the number of intercountry adoptions which break down.

5.21 In Ireland, post-adoption care may only be carried out on a voluntary basis, subject to the consent of the family; any mandatory supervision of the adoptive family would risk interference with the rights of the family under Article 41 of the Constitution. Health boards or accredited agencies should be responsible for the provision of post-adoption services, under the supervision of the Central Authority. *We provisionally recommend that the Child Care Act, 1991 should be amended to place a statutory duty on health boards to provide post-adoption services, for both domestic and intercountry adoptions.*

11 Also, under Article 30, states are under a duty to preserve information, and allow the child access to it in accordance with the laws of the State.

12 Support and information services may be provided by private organisations. See *supra* para.2.21.

13 See *supra* para.2.21.

5.22 The requirement, in Article 9.d, that the Central Authority provide the authorities in other states with reports on their experience with intercountry adoption, is unproblematic.

5.23 Article 9.e requires that the Central Authority should, upon request and "in so far as is permitted by the law of their State", provide information to other Central Authorities regarding individual adoptions. The Adoption Board already provides such information to the authorities in other states on occasion. Under the Romanian agreement, information is provided by the Adoption Board to the Romanian Committee on Adoptions.¹⁴ Difficulties with responding to requests for information might, however, arise where the authorities in another state requested that they be provided with a particular adoption order. Under the present law, the Adoption Board may provide evidence of a certified entry in the Register of Adoptions,¹⁵ but it cannot provide an actual adoption order.

Ireland as a State of origin.

5.24 Where Ireland is the State of origin, the authorities in the receiving State may request information as to the identity of the birth parents of the adopted child. Under the present law, in the case of an adoption made in Ireland, the Adoption Board is required to maintain an index to make traceable the connection between the adoption order and the child's birth certificate, thus making it possible to identify the natural parents of the child. However, this index is not open to public scrutiny, and information from it may only be released by order of a court or the Adoption Board, which orders shall only be made if they are in the best interests of the child.¹⁶ While this restriction on the release of information may prevent the Adoption Board from replying to all requests for information, it does not cause difficulties of compliance. Information must be supplied only in so far as is permitted by the law of the State. This position is reflected in Article 16.2, where it is stated that, in the transmission to the receiving State of the report on the child, care must be taken not to reveal the identity of the child's birth parents, if the law of the State of origin forbids their being disclosed.

Articles 10 and 11.

5.25 Article 10 stipulates the standard for the granting of accredited status to adoption societies: they must have the competence to carry out their tasks properly. These standards are then elaborated further in Article 11. At present, under the 1952 Act, there is a system of registered adoption societies.¹⁷ Section

14 *Supra* para.2.23.

15 1952 Act, Section 22 (9). See *supra* para.1.12.

16 1952 Act, Section 22 (5). See *supra* para.1.12.

17 1952 Act, Part IV.

36 (2) (a) of the 1952 Act states that the Adoption Board shall not register an adoption society unless it is satisfied that the society is "competent to discharge the obligations imposed upon registered adoption societies under [the] Act."

5.26 Consideration must be given to which bodies should be accredited for the purposes of the Convention. There are several possibilities.

1. Accredit all registered adoption societies.
2. Accredit a smaller number of bodies, or a single body, on the basis of specific standards of competence in intercountry adoption. These could be:
 - a. bodies which are already registered adoption societies;
 - b. bodies set up specifically to deal with intercountry adoption.
3. Allow Convention adoptions to be administered solely through health boards, which do not require accreditation.

5.27 The accreditation of all registered adoption societies is not recommended. Many adoption societies would be unlikely to meet the standards of competence contained in Article 10. Competence to work with domestic adoptions does not imply the competence to administer intercountry adoption; specialist expertise is required. To date, most Irish adoption societies have not been involved in intercountry adoption, and many of them would find the high costs involved prohibitive.

5.28 The health boards will clearly play an important role in the administration of Convention adoptions. Provision should also be made, however, for the involvement of competent, independent, accredited agencies, to work alongside the health boards in the intercountry adoption system. The establishment of one or more accredited agencies would help to ease the pressure of work on health boards, would alleviate delays, and would be of considerable benefit to prospective adopters by providing information, advice and assistance through the whole of the complex intercountry adoption process.

5.29 The ideal would be for the Adoption Board to establish standards of competence for bodies administering intercountry adoption, based on Articles 10 and 11. All agencies involved in intercountry adoption would have to comply with these standards. The standard should also apply to health boards. It would also be desirable that accredited agencies be subject to the same supervision by the Adoption Board. This could be achieved by a requirement that every accredited agency must register as an adoption society under the 1952 Act. Alternatively, the 1952 Act could be amended in order to apply the Adoption

Board's powers of regulation and supervision, in Part IV of the 1952 Act, to accredited agencies.¹⁸

5.30 Under the accreditation system, any body wishing to become an accredited agency would be obliged to apply to the Adoption Board for accreditation. The Adoption Board would then decide, on the basis of the standards of competence, whether the body was suitable to act as an accredited agency.

5.31 *We therefore provisionally recommend that the Minister for Health, in consultation with the Adoption Board, establish standards of competence for all bodies administering intercountry adoption, and that provision be made for the accreditation by the Adoption Board of agencies to administer Convention and other intercountry adoptions. These agencies should be subject to regulation and supervision by the Adoption Board under the Adoption Act, 1952.*

5.32 Article 11 sets out in further detail the standards for the operation of "accredited bodies". Sub-paragraph (a) stipulates that accredited bodies shall pursue only non-profit objectives. The Article also stipulates that the working of the accredited body should be subject to supervision by the authorities and that the staff of the accredited body be well-qualified.

5.33 Part IV of the *Adoption Act, 1952*, which deals with the registration of adoption societies, provides that they cannot be registered unless they are formed for charitable purposes. The definition of charitable in the Act is ambiguous: section 36 (2) (a) states that the body must be one "which exists only for the purpose of promoting charitable, benevolent or philanthropic objects, whether or not any such object is charitable within the meaning of any rule of law." This somewhat loose definition leaves much to the discretion of the Adoption Board. There are no further guidelines as to the meaning of "charitable" under the Act.

5.34 In practice, when considering the recognition of an adoption society, the Board will take into account the objects and aims of the body as expressed in its Constitution, as well as its sources of funding. Adoption societies may be forced to make some charges in order to survive financially. Some adoption societies charge for tracing services; others, particularly religious societies, require adoptive parents to make a donation if they adopt through the society.

5.35 It is unclear whether "charitable" under the 1952 Act can be equated with "non-profitable" under the Convention. *We provisionally recommend clarification, in statute or regulation, of the exact nature of the charitable status required in respect of adoption societies; a provision expressly requiring them to be non-profit-making would ensure compliance with Article 11.*

5.36 The question arises whether adoption societies, or agencies dealing with intercountry adoptions, should be permitted to receive payments for their services, from adoptive parents. Intercountry adoption is considerably more expensive an undertaking for adoptive parents than adoption within Ireland. Couples undertaking intercountry adoptions already incur substantial costs. A fee paid to an adoption agency, which could be means-tested, directly related to the actual service provided, would make it much easier for an adoption agency to administer intercountry adoptions without State financial support. It need not alter the character of an adoption agency as charitable or non-profit-making.

5.37 As against this, there might be a concern that payments to adoption agencies would give rise in practice to inequalities between prospective adopters. Although, at present, those with meagre financial resources have little chance of adopting from abroad, this situation could only be exacerbated by the imposition of charges by adoption societies. Means-testing in respect of payments would go some way towards meeting this concern.

5.38 A further concern is that a requirement to pay fees might conflict with the statutory right to an assessment for intercountry adoption, under section 5 (3) (b) of the 1991 Act. In addition, there may be concern that payment for an assessment might create an expectation of a positive outcome, and thus put pressure on assessors.

5.39 *On balance, we provisionally recommend that accredited agencies and health boards be permitted to levy some reasonable charges for intercountry services. The level of service provided by the agencies and health boards must not be dependent on any such payments. We recognise that this is a difficult issue and would welcome submissions.*

5.40 With regard to the staffing of accredited bodies, Article 11.b requires that they be staffed and directed by "persons qualified by their ethical standards and by training or experience to work in the field of intercountry adoption." Existing legislation does regulate the staffing of registered adoption societies. Section 36 (3) of the 1952 Act enables the Adoption Board to refuse to register an adoption society if any person engaged on its behalf is not a "fit and proper person" to be engaged in the making of arrangements for adoption.

5.41 Regarding the supervision of accredited agencies (Article 11.c), the Adoption Board has the power, under section 38 of the 1952 Act, to require an adoption society to furnish it with information from time to time regarding "its constitution, members, employees, organisation and activities." The Board also has the power to examine the books of an adoption society, and, under section 37, to cancel the registration of a society under certain circumstances. It would be desirable that the Board should also have these powers in relation to agencies accredited under the Convention, as would be the case if all accredited agencies were required to register as adoption societies.

Article 12.

5.42 Article 12 states that a body accredited in one Contracting State may act in another Contracting State only if the competent authorities of both of the states have authorised it to do so. Under the 1952 Act, it would be possible for a foreign adoption society to operate in Ireland, but only where it had applied to become a registered adoption society under the Act, and had been approved by the Adoption Board. *We provisionally recommend the development of a procedure whereby the Adoption Board may grant authorisation, subject to pre-determined standards, for an overseas agency to carry out specified functions in Ireland in respect of intercountry adoption.*

Article 13.

5.43 There is no difficulty with the stipulation that the name of the Central Authority, its functions, and the names of accredited bodies, be communicated to the Permanent Bureau of the Hague Conference on Private International Law.

Article 14.

5.44 Article 14 provides that persons wishing to adopt a child in a foreign Contracting State, must make their initial application to the Central Authority in their own State. This means that the prospective adoptive parents will be forbidden to apply directly to the Central Authority of the State of origin, as would often be the present practice.

5.45 Under Article 22. 1, which permits the delegation of certain functions of the Central Authority, the application need not be made to the Central Authority itself. Prospective adopters could instead be required to apply to a health board or accredited agency. We recognise that it may eventually in many cases be an agency which the prospective adoptive parents first approach for assistance in processing the application. *We provisionally recommend, however, that, where Ireland is a receiving State, prospective adoptive parents should formally make their application directly to the Adoption Board, with a copy of the application to the relevant health board or accredited adoption agency.*

Article 15.

5.46 Article 15 requires that, once satisfied that the applicants are suited to adopt, the Central Authority of the receiving State must prepare a comprehensive report concerning the applicants, dealing with their background and their suitability to undertake an intercountry adoption. The report must then be sent to the Central Authority in the State of origin.

Ireland as a receiving State

5.47 Under section 5 of the 1991 Act, prospective adoptive parents are assessed by a health board or adoption society. A report is then prepared, setting out whether they are suitable to adopt. On foot of this report, the Adoption Board may declare the applicants to be suitable adoptive parents.¹⁹ This system would allow for substantial compliance with Article 15; however full compliance with that Article may require a more detailed report than is at present provided for.

5.48 While assessments under the Irish legislation enquire into whether the prospective adoptive parents are of "good moral character", have "sufficient means to support the child" and be "suitable person[s] to have parental rights and duties in respect of the child",²⁰ the requirements of Article 15 are more detailed and specific. The report required by the Convention must include information concerning "identity, eligibility and suitability to adopt, background, family and medical history, social environment, reasons for adoption, ability to undertake an intercountry adoption, as well as the characteristics of the children for whom they would be qualified to care." Reports prepared by health boards or adoption agencies in respect of Convention adoptions would have to deal with all of these matters.

5.49 Under the *Adoption Act, 1991*, all applicants are entitled to an assessment for intercountry adoption, provided they meet the requirements of section 10 of the Act, that they be a married couple, a widow or widower, or, if a single person, that in the particular circumstances an adoption order could be made in their favour. Section 5 (3) (b) states that any person "who has applied, or proposes ... to apply, for the effecting in his ... favour of a foreign adoption, may, before the adoption is effected, apply to the Board ..." for a declaration, based on an assessment, that he or she is a suitable adoptive parent.

5.50 In the domestic adoption process, there is no general right to an assessment such as that in the 1991 Act. In the course of our consultations, we have observed some degree of concern that the different procedures for intercountry and for domestic adoption may lead to lower standards being accepted for intercountry adoption, and less stringency and vigilance in the assessment of suitable adoptive parents.²¹ The general right to an assessment for intercountry adoption has created procedural difficulties. Since the health boards are obliged to assess every person or couple that applies to them, the number of assessments they deal with has given rise to delays in the adoption process.²²

19 See *supra* paras.2.04- 2.06.

20 Section 5 (1) (iii) (B) of the 1991 Act and section 13 (1) of the 1952 Act.
See *supra* para.1.04, and paras.2.04-2.08.

21 See *supra* para.2.08

22 See *supra* paras.2.09-2.12.

5.51 There is a need for a more structured and discriminating procedure of assessments for intercountry adoptions, which may result in a reduction of the number of applicants being fully assessed by the health boards. This also is an area in which the intervention of specialist accredited agencies should alleviate some of the burden placed on health boards.

Article 16.

5.52 Article 16 sets out the procedure to be followed by the Central Authority in the State of origin, once it is satisfied that the child is suitable for adoption. A report must be prepared on the child, including information about his/her "identity, adoptability, background, social environment, family history, medical history including that of the child's family, and any special needs of the child." The report, together with proof that the necessary consents have been obtained and the reasons for the proposed placement, is then transmitted to the Central Authority of the receiving State. *We provisionally recommend that, where Ireland is the receiving State, the report provided for in Article 16 should be received by the Adoption Board, with copies sent immediately to the relevant health board or accredited agency. Where Ireland is the State of origin, the report should be prepared by the relevant health board or agency and a copy supplied to the Adoption Board.*

Ireland as a State of origin

5.53 The requirement in Article 16.1.b that the Central Authority "give due consideration to the child's upbringing and to his or her ethnic, religious and cultural background" raises some issues where Ireland is the State of origin. Originally, under the 1952 Act, Irish law contained a provision that a child could only be placed for adoption with persons of the same religion as his or her natural parents. This provision was found to be unconstitutional in the cases of *McG v An Bord Uchtála*²³ and *M v An Bord Uchtála*.²⁴ Under the present law, governed by the 1974 Act, any differences in religion (or absence of religion) among the parties to the adoption must be made known to the natural mother when she gives her consent.²⁵

5.54 The requirement in the Convention to give "due consideration" to religious, ethnic and cultural background is an ambiguous one. The account of the drafting of Article 16 sheds some light on its intentions. It was pointed out by delegates, during the drafting of the Convention, that the requirement to give due consideration to ethnic and religious factors might allow for discrimination against the child on these grounds. In defence of the requirement, it was

23 [1974] 109 ILTR 62.

24 [1975] IR 81.

25 1974 Act section 4.

stressed that its basis was in Article 29 of the *UN Convention on the Rights of the Child*, and that the word "due" was to be interpreted in the light of that Article.²⁶ Article 29 of the *Convention on the Rights of Child* deals with the educational rights of the child, and specifies that the child's education shall be directed towards respect for his or her cultural identity, language and values.²⁷

5.55 Once it is accepted that issues of religion and ethnicity are not rendered determinative by the "due consideration" requirement, but are merely to be noted and considered in the context of assessing cultural compatibility of a child with adoptive parents, there is no conflict between Irish law and the provisions of Article 16.

5.56 Subparagraphs (c) and (d) of Article 16 require the Central Authority to ensure that the necessary consents have been obtained, and to determine whether the placement is in the best interests of the child. Proof of the consents and the reasons for determining that the adoption is in the child's best interests must also be sent to the Central Authority of the receiving State. The identity of the natural parents need not be revealed. *Where Ireland is the State of origin, the determination that the placement is in the child's best interests should, in our provisional opinion, be made by the health board or accredited adoption agency.* This will be a new function (albeit rarely exercised) for health boards and agencies, which at present have no statutory functions with respect to the placement of children for adoption abroad.

Article 17.

5.57 Article 17 deals with the conditions which are necessary for the making of a placement, or, in the words of the Convention, the "entrustment" of the child to the prospective adoptive parents. Under Article 17.a, the State of origin must have verified that the prospective adoptive parents have agreed to the adoption. In particular, where the adoptive parents are a married couple, it must be ensured that both partners have agreed to the adoption. The State of origin must presumably obtain information on the consent of the adoptive parents from the Central Authority of the receiving State. *Where Ireland is the State of origin, the function of confirming the consent of the prospective adoptive parents should, in our provisional opinion, be performed by the relevant health board or adoption agency.*

5.58 Second, Article 17.b requires that the State of origin must, before the decision on entrustment, have ensured that the placement has been approved by the authorities in the receiving State, where such approval is required either by the law of the receiving State, or by the Central Authority of the State of origin itself. In effect, this refers to the "matching" process, which is the responsibility

26 *Explanatory Report, op cit.* fn.5, at para.315.

27 Article 29. c.

primarily of the State of origin, but which must be approved by the receiving State if either State so insists.

Ireland as a State of origin

5.59 The rationale behind the requirement, under Article 17.b, of approval by the receiving State, is that its involvement in the placement process helps to guard against abuses of intercountry adoption, and ensure greater protection for the child. *We recommend provisionally that implementing regulations should provide that, where Ireland is the State of origin in a Convention adoption, the approval of the Central Authority of the receiving country must be obtained before the child can be entrusted for adoption.*

Ireland as a receiving State

5.60 For cases in which Ireland is the receiving State, a body must be designated to give the approval required by Article 17.b. Since the approval should be given by the person or body best informed as to the circumstances of the individual case, *the relevant health board or adoption agency should fulfil this function.* The decision as to approval would in the usual case be made by the placement committee of the health board or agency.

The Adoption Board would then be notified of the approval. Although the giving of Article 17.b approval can appropriately be delegated to health boards and agencies, the Commission is of the opinion that there should be recourse to the Adoption Board in cases where the initial decision is disputed. *We provisionally recommend that the decision of the health board or adoption agency to give or withhold their approval under Article 17.b should be subject to a right of appeal to the Adoption Board, within a reasonable time limit.* We would welcome submissions on whether there should be a right of appeal, and if there is such a right, on the time limit to be applied.

Article 17.c

5.61 Article 17.c is of fundamental importance to the Convention procedure, and has been discussed already in the context of Articles 4 and 5.²⁸ Under this provision, the Irish Central Authority has the right to approve or not approve an individual adoption process, where Ireland is to be the receiving State. Thus, for example, where the Central Authority suspected malpractice or abuse, either in this country or abroad, in the conduct of a particular adoption, it could exercise its veto.

5.62 On the question of which body should have the function of agreeing whether the adoption may proceed, there are two principal options. First, the agreement could be given by the health board or accredited adoption agency concerned. This would have the same advantages as the health board or agency performing the Article 17.b function, in that those bodies would have the most direct knowledge of the circumstances of the individual adoption.

5.63 On the other hand, the power of veto will be the most important where serious legal difficulties arise. In such cases it may be more appropriate that the decision on whether the adoption should proceed be made by the Central Authority itself, which would be better equipped to deal with legal issues. Designating the Adoption Board to perform this function would also have the advantage of ensuring consistency in decisions taken under Article 17.c. *On balance, therefore, we provisionally recommend that the Adoption Board be given the responsibility of deciding whether agreement should be given under Article 17.c.*

5.64 Consideration must be given to how, in practice, the Adoption Board will exercise its function under Article 17.c, and in particular, whether or to what degree it should scrutinise the law of the State of origin before it determines that the adoption may proceed. The question is to what extent the Adoption Board should, in deciding whether the adoption has been processed satisfactorily, measure the law of the State of origin against the standard of Irish law.

5.65 To some extent this matter has already been decided in paragraphs 4.35 to 4.45 above. The veto power in Article 17.c should only be used when necessary; it should not be exercised excessively, or against the spirit of the Convention, and its exercise should certainly not be the occasion of undue delay in the placement process. The scope of the Adoption Board's function under the Article needs to be clearly defined, and the factors it considers when giving its agreement, delimited. In particular, as we have already suggested, Article 17.c should not be used as a means of imposing rigidly the Irish domestic requirements concerning eligibility for adoption or consent on adoptions involving foreign children.²⁹ The underlying spirit of the Convention calls for maximum respect on these matters for the laws and decisions of the child's State of origin. On the other hand, it would be important to use the veto where there is evidence that Convention principles and procedures have been violated, such as where unauthorised payments have been made.³⁰

Ireland as a State of origin

5.66 Where Ireland is the State of origin, the situation is different. The primary responsibility for determining whether a particular placement is appropriate, and whether the adoption should proceed, rests with the authorities

29 See *supra*, at paras.4.40 and 4.45.

30 On the question of whether Article 17.c should be used to avoid simple adoption where Ireland is the receiving State, see *infra* at para.6.12.

of the child's State of origin. The use of Article 17.c by the authorities will not in general arise, because matters will not have been allowed to proceed to that stage. In determining whether the child is eligible for adoption prior to any placement decision, it would be appropriate to apply the Irish domestic rules where Ireland is the State of origin.³¹ Whether the Irish authorities should insist that the overseas parents be eligible according to Irish domestic law is more debatable. Perhaps there should be some flexibility in this matter, although the situation is unlikely to arise often in practice.

Article 17.d

5.67 According to Article 17.d, in order for the child to be entrusted to the prospective adoptive parents, the requirements of Article 5 must also have been already fulfilled, that is, the prospective adoptive parents must have been declared eligible, they must have been counselled, and the child must have been granted permission to enter and reside permanently in the receiving State.

Article 18.

5.68 Article 18 deals further with the obtaining of permission for children to leave the State of origin and enter the receiving State; it provides that both Central Authorities shall "take all necessary steps" to obtain such permission. Delegation of this function is permitted.

5.69 The current practice is that the Adoption Board does not obtain permission for children to leave and enter states, but leaves this to the prospective adopters. However, it would be desirable that there be some supervision of the granting of permission for the child to enter the State. As has already been noted, the granting of an immigration clearance by the Department of Justice, permitting the child to enter Ireland, is usually automatic upon the granting, by the Adoption Board, of a declaration of eligibility in respect of the prospective adoptive parents.³² Nonetheless, Article 18 would seem to place a duty on the Irish authorities to take a more active role in making arrangements for the transfer of the child. Where Ireland is the receiving State, the Central Authority, or a body to which it had delegated the power, would have to both verify that the Department of Justice clearance had been granted, and secure or verify permission for the child to leave the State of origin. This latter task could be accomplished in cooperation with the Central Authority of the State of origin. We have already made recommendations for reform of the procedures governing immigration clearance for the child.³³ *We further provisionally recommend that*

31 See the recommendation *supra* para.4.25.

32 *Supra* paras.2.13- 2.15.

33 *Supra* para.4.55.

in exercising its powers, the Department of Justice should work in close co-operation with the Central Authority and the concerned health board or accredited agency.

Ireland as a State of origin

5.70 In cases where Ireland is the State of origin, the Irish Central Authority would have to ensure that the natural parents had given permission for the child to leave the jurisdiction, where this is required under section 40 of the 1952 Act.³⁴ In addition, the Irish Central Authority would be required to co-operate with the Central Authority of the receiving State to secure authorization for the child to enter that State.

Ireland as a receiving State

5.71 Article 18 also requires that the Central Authorities ensure that the child has permission to reside permanently in the receiving State.³⁵

34 Section 40 (1). This applies where the child is under seven years of age.

35 *Supra* para.4.58.

Article 19.

5.72 According to Article 19.1, the transfer of the child to the receiving State cannot take place unless all the requirements of entrustment, set out in Article 17, have been met. Thus, amongst other things, the agreement of the prospective adoptive parents must have been ensured, and their eligibility and suitability to adopt must have been determined. Also, significantly, there can be no transfer of the child unless both states have agreed to the adoption going ahead in accordance with Article 17.c.

5.73 Under Article 19.2, the Central Authorities of both states must ensure that the transfer of the child takes place in "secure and appropriate circumstances", preferably in the company of the adoptive or prospective adoptive parents. Under the current practice, the Adoption Board would not play a role in the transfer of the child.³⁶ Again, in this instance the Convention demands that the Central Authority exercise substantial supervisory responsibilities, significantly greater than those currently exercised by the Adoption Board, or any of the Irish authorities. *We recommend that the function of ensuring the safe transfer of the child under Article 19.2 be delegated, in the Irish system, to health boards or accredited agencies.*

5.74 Article 19.3 makes provision for cases where the adoption process breaks down, and the transfer of the child does not take place. In such cases, Article 15 and 16 reports are to be returned to the authorities that forwarded them.

Article 20.

5.75 Article 20 places an obligation on Central Authorities to keep each other informed of the progress of the adoption process in individual cases. This function may be delegated, and should be performed, in the Irish system, by health boards or accredited adoption agencies.

Article 21.

5.76 Article 21 makes provision for cases where, the child having already been transferred to the receiving State, it is then determined by the authorities of that State that the adoption is not in the child's best interests. The Article applies only to cases where the adoption has not yet taken place.

5.77 Article 21 outlines the obligations of the Central Authority of the receiving State in these circumstances. The child must be withdrawn from the care of the prospective adoptive parents, and temporary care arranged. A new adoption placement or other long-term care must be arranged for the child, in

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Supra para.5.18.

consultation with the State of origin; if this is not possible, the child may be returned to the State of origin. The child must be consulted in relation to these arrangements, and must consent to them, as appropriate, having regard to age and maturity.

Ireland as a receiving State

5.78 Appropriate procedures to implement Article 21 are already in place. Under the *Child Care Act, 1991* a child may be taken into voluntary or compulsory care by the relevant health board. A child may be taken into voluntary care with the consent of his or her parents or anyone acting in *loco parentis*, where the child is in need of care or protection that he or she is unlikely to receive in the home.³⁷ Compulsory care orders must be made by the District Court. The health board is under a duty to apply for a care order where it appears that a child is unlikely to receive the care and protection he or she requires unless such an order is made.³⁸ The court can make a care order where:

- "(a) the child has been or is being assaulted, ill-treated, neglected or sexually abused, or
- (b) the child's health, development or welfare has been or is being avoidably impaired or neglected, or
- (c) the child's health, development or welfare is likely to be avoidably impaired or neglected".³⁹

5.79 Once a care order has been made, the health board may make arrangements for the child to be either placed in foster care or residential care or adopted, once the conditions for the adoption are met. Alternatively, other suitable arrangements may be made.⁴⁰ In the case of a child the subject of a Convention adoption, these arrangements would have to be made in consultation with the authorities in the State of origin. The Act provides that the welfare of the child is to be paramount in the proceedings. The court shall "in so far as practicable, give due consideration, having regard to his age and understanding, to the wishes of the child."⁴¹

5.80 The current procedures would be sufficient to satisfy Article 21. The function of withdrawing the child from the care of the prospective adoptive parents and arranging for the alternative care of the child would be that of the

37 *Child Care Act, 1991*, section 4.

38 *Ibid.*, section 16.

39 *Ibid.*, section 18 (1).

40 *Ibid.*, section 36 (1).

41 *Ibid.*, section 24 (b).

health boards. The Central Authority would have the responsibility of alerting the health board in a case where the placement of the child had proved to be unsatisfactory.

Article 22.

5.81 Article 22.1 makes provision for the delegation of the functions of the Central Authority to other public authorities or accredited bodies. The delegation is to take place "to the extent permitted by the laws of [the] State."

5.82 The Irish Adoption Acts do not provide expressly for the delegation of the functions of the Adoption Board. However, there is provision for the substantial involvement of health boards and adoption societies in the adoption process, and they perform some functions which are the responsibility of the Central Authority under the Convention.

5.83 By way of summary, we have recommended that health boards and accredited agencies should be permitted to perform the following functions under the Convention:

1. Where Ireland is a receiving State:
 - (a) To determine the eligibility and suitability of the prospective adoptive parents (Article 5.a).
 - (b) To counsel the prospective adoptive parents (Article 5.b).
 - (c) To prepare the report on the prospective adoptive parents (Article 15).
 - (d) To ensure the necessary arrangements have been made for the child to enter the State and reside here permanently (Article 5.c).
 - (e) To obtain the agreement of the prospective adoptive parents to the adoption proceeding, under Article 17.a.
 - (f) To agree to the matching of the child with the prospective adoptive parents under Article 17.b (subject to a right of appeal to the Adoption Board).
 - (g) To ensure that the transfer of the child takes place satisfactorily (Article 19).
 - (h) To provide information on the progress of the adoption, under Article 20.

- (i) In the case of health boards only, to protect and make alternative arrangements for the care of the child if the placement breaks down (Article 21).
 - (j) To provide post-adoption services (Article 9.c).
 - (k) To preserve records relating to adoption (Article 30).
2. Where Ireland is the State of origin, health boards and accredited agencies should have the following functions:
- (a) To establish that the child is adoptable (Article 4.a).
 - (b) To ensure that all consents have been given, under Article 4.c.
 - (c) To counsel the child and consult him or her on the adoption, where appropriate (Article 4.d).
 - (d) To prepare the report on the child, under Article 16.
 - (e) To ensure that the prospective adoptive parents agree to the placement (Article 17.a).
 - (f) To obtain the necessary consents for the child to leave the State (as required by the *Adoption Act, 1952*).
 - (g) To ensure that the transfer of the child is satisfactory (Article 19).
 - (h) To provide information on the progress of the adoption (Article 20).
 - (i) To preserve records relating to adoption (Article 30).

Article 22.2

5.84 Article 22.2 allows for a limited delegation of functions to non-accredited bodies or persons who meet certain standards. This provision is intended to take account of "independent" adoptions facilitated by unregistered agencies and individuals, which are common in countries such as the US. Under present Irish law, functions of the Adoption Board as the Central Authority cannot be delegated to a body other than health boards or accredited agencies. Independent adoptions are not permissible. Section 34 (1) of the 1952 Act provides that it is unlawful for anyone not a registered adoption society or health board, to make arrangements for the adoption of a child under seven years of age. Section 34 goes on to provide that it is an offence to take part in the management or control of a body which makes arrangements for the adoption of children under seven, and is not registered under the Act. *We recommend that, upon ratification of the Convention, Ireland should make the declaration provided*

for in Article 22.4, to the effect that adoptions involving children habitually resident in the State may only take place where the arrangements are made by public or accredited bodies.

**THE CONVENTION PROCESS:
IRELAND AS A RECEIVING STATE.**

(Note: This is the normal process envisaged. It may be modified in bilateral agreements)

<i>Action</i>	<i>Article</i>	<i>Responsible body/bodies</i>
Receipt of initial application.	14	Adoption Board (AB), with copy to relevant Health Board (HB) or accredited agency (AA).
Determination of Eligibility and Suitability of Adopters.	5.a, 17.d.	HB or AA carries out the assessment; AB makes the final determination.
Counselling of prospective adoptive parents.	5.b.	HB or AA.
Preparation of Report on parents.	15	HB or AA, with copy to AB (suitability declaration by AB).
Clearance for entry and permanent residence.	5.c, 17.d.	Department of Justice, with copy to HB or AA
Receipt of Report on Child.	16	AB - copies immediately to HB or AA.
Obtaining agreement of parents.	17.a.	HB or AA. Notify AB.
Agreement on matching.	17.b.	HB or AA. Notify AB.
Approval for adoption to proceed.	17.c.	AB.
Ensuring the transfer takes place satisfactorily.	19.2.	HB or AA. Notify AB.
Facilitate, follow and expedite the adoption.	9.b.	HB or AA.
Provision of information on the progress of the adoption.	20, 9.c.	HB or AA.
Protection of child if the placement breaks down.	21	HB.
Recognition of adoption, where it takes place abroad.	23.	AB.
Provision of post-adoption services.	9.c.	HB or AA.
Preservation of records.	9.a, 30.	AB and HB or AA.

**THE CONVENTION PROCESS:
IRELAND AS A STATE OF ORIGIN.**

<i>Action.</i>	<i>Article.</i>	<i>Responsible body.</i>
Establish the child is adoptable.	4.a.	HB or AA.
Determine intercountry adoption is in the child's best interests.	4.b.	HB or AA. Copy to AB.
Ensure consents have been given.	4.c, 16.c.	HB or AA, with copies sent to AB.
Counsel and consult the child.	4.d, 5.c.	HB or AA.
Facilitate, follow and expedite the adoption.	9.b.	HB or AA.
Prepare report on child.	16.1.a.	HB or AA, with copy to AB.
Determine that the placement is in the child's best interests.	16.1.d.	AB.
Transmit reports and documentation.	16.2	AB.
Ensure the adopting parents agree to the placement.	17.a	HB or AA.
Agree the adoption may proceed.	17.c	AB.
Clearance to leave State (consent of parents).	18	HB or AA.
Ensure transfer is satisfactory.	19.2	HB or AA.
Provide information on the progress of the adoption.	20.	HB or AA.
Preservation of records.	9.a, 30.	AB and HB or AA.

CHAPTER 6: RECOGNITION AND EFFECTS OF THE ADOPTION

Article 23.

6.01 Under this Article, where an adoption is made in a Contracting State, and is certified by the authorities of that State to have been made in accordance with the Convention, the adoption is to be recognised "by operation of law" in other Contracting States. Therefore, all Convention adoptions will have automatic validity in Ireland, as though they had been effected by an Irish adoption order whether or not Ireland is the receiving State or State of origin.

6.02 This position is fundamentally different from that under the *Adoption Act, 1991* and the *Adoption (No. 2) Bill, 1996*, which set out stringent criteria and procedures for recognition.¹ The narrow definition, in both instruments, of foreign adoptions which are recognisable in Ireland, is not compatible with the Convention.² The implementation of the Convention will necessarily involve excluding the recognition principles contained in the Act of 1991 and the 1996 Bill from application to Convention adoptions.

6.03 By Article 23.2, each Contracting State must designate an authority competent to certify an adoption in accordance with Article 23.1; the State must then notify the depository of the identity of the body in question. *It is our provisional recommendation that the body most fitted to fulfil this function would be the Centra.. Authority, the Adoption Board.*

Article 24.

6.04 A Convention adoption may be refused recognition under Article 24 only if it is "manifestly contrary to [the recognising State's] public policy, taking into account the best interests of the child." This is a very restrictive ground of refusal.

Article 25.

6.05 In Article 25, the Convention provides for an exception to the general obligation to recognise Convention adoptions. Where Contracting States have entered into bilateral agreements on intercountry adoption, permitted under Article 39.2, other Contracting States may refuse to recognise adoptions under such agreements, provided that they make a declaration to this effect to the depository of the Convention.

1 See *supra*, paras.1.25- 1.31.

2 See *supra*, para.4.17. For an explanation of the existing law and the difficulties associated with it, see *supra*, paras.1.25-1.31, 2.17 and 2.28-2.31.

Article 26

6.06 Article 26 deals with one of the most difficult issues of intercountry adoption: the effect of the recognition of an adoption made in another State. Article 26 aims to take account of the varying effects of adoptions in different jurisdictions, and in particular of "simple" adoptions.

6.07 Since Article 26 addresses such a delicate issue, it does not contain a comprehensive enumeration of the effects of recognition; rather it lists its minimum consequences. It may be supplemented with additional rules as to recognition in the implementing legislation.

6.08 The aspects of the adoption set out in Article 26.1.a and 26.1.b must be recognised in all cases, while the effects referred to in sub-paragraph (c) need only be recognised in some circumstances. In relation to the first stipulation in Article 26.1.a, that there must be recognition of the legal parent-child relationship between the child and the adoptive parents, there is no difficulty. Section 24 of the 1952 Act provides that an adopted child shall be considered the child of the adoptive parents.³ Similarly, there is no difficulty with the need to recognise the parental responsibility of the adoptive parents for the child (sub-paragraph (b)). This would also be a normal consequence of an adoption under Irish law.⁴

6.09 Under sub-paragraph (c), states must recognise the termination of the legal relationship between the child and the natural parents only "where the adoption has this effect in the Contracting State where it was made." This will create no problems. The difficulty will arise in a case where the adoption did not have the effect of terminating the pre-existing relationship between the child and the parents in the State of origin, that is, where the adoption was a simple adoption. Ireland, as a receiving State or as a third State, would still be obliged to recognise the adoption by operation of law, under Article 23, to the extent at least of recognising the parent - child relationship and the parental responsibility created by it.

6.10 As the law stands at present, it appears that a limited number of simple adoptions, such as those effected in China, can be recognised here. This is the purport of the Supreme Court's decision in *An Bord Uchtála v B and B*⁵, discussed above. In that case, the Supreme Court held that an adoption effected in China, which, under Chinese law, could be terminated in certain circumstances, was nevertheless sufficiently similar to an adoption under Irish law to be capable of recognition here.

3 *Supra* para.1.02.

4 Section 24 of the 1952 Act states that the child shall be considered the child of the adoptive parents as regards "the rights and duties of parents and children in relation to each other."

5 *Supra* paras.1.37-1.39.

6.11 The legal position established by the Supreme Court would be confirmed by the amendments contained in the *Adoption (No. 2) Bill, 1996*. In the case of such an adoption, effected under the Convention, Irish law would recognise it as having the effect of a full adoption. Recognition would include recognition of the effects outlined in sub-paragraphs (a), (b) and (c) of Article 27.

6.12 Although there must remain some ambiguity as to the precise scope of the definition in the 1996 Bill, it is unlikely that it would allow for the recognition of simple adoptions which allow the natural parents to retain some of their parental rights. Under the Convention, where Ireland is the receiving State in respect of such an adoption, what effects should that adoption be given in Irish law? There are several options.

1. The first option is contained in Article 27. Under Article 27, simple adoptions may be converted into full adoptions in the receiving State, provided that the natural parents have consented to the conversion of the adoption in this way.⁶

Conversion of simple adoptions to full adoptions under Article 27 is the approach favoured by the United Kingdom.⁷ This has the advantage of helping to avoid a two-tier system of effects for Convention adoptions.

However, there will be some simple adoptions where either the natural parents refuse to agree to the conversion of the adoption, or it is not possible to contact them to obtain their consent. One solution would be for the receiving State to refuse to sanction (under Article 17) any adoption where conversion to full adoption is not possible.

2. A second option would confine recognition to the minimum consequences of an adoption under Article 26: those set out in sub-paragraphs (a) and (b). On this approach, neither irrevocability, nor the termination of the rights of the natural parents, would be recognised as a consequence of the adoption. The only consequences of the adoption in Irish law would be the establishment of a new parent-child legal relationship with the adoptive parents, and the recognition of the parental responsibility of the adoptive parents for the child. Beyond this, it would remain unclear what the effects of the adoption would be in relation to matters such as succession or citizenship. This lack of clarity would be the major disadvantage to this approach.

6 Under the 1996 Bill, simple adoptions may be converted to full adoptions, but only in the State of origin. If the adoption is so converted, the consent of the natural parents to the conversion will be sufficient to satisfy the consent requirements for the recognition of the adoption in Ireland. At present, many adoptive parents who adopt under simple adoptions abroad, and cannot have the adoption recognised here, re-adopt the child under the 1988 legislation, on the grounds that the natural parents have abandoned their parental rights.

7 Department of Health, Welsh Office, *Adoption - A Service for Children: A Consultative Document*, (March 1996)

3. Another option would be to recognise the simple adoption as having the same effects in this State as it has in the State where it was made, that is, the State of origin. This approach has been criticised as creating uncertainty.⁸ It would result in a system whereby adoptions from each State of origin would have differing legal effects in Ireland. Until the effect of an adoption from a particular country of origin had been interpreted by the Irish courts, the effect of an individual adoption would remain unclear. Furthermore, it might be difficult to obtain information on the law concerning the effects of adoption in some states of origin. Once the Convention has been fully implemented in all Contracting States, however, an efficient system of communication between Central Authorities should facilitate the gathering of information on adoption laws, and this should alleviate to some extent the problem of uncertainty.

The advantage of this approach is that it would ensure that the rights of the natural parents, as they had been defined in the State of origin, would not be circumscribed or defeated.

We are at this stage uncertain as to the most appropriate approach. *We provisionally recommend that the conversion option (option 1) should be employed to the greatest extent possible. However, in the absence of the possibility of conversion, we are not in favour of a complete veto on simple adoption, and in such exceptional circumstances we provisionally recommend the approach adopted in option three above.* We do, however, have some concerns for the implications of option 3 for the equal status of the child. We would welcome submissions on this issue.

Adoptions effected in third countries

6.13 Article 27 refers only to the capacity of receiving states to convert full adoptions into simple adoptions. Where Ireland is not the receiving State, there is still an obligation under the Convention to recognise intercountry simple adoptions effected in states party to the Convention; in these circumstances there is no possibility of conversion to full adoption. Where, for example, an intercountry adoption is effected in one Contracting State and recognised in another, both of which recognise simple adoptions, and the family later settle in Ireland, the recognition of the adoption in this country could create significant difficulties. Ireland would be under an obligation to recognise the adoption.

6.14 There are several options.

1. The adoption could be recognised as having the effects which it has in the State of origin. This has the disadvantage of uncertainty, referred to above, and the advantage of preserving existing rights and duties.

⁸ *ibid.*, at para.4.33.

2. The adoption could be recognised as having the effects which it has in the receiving State. This would have the advantage that the adoption would have the same effect as it had in the State where the child was most recently habitually resident; considerations of continuity would therefore favour this approach. Also, it may prove easier to gather information on the effects of adoptions in receiving states than on the effects in states of origin.
3. The minimum consequences of the adoption could be recognised under Article 26.a and b. This has the disadvantage referred to above, that the exact status of the child would remain unclear.
4. The method of implementation favoured by the UK, which faces similar difficulties, is also of interest here. The UK has decided on a course of recognising simple adoptions as full adoptions, but giving the natural parents the right to apply for a contact order in relation to the child. This is described as the most satisfactory solution in that it "puts the child on the same footing as any other adopted child and gives it a clear and permanent status under the law of the United Kingdom."⁹

There are disadvantages to this approach. In the first place, it is questionable whether it protects the rights of the natural parents fully. More generally, the legal situation it creates, in relation to the termination of the rights of the natural parents, is ambiguous. Implementation by this means in Ireland would necessitate an amendment of section 24 of the 1952 Act, in so far as it affects Convention adoptions.¹⁰

Our provisional recommendation is in favour of option two above.

Article 26.2

6.15 Article 26.2 deals with the status of children the subject of intercountry adoptions. It does not stipulate the absolute equality of all adopted children, but it provides that, where an adoption has the effect of a full adoption, the child must enjoy "rights equivalent" to those of a child adopted under domestic law, in all states where the adoption is recognised. The requirement of equal treatment, therefore, applies only to full adoptions.

6.16 The Convention does not elaborate on the term "rights equivalent". However, the provision should be interpreted in the light of Article 21 of the *Convention on the Rights of the Child, 1989*, which imposes a duty on states to ensure equivalent standards in national and intercountry adoption. In this

9 *ibid.*

10 Section 24 states: "the [natural] mother or guardian shall lose all parental rights and be freed from all parental duties with regard to the child upon the making of an adoption order."

context, Article 26.2 may be interpreted narrowly as outlawing only direct discrimination by the State, rather than creating rights in both public and private law.¹¹

6.17 One area where it would be necessary to ensure equality of treatment is in relation to nationality. Under the present law, where a child is adopted abroad (by an Irish citizen) and that adoption is recognised and entered into the Register by the Adoption Board, the child becomes an Irish citizen, subject to the conditions of section 11 of the *Irish Nationality and Citizenship Act, 1956*.¹² In such a case, the child will enjoy equal rights, and Article 26.2 will be satisfied.

6.18 Where the adoptive parents are not Irish citizens, but are resident in Ireland, the recognition of the adoption in Ireland would not automatically grant the child citizenship. This may create an inequality between some children adopted through intercountry adoption, and other adopted children; however it is an inequality based solely on citizenship, not on the fact that the adoption was made outside the State.

6.19 Article 26.3 contains a proviso to the section as a whole, to the effect that states may afford children more favourable treatment than that provided for in the Article. This could in any case have been regarded as implicit in the Article, and raises no further issues.

Article 27

6.20 The conversion procedure provided for in Article 27 raises the question of the standard of consent which the natural parents will be required to give to the conversion of the adoption to a full adoption.

6.21 Article 27.b sets out the requirements for consent in terms of Article 4.c and d. The consents required by Article 4 must have been given for the purpose of an adoption which has the effect of terminating the pre-existing legal parent-child relationship.

6.22 In domestic adoptions, Irish law requires a very high standard of consent. In many cases, the law of the State of origin may not be as exacting in its requirements for consent as Irish law. To require the authorities of the State of origin to comply with Irish procedures in obtaining consents would be to create unnecessary complications. Against this, however, care must be taken that there is no possibility of an adoption being converted to a full adoption without the full, informed and free consent of the natural parents.

11 William Duncan, *Conflict and Cooperation: The Approach to Conflicts of Law in the 1993 Hague Convention on Intercountry Adoption*, in Nigel Lowe and Gillian Douglas, ed., *Families Across Frontiers* (1998).

12 That section provides that the acquisition of citizenship is conditional upon the adopter or, where the adoption is by a married couple, either spouse, being an Irish citizen.

6.23 Under the present law, contained in the 1991 Act, it is a condition for the recognition of an adoption that consents be validly obtained under the law of the State of origin. Where there is a simple adoption, however, the consents of the natural parents to that adoption will not be sufficient. The consent must be to the termination of the legal rights of the natural parents.

6.24 Under the *Adoption (No. 2) Bill, 1996*, where a natural parent gives consent to the conversion of a simple adoption to a full adoption, this is sufficient to allow for the recognition of the adoption in Irish law as a full adoption.¹³

6.25 It is desirable that a specific standard of consent be established for cases in which an adoption is converted from simple to full. *Where the State of origin is a party to the Convention, it is our provisional recommendation that Irish law should be limited to requiring that the consent requirements of the State of origin be complied with, provided they are in accordance with Article 4.*

13 Section 10 (a) (i)

CHAPTER 7: GENERAL PROVISIONS

Article 28

7.01 Article 28 provides that the Convention does not affect any national law of a State of origin which requires that the adoption take place within the State of origin, or which prohibits a child from being placed for adoption abroad. Irish law contains no such prohibition. Given the fact that Ireland is a State of origin in only a few rare cases, there would appear to be no need to require all adoptions to take place within Ireland.

Article 29

7.02 This provision regulates contact between the prospective adoptive parents and those taking care of the child, in the early stages of the adoption process.¹ Contact may occur only if it is within the family, or if it is in accordance with conditions established by the authorities of the State. The purpose of this provision is to prevent pressure being put on the natural parents to give a child up for adoption.

7.03 In relation to Ireland as a receiving country, it has been the experience to date that contact does often take place between the prospective adopters and the natural parents, prior to the adoption. In some cases there may have been an existing non-family relationship between the adopter and the child; this would be the case, for example, in many adoptions by development workers. In Ireland, it is generally the case that, during the assessment process, assessors seek to establish whether the adoptive parents are open to communicating with the birth parents. It has been the experience that such communication can be beneficial, particularly in regard to issues of identity and culture. Ireland, as a receiving country, would have little control over whether there would be contact in the State of origin, and this would depend on the regulatory "conditions" set out by states of origin.

7.04 Where Ireland is a country of origin the relevant health board or accredited agency would have to ensure that no inappropriate contact occurs in the early stages of the adoption process.

Article 30

7.05 The purpose of Article 30 is to ensure the preservation of information relating to the origins of children adopted under the Convention. It stipulates

¹ The (conditional) prohibition on contact applies where the assurances and consents required by Article 4 (a) to (c) and Article 5 (c) have been obtained.

that states must ensure that such information is preserved, and that the child has access to it in accordance with the laws of the State.

7.06 It is already the practice of the Adoption Board to retain every document and piece of correspondence in respect of adoptions and adoption applications. There is a large number of files in the Board's possession, extending back to the first adoptions made in the State. Much of the information on past adoptions is, however, contained in the records of adoption societies. In a small number of cases, information is in the possession of private individuals. The status of records in the possession of bodies other than the Adoption Board, the ownership of them and rights of access to them are unclear. In Article 30, the duty to preserve information is on all "competent authorities"; this refers to more than just the Central Authority. It would also place a duty on health boards or accredited agencies to preserve information.

7.07 Article 30 requires that the State grant the adopted child access to information concerning his or her origins; however, this is conditional only: "in so far as is permitted by the laws of that State". Under the present Irish law, an adopted person has no right to be informed of the identity of his or her natural parents. By section 22 (5) of the *Adoption Act, 1952*, the Adoption Board must keep an index which allows connections to be traced between the Adopted Childrens' Register and the Register of Births.² The same section provides, however, that the index shall not be open for public inspection, and that details shall only be released from it by order of a court or of the Adoption Board. Such an order may only be made if it is in the best interests of the child.³ The law of data protection also affects the position on the availability of this information, where it is computerised; data protection regulations of 1989 state that the provisions of section 22 (5) shall prevail in the interests of the data subjects and other individuals concerned.⁴

Article 31

7.08 Article 31 addresses the issue of data protection. It provides that personal data gathered under the Convention is to be used only for the purpose for which it was originally gathered. This mirrors the Irish law of data protection. Under section 2 of the *Data Protection Act, 1988*, it is provided that "data shall be kept only for one or more specified and lawful purposes."⁵ There

2 *Supra* para.1.12.

3 *Adoption Act 1976*, section 8. In *PB v AL*, [1996] 1 ILRM 154, Costello P held, in reference to section 8, that: "[I]his section not only prohibits orders made under s. 22 (5) of the *Adoption Act, 1952* ... but also prohibits the court from making an order for discovery etc. or otherwise in relation to the giving or obtaining of information from the Board. Thus, the section confers what in other contexts is referred to as 'privilege' on the Board in respect of all its records. But this privilege is subject to one proviso - ... the best interests of any child'.(at p.159).

4 *Data Protection Act, 1988 (Restriction of Section 4) Regulations of 1989*, SI No. 81 of 1989. See Robert Clark, *Data Protection Law in Ireland*, (1990) p.80.

5 Section 2 (1) (c) (i).

must be no use or disclosure of this data which would be incompatible with that lawful purpose.⁶ This law would only bind the Adoption Board in respect of all records kept on computer; the Data Protection Act does not apply in the case of manual files.⁷ However, section 8 of the *Adoption Act, 1976* stipulates the privacy of all records of the Adoption Board. It provides that a court may only make an order for the release of information from the Adoption Board's records where it is satisfied that it is in the best interests of the child to do so.

Article 32

7.09 Article 32 stipulates that no one shall derive improper financial or other gain from intercountry adoption. This provision echoes the prohibitions on unauthorised payments in Article 4.c.(3) and d.(4)⁸ and the stipulation, in Article 11.a, that adoption agencies be non-profit-making.⁹ Also, Article 8 imposes a duty on Central Authorities to prevent any improper gain in connection with adoption.¹⁰ Under Irish law, payments in respect of adoptions are prohibited¹¹ and it is stipulated that adoption societies be non-profit making, although this does not prevent them from receiving some voluntary donations.¹²

7.10 Article 32 goes on to limit payments to "reasonable professional fees" (Article 32.2) and to prohibit "unreasonably high" remuneration of employees of bodies involved in the adoption process (Article 32.3). The determination of "reasonable" is left to individual Contracting States, and the Convention does not prescribe any measures of enforcement, or stipulate responsibility as to supervision. This matter should be monitored by the Central Authority, in its role in supervising health boards and accredited agencies.

Article 33

7.11 Article 33 makes provision for methods of enforcement. It states that, where a "competent" authority is aware that the Convention is not being respected in any way, it must inform the Central Authority, which must then take "appropriate measures". This imposes a duty on the Central Authority in respect of both individual violations and attempted violations of the Convention, as well as more systematic lack of respect for its provisions.¹³

6 Section 2 (1) (c) (ii).

7 Under section 1 of the Act, "Data" means information in a form in which it can be processed.

8 *Supra*, paras.4.29 and 4.33.

9 *Supra*, paras.5.32-5.39.

10 *Supra*, paras.5.11-5.15.

11 1952 Act, section 42.

12 *Supra*, paras.5.33-5.34.

13 G Para Aranguren, *Explanatory Report*, in *Proceedings of the Seventeenth Session of the Hague Conference on Private International Law*, Tome II, at para. 536.

7.12 The obligation to take appropriate measures must be seen in the light of Article 7.b, which places a duty on Central Authorities to directly, without delegation, eliminate any obstacles to the application of the Convention.

7.13 Appropriate measures of enforcement to be taken would depend on the nature of the violation. In respect of violations occurring in this State, at present the Adoption Board has the power to deregister adoption societies, and to refuse to recognise adoptions. In respect of violations which have occurred in the course of an intercountry adoption, outside this jurisdiction, there are several measures that the Board, as the Central Authority, could take. If the adoption has not yet been completed, the Adoption Board could refuse to proceed with the adoption, as is permitted under Article 17 (c). Where there was a serious violation in respect of an adoption which had already taken place, for example where it emerged that an adopted child had been abducted, or that payments had been made to the child's parents, recognition of the adoption could be refused under Article 24, on the grounds that it would be manifestly contrary to the public policy of the State. The Adoption Board also has the power to report actions which constitute offenses under Part V of the 1952 Act. These include the making of payments in respect of adoption and the furnishing of false information to the Adoption Board, and are punishable by fines and imprisonment.

7.14 Having regard to the above powers of enforcement, it would appear that the Adoption Board already has adequate powers to police the Convention.

Article 35

7.15 This provision places a duty of the authorities of Contracting States to act "expeditiously" in the adoption process. At present, there are serious problems with delays in assessments for intercountry adoption. This issue has been discussed above.¹⁴

Article 39

7.16 Under Article 39.2, Contracting States may enter into bilateral agreements with other Contracting States, in order to improve their application of the Convention. Ireland already has a bilateral agreement with Romania.¹⁵ In respect of any further bilateral agreements which Ireland may enter into, the agreement must not derogate from certain sections of the Convention, and a copy must be transmitted to the depository of the Convention.

14 *Supra*, paras.2.09-2.12.

15 *Supra*, paras.2.22-2.25.

CHAPTER 8: EXTENT OF APPLICATION OF THE CONVENTION

8.01 In this chapter, we consider briefly the extent of application of the rules and procedures established by Ireland in its implementation of the 1993 Convention. The scope of application of the Convention itself is determined by its terms. It will be a question for Ireland, however, how far the new procedures, administrative structures, and rules for recognition of adoptions, should be extended to apply to adoptions not strictly within the terms of the Convention. This question arises, first, in the context of retrospectivity.

Retrospectivity

8.02 It would be possible for Ireland to apply the rules of the Convention, as implemented in Irish law, to adoptions which took place before the Convention was ratified, or which had at least been begun at that time. Several distinct categories must be examined.

8.03 1. Existing Convention adoptions between third states

Under Article 23, Ireland would probably be obliged to recognise adoptions which had taken place between two Contracting States before Ireland ratified the Convention, since these would be adoptions carried out under and in accordance with the Convention. There would, in any case, be no policy reason why such adoptions should not be recognised, since they would have been subject to all the necessary safeguards and procedures.

8.04 2. Existing adoptions in which Ireland is the receiving State or State of origin

This may be:

1. Where the adoption order has already been made at the time of ratification; or
2. Where the adoption process has been begun at the date of ratification of the Convention, but the adoption order has not yet been made.

8.05 Article 41 is the relevant provision here. It states that the Convention applies "in every case where an application pursuant to Article 14 has been received after the Convention has entered into force in the receiving State and the State of origin". The effect of Article 41 is that, in an adoption involving Ireland, where prospective adoptive parents had already made an application to adopt at the date of Ireland's ratification of the Convention, the provisions of the Convention need not be applied to that adoption process, and the adoption need not be recognised under the Convention procedure.

8.06 Therefore, the Convention does not apply to adoptions involving Ireland which either took place before the Convention was ratified, or for which the adoption process was already underway at the time of ratification. Nevertheless, it would be possible for Ireland, in its national law, unilaterally to extend the application of some of the Convention rules to such adoptions, under certain circumstances.

8.07 Retrospective application might, for example, make possible the recognition of some simple adoptions which are at present not recognised in this country. This would benefit children, already resident in Ireland, who have been adopted abroad through unrecognised simple adoptions.

8.08 In principle, the recognition of the maximum number of existing adoptions possible, within the necessary legal constraints, must be regarded as desirable, in the interests of the child. There would be considerable difficulties attached to the retrospective recognition of simple adoptions, however. The 1993 Convention is based on a carefully regulated and monitored adoption process, at the conclusion of which an adoption, provided it creates a permanent parent-child relationship, is given automatic recognition. In the case of an adoption which has taken place, or begun, before the Convention procedures have been put in place, equivalent safeguards may not have been applied. Documentation and consents, required under the Convention, may not have been obtained, or it may be difficult to obtain evidence of them. The rights of the natural parents must not be discounted in a desire to provide greater recognition to foreign adoptions. In the light of this, it would not be possible to justify automatic recognition of existing adoptions from Contracting States on the same basis as Convention adoptions.

8.09 A better approach would be to apply the Convention definition of adoption in such cases, but to make separate legislative provision, which would allow the adoption to be recognised under the expanded definition, but only where there was evidence that certain standards had been met in the adoption process. These standards would be based on the standards of the Convention. Documentation from the State of origin authorities would be required, verifying good practice in the adoption, and proof of consents would also be necessary. This approach could be seen as repeating the 1991 Act's imposition of strict criteria for recognition. However, the test would not be as exclusionary as that in the 1991 Act or the 1996 Bill, and would be based on good practice, rather than on the legal effect of the adoption.

8.10 Under such an approach, the effects of the adoption in Irish law could be, as outlined in Chapter 4, either:

1. That the adoption would have the effect it had in the State of origin; or
2. That the adoption would have the minimum effect possible under the Convention, recognition of the legal parent-child relationship between

the child and adoptive parents, and of the parental responsibility of the adoptive parents for the child.

8.11 There is a further option, if the implementing legislation contains a procedure by which simple adoptions can be converted in Ireland to full adoptions under Article 27. The conversion procedure could be applied to existing adoptions, and the present definition of a recognisable adoption (in the 1991 Act) left intact for the purposes of such adoptions. Existing unrecognised simple adoptions could be converted in Ireland to full adoptions under Irish law on the production of consents from the natural parents to such conversion. This procedure would have the advantage that there would not be any concern that the rights of the natural parents had been disregarded. It would give the children concerned equal status to children adopted under Irish law, and would effectively assimilate such adoptions into the existing legal structure of adoption. The disadvantage of this approach, however, would be that the necessary consents may not be obtainable in some cases, and so some adoptions may still be left unrecognised.

Non-Convention States.

8.12 The question also arises as to whether Ireland should apply procedures, developed in the implementation of the Convention, to adoptions from non-contracting states. Under the Convention itself, the rules and procedures will clearly only apply to Contracting States. Again, however, there is the possibility that Ireland could, of its own accord, apply some of the procedures as set out in the implementing legislation to adoptions from non-contracting states of origin, by bilateral agreement with those states.

8.13 A more difficult question is whether, in the absence of bilateral agreement, any of the Convention principles should be applied to adoptions from non-contracting states, replacing the present law as contained in the *Adoption Act, 1991*. There are several possible approaches.

1. Irish law could apply the wider Convention definition of a recognisable adoption as any adoption that creates a "permanent parent-child relationship", to non-Convention states. The law would have to impose an additional layer of regulation in respect of non-Convention states, however, prior to the recognition of their adoptions here. Recognition of an adoption would have to be based on evidence of standards equivalent to those in the Convention, and proof of consents would have to be forwarded from the State of origin. The drawback of this approach is that to some extent it resembles the stricter definition of recognisable adoptions in the 1991 Act and 1996 Bill. The only difference would be that the criteria for recognition would be primarily concerned with good procedure, rather than degree of identity to an Irish adoption.

2. The second possible approach is more grounded in procedure. It would require parents adopting from a non-Convention State to submit the necessary documentation, demonstrating good practice in the adoption, to the Adoption Board, prior to the making of the adoption order in the State of origin. The Adoption Board could then examine this documentation, which would include consents, and ensure that it was in order. If the documentation was not satisfactory, the Adoption Board would have the power, similar to that under Article 17 of the Convention, to prevent the adoption from proceeding. Immigration clearance for the child to enter Ireland would only be given where the adoption had been declared to be satisfactory under this procedure. In this system, an adoption which, in the opinion of the Adoption Board, would not be capable of recognition in Irish law, would be unlikely to proceed to the placement stage and would certainly not proceed to the stage where the child was transferred to Ireland. Any adoption which did so proceed would be recognisable in Irish law. The advantage of the procedure is that it allows any difficulties to be dealt with prior to the making of the adoption order.

Under this procedure, whether an adoption was recognisable could be determined either:

- a. By the broad definition of adoption contained in Article 2 of the Convention; or
- b. By the present definition in the 1991 Act (or the definition as amended by the 1996 Bill).

If the latter definition were to be applied, adoptions could be vetoed by the Adoption Board on the grounds that they did not have sufficient identity with an Irish adoption as defined in the legislation.

If the former, wider, definition were employed, the adoption could not be vetoed by virtue alone of the fact that the adoption was a simple adoption. It could only be vetoed on the grounds of poor practice.

8.14 *We provisionally recommend that the Article 27 conversion mechanism be made applicable retrospectively to adoptions which have not been entitled to recognition, because they did not have the effect of terminating the legal relationship between the child and the biological family. In making this provisional recommendation, we emphasise the requirement that the appropriate consents must have been obtained.*

8.15 *We further provisionally recommend that the same mechanism continue to be available in future for non-Convention adoptions which are not entitled to recognition because they do not have the effect of terminating the legal relationship between the child and the biological family. Again, we emphasise the requirement that the appropriate consents must have been obtained. We recognise that there*

may be difficulties with the application of this procedure to non-Convention adoptions, and we welcome submissions on this issue.

Adoptions by Non-Irish Residents in Non-Contracting States

8.16 Consideration could also usefully be given to extending the recognition standards contained in the Convention to adoptions effected abroad, in favour of persons habitually resident outside Ireland, in a State not a party to the Convention. At present, to be recognised in Ireland, such adoptions must satisfy the test of a recognisable adoption under the 1991 Act. This test would seem to be unduly onerous in relation to such adoptions. A more practical approach might be to recognise these adoptions as having the effect which they had in the State in which the adoptive parents were habitually resident at the time of the adoption. This would be similar to the approach discussed above in relation to Convention adoptions in which Ireland is not involved as a State of origin or receiving State. While we recognise that this may create a degree of uncertainty we believe that it is the best course to follow, having regard to the paramount importance of the rights of the child. *We provisionally recommend that the definition of foreign adoption in section 1 of the 1991 Act should not apply to an adoption recognised under sections 2, 3 and 4 (i.e. on the basis of the domicile or residence of the adopting parents in the State of Adoption) and that such adoptions should be entitled to recognition except where recognition would be manifestly contrary to public policy, taking into account the best interests of the child. In any such case, where the adoption does not have the effect of terminating the pre-existing legal relationship between the child and the mother or father, the effects of the adoption should be the same as they were in the State where the adoption was granted. In all other cases, the adoption should be treated as if it were made in Ireland.*

SUMMARY OF PROVISIONAL RECOMMENDATIONS

Implementation of the Convention

1. While the Convention itself and key elements of its implementation should be set out in the implementing Act, we provisionally recommend that much of the detail of the procedures to be followed by the various authorities should be set out in regulations. (para. 4.01)

Ireland as a State of Origin

2. The Commission provisionally recommends that the rule in section 40 of the *Adoption Act, 1952*, that no child may be removed from the jurisdiction without the consent of a parent, guardian or relative, should apply to all children who are habitually resident in the State. (para. 4.23)
3. The Commission's provisional view is that, where Ireland is the State of origin in a Convention adoption, the same criteria of adoptability should be applied to children who are entrusted to prospective adoptive parents for adoption outside the jurisdiction, as are applied to children in domestic adoptions. (para. 4.25)
4. The Commission provisionally recommends that the basic requirements for consent in domestic adoptions be extended, in the implementing legislation, to cover the sending of a child for adoption abroad. (para. 4.31)
5. The Commission provisionally recommends that the duty to consult the child where appropriate should be set out in legislation and should apply to all adoptions in which Ireland is the State of origin, whether the adoptions are made in Ireland, or are to be made abroad. (para. 4.34)

Ireland as a Receiving State

6. We provisionally recommend that, as a general principle in the case of Convention adoptions, where Ireland is the receiving State, the determination of the child's eligibility for adoption made by the competent authorities of the State of origin under Article 4.a, should be accepted by the Irish authorities. This would apply where the Adoption Board makes an adoption order, as well as where the adoption takes place abroad. The Irish authorities should not, as a general principle, object to the adoption proceeding, under Article 17.c, on the sole ground that the child is not eligible for adoption under Irish domestic law. We recognise that, for constitutional reasons, some flexibility in the drafting of these principles may be necessary. (para. 4.40)

7. We provisionally recommend that, where Ireland is the receiving State under the Convention, the determination of the competent authorities of the State of origin in accordance with Article 4. c and d, of the sufficiency of consents should, as a general principle, be accepted by the Irish authorities. This should be the case whether the adoption is to be effected in Ireland or in the State of origin. (para. 4.45)
8. The Commission provisionally recommends that the provision of counselling services to prospective adoptive parents be placed on a statutory footing, in order to comply fully with Article 5.b of the Convention and that an obligation should be placed on health boards and accredited agencies to inform prospective adoptive parents of the availability of counselling services. (para. 4.49)
9. In relation to immigration clearances for intercountry adopted children, we provisionally recommend:
 - (a) that a separate clearance should be issued in respect of each particular child to be brought into the country (this should apply whether the child is to be adopted abroad or in the State);
 - (b) that, upon entry into the State with the child, the (prospective) adoptive parents should be under a legal obligation to inform the authorities of the identity of the child; and
 - (c) that it should be an offence to fail to furnish information in accordance with (b) above, or to use or attempt to use an immigration clearance to obtain entry for more than one child. (para. 4.55)
10. We provisionally recommend that in determining whether to grant an immigration clearance to a child the subject of an intercounty adoption, the Department of Justice should work in close co-operation with the Central Authority and the concerned health board or accredited agency. (para. 5.69)
11. It is provisionally recommended that provision be made for the granting of a right of permanent residency to children adopted by foreign nationals habitually resident in Ireland, subject to such safeguards as may be necessary to avoid abuse of the immigration process. (para. 4.58)

Administration and Procedures

12. We provisionally recommend that the Adoption Board be made the Central Authority for Ireland, with delegation of some of its functions to health boards and accredited agencies. (para. 5.07)

13. We provisionally recommend that the *Child Care Act, 1991* should be amended to place a statutory duty on health boards to provide post-adoption services, for both domestic and intercountry adoptions. (para.5.21)
14. We provisionally recommend that the Minister for Health, in consultation with the Adoption Board, establish standards of competence for all bodies administering intercountry adoption, and that provision be made for the accreditation by the Adoption Board of agencies to administer Convention and other intercountry adoptions. These agencies should be subject to regulation and supervision by the Adoption Board under the *Adoption Act, 1952*. (para. 5.31)
15. We provisionally recommend clarification, in statute or regulation, of the exact nature of the charitable status required in respect of adoption societies; a provision expressly requiring them to be non-profit-making would ensure compliance with Article 11. (para. 5.35)
16. We provisionally recommend that accredited agencies and health boards be permitted to levy some reasonable charges for intercountry services. The level of service provided by the agencies must not be dependent on any such payments. (para 5.39)
17. We provisionally recommend the development of a procedure whereby the Adoption Board may grant authorization, subject to pre-determined standards, for an overseas agency to carry out specified functions in Ireland in respect of intercountry adoption. (para. 5.42)
18. We provisionally recommend, that, where Ireland is a receiving State, prospective adoptive parents should formally make their application directly to the Adoption Board, with a copy of the application to the relevant health board or accredited adoption agency. (para. 5.45)
19. We provisionally recommend that, where Ireland is the receiving State, the report provided for in Article 16 should be received by the Adoption Board, with copies sent immediately to the relevant health board or accredited agency. Where Ireland is the State of origin, the report should be prepared by the relevant health board or agency and a copy supplied to the Adoption Board. (para. 5.52)
20. Where Ireland is the State of origin, the determination under Article 16 that the placement is in the child's best interests should, in our provisional opinion, be made by the Adoption Board. (para 5.56)
21. Where Ireland is the State of origin, the function of confirming the consent of the prospective adoptive parents under Article 17.a should, in our provisional opinion, be performed by the health board or accredited agency. (para. 5.57)

22. We recommend provisionally that implementing regulations should provide that, where Ireland is the State of origin in a Convention adoption, the approval of the Central Authority of the receiving country must be obtained before the child can be entrusted for adoption. (para. 5.59)
23. Where Ireland is the receiving State in an intercountry adoption, the Commission provisionally recommends that the body to approve the entrustment of the child to the prospective adoptive parents under Article 17.b should be the relevant health board or adoption agency. The decision of the health board or adoption agency to give or withhold their approval under Article 17.b should be subject to a right of appeal to the Adoption Board, within a reasonable time limit. (para. 5.60)
24. We provisionally recommend that the Adoption Board be given the responsibility of deciding whether agreement should be given, under Article 17.c, to the adoption proceeding to the placement stage. (para. 5.63)
25. We provisionally recommend that the function of ensuring the safe transfer of the child under Article 19.2 be delegated, in the Irish system, to health boards or accredited agencies. (para. 5.73)
26. We provisionally recommend that, upon ratification of the Convention, Ireland should make the declaration provided for in Article 22.4, to the effect that adoptions involving children habitually resident in the State may only take place where the arrangements are made by public or accredited bodies. (para. 5.84)

Recognition and Effects of Adoptions

27. We provisionally recommend that the body most fitted to certify an adoption in accordance with Article 23.1 would be the Central Authority, the Adoption Board. (para. 6.03)
28. We provisionally recommend that, where Ireland is the receiving State in a simple adoption, then, in as many cases as possible, the adoption should be converted to a full adoption under Article 27. However, in the absence of the possibility of conversion, we are not in favour of a complete veto on simple adoption, and in such exceptional circumstances we provisionally recommend that the adoption be recognised as having the same effects as it has in the State of origin. (para. 6.12)
29. Where Ireland is neither the receiving State nor the State of origin in an adoption between two Contracting States, we provisionally recommend

that the adoption be recognised as having the effects which it has in the receiving State. (para. 6.14)

30. Where an adoption is converted from a simple adoption to a full adoption under the Article 27 procedure, and where the State of origin is a party to the Convention, it is our provisional recommendation that Irish law should be limited to requiring that the consent requirements of the State of origin be complied with, provided they are in accordance with Article 4. (para. 6.25)
31. We provisionally recommend that the Article 27 conversion mechanism be made applicable retrospectively to adoptions which have not been entitled to recognition, because they did not have the effect of terminating the legal relationship between the child and the biological family. In making this provisional recommendation, we emphasise the requirement that the appropriate consents must have been obtained. (para. 8.14)
32. We further provisionally recommend that the same mechanism continue to be available in future for non-Convention adoptions which are not entitled to recognition because they do not have the effect of terminating the legal relationship between the child and the biological family. Again, we emphasise the requirement that the appropriate consents must have been obtained. (para. 8.15)
33. We provisionally recommend that the definition of foreign adoption in section 1 of the 1991 Act should not apply to an adoption recognised under sections 2, 3 and 4 of that Act (i.e. on the basis of the domicile or residence of the adopting parents abroad, in the State in which the adoption was effected) and that such adoptions should be entitled to recognition except where recognition would be manifestly contrary to public policy, taking into account the best interests of the child. In any such case, where the adoption does not have the effect of terminating the pre-existing legal relationship between the child and the mother or father, the effects of the adoption should be the same as they were in the State where the adoption was granted. In all other cases, the adoption should be treated as if it were made in Ireland. (para. 8.16)

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APPENDIX I

CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION

The States signatory to the present Convention,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Recalling that each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin,

Recognizing that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin,

Convinced of the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children,

Desiring to establish common provisions to this effect, taking into account the principles set forth in international instruments, in particular the *United Nations Convention on the Rights of the Child*, of 20th November 1989, and the United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (General Assembly Resolution 41/85, of 3rd December 1986),

Have agreed upon the following provisions-

CHAPTER 1 - SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are-

- a* to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law;
- b* to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children;

- c* to secure the recognition in Contracting States of adoptions made in accordance with the Convention.

Article 2

- 1* The Convention shall apply where a child habitually resident in one Contracting State ('the State of origin') has been, is being, or is to be moved to another Contracting State ('the receiving State') either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin.
- 2* The Convention covers only adoptions which create a permanent parent-child relationship.

Article 3

The Convention ceases to apply if the agreements mentioned in Article 17, sub-paragraph *c*, have not been given before the child attains the age of eighteen years.

CHAPTER II - REQUIREMENTS FOR INTERCOUNTRY ADOPTIONS

Article 4

An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin-

- a* have established that the child is adoptable;
- b* have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests;
- c* have ensured that
 - (1) the persons, institutions and authorities whose consent is necessary for adoption, have been counselled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin,

- (2) such persons, institutions and authorities have given their consent freely, in the required legal form, and expressed or evidenced in writing,
 - (3) the consents have not been induced by payment or compensation of any kind and have not been withdrawn, and
 - (4) the consent of the mother, where required, has been given only after the birth of the child; and
- d* have ensured, having regard to the age and degree of maturity of the child, that
- (1) he or she has been counselled and duly informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required,
 - (2) consideration has been given to the child's wishes and opinions,
 - (3) the child's consent to the adoption, where such consent is required, has been given freely, in the required legal form, and expressed or evidenced in writing, and
 - (4) such consent has not been induced by payment or compensation of any kind.

Article 5

An adoption within the scope of the Convention shall take place only if the competent authorities of the receiving State-

- a* have determined that the prospective adoptive parents are eligible and suited to adopt;
- b* have ensured that the prospective adoptive parents have been counselled as may be necessary; and
- c* have determined that the child is or will be authorized to enter and reside permanently in that State.

CHAPTER III - CENTRAL AUTHORITIES AND ACCREDITED BODIES

Article 6

- 1 A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

- 2 Federal States, States with more than one system of law or States having autonomous territorial units shall be free to appoint more than one Central Authority and to specify the territorial or personal extent of their functions. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

- 1 Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their States to protect children and to achieve the other objects of the Convention.
- 2 They shall take directly all appropriate measures to -
 - a provide information as to the laws of their States concerning adoption and other general information, such as statistics and standard forms;
 - b keep one another informed about the operation of the Convention and, as far as possible, eliminate any obstacles to its application.

Article 8

Central Authorities shall take, directly or through public authorities, all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention.

Article 9

Central Authorities shall take, directly or through public authorities or other bodies duly accredited in their State, all appropriate measures, in particular to -

- a collect, preserve and exchange information about the situation of the child and the prospective adoptive parents, so far as is necessary to complete the adoption;
- b facilitate, follow and expedite proceedings with a view to obtaining the adoption;
- c promote the development of adoption counselling and post-adoption services in their States;

- d* provide each other with general evaluation reports about experience with intercountry adoption;
- e* reply, in so far as is permitted by the law of their State, to justified requests from other Central Authorities or public authorities for information about a particular adoption situation.

Article 10

Accreditation shall only be granted to and maintained by bodies demonstrating their competence to carry out properly the tasks with which they may be entrusted.

Article 11

An accredited body shall -

- a* pursue only non-profit objectives according to such conditions and within such limits as may be established by the competent authorities of the State of accreditation;
- b* be directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of intercountry adoption; and
- c* be subject to supervision by competent authorities of that State as to its composition, operation and financial situation.

Article 12

A body accredited in one Contracting State may act in another Contracting State only if the competent authorities of both States have authorized it to do so.

Article 13

The designation of the Central Authorities and, where appropriate, the extent of their functions, as well as the names and addresses of the accredited bodies shall be communicated by each Contracting State to the Permanent Bureau of the Hague Conference on Private International Law.

CHAPTER IV - PROCEDURAL REQUIREMENTS IN INTERCOUNTRY ADOPTION

Article 14

Persons habitually resident in a Contracting State, who wish to adopt a child habitually resident in another Contracting State, shall apply to the Central Authority in the State of their habitual residence.

Article 15

1 If the Central Authority of the receiving State is satisfied that the applicants are eligible and suited to adopt, it shall prepare a report including information about their identity, eligibility and suitability to adopt, background, family and medical history, social environment, reasons for adoption, ability to undertake an intercountry adoption, as well as the characteristics of the children for whom they would be qualified to care.

2 It shall transmit the report to the Central Authority of the State of origin.

Article 16

1 If the Central Authority of the State of origin is satisfied that the child is adoptable, it shall -

a prepare a report including information about his or her identity, adoptability, background, social environment, family history, medical history including that of the child's family, and any special needs of the child;

b give due consideration to the child's upbringing and to his or her ethnic, religious and cultural background;

c ensure that consents have been obtained in accordance with Article 4; and

d determine, on the basis in particular of the reports relating to the child and the prospective adoptive parents, whether the envisaged placement is in the best interests of the child.

2 It shall transmit to the Central Authority of the receiving State its report on the child, proof that the necessary consents have been obtained and

the reasons for its determination on the placement, taking care not to reveal the identity of the mother and the father if, in the State of origin, these identities may not be disclosed.

Article 17

Any decision in the State of origin that a child should be entrusted to prospective adoptive parents may only be made if -

- a* the Central Authority of that State has ensured that the prospective adoptive parents agree;
- b* the Central Authority of the receiving State has approved such decision, where such approval is required by the law of that State or by the Central Authority of the State of origin;
- c* the Central Authorities of both States have agreed that the adoption may proceed; and
- d* it has been determined, in accordance with Article 5, that the prospective adoptive parents are eligible and suited to adopt and that the child is or will be authorized to enter and reside permanently in the receiving State.

Article 18

The Central Authorities of both States shall take all necessary steps to obtain permission for the child to leave the State of origin and to enter and reside permanently in the receiving State.

Article 19

- 1 The transfer of the child to the receiving State may only be carried out if the requirements of Article 17 have been satisfied.
- 2 The Central Authorities of both States shall ensure that this transfer takes place in secure and appropriate circumstances and, if possible, in the company of the adoptive or prospective adoptive parents.

- 3 If the transfer of the child does not take place, the reports referred to in Articles 15 and 16 are to be sent back to the authorities who forwarded them.

Article 20

The Central Authorities shall keep each other informed about the adoption process and the measures taken to complete it, as well as about the progress of the placement if a probationary period is required.

Article 21

- 1 Where the adoption is to take place after the transfer of the child to the receiving State and it appears to the Central Authority of that State that the continued placement of the child with the prospective adoptive parents is not in the child's best interests, such Central Authority shall take the measures necessary to protect the child, in particular-
 - a to cause the child to be withdrawn from the prospective adoptive parents and to arrange temporary care;
 - b in consultation with the Central Authority of the State of origin, to arrange without delay a new placement of the child with a view to adoption or, if this is not appropriate, to arrange alternative long-term care; an adoption shall not take place until the Central Authority of the State of origin has been duly informed concerning the new prospective adoptive parents;
 - c as a last resort, to arrange the return of the child, if his or her interests so require.
- 2 Having regard in particular to the age and degree of maturity of the child, he or she shall be consulted and, where appropriate, his or her consent obtained in relation to measures to be taken under this Article.

Article 22

- 1 The functions of a Central Authority under this Chapter may be performed by public authorities or by bodies accredited under Chapter III, to the extent permitted by the law of its State.

- 2 Any Contracting State may declare to the depositary of the Convention that the functions of the Central Authority under Articles 15 to 21 may be performed in that State, to the extent permitted by the law and subject to the supervision of the competent authorities of that State, also by bodies or persons who -
 - a meet the requirements of integrity, professional competence, experience and accountability of that State; and
 - b are qualified by their ethical standards and by training or experience to work in the field of intercountry adoption.
- 3 A Contracting State which makes the declaration provided for in paragraph 2 shall keep the Permanent Bureau of the Hague Conference on Private International Law informed of the names and addresses of these bodies and persons.
- 4 Any Contracting State may declare to the depositary of the Convention that adoptions of children habitually resident in its territory may only take place if the functions of the Central Authorities are performed in accordance with paragraph 1.
- 5 Notwithstanding any declaration made under paragraph 2, the reports provided for in Articles 15 and 16 shall, in every case, be prepared under the responsibility of the Central Authority or other authorities or bodies in accordance with paragraph 1.

CHAPTER V - RECOGNITION AND EFFECTS OF THE ADOPTION

Article 23

- 1 An adoption certified by the competent authority of the State of the adoption as having been made in accordance with the Convention shall be recognized by operation of law in the other Contracting States. The certificate shall specify when and by whom the agreements under Article 17, sub-paragraph c, were given.
- 2 Each Contracting State shall, at the time of signature, ratification, acceptance, approval or accession, notify the depositary of the Convention of the identity and the functions of the authority or the authorities which, in that State, are competent to make the certification. It shall also notify the depositary of any modification in the designation of these authorities.

Article 24

The recognition of an adoption may be refused in a Contracting State only if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child.

Article 25

Any Contracting State may declare to the depositary of the Convention that it will not be bound under this Convention to recognize adoptions made in accordance with an agreement concluded by application of Article 39, paragraph 2.

Article 26

- 1 The recognition of an adoption includes recognition of
 - a the legal parent-child relationship between the child and his or her adoptive parents;
 - b parental responsibility of the adoptive parents for the child;
 - c the termination of a pre-existing legal relationship between the child and his or her mother and father, if the adoption has this effect in the Contracting State where it was made.
- 2 In the case of an adoption having the effect of terminating a pre-existing legal parent-child relationship, the child shall enjoy in the receiving State, and in any other Contracting State where the adoption is recognized, rights equivalent to those resulting from adoptions having this effect in each such State.
- 3 The preceding paragraphs shall not prejudice the application of any provision more favourable for the child, in force in the Contracting State which recognizes the adoption.

Article 27

- 1 Where an adoption granted in the State of origin does not have the effect of terminating a pre-existing legal parent-child relationship, it may, in the receiving State which recognizes the adoption under the Convention, be converted into an adoption having such an effect -
 - a if the law of the receiving State so permits; and

- b* if the consents referred to in Article 4, sub-paragraphs *c* and *d*, have been or are given for the purpose of such and adoption.
- 2 Article 23 applies to the decision converting the adoption.

CHAPTER VI - GENERAL PROVISIONS

Article 28

The Convention does not affect any law of a State of origin which requires that the adoption of a child habitually resident within that State take place in that State or which prohibits the child's placement in, or transfer to, the receiving State prior to adoption.

Article 29

There shall be no contact between the prospective adoptive parents and the child's parents or any other person who has care of the child until the requirements of Article 4, sub-paragraphs *a* to *c*, and Article 5, sub-paragraph *a*, have been met, unless the adoption takes place within a family or unless the contact is in compliance with the conditions established by the competent authority of the State of origin.

Article 30

- 1 The competent authorities of a Contracting State shall ensure that information held by them concerning the child's origin, in particular information concerning the identity of his or her parents, as well as the medical history, is preserved.
- 2 They shall ensure that the child or his or her representative has access to such information, under appropriate guidance, in so far as is permitted by the law of that State.

Article 31

Without prejudice to Article 30, personal data gathered or transmitted under the Convention, especially data referred to in Articles 15 and 16, shall be used only for the purposes for which they were gathered or transmitted.

Article 32

- 1 No one shall derive improper financial or other gain from an activity related to an intercountry adoption.
- 2 Only costs and expenses, including reasonable professional fees of persons involved in the adoption, may be charged or paid.
- 3 The directors, administrators and employees of bodies involved in an adoption shall not receive remuneration which is unreasonably high in relation to services rendered.

Article 33

A competent authority which finds that any provision of the Convention has not been respected or that there is a serious risk that it may not be respected, shall immediately inform the Central Authority of its State. This Central Authority shall be responsible for ensuring that appropriate measures are taken.

Article 34

If the competent authority of the State of destination of a document so requests, a translation certified as being in conformity with the original must be furnished. Unless otherwise provided, the costs of such translation are to be borne by the prospective adoptive parents.

Article 35

The competent authorities of the Contracting States shall act expeditiously in the process of adoption.

Article 36

In relation to a State which has two or more systems of law with regard to adoption applicable in different territorial units -

- a* any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;
- b* any reference to the law of that State shall be construed as referring to the law in force in the relevant territorial unit;

- c* any reference to the competent authorities or to the public authorities of that State shall be construed as referring to those authorized to act in the relevant territorial unit;
- d* any reference to the accredited bodies of that State shall be construed as referring to bodies accredited in the relevant territorial unit.

Article 37

In relation to a State which with regard to adoption has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 38

A State within which different territorial units have their own rules of law in respect of adoption shall not be bound to apply the Convention where a State with a unified system of law would not be bound to do so.

Article 39

- 1 The Convention does not affect any international instrument to which Contracting States are Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument.
- 2 Any Contracting State may enter into agreements with one or more other Contracting States, with a view to improving the application of the Convention in their mutual relations. These agreements may derogate only from the provisions of Articles 14 to 16 and 18 to 21. The States which have concluded such an agreement shall transmit a copy to the depositary of the Convention.

Article 40

No reservation to the Convention shall be permitted.

Article 41

The Convention shall apply in every case where an application pursuant to Article 14 has been received after the Convention has entered into force in the receiving State and the State of origin.

Article 42

The Secretary General of the Hague Conference on Private International Law shall at regular intervals convene a Special Commission in order to review the practical operation of the Convention.

CHAPTER VII - FINAL CLAUSES

Article 43

- 1 The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Seventeenth Session and by the other States which participated in that Session.
- 2 It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 44

- 1 Any other State may accede to the Convention after it has entered into force in accordance with Article 46, paragraph 1.
- 2 The instrument of accession shall be deposited with the depositary.
- 3 Such accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in the six months after the receipt of the notification referred to in sub-paragraph *b* of Article 48. Such an objection may also be raised by States at the time when they ratify, accept or approve the Convention after an accession. Any such objection shall be notified to the depositary.

Article 45

- 1 If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in the Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

- 2 Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.
- 3 If a State makes no declaration under this Article, the Convention is to extend to all territorial units of that State.

Article 46

- 1 The Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the third instrument of ratification, acceptance or approval referred to in Article 43.
- 2 Thereafter the Convention shall enter into force -
 - a for each State ratifying, accepting or approving it subsequently, or acceding to it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;
 - b for a territorial unit to which the Convention has been extended in conformity with Article 45, on the first day of the month following the expiration of three months after the notification referred to in that Article.

Article 47

- 1 A State Party to the Convention may denounce it by a notification in writing addressed to the depositary.
- 2 The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

Article 48

The depositary shall notify the States Members of the Hague Conference on Private International Law, the other States which participated in the Seventeenth Session and the States which have acceded in accordance with Article 44, of the following -

- a* the signatures, ratifications, acceptances and approvals referred to in Article 43;
- b* The accessions and objections raised to accessions referred to in Article 44;
- c* the date on which the Convention enters into force in accordance with Article 46;
- d* the declarations and designations referred to in Articles 22, 23, 25 and 45;
- e* the agreements referred to in Article 39;
- f* the denunciations referred to in Article 47.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

Done at The Hague, on theday of19.¹, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Seventeenth Session and to each of the other States which participated in that Session.

¹ The Convention was signed on the 29th of May 1993 and thus bears that date.

APPENDIX II

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

HAGUE CONVENTION OF 29 MAY 1993 ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION

(Listing as of 2 July 1997)

The following States have signed the Convention:

Costa Rica	29 May 1993	Peru	16 November 1994
Mexico	29 May 1993	Cyprus	17 November 1994
Romania	29 May 1993	Switzerland	16 January 1995
Brazil	29 May 1993	Spain	27 March 1995
Columbia	1 Sept. 1993	France	5 April 1995
Uruguay	1 Sept. 1993	Luxembourg	6 June 1995
Israel	2 Nov. 1993	Poland	12 June 1995
Netherlands	5 Dec. 1993	Philippines	17 July 1995
United Kingdom	12 Jan. 1994	Italy	11 December 1995
United States	31 March 1994	Norway	20 May 1996
Canada	12 April 1994	Ireland	19 June 1996
Finland	19 April 1994	Sweden	10 October 1996
Burkina Faso	19 April 1994	El Salvador	21 November 1996
Ecuador	3 May 1994	Venezuela	10 January 1997
Sri Lanka	24 May 1994	Denmark	2 July 1997

TOTAL NUMBER OF SIGNATORIES: 30

The following States have ratified the Convention:

Entry into force:

Mexico	14 September 1994	1 May	1995
Romania	28 December 1994	1 May	1995
Sri Lanka	23 January 1995	1 May	1995

Cyprus	20 February 1995	1 June 1995
Poland	12 June 1995	1 October 1995
Spain	11 July 1995	1 November 1995
Ecuador	7 September 1995	1 January 1996
Peru	14 September 1995	1 January 1996
Costa Rica	30 October 1995	1 February 1996
Burkina Faso	11 January 1996	1 May 1996
Philippines	2 July 1996	1 November 1996
Canada	19 December 1996	1 April 1997
Venezuela	10 January 1997	1 May 1997
Finland	27 March 1997	1 July 1997
Sweden	28 May 1997	1 September 1997
Denmark	2 July 1997	1 November 1997

TOTAL NUMBER OF RATIFICATIONS: 16

The following State has acceded to the Convention:

	<i>Entry into force:</i>	
Andorra	3 January	1 May 1997

THE CONVENTION ENTERED INTO FORCE ON 1 MAY¹

¹

The accession shall have effect only as regards the relations between Andorra and those Contracting States which have not raised an objection to its accession between 1 February 1997 and 31 July 1997 (inclusive) (see Article 44(3).)

APPENDIX III

Recognized

Africa

Liberia
Sierra Leone
South Africa
Zambia
Zimbabwe

North America

Alberta, Canada
British Columbia, Canada
Newfoundland, Canada
Ontario, Canada
Colorado, U.S.A.
Illinois, U.S.A.
Massachusetts, U.S.A.
Michigan, U.S.A.
New Mexico, U.S.A.
New York, U.S.A.
Oklahoma, U.S.A.
Texas, U.S.A.
*Mexico

South America

*Bolivia
Brazil
Colombia
Ecuador
*Paraguay
*Venezuela

Asia

China
Hong Kong
Indonesia
Israel
*Japan
Malaysia
*Papua New Guinea
Philippines
Sri Lanka
Taiwan
Vietnam

Not Recognized

Africa

Rwanda

Central America

Guatemala

South America

Peru

Asia

Lebanon
Nepal
South Korea
Thailand

Australia/New Zealand

Australian Capital Territory
Northern Territory
New Zealand

Europe

*Belgium
Cyprus
England & Wales
*France
Germany
Jersey
*Luxembourg
Northern Ireland
Norway
*Poland
Romania
*Russia
Scotland
Switzerland

*These are countries where there is a dual system of adoption i.e. Plenary Adoption (Full) and Simple Adoption (foster care). Only Plenary Adoptions effected in these countries can be recognized.

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