

Expert Group "International Adoption"

**Interim report for the attention of the Federal Office of
Justice**

Monika Pfaffinger, Chair of the Expert Group,
incorporating the considerations of the working groups on the specific issues Zurich, 28 March 2023

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Introduction

With this interim report, the expert group "International Adoption" recommends two scenarios for a Swiss policy on international adoption in accordance with its mandate from the first stage. Both scenarios were developed in a careful process, reflecting on a wide range of sources, findings and arguments. This interim report sets out all of this. *The first scenario*, the *reduction-plus-reform scenario*, calls for two things: firstly, the limitation of cooperation to those countries of origin that formally and de facto demonstrably comply with minimum guarantees, and secondly, a comprehensive reform that addresses numerous issues. The *second scenario* is the *exit scenario*. Both scenarios should be implemented directly and promptly.

Regardless of which scenario is chosen, there is always a need for action. A revision of the Federal Act on Private International Law (IPRG) and a reform of intra-family adoption will be necessary for both constellations, followed by the expansion of support services (in particular, but not limited to, the search for origin).

This interim report describes in detail how the expert group came to the conclusion that only the two scenarios proposed here represent viable alternatives. The collection and review of all relevant facts, developments and legal standards, the assessments of the various working groups based on these, and the resulting discussions are described step by step. In this way, it becomes clear why the expert group believes that a continuation of current adoption practices is legally and morally out of the question and why it would be equally unjustifiable to make only minimal adjustments to these practices. It is expressly *not the* intention of the group of experts to condemn adoptions outright as irregular or to "pathologise" them. Of course, there have been and still are adoptions whose procedures have been carried out correctly, which have done good for those affected and are therefore an important and valuable instrument. Based on a careful consideration of all relevant aspects and arguments, the demand for fundamental change common to both scenarios is also based on a risk and precautionary argument: it must be ensured that there are no (more) cases of adoptions in which the rights of the parties involved are violated and which are not beneficial but detrimental to the well-being of those affected. This goal dictates the range of possibilities for future adoption practices, which in any case means and requires a fundamental change in view of previous practices.

In the course of leading up to this conclusion, the only two realistic possible solutions in the opinion of the expert group take shape *ex negativo*, so to speak, i.e. by process of elimination. This also explains why the final chapter, with its recommendation of two political scenarios, is comparatively short: it represents the culmination point in which the findings, which have been elaborated and substantiated in detail in the previous sections, take concrete shape in the form of the scenarios ultimately proposed. The interim report contains and concludes accordingly with detailed explanations, which then also lead to the second stage of the assignment and a final report by the expert group.

First chapter - The "International Adoption" expert group

1 (Background) reasons for its establishment

The establishment of the expert group is based on the conclusion of the Federal Council's report in fulfilment of postulate 17.4181 Ruiz Rebecca of 14 December 2017 entitled "Illegal adoptions of children from Sri Lanka: historical reappraisal, search for origin, perspectives".¹ The Federal Council's report (based on comprehensive investigations) is primarily a contribution to the historical reappraisal of irregularities in international adoptions from Sri Lanka. A second topic area is the search for origin, to which great importance is attached. A third part deals with the current regime and identifies weaknesses. These are to be analysed in depth with regard to the need for improvement. The Federal Department of Justice and Police (hereinafter FDJP) was commissioned to set up an expert group on international adoption (hereinafter "expert group"²), which was to propose solutions, including legislative reforms, following in-depth analyses.³ As a first step, this interim report proposes *two scenarios* for a Swiss policy on international adoption, which appear to be the most suitable for respecting the welfare and rights of the persons concerned. Both scenarios are based on a guiding principle from the Federal Council report: "The events of that time must not be repeated."⁴

The establishment and analyses of the expert group are not isolated. Various bodies and institutions are currently dealing with the challenges of international adoptions in the past, present and future. In Switzerland, the "Working Group on the Search for Origin to Support Adopted Persons" (hereafter "Working Group on the Search for Origin") of the Conference of Cantonal Justice and Police Directors (hereafter KKJPD) and the broader review of the practice of international adoption in the years 1973-1997 by the Zurich University of Applied Sciences (hereafter ZHAW) should be mentioned in particular. Not only Switzerland, but also numerous other countries were shaken by adoption scandals, as a result of which the institute was placed at the top of the political agenda. Based on various investigations, it can no longer be assumed that these are isolated cases. Rather, the picture is becoming clearer that *irregular practices* across a broad spectrum of procedures and severity have given, or are giving, international adoption a characteristically negative character. These practices, in particular the misconduct, often have a very negative impact on the entire lives of those affected.⁵ The exposure of these sometimes serious, often far-reaching unlawful practices and the descriptions of the suffering of those affected have triggered an intensive media response and social outrage.⁶ Courts also deal with critical adoption procedures⁷, and bodies

¹Federal Council Report 2020, 5 f. (overview) and 65 f.

²For reasons of readability, the term "expert group" is used in this interim report. This refers to the group of experts.

³Federal Council Report 2020, 5 f. (overview), then 65 f., with reference to developments, steps and measures taken, e.g. in Austria.

⁴See Federal Council Report 2020, 5 f. (overview) and 65 f.

⁵See Federal Council Report 2020, 5.

⁶Cf. the following reports among many others: <<https://www.srf.ch/news/schweiz/skandal-um-adoptierte-kinder-illegaler-baby-schmuggel-aus-sri-lanka-in-die-schweiz>>; <<https://www.telegraph.co.uk/global-health/climate-and-people/international-adoption-scan-dal/>>; <https://www.lemonde.fr/en/france/article/2022/12/11/the-stolen-children-scandal-the-abuses-of-a-french-non-profit-organization-under-judicial-investigation_6007369_7.html>; <<https://pages.rts.ch/emissions/temps-present/suisse/9787679-les-bebes-voles-du-sri-lanka-un-scandale-suisse.html>>; <<https://www.srf.ch/news/schweiz/hunderte-betroffene-illegal-adoptierten-aus-sri-lanka-soll-endlich-ge-holfen-werden>>; <https://www.lemonde.fr/societe/article/2022/11/23/des-adoptions-frauduleuses-suspectees-dans-l-association-rayon-de-soleil-de-l-enfant-etranger-au-mali-en-roumanie-ou-en-centrafrique_6151158_3224.html>.

⁷For Switzerland, see the judgment of the Criminal Court of the Canton of Lucerne of 24 April 2020.

international organisation⁽⁸⁾. The fundamental review of the institution by numerous countries and at international level is both retrospective and reappraisal-oriented as well as forward-looking. Both home and host countries are taking action. Switzerland therefore fits into a *broad landscape*.

The group of experts emphatically welcomes the Swiss authorities' approach to analysing practices and fundamentally rethinking the future role of international adoption. With its analyses, it wants to make a contribution to better protecting the welfare and rights of those affected, above all the child. Because compliance, accountability and transparency ensure trust and integrity, the first chapter sets out the (background) reasons for the establishment of the expert group (1), its constitution (2), its mandate (3) and its method and working methods and the individual work steps (4).

2 Constitution - procedure and criteria

The expert group was appointed by the Federal Office of Justice (hereinafter "FOJ"), taking into account recommendations from the chairperson. The co-operative selection of members was based on several criteria: (complementary) expertise ("group of experts") and diversified know-how, integrity, independence, appropriate representation of the actors involved in international adoptions with their functions, taking into account the federal structure with its implications for international adoption, in particular integration of affected persons and specifically adopted persons, linguistic diversity, balanced gender and language representation. This led to the following composition of the expert group:

Chairperson:

PROF. DR IUR. HABIL. MONIKA PFAFFINGER

Legal scholar and expert in private law, information law, law and new technologies, in particular family law and adoption law (dissertation: Secret and open forms of adoption. Effects of information and contact on the balance in the adoption triangle); former Vice-President of the EKFF; owner of MP - *only connect*.

Members of the expert group, in alphabetical order:

PRITI AESCHBACHER

Head of an adoption agency, herself adopted and adoptive mother

⁸Cf. e.g. UN Committee on the Rights of the Child; UN Committee on Missing Persons.

DR IUR. YVO BIDERBOST

Head of Legal Services of the Child and Adult Protection Authority (and Adoption Authority) of the City of Zurich, Board Member of PACH, Member of the Working Committee of KOKES (Conference for Child and Adult Protection), Lecturer at the Universities of Lucerne, Fribourg and Zurich

LIC. IUR. HERVÉ BOÉCHAT

Self-employed, lawyer specialising in children's rights. Former member of the Central Federal Authority for International Adoption at the time of its foundation. Has conducted many assessment missions to countries of origin with the SSI and published numerous studies and reports on the subject of irregular adoptions

SARAH INEICHEN

President of the association Back to the Roots, qualified midwife (FH) LIC. IUR.

MARYSE JAVAUX VENA

Research assistant at the Department of Private International Law, Federal Office of Justice, Central Federal Authority for International Adoptions

MLAW SANDRO KÖRBER

Lawyer, Head of the Central Authority for Adoption of the Canton of Thurgau

PROF. DR. IUR. GIAN PAOLO ROMANO

Associate Professor at the University of Geneva, lawyer, expert in private international law, in particular international family law

LIC. IUR. JOËLLE SCHICKEL-KÜNG

Co-Head of the Department of Private International Law, Federal Office of Justice, Central Federal Authority for International Adoptions

PROF. DR IUR. JUDITH WYTENBACH

Professor of constitutional and international law, advocate, expert in fundamental and human rights, in particular children's and women's rights

MLAW LARISSA KILLER provided some of the minute-taking and other legal support for the chairpersons. The FOJ provided administrative and organisational support for the work of the group of experts.

3 Mandate and task

The mandate of the expert group is:⁽⁹⁾

- To draw up recommendations for the definition of a Swiss policy on intercountry adoption and, in particular, a statement on the system best suited to promoting the welfare of children and safeguarding their rights.⁽¹⁰⁾
- Drawing up concrete proposals on
 - the optimisation of institutional organisation, including the position of accredited placement agencies;
 - harmonisation of the treatment of proceedings under the 1993 Hague Adoption Convention (Hague Convention) and those not under the Hague Convention;
 - a revision of the chapter of the Federal Act on Private International Law on adoption;
 - a review of the financial aspects of adoptions, integrating the instruments and recommendations developed at international level;
 - a review of issues relating to unlawful practices, integrating the instruments and recommendations developed at international level.

Depending on the conclusions of the KKJPD and FOJ working group on the search for origin, legislative changes could also be considered in this area.⁽¹¹⁾

The work is divided into *two stages*:

- In the first phase, the expert group is to draw up at least two possible scenarios for the FOJ to define a Swiss policy on international adoption.
- Based on a decision by the client in favour of one of the scenarios, concrete proposals will be developed in a subsequent second phase.

The completion of the interim report, originally scheduled for 31 December 2022, was postponed to postponed to 31 March 2023, partly due to the duration of the constitution process. The deadline for submitting the final report was agreed as 31 July 2023.

The expert group initially discussed the tasks set under *four aspects*:

Firstly - the relationship of the scenarios and their granularity to the specific questions.⁽¹²⁾ The successively increasing information situation, which documents systematic and decades-long violations of legal guarantees, gives reason to negotiate the future role of international adoption and thus the question of political scenarios very fundamentally - including exit scenarios.⁽¹³⁾

Secondly - need for interpretation of the mandate in order to harmonise the two stages. The two stages or task areas cannot be strictly separated from each other, as a "vice-versa" relationship is assumed for the "scenario mandate" and "design mandate": Preliminary

⁹Not verbatim, but largely consistent with the original wording.

¹⁰Indexed for the expert group as "1st, core element of the first stage"; cf. the second chapter for the derivation and the third chapter for the scenarios that are recommended.

¹¹Cf. in this respect already the Federal Council 2020 report, 65 f., with references to relevant passages in the report; the final draft of the report of the working group of the KKJPD and FOJ on the search for origin was made available to the "International Adoption" expert group.

¹²The need for interpretation is probably due to the fact that the staggering into two phases was not envisaged from the outset.

⁽¹³⁾ (Political) scenarios as "major fundamental decisions" ("motorways").

Answers to the specific questions on the need for legal adaptation have implications for the scenarios. However, they do not represent the scenarios of a "Swiss policy on international adoption" themselves, either in isolation or in combination. Conversely, scenarios can be defined in the abstract, but the need for adaptation resulting from the individual questions must be embedded in them. For a Swiss policy on international adoption, the "extreme scenarios" of a complete termination on the one hand¹⁴ and a (largely) unchanged continuation on the other hand must therefore be considered, as well as shaded and differentiated scenarios in between (e.g. Limitation of cooperation with HCT states or differentiation based on additional, stricter criteria, so that cooperation only takes place with certain HCT states).¹⁵ The specific sub-questions are then located at different levels and have different relevance in the context of the scenarios: While, for example, the answer to the question of the relationship between proceedings under the Hague Convention and non-Hague Convention states can be an element of a scenario itself, answers to the financial questions also serve to justify the scenario, while the design of a revision of the PILA is not insignificantly a consequence of the chosen scenario. Modalities are complete or partial moratoria.¹⁶

Thirdly - For international adoption and its challenges, the "transfer" of a child between different family and cultural systems and countries is typological. The child has links to a family and cultural system of origin and later to a family and cultural receiving system. Switzerland organises international adoptions with several countries of origin. If the cooperating states are member states of the Hague Convention, international cooperation is more structured/institutionalised than in the case of non-Hague Convention states.¹⁷ In any case, international adoption cannot be properly organised as long as the approach remains primarily a national one. The idea that responsibilities stop at national borders does not do justice to the complexity and sensitivity of the situation. Against this background, the labelling "Swiss policy on international adoption" is associated with a certain paradox. The responsibility of receiving countries - in this case Switzerland - to protect the integrity of international adoption processes with their preliminary and subsequent phases does not stop at their own national borders. We therefore argue in favour of a decidedly networked and holistic approach to international adoption and its procedures.

Fourthly - Whose welfare and rights or which adoptees should be protected in the best possible way by the measures to be taken? Are only future (potentially) adoptable children meant? Or does the mandate also apply to adoptees who have long since grown up and are therefore no longer considered adoptive children in the sense of underage adoptees in terms of age? The distinction is relevant for legal positions and applicable decrees. However, it seems clear that the persons in question are still adoptive children from a generational and legal perspective in view of the events (termination or establishment of family ties through adoption), regardless of their current age. Consistency is required here: It is not only necessary to develop a scenario for dealing with future adoptions, but one that is also aimed at consistently coming to terms with and overcoming the challenges faced by those who have already been adopted.

¹⁴Some countries of origin have ended the practice of international adoption altogether, e.g. Mali, Namibia and Romania; see SMOLIN 2022 for a recent call for an end to this practice.

¹⁵See chapter three, 2.1.1.

¹⁶Such measures have been both demanded and rejected in the literature and implemented by several countries.

¹⁷Cf. for the analysis of the HAT procedures and the non-HAT procedures, also with regard to the weak points, Federal Council Report 2020, 50 ff. and 54 ff.; for the countries of origin with figures < <https://www.bj.admin.ch/bj/de/home/gesellschaft/adoption/statistiken.html> >.

.¹⁸A Swiss policy on international adoption must effectively protect the interests and rights of those who have already been adopted and, in particular, ensure the necessary processing and support services. This includes, among other things that the right to know one's own parentage is realised, as well as "aftercare" .¹⁹In this context, the expert group also argues that neither a completely abstract concept of the potential "welfare of children" ("narrative of children to be saved"), nor a reference to specific children whose welfare has in fact been promoted in the best possible way through international adoption, can in any way outweigh illegal, abusive, unlawful or seriously harmful adoption practices or the risks of such practices with negative connotations. Such an approach or argumentation does not appear to be compatible with respect for the rights of children (and all other persons concerned). In short: the end alone does not justify the means.

4 Methodology, working methods and process

Methodologically, a *holistic approach* was used, with special consideration given to children's and women's rights.⁽²⁰⁾The aim was always to integrate all relevant aspects and developments and to critically evaluate them appropriately, i.e. from an overall perspective, in order to derive plausible conclusions and viable proposals for solutions. All members of the expert group contributed their expertise proactively. The dialogue was constructive and divergent aspects and positions were negotiated respectfully. An in-depth examination of various sources took place, whereby documents, findings and developments from science, law, politics and media reporting were reflected.⁽²¹⁾The requirement in the Federal Council's report to integrate the perspective of those affected was consistently taken into account.

In the *first stage up to the finalisation of this interim report*, the expert group held six plenary meetings (agenda and minutes available). Members who were unable to attend the meetings had the opportunity to submit their comments to the chairperson in writing or by telephone. New or topic-specific documents and considerations were exchanged by correspondence before and between meetings.

Below is a brief chronological overview of the work and progress of the expert group, starting with the first three plenary meetings:

First meeting on 30 August 2022, kick-off meeting - delivery of preparatory mandatory literature and supplementary literature with a brief assignment to the experts to present the core challenges of international adoption from their own perspective. Round of introductions and presentation of the assignment. Input round with the following objectives: clarification of terminology (e.g. "international adoption", "intercountry adoption", "intra-family adoption" or "illegal adoption"), discussion of the factual and legal starting position, identification of weak points/risks of the system including prioritisation, outlining of ideas for solutions, development of an initial sketch of scenarios; in this respect, short exposé on relevant aspects of each member from his/her perspective/experience.

¹⁸See also Federal Council Report 2020, 5: "The Federal Council is aware that the misconduct of the authorities at the time still characterises the lives of the people concerned today."

¹⁹According to the Federal Council Report 2020, 5, the search for origin is therefore also of specific importance. In this respect, a working group was set up, whose findings were made available to the group of experts in the draft; it should be noted at this point that further reparations should be examined in the event of proven illegality, irrespective of any limitation periods.

²⁰On this demand, see Joint Statement.

²¹Cf. bibliography and list of materials.

After the "tour de table" round: mutual reflection on the findings presented in each case; in this way: distillation of core problems and guiding principles.

Second meeting on 19 September 2022 - Synopsis of core findings from the first meeting by the chairperson. Presentation by J. SCHICKEL-KÜNG on the course of procedures for international adoptions with a focus on various cases and in particular on Thailand as a statistically important country for Switzerland. Subsequent discussion of the procedures and cases (tour de table).

Third meeting on 26 September 2022 - Advance request to members to develop individually convincing political scenarios. Presentation and discussion of these proposals. Discussion of the relationship between the scenarios put forward for debate and the sub-questions and how to deal with the staggering of the mandate into two stages and the scenarios themselves.

29 September 2022 - Establishment of working groups/triaging of work. Development of working documents on the sub-questions, in some cases with conclusions on the scenarios. Preparation of a working document on the scenarios and first draft of the interim report by the chairperson. This "multi-page access" enabled the development of a granular picture of the system of international adoption with its challenges and the development of possible solutions.

16 October 2022 - The final draft of the report "Working group on the search for origin KKJPD" is made available to all members of the expert group.

27 October 2022 - Request to extend the deadline for submitting the interim report (new deadline: 31 March 2023). Justification: Time of constitution of the expert group, subsequent tight meeting schedule, wealth of information to be integrated and new relevant information and documents, general complexity of the topic.

16 November 2022 - Letter from the Latin Conference for the Promotion and Protection of Youth to the Chair. Sent to the members of the expert group on 18 November 2022, discussed at the 4th meeting⁽²²⁾

Fourth meeting on 9 December 2022 - First block: Presentation/discussion of newly submitted documents (in particular draft of the KKJPD Working Group on the Search for Origin, CLASS letter, Lucerne ruling, statement by the UN Treaty Bodies, in-depth literature). Second block: Presentation/discussion of the findings of the working groups on the concretised sub-questions. Third block: Discussion of scenarios proposed by the chair, rejection of certain scenarios/modalities by way of exclusion procedure, sharpening of other scenarios.

Fifth meeting on 2 February 2023 - Discussion of the draft interim report further developed by the Chair with regard to structure/structure and arguments. Consolidation of two scenarios to be recommended as conclusions.

Sixth meeting on 13 March 2023 - Finalisation/approval of the draft interim report.

⁽²²⁾ The letter welcomes the reform of the system of international adoption. The Hague Convention has brought changes. Reference is also made to the "chutte" of international adoptions. The expansion of federal competences (ACF) is mentioned. The cantonal social assessment should remain in accordance with Art. 268a of the Swiss Civil Code. Regional as well as neutral and independent organisations should be established for the search for origin. It is stated that international adoption is still not at the level it should be. A moratorium would be a clear signal.

Chapter Two - Analysis

1 Initial situation - irregular practices, especially in the 1970-1990s

Various studies of adoption practices in the last three decades or so of the 20th century document in detail the existence of widespread and sometimes serious irregularities.⁽²³⁾ In addition to the lack of integrity of the procedures and documents, the stressful conditions under which those affected often suffer (as described by those affected themselves) become clear. It is true that individual/some adoption procedures may have been carried out in accordance with the rules (and therefore correctly), and there are descriptions of adoptees who, despite all the challenges, experienced their adoption as an opportunity and describe it in this way. Nevertheless, the systemic nature and seriousness of the consequences of adoption practices that are worthy of criticism must be recognised. Measures must be taken to take responsibility.⁽²⁴⁾ The following is an overview of the situation in Switzerland, in other countries and at international level.

1.1 Situation in Switzerland

Tab. 1: Chronological overview, Switzerland

14 December 2017	<p>Postulate Ruiz: "Bringing light into the darkness. In the 1980s, children from Sri Lanka were illegally adopted in Switzerland."²⁵</p> <p>The Federal Council is instructed, together with the cantons, to investigate the practice of private placement centres and the approach of the authorities at cantonal and federal level with regard to the adoption of children from Sri Lanka in the 1980s. He is to submit a report on the failures and in it name all the information that was in the possession of the authorities at the time, as well as the measures taken on this basis. The report should also explain the efforts made by the persons concerned to trace their origins and what means of support were available to them. Finally, the report will analyse the current legal framework for international adoption procedures and make recommendations on practice and the current and future legal framework.</p> <p>be formulated.</p>
January 2019	<p>Sabine Bitter, "The mediator. Alice Honegger's child adoptions from Sri Lanka and the supervision of the authorities (1979 to 1997)", report commissioned by the Office of Social Affairs of the Department of Home Affairs of the Canton of St. Gallen²⁶.</p> <p>"Overall, the Canton of St.Gallen d i d not adequately supervise the adoption placement of Alice Honegger. Already at the</p>

²³Cf. e.g. SMOLIN 2005, 2006, 2022; Unicef 1998; CANTWELL 2014.

²⁴Cf. in this respect also recently for France DENÉCHÈRE/MACEDO 2023, esp. 135 ff.

²⁵Available at < <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20174181>>.

²⁶Retrievable at <<https://www.sg.ch/content/dam/sgch/gesundheit-soziales/soziales/familie/Adoptionen%20von%20Kindern%20aus%20Sri%20Lanka%20in%20den%20Jahren%201979%20bis%201997%20E2%80%93%20Bericht%20von%20Sabine%20Bitter.pdf>>.

	<p>After the first licences were granted in 1973, when the welfare worker did not provide all the required evidence and therefore did not meet all the conditions, the St.Gallen Department of Justice and Police set framework conditions that worked well: It often turned a blind eye and did not look closely. The department made enquiries or demanded explanations and statements from Alice Ho-negger, but only when the pressure from outside could no longer be averted - whether because the media pointed out dubious practices by the intermediary or the Swiss ambassador came forward with a description of the events that could not have been more drastic.</p> <p>could not have been more drastic."</p>
January 2020	<p>Report of the Zurich University of Applied Sciences (ZHAW) incl. summary.²⁷</p> <p>Subject of the study: International adoptions from Sri Lanka in the time frame largely <i>before</i> the Hague Convention came into force.</p> <p>"This incident is an example of how Sri Lankan adoptions were abused in many ways when it came to fulfilling the unfulfilled wishes of married couples from rich Western industrialised countries such as Germany, the Netherlands, Sweden or Switzerland. In order to satisfy this need, a veritable adoption market emerged in Sri Lanka in the second half of the 1970s, which was dominated by a network of lawyers and agents. The placement of Sri Lankan adoptive children was highly lucrative for the local actors due to the large poverty and wage gap between the countries involved, which favoured corruption. In the 1980s, thousands of Sri Lankan children ended up in European countries under dubious, sometimes illegal conditions. Between 1973 and 1997, the Swiss authorities issued a total of 950 entry permits for children from Sri Lanka. (...). Critical reporting, which began in Sri Lanka in 1981, unequivocally exposed child trafficking. Not only the federal and cantonal authorities learnt about it. (...) All in all, it is clear that</p> <p>Children were sought for parents and not parents for children."</p>
24 April 2020	<p>Sentencing order/judgement of the Criminal Court of the Canton of Lucerne:</p> <p>Conviction of an accredited intermediary for attempted incitement to bribe foreign public officials pursuant to Art. 322septies para. 1 i. in conjunction with Art. 22 para. 1 and Art. 24 para. 2 StGB.²⁸</p> <p>The judgement documents the fact that irregular practices have also recently been even recently occurred on the territory of a host state/Switzerland.</p>
11 December 2020	<p>Illegal adoptions of children from Sri Lanka : historical reappraisal, search for origin, perspectives, report of the Federal Council in fulfilment of the</p>

²⁷Available at < <https://www.bj.admin.ch/bj/fr/home/gesellschaft/adoption/illegale-adoptionen.html>>.

²⁸The procedure is described anonymously as follows: "On 18 January 2017, at an unknown time, the accused called the couple NN, where he spoke to the woman and told her that she and her husband would receive a permit for a child if they transferred a sum of CHF 3,000.00 to CHF 6,000.00 as soon as possible. The accused further explained to her that local people would agree to prioritise the dossier if they received money. After the woman asked the defendant whether this was corruption, the defendant replied that it was and that there was a lot of it in Sri Lanka." The couple did not want to realise an adoption under these conditions and took the case to the authorities. The conviction led to their accreditation being withdrawn. It can be concluded from this that the risk of unlawful financial flows in the course of international adoptions remains manifest recently and even under the Hague Convention regime and in Switzerland as the receiving country; see judgement of the Criminal Court of the Canton of Lucerne of 24 April 2020.

	<p>Postulate 17.4181 Ruiz Rebecca of 14 December 2017.⁽²⁹⁾Based on the completed study by the ZHAW, the Federal Council report also concludes in particular: identification of a need for further clarification regarding other countries of origin (subsequent new mandate for the ZHAW), regarding the search for origins (mandate for the KKJPD working group) and regarding necessary reforms (mandate for the "International Adoption" expert group).</p> <p>"Even though the situation has fortunately improved since the 1980s, the report reveals the current weaknesses of the system and argues in favour of establishing an actual policy on international adoption in Switzerland. The report proposes various solutions: optimisation of the institutional organisation, limitation of the number of countries of origin, consistent implementation of international recommendations on financial issues and combating illegal practices in general, and revision of the relevant chapter of the IPRG. In order to strengthen the protection of children in this area, the FDJP is instructed to set up a group of experts to carry out a comprehensive analysis of the Swiss system and propose solutions, including in the form of legal reforms."</p>
14 December 2020	<p>Media conferences by Ms Keller-Sutter.³⁰</p> <p>"The Federal Council as well as the cantons and the KKJPD express their regret to the adoptees and their families about the misdemeanours committed in international adoptions in proceedings from Switzerland. The federal and cantonal authorities declare that they are committed to supporting the implementation of means to assist adoptees in their search for origins. A study on the need to review the legal framework for international adoptions will also be initiated.</p> <p>adoptions will also be initiated."</p>
21 May 2021	<p>The Committee on Enforced Disappearances states in its concluding observations on the report submitted by Switzerland under article 29, paragraph 1, of the Convention on the Abduction of Children that</p> <p>"39. The Committee welcomes the adoption by the Federal Council of the report of 11 December 2020 in fulfilment of postulate 17.4181 by Rebecca Ruiz entitled "Clarification of the illegal adoptions of children from Sri Lanka in Switzerland in the 1980s". It notes in particular that the Federal Council recognises the failings of the contracting state and expresses its regret to the adopted persons and their families. The Committee also notes that the State party is considering providing assistance to adopted persons in tracing their roots and initiating a broader reflection on the situation of intercountry adoption in Switzerland with a view to proposing solutions, including through legislative reform. The Committee also notes that the delegation of the State party has recognised that illegal adoptions are in some cases the result of the disappearance of children.</p> <p>or of the abduction of children , which may be attributable to the</p>

²⁹Available at< <https://www.bj.admin.ch/bj/fr/home/gesellschaft/adoption/illegale-adoptionen.html>>.

³⁰Available at< <https://www.youtube.com/watch?v=s32PZrjcag>>.

	<p>enforced disappearance or whose father, mother or legal representative is subject to enforced disappearance, or of children born during the captivity of their mother who is subject to enforced disappearance. The Committee notes with concern that the persons concerned have difficulties in obtaining the information and assistance they need. It is also concerned that the State party does not appear to be considering measures to prosecute the perpetrators and to recognise and implement the victims' right to reparation (arts. 9, 12, 14, 15, 24 and 25)."</p> <p>The Committee calls upon the State party under 40:</p> <p>"(a) Conduct thorough and impartial investigations to determine whether children adopted in Sri Lanka in the 1980s and 1990s may have been victims of enforced disappearance or child abduction and whether other offences such as forgery, concealment or destruction of identity documents were committed in these cases, with a view to identifying and punishing the perpetrators;</p> <p>b) identify, in consultation with the victims, the victims of enforced disappearance or child abduction and provide them with the assistance they need to establish their identity and parentage and to clarify the circumstances under which they were adopted;</p> <p>c) guarantee the right to compensation to any person who has suffered direct harm as a result of enforced disappearance, regardless of when the offence was committed and even if the harm occurred in another State, and even if no criminal proceedings have been instituted against the alleged perpetrators or if they have not been identified;</p> <p>d) for all purposes related to the implementation of the recommendations below, to request Sri Lanka to cooperate in accordance with Articles 14, 15 and 25 of the Convention."</p>
22 October 2021	<p>The Committee on the Rights of the Child states in the concluding observations on Switzerland's report</p> <p>"32 Taking into account the recommendations contained in the report of the Federal Council on the illegal adoption of children from Sri Lanka, the Committee recommends that the State party</p> <p>a) reform laws and procedures so that the principle of the best interests of the child is a central element in intercountry adoptions and the abduction, sale and trafficking of children is prevented;</p> <p>b) ensure that all children, including those adopted long ago, receive the help they need to know their origins."</p>

29 June 2022	<p>Danielle Berthet and Francesca Falk: "Adoptions of children from Sri Lanka in the Canton of St. Gallen 1973-2002".³¹</p> <p>"The present study shows that the errors and deficiencies described were not "only" due to the events in Sri Lanka, but - particularly with regard to the often inadequate supervision - were also essentially due to procedural errors on the part of the communal and cantonal authorities involved. The abuses revealed are an expression of the fact that although the "best interests of the child" were often cited, in specific cases they often amounted to empty words."</p>
Not yet published	<p>Investigation of the federal archives by the ZHAW.⁽³²⁾ After being informed by the FOJ, it completed its work and presented a comprehensive report analysing international adoption procedures with other countries of origin.</p> <p>This report was not yet available to the expert group at the time the interim report was finalised. Consequently, the findings for other countries of origin for the same time frame, i.e. the 1970s-1990s, could not be integrated.³³ However, according to information received by the expert group, it must be assumed that international adoptions from other countries of origin were also permeated by irregularities.</p>
Not yet published	"Recommendations of the Working Group on the Search for Countries of Origin to Support Adopted Persons" (KKJPD); the draft was made available to the expert group.
Not yet published	Swiss National Science Foundation (SNSF), Adoptions in forced situations and family placements. ³⁴
Since spring 2022	Appointment of and mandate to the expert group in fulfilment of a request according to the Federal Council report of 11 December 2020 ⁽³⁵⁾ .

Two core findings at this point: *Firstly*, the review primarily refers to adoption practices from the time *before* the 1993 Hague Convention and the 1989 UN Convention on the Rights of the Child (CRC).⁽³⁶⁾ Both legal instruments integrate important guarantees for children and their biological parents into the (international) adoption context. At present, however, it is not robustly established how the situation has developed from 1993 to the present day and to what extent progress has been made or to what extent irregularities must still be assumed today.⁽³⁷⁾ There are still alarming signs. *Secondly*, a Swiss policy on international adoption must prioritise effective measures to come to terms with the past and support those who have already been adopted - this is also what the international committees are demanding of Switzerland.

³¹Available at < <https://www.sg.ch/content/dam/sgch/gesundheit-soziales/soziales/familie/Bericht%20Adoptionen%20von%20Kindern%20aus%20Sri%20Lanka%20im%20Kanton%20St.%20Gallen%201973%20bis%202002.pdf> >.

³²Cf. 2020 Federal Council report, 25 ff.

³³Cf. < [nau.ch/news/forschung/bund-lasst-nach-sri-lanka-adoptionen-aus-korea-und-co-untersuchen-66346261](https://www.nau.ch/news/forschung/bund-lasst-nach-sri-lanka-adoptionen-aus-korea-und-co-untersuchen-66346261) >.

³⁴Cf. < www.snf.ch/de/Is5Ad1q61aWBXlBc/news/news-201210-ausschreibung-nfp-76-will-weitere-forschungsluecken-schliessen >.

³⁵Available at < <https://www.bj.admin.ch/bj/de/home/gesellschaft/adoption/illegale-adoptionen.html> >.

³⁶On the need for "chronological clarity", cf. also Chapter 2, 3.5; the expert group had to continuously deal with the finding that it is not possible to draw on a consistent review of adoption practices over the last 30 years or so - accordingly, there is a lack of consolidated information necessary for a robust assessment of the integrity of the procedures.

³⁷For an analysis of the Hague Convention procedures and the non-Hague Convention procedures, also with regard to the weaknesses, see Federal Council Report 2020, 50 et seq. and 54 et seq. The recommendations of the special commissions of the Hague Conference also provide information on the observed deficiencies in the implementation of the Agreement.

1.2 Situation in other countries

The practice of international adoption has been and is being critically analysed in several other countries. Below is a (non-exhaustive) tabular overview, in particular of political developments in other countries:

Table 2: Overview of political developments on the topic of international adoptions in other countries

Belgium	On 9 June 2022, the Federal Parliament adopted a resolution aimed at recognising the occurrence of illegal adoptions in Belgium, granting the persons concerned the status of victims and launching an administrative investigation into the matter. ³⁸ The results are expected in the summer of 2023. On 17 May 2022, the Foreign Affairs Committee of the Federal Parliament unanimously acknowledged that fraud had occurred in Belgium. The committee apologised for the suffering caused to the adopted children and their families. and their families.
Belgium (Flanders)	In September 2021, an expert report was presented, the conclusions of which are very clear with regard to the poor historical practices in international adoptions. At the end of 2021, the Flemish authorities adopted a package of measures to better regulate the procedures, in particular with regard to the traceability of information, money transfers and the honesty of the countries of origin. A screening of adoption practices was initiated with numerous countries of origin. The first of the analyses carried out for Vietnam led to the decision to end cooperation with Vietnam.
Chile	On 10 January 2022, the Chilean government decided to launch an investigation at both national and international level into adoptions that took place during the Pinochet dictatorship (1973-1990). ³⁹ A study published in 2021 entitled "Niños y niñas chilenos adoptados por familias suecas. Proximidad diplomática en tiempos de Guerra Fría (1973-1990)" ⁴⁰ concluded that "the adoptions of Chilean children by Swedish families were part of a campaign by the military dictatorship to promote adoptions as a means of counter-propaganda in order to end the "anti-Chilean campaign" in Sweden and restore international ties". and re-establish international links".
Denmark	Establishment of a homepage on the government website, where not only specific information on historical adoptions with certain countries of origin can be retrieved, but where it is also possible to lodge an individual complaint if an illegal adoption is suspected. countries of origin, but also the possibility of submitting an individual complaint to in the event of a suspected illegal adoption ⁽⁴¹⁾ .
France	On 11 February 2021, the association RAÏF (Association pour la Reconnaissance des Adoptions Illégales à l'International en France) launched an online petition with the title "Demande d'enquête sur les adoptions illégales à l'international en France depuis 1960" ⁽⁴²⁾ (Request for an investigation into illegal adoptions abroad in France since 1960). On 8 June 2022, a deputy from the Nouvelle union populaire écologique et sociale (NUPES) submitted a proposal for a "resolution to set up a ministerial mission of enquiry into the illegal adoptions of children in Sri Lanka that took place between 1973 and 1997". This, after

³⁸Cf. < <https://www.rtb.be/article/la-chambre-demande-une-enquete-sur-les-adoptions-illegales-11009596>>.

³⁹Information at < <https://www.dw.com/es/chile-buscar%C3%A1-v%C3%ADctimas-de-adopci%C3%B3n-illegal-en-era-de-augusto-pino-chet/a-60384277>>.

⁴⁰Cf. < https://www.researchgate.net/publication/353277513_Ninos_y_ninas_chilenos_adoptados_por_familias_suecas_Proximidad_diplomatica_en_tiempos_de_Guerra_Fria_1973-1990>.

⁴¹Cf. < <https://ast.dk/born-familie/hvad-handler-din-klage-om/adoption/historiske-adoptioner>>.

⁴²Cf. < <https://associationraif.com/>>.

	<p>adoptive parents had filed a request because they had discovered irregularities to which their adoption had been subjected.⁴³On 22 December 2022, a motion for a resolution was submitted with the aim of recognising the existence of illegal international adoptions in France since 1950, identifying the public and private responsibilities that had made these illegal practices possible and examining the need for reparation measures for children and adoptive families who had been victims of these practices.⁴⁴On 8 November 2022, the government launched an inspection mission to on illegal practices in the context of international adoption in France.⁴⁵On 6 February 2023, the university study "Etude historique sur les pratiques illicites dans l'adoption internationale en France" was published.⁴⁶</p>
The Netherlands	<p>Establishment of an independent committee of enquiry on 18 April 2019, whose investigations were limited to Brazil, Bangladesh, Colombia, Indonesia and Sri Lanka. Its conclusions were presented on 8 February 2021. The Netherlands then decided to temporarily suspend international adoption procedures. These were resumed in April 2022, albeit under stricter conditions.⁴⁷A single public operator now replaces the four previously private authorised bodies; cooperation projects related to adoptions are no longer permitted and the monitoring of procedures is strengthened. A document dated 2 November 2022 from the Minister for Legal Protection was made available to the (Swiss) expert group "International Adoption". According to this: Various steps have been taken to "transform"/"reform" the system in order to place the child at the centre of protection; measures have been taken to mitigate risks and prevent abuse - tightening up, specifically with regard to the centralisation of mediation and the reduction of countries (see below); establishment of a single <i>central accredited agency</i>; selection of countries with which international adoptions will be carried out in future: only with countries that comply with the Hague Convention and the Convention on the Rights of the Child (CRC), in particular. HAÜ and KRK, as well as the additional protocol against the sale of children, child prostitution and child pornography and which follow the <i>reverse flow approach</i>; co-operation only after a "critical assessment" has been carried out, which checks/confirms the actual compliance with the said decrees; co-operation with countries which act on the basis of an open, transparent and equal attitude and protect the interests of the child with the necessary flexible and critical attitude. Based on these criteria, it was decided to continue co-operation with six countries (Philippines, Hungary, Lesotho, Taiwan, Thailand and South Africa) and to build strong relationships through <i>agreements</i> and <i>working visits</i> to improve procedures. It was also decided to suspend cooperation with two countries (Bulgaria and Portugal) until more detailed information is available and to terminate cooperation with eight countries (USA, China, Slovakia, Czech Republic, Peru, Colombia, Burkina Faso, Haiti), the latter decision being taken for different reasons; intensification of international cooperation with the UN CRC Committee and the Permanent Bureau.</p>

⁴³Cf. < https://www.assemblee-nationale.fr/dyn/15/textes/l15b5262_proposition-resolution >.

⁴⁴Information available at <https://www.assemblee-nationale.fr/dyn/16/dossiers/PPR_34-1_reconnaitre_adoption_internationales_illegales_france?fbclid=IwAR1duEpV0V4sWTvclpymCLZjqu2Wcw4wFcl4VkHm0Qq_CIXIEX7gjx1upuw>; on restitution also LOI BLE 2021, 477 et seq.

⁴⁵Cf. < <https://enfance.gouv.fr/le-gouvernement-lance-une-mission-dinspection-sur-les-pratiques-illicites-dans-ladoption> >.

⁴⁶Cf. < <https://www.univ-angers.fr/fr/recherche/actualites/actus-2023/pratiques-illicites-dans-ladoption-internationale.html> >.

⁴⁷Cf. <<https://www.government.nl/latest/news/2022/04/12/weerwind-adoption-from-abroad-now-subject-to-stricter-conditions>>; on problematic practices specifically for Colombia TRIBOWSKI 2013, *passim*.

	of the Hague Conference; better preparation of future adoptive parents; establishment of the "Expertise Center for Intercountry Adoption".
Norway	20 January 2023: Establishment of an external committee to investigate intercountry adoptions ⁴⁸
Sweden	The government announced on 27 October 2021 that it has launched an enquiry to examine and analyse how the legal framework, organisational arrangements and decision-making processes for intercountry adoptions have worked in the past and to date. ⁴⁹ The aim is not only to shed light on past practices, but also to identify the current support needs of adoptees. The Swedish research will cover China, Chile, Colombia, Korea and Sri Lanka and (with the exception of China) will include field missions to gather information about the adoption programme in each country. The report is expected on 7 November 2023.
South Korea	Adoptees took the initiative to conduct a study on the practices related to international adoptions ⁵⁰ and received a grant from the National Human Rights Commission, which is a positive act in terms of the recognition of this work by the Korean authorities.

1.3 Situation at international level

The following is an overview of the most important international decrees, documents, authorities and findings in the context of international adoptions:

Table 3: Overview of the most important international decrees, documents and authorities relating to the topic of international adoptions

European Assembly (1987)	"Report on the Traffic in Children and Other Forms of Child Exploitation" Doc. 5777. ⁵¹	
Hague Conference (1990)	Report on the adoption of children from abroad. ⁵²	"The documents submitted to the Secretary-General (...) leave no doubt that international child trafficking is taking place, especially between the countries of Asia, Latin America and Eastern Europe. Asia, Latin America and Eastern Europe

⁴⁸ Cf. <https://www.vg.no/nyheter/innenriks/i/MoPyal/kjersti-toppe-til-vg-aapner-ekstern-gransking-av-utenlandsadopsjoner?fbclid=IwAR2elq6rFbRpPFOc_HIOYABpgZg4gKtILZMODEpuMSEHdplf32Ri5O80UE>.

⁴⁹ Cf. <<https://www.hrw.org/news/2021/02/22/sweden-investigate-illegal-intercountry-adoptions>>.

⁵⁰ Cf. <<http://koroot.org/board/4137/detail>>.

⁵¹ Cf. <<https://pace.coe.int/en/files/15099/html>>.

⁵² Cf. <https://assets.hcch.net/upload/adoption_rpt1990vloon.pdf>.

		on the one hand and the countries of North America and Western Europe on the other."
HAGUE CONVENTION (1993)	Hague Convention of 29 May 1993 on the protection of children and cooperation in respect of intercountry adoption (Hague Convention; SR 0.211.221.311).	Multilateral Convention on Intercountry Adoption, regulates co-operation between the competent authorities in the child's country of origin and the receiving country.
United Nations (1989)	Convention on the Rights of the Child ("CRC").	Art. 35 CRC stipulates that "all appropriate measures shall be taken at national, bilateral and multilateral levels to prevent the abduction, sale and trafficking of children for any purpose and in any form"; also applicability of further guaranteed children's rights to adopted children, in particular Art. 7 CRC; so- then in particular Art. 16 and Art. 21 CRC.
United Nations (2000)	United Nations Convention against Transnational Organised Crime and the Protocol against Transnational Organised Crime. Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children s trafficking. trafficking in women and children ⁽⁵³⁾ .	Neither instrument refers to violations of rights specific to intercountry adoption; they are therefore not directly applicable, but serve as inspiration for mechanisms for prosecution, assistance, compensation and redress.
Council of Europe (2005)	Council of Europe Convention on Action against Trafficking in Human Beings trafficking. ⁵⁴	
United Nations (2006)	Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.	The Protocol contains provisions that expressly prohibit the sale of children for adoption; intermediaries may not unfairly obtain consent to the adoption of a child in violation of international instruments. instruments.
European Union (2011)	European Union Directive on preventing and combating trafficking in human beings. Combating this	(11) "This definition also includes (...) other forms of behaviour such as illegal adoption or forced marriage, where the elements of trafficking in human beings are met. are fulfilled."

⁵³Convention des Nations Unies contre la Criminalité Transnationale organisée et son Protocole visant à prévenir, réprimer et punir la traite des personnes, en particulier des femmes et des enfants, Résolution de l'Assemblée générale 55/25 du 15 novembre 2000, <<https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebookf.pdf>>

⁵⁴ Convention du Conseil de l'Europe sur la lutte against la traite of êtres human beings, <https://www.coe.int/t/dghl/monitoring/trafficking/Docs/Convntn/CETS197_en.asp>.

	phenomenon and to protect d he victims (Directive 2011/36/EU). ⁵⁵	
Hague Conference (2012-2021)	working group on the prevention of unlawful practices in international adoptions and how these can be counteracted. can be counteracted. ⁵⁶	Cf. the entirety of the documents.
United Nations High Commissioner for Human Rights (2017)	Report of the Special Rapporteur on the sale of children, child prostitution and child pornography.	"Adoptions that are the result of crimes such as abduction, sale or trafficking of a child, fraud in the declaration of "adoptability", falsification of official documents or coercion, as well as any illegal activity or practice such as lack of proper consent of birth parents, unjustified material gains in favour of intermediaries and related corruption, constitute illegal adoptions and must be prohibited, criminalised and prosecuted as such."(57). be criminalised and prosecuted." ⁵⁷
UN treaty bodies/ specialised committees of the United Nations, on compliance with international human rights treaties (2022)	Joint statement o n illegal inter-country adoptions ⁵⁸	Illegal adoptions must be prevented and eliminated (see the entire document); core statements (not exhaustive): A human rights-based and gender-sensitive approach is called for; illegal adoption is recognised as a widespread phenomenon with various modalities that has devastating effects on all those affected; importance of protecting the child in its original family environment. Illegal adoptions violate various human rights (strong nexus between <i>right to privacy, identity, family</i>). Criminal norms may be violated and consequently (serious) crimes/offences committed; obligation to prevent illegal adoptions. The rights and measures that must be taken to prevent this are mentioned (safeguarding the best interests of the child and children's rights as a <i>pa-ramount consideration</i> , subsidiarity principle, preventing improper financial benefits, competent authorities must investigate and prevent illegal adoptions). authorities must act in accordance with

⁵⁵Cf.< <https://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:32011L0036&from=FR>>.

⁵⁶Cf.< <https://www.hcch.net/fr/publications-and-studies/details4/?pid=6309&dtid=62>>.

⁵⁷Cf.< <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/440/27/PDF/G1644027.pdf?OpenElement>>; see also< <https://www.ohchr.org/en/special-procedures/sr-sale-of-children/illegal-adoptions>>.

⁵⁸Available at< https://www.ohchr.org/sites/default/files/documents/hrbodies/ced/2022-09-29/JointstatementICA_HR_28September2022.pdf>.

		<p>Checking compliance with the requirements for deciding to find a family for a child and not the other way round, eliminating false incentives). In this respect, rights and practices should prevent unlawful international adoptions from taking place and the corresponding framework conditions should be created. This includes the establishment of data collections and statistics. The document also refers to the obligation to criminalise and investigate illegal adoptions. In this respect, the right to the truth and truth mechanisms, a DNA database, the procedure for cancelling adoptions and the right to restitution are relevant. Finally, the text contains considerations on rehabilitation, which should include: medical and psychological care and support at the legal and social level, counselling and guidance, the pursuit of peace and satisfaction, which should include full and "public" disclosure of the truth, a public apology, memorials and tributes to the victims, and guarantees that what has happened will not happen again (through legal, institutional and practical reforms).</p>
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2 Key findings of the expert group

The following *thematic clusters* outline the key findings of the expert group in answering the specific questions and forming scenarios in accordance with the mandate.

2.1 Terminology

The term "intercountry adoption" requires embedding/differentiation with regard to the following aspects: national adoption vs. international adoption, intercountry adoption vs. intra-family adoption in a national or international context as well as intercountry adoptions within the scope of application of the Hague Convention and those outside the Hague Convention.⁽⁵⁹⁾ The main focus of the group of experts is *not* on intra-family adoption with international connections. Rather, their interpretation of the term "intercountry adoption" is based, *mutatis mutandis*, on Art. 2 Hague Convention. The *case* is the situation in which a minor ("child") residing in one state is to be placed before or after adoption by persons residing in another state - i.e. Switzerland.⁽⁶⁰⁾ The child and its biological parents live in different countries/states after the adoption has been finalised. The focus is therefore on *international intercountry adoption*. Switzerland is the receiving country for children from countries of origin that have ratified the Hague Convention as well as from countries that have not ratified the Hague Convention (non-Hague Convention countries).⁽⁶¹⁾

The term *illegal adoption* is an umbrella term for various negative phenomena. The relevant national and international legal framework (e.g. before and after the entry into force of the Hague Convention and the CRC) is decisive for the question of what is (historically) to be described as an "unlawful practice" in the narrower sense and at what point in time. The term "*irregular adoptions*"⁽⁶²⁾ is preferable, possibly that of unlawful adoptions. Irregular practices cover a broad spectrum. They range from violations of ethical standards and minor violations of low-threshold requirements to serious violations of national and international law. Where serious violations of human rights standards and criminal law norms are involved, e.g. child trafficking, the term *illegal adoption* should be used explicitly.

It is challenging to legally categorise different types of actions (irregular or illegal) in the context of international adoption procedures that took place decades ago. It is necessary to take into account both the national law of the child's country of origin and that of the receiving country, as well as the temporal dimension that determines which texts were in force at the time the offences in question were committed. In addition, there are the rules of private international law and criminal law applicable at the time, which regulate questions of jurisdiction and applicable law, according to complex legal modalities that are in turn linked to the provisions of the national law of each state concerned. In addition, international treaties must be observed, which apply depending on the typology of the offences in question.

⁵⁹Adoptions can then be systematised according to the adopting persons: Is it a joint adoption by spouses, a single adoption or a stepchild adoption? A further element of systematisation is the effect of the adoption: Incognito full adoption, simple adoption, semi-open and open adoption.

⁶⁰For a (comparable) definition of international adoption, see the Federal Statistical Office: "The statistics on international adoptions show the number of adopted children whose place of birth is abroad, who were holders of a foreign nationality before the adoption and whose adoptive parents are resident in Switzerland. These statistics do not include cases of simple adoptions abroad (stepchild and adult adoptions)", available at <

⁶¹Cf. also the Federal Council 2020 report, 50 ff. on the two procedures.

⁶²Cf. the proposal of the working group in the second chapter, 3.5; on the difficulty of terminology also BALK/FREKES/DE GRAAF 2022, 1.

However, their territorial and temporal applicability must be taken into account. The body of law that prevailed for a long time in the countries of origin and host countries was sometimes inadequate. From today's perspective, if one adopts a strictly legal focus, it is difficult to reliably judge whether a certain act was illegal or not at a certain time in a certain country. Experience also shows that some of the irregularities identified today are due to omissions, steps not taken or missing documents and are therefore difficult to qualify, at least in part, from a legal perspective. However, none of this in any way relativises the strikingly critical findings of the evaluations carried out on international adoption practices.

2.2 Statistical data with contextual considerations

Factual changes and empirical findings regarding (international) adoption were taken into account. Firstly, the figures for international adoptions by host country for the years 2004-2020:⁽⁶³⁾

Table 4: Overview of the number of intercountry adoptions by receiving country for the years 2004-2020

14-6-2022	25 Receiving States 2004-2020																	
COUNTRY	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2004-2020
USA	22.988	22.735	20.671	19.605	17.467	12.753	12.149	9.320	8.668	7.094	6.441	5.648	5.372	4.714	4.059	2.970	1.622	184.276
Italy	3.402	2.874	3.188	3.420	3.977	3.964	4.130	4.022	3.106	2.825	2.206	2.216	1.872	1.439	1.394	1.205	669	45.909
Spain	5.541	5.423	4.472	3.648	3.156	3.006	2.891	2.573	1.669	1.191	827	801	574	542	456	375	195	37.340
France	4.079	4.136	3.977	3.162	3.270	3.017	3.508	2.003	1.569	1.343	1.069	815	956	685	615	421	244	34.869
Canada	1.949	1.858	1.568	1.715	1.614	1.695	1.660	1.516	1.162	1.243	905	895	790	621	658	576	416	20.841
TOP FIVE	37.959	37.026	33.876	31.550	29.484	24.435	24.338	19.434	16.174	13.696	11.448	10.375	9.564	8.001	7.182	5.547	3.146	323.235
Sweden	1.109	1.083	879	800	793	912	728	630	542	450	408	400	342	297	262	170	92	9.897
Netherlands	1.307	1.185	816	782	767	682	705	528	488	401	354	304	214	210	156	145	70	9.114
Germany	744	720	661	783	716	606	513	624	452	288	227	200	196	96	91	85	81	7.083
Norway	706	582	448	426	304	344	343	304	239	144	152	132	126	125	95	89	40	4.599
Denmark	528	586	450	426	395	496	419	338	219	176	124	97	84	79	64	46	23	4.550
TOP TEN	42.353	41.182	37.130	34.767	32.459	27.475	27.046	21.858	18.114	15.155	12.713	11.508	10.526	8.808	7.850	6.082	3.452	358.478
Belgium	470	471	383	358	364	439	388	351	260	178	156	137	121	124	104	75	52	4.431
Switzerland	567	389	410	394	259	288	293	238	194	159	92	92	73	75	52	62	35	3.672
Australia	370	434	421	405	270	269	222	217	157	138	114	83	82	69	65	57	37	3.410
Ireland	398	366	313	392	422	307	201	188	117	72	34	82	54	53	41	33	29	3.102
UK	333	369	363	356	225	200	173	153	120	124	68	58	64	60	71	52	53	2.842
Finland	289	308	218	176	157	187	160	163	175	141	142	93	58	70	54	67	27	2.485
Israel	226	191	176	218	150	120	114	115	88	69	42	37	22	17	17	11	6	1.619
N.Zealand	339	30	20	49	39	16	13	19	25	42	22	12	22	23	18	13	12	714
Malta	46	39	60	64	53	34	42	50	57	19	11	18	6	45	53	31	8	636
Luxembourg	56	41	45	23	28	36	32	25	32	17	13	18	19	16	12	18	5	436
Iceland	29	41	19	18	13	17	18	19	17	8	11	20	5	6	5	5	5	256
Slovenia		3	15	3	6	14	21	18	35	15	14	15	11	14	14	15	5	218
Cyprus	3	3	0	19	16	12	4	12	1	2	2	4	0	0	0	3	0	81
Andorra	3	1	4	6	5	7	9	2	1	4	2	0	2	2	0	3	0	51
Monaco	n/a	0	0	1	3	4	1	2	1	4	1	3	0	1	1	0	3	25
TOTAL	45.482	43.868	39.577	37.249	34.469	29.425	28.737	23.430	19.394	16.147	13.437	12.180	11.065	9.383	8.357	6.527	3.729	382.456

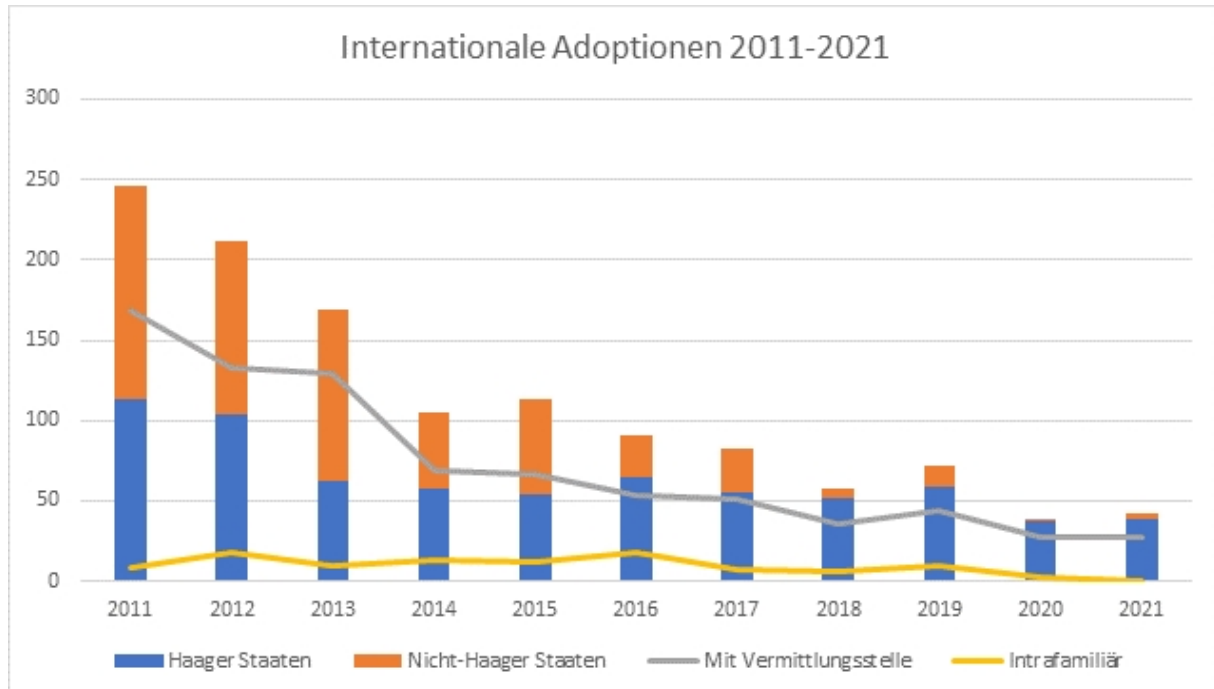
International adoption and its developments must be placed in relation to developments in the area of national adoption: *National, domestic intercountry adoption* has noticeably lost importance in Switzerland since the 1970s. Today it is a rarity. The reasons for this trend are, on the one hand, social developments such as the destigmatisation of illegitimate parenthood, in particular motherhood, the pluralisation of family and living arrangements, the greater economic independence of women and mothers, family solidarity and welfare state and family policy measures, as well as the fact that the number of adoptions is increasing. The main reasons for this are family solidarity and social and family policy measures, as well as biomedical/technological developments, in particular contraception, the medical option of ending a pregnancy with the "morning-after pill" (e.g. RU-486), as well as the options of reproductive medical technologies in the case of involuntary childlessness, etc. It is therefore obvious that the "release of children" for adoption depends to a large extent on the framework conditions.

With the "decline" of national intercountry adoption (in Switzerland/other host countries), the pressure on countries of origin and emerging countries increased, making international adoption significantly more relevant. Until 2004 - also due to the still limited possibilities of

⁶³ Cf. in this respect the statistics in SELMAN 2022, available at <https://www.hcch.net/fr/publications-and-studies/de-tails4/?pid=5891&dtid=32>.

reproductive technologies - to a boom in international adoption. The demand that (adoptive) parents should be sought for "parentless" children was reversed: children were procured for unwanted childless parents⁽⁶⁴⁾ After a statistically documented peak in the 2000s, however, the numbers in the context of international adoptions in Switzerland have fallen steadily in the 21st century, recently quite steeply (see table above and immediately below).⁽⁶⁵⁾

Fig. 1: Adoption statistics 2011-2021 (source: statistics from the cantonal central authorities for the attention of the FOJ)⁽⁶⁶⁾



In recent years, they have levelled off at a low level of around 50 cases per year. The reasons for this development in the receiving countries are likely to be the reproductive medical options available today and the destigmatisation of childlessness, as well as the changed legal framework with advances in child protection in the countries of origin (especially the principle of subsidiarity, which has led to countries of origin increasingly seeking solutions in their own countries and promoting national adoptions). The principle of subsidiarity, which has led to countries of origin increasingly seeking solutions in their own countries and promoting national adoptions).⁽⁶⁷⁾ In addition, there is an increasingly critical perspective on the institution of international adoption in view of adoption scandals, illegal practices and other findings of adoption research. Even if the procedural rules and elementary basic principles are adhered to, (international) adoption can be associated with stresses and challenges for the parties in the adoption triangle.⁽⁶⁸⁾ Apart from illegal and failed adoptions or adoption procedures that were carried out *comme il faut* and in which the people involved developed well, the adoption constellation, especially in an international context, represents a major psycho-social coping task at both an individual and collective level.

⁶⁴Report ZHAW Summary 2020, 18; on the fact that children can only be sold if there is a corresponding demand, CANTWELL 2017, 11.

⁶⁵< <https://www.bj.admin.ch/bj/de/home/gesellschaft/adoption/statistiken.html>>; on the question of whether adoption is an obsolete model, cf.

<<https://www.swissinfo.ch/ger/wirtschaft/familienleben-ist-die-adoption-in-der-schweiz-ein-auslaufmodell-/43833758#:~:text=In%20der%20Schweiz%20trat%20das,kinderlose%20Paare%20gerne%20adoptieren%20w%C3%BCrden>>.

⁶⁶The statistics are available at <<https://www.bj.admin.ch/bj/de/home/gesellschaft/adoption/statistiken.html>>.

⁶⁷Cf. on the reasons for the trend MIGNOT 2015, 1 ff.

⁶⁸Cf. with further references PFAFFINGER 2007, N 167 ff.; more recently BRÄNZEL 2019, 12 ff.

For Switzerland, Thailand (a Hague Convention country) is currently the most important country of origin. Adoptions from non-HTA countries are very rare; these are usually intra-family adoptions.⁽⁶⁹⁾ With around 50 international adoptions, Switzerland is currently an extremely small host country.

"Player". The international comparison shows that the USA is the most important receiving country in the context of international adoptions; at the same time, the USA also figures as a "sending country".

The figures and their development must be contextualised: In particular, it should be remembered that many of the children in the homes are often not full orphans in the sense of children whose parents have died (e.g. in Thailand or Haiti, and previously in Romania in particular, where they were regularly so-called social orphans).⁽⁷⁰⁾ Often parents are simply not known or there is a (supposed) "adoption clearance". It should also be borne in mind that children in the so-called "orphanages", homes are by no means automatically adoptable at the same time. To put it differently and succinctly: The fact that there are "full children's homes" should not lead to the conclusion that adoption is necessary.⁽⁷¹⁾ All of this must be taken into account under the heading of the principle of subsidiarity, especially as poverty should not be the only factor legitimising international adoption.⁽⁷²⁾ It is against this background that the numerical developments should be read. In this context, it is also relevant that the profile of children who are taken in as part of an international intercountry adoption has changed. They are more often children with *special needs*⁽⁷³⁾, i.e. older children, siblings, children with disabilities or illnesses - a consequence of the principle of subsidiarity and the new framework conditions, in particular due to the Hague Convention.

The expert group raised the question of why intensive cooperation has been established between certain countries (e.g. Switzerland - Thailand or today France - Vietnam), but not with others. The reasons for this are likely to be political and/or historical in nature, although this has not been scientifically analysed.⁽⁷⁴⁾

The circumstances of the birth parents and family are highly relevant to whether children are "given up" for adoption or placed for adoption. The decision to "give up" a child for adoption "can be triggered by massive pressure due to social realities or a lack of supportive measures"⁽⁷⁵⁾

The numerical development in Switzerland shows a continuous reduction in procedures (characterised by social, technological and legal framework conditions), which is tantamount to an *exit trend*.

In connection with the statistical/empirical recording of international adoption practices, a *core problem* must be mentioned again:⁽⁷⁶⁾ International adoptions in the years 1973-1997 were analysed, in particular from Sri Lanka (further analysis not yet available). In line with studies from other countries, it must be stated that international adoptions in the

⁶⁹Cf. < <https://www.bj.admin.ch/bj/de/home/gesellschaft/adoption/statistiken.html> >.

⁷⁰Cf. < <https://www.reuters.com/article/us-slavery-conference-orphanages-factbox-idUSKCN1NJ0AG> >.

⁷¹For more information on the whole, see < [Governments now have an opportunity to stop supporting the unnecessary separation of children from par-ents | Save the Children International](#) > or < [Finding Families - The State of Residential Care for Children and Implications for Human Development: A Research Review | Better Care Network](#) >.

⁷²Cf. CANTWELL 2014, esp. 5 et seq. and 71 et seq. H. SMOLIN 2022, 21; HCCH 2008, Guideline No. 1, 75.

⁷³Cf. in this respect for Thailand and the year 2023 the restriction to children with special needs < <https://www.bj.admin.ch/bj/de/home/gesellschaft/adoption/herkunftslander/thailand.html> >.

⁷⁴It is about the risk of the influence of non-systemic interests on child protection measures, which should be guided primarily by the welfare and rights of the child. The impairment of the integrity of international adoption by monetary/economic interests is the subject of intense debate, whereas political interests are less well analysed; see BUNN 2019, esp. 713.

⁷⁵Cf. instead of many BOÉCHAT/FUENTES 2012, 61.

⁷⁶Cf. also the findings of the working group in the second chapter, 3.5.

The periods analysed - especially in the 1970s to 1990s - were often characterised by irregularities in various fields and dysfunctionalities of varying degrees of severity. Irregularities did not only occur in individual cases. Instead, structural deficits were uncovered.⁽⁷⁷⁾ There is a lack of *systematic evaluations of the HAÜ*. There are no in-depth studies on the progress made by the Hague Convention of 1993 and the CRC 1989 with the relevant Additional Protocol, in particular the extent to which they are actually complied with and whether their regulatory mechanisms were or are capable of eliminating the weaknesses in the system of international adoption or not.⁽⁷⁸⁾ From a normative point of view, the Hague Convention and the CRC, including the Additional Protocols, undoubtedly represent progress, in particular with regard to the welfare and rights of children and the safeguarding of integral processes, procedures and organisations. However, the actual compliance with and effectiveness of the formal, material, procedural, registration and organisational requirements of international adoption remain a different issue. The Hague Conference saw it as its duty to develop instructions (e.g. using toolkits) to prevent child trafficking more effectively. Similar gaps in research and knowledge exist with regard to recent international adoptions with non-Hague states.⁽⁷⁹⁾ Several European receiving states are currently conducting screenings of international adoption practices with various countries of origin, some of which have subsequently led to the termination of co-operation. The expert group has consolidated *a position on how to deal with this knowledge gap*.⁽⁸⁰⁾ It strongly recommends that the practice of international adoptions since 1993 to the present day be analysed (at least for a time frame of the last five years, preferably longer) and evaluated. Initiatives at the level of the international bodies that are active with regard to the Hague Convention and the CRC are desired/indicated.

2.3 Compliance and accountability - trust and control - due diligence

Numerous studies have revealed various, often serious and systemic risks for international adoption, both for the adoption procedure (including a preceding phase) and for the post-adoption phase (keywords: illegal and irregular practices within the framework of the adoption procedure, including child trafficking, falsified documents, non-compliance with the principle of subsidiarity, etc.; failure to guarantee the right to know one's own parentage/clean break, etc.).

The *neuralgic phases* are already in the time before/during the pregnancy (i.e. possibly long before an adoption is even considered), then around the birth or separation, possibly release of the child for adoption, which takes place in the country of origin; the decisive factor here is the local framework conditions. In the countries of origin, the state structures are sometimes only weakly developed; there is poverty, disasters, and so on. At the same time, the milieu in which the institution of international adoption is embedded is characterised by economic and historical, partly post-colonial power asymmetries between countries of origin and host countries on a micro level.

⁷⁷Cf. in this respect also DENÉCHÈRE/MACEDO 2023, 137: " Il semble donc légitime de se poser la question du caractère systémique des pratiques illicites dans l'adoption internationale, de la consubstantialité de ces pratiques avec le phénomène lui-même. D'où la tentation d'en tirer l'axiome selon lequel partout où il y eu adoption internationale, il au y avoir pratiques illicites. This certainly does not mean that all international adoptions are based on illicit practices. "

⁷⁸The Federal Council Report 2020, 50 et seq. also provides assessments of weaknesses; furthermore, the recommendations of the special commissions of the Hague Conference on the observed deficiencies in the implementation of the agreement.

⁷⁹Cf. in this respect BOÉCHAT 2016, 16: " La Convention n'a évidemment jamais eu pour vocation de résoudre tous les problèmes des pays d'origine et des pays d'accueil dans leur gestion des procédures d'AI. On the contrary, it offers a certain number of tools that should enable the M e m b e r States to better understand each other by means of common modes of operation and minimum recognised standards. The law of the land, the procedures and their professional implementation depend on the competence of each of the States concerned, and if these aspects do not receive adequate attention, abuses will automatically (re)occur, supported by monetary transactions. "

⁸⁰On how the expert group "International Adoption" deals with this information and knowledge gap, on the assessments in this respect, on the conclusions and on the recommendations of the expert group, see in particular the first chapter, 3 and 4, and the second chapter, 2.2.

and macro level. In the second half of the 20th century, due to the not yet so advanced techniques of reproductive medicine, a considerable demand from childless persons/couples in the receiving countries and corresponding pressure on the countries of origin could be assumed (the principle that parents should be sought for parentless children was reversed: children were sought for childless parents, in some cases procured).

Probably the greatest challenge for the integrity of adoption procedures in the international context in the form of intercountry adoption lies in the *difficult, possibly insufficient influence in relation to the*

"Situation at the source": How can and should it be ensured that no unlawful payments are made "under the table"?⁽⁸¹⁾ How can it be verified that documents are not falsified and that children are not falsely labelled as orphans or "found" children? In the setting in which international adoptions operate, are effective and effective protection mechanisms and control instruments even conceivable?

The categories of *justified and unjustified trust vs. control* were discussed in depth and controversially in the expert group. It was argued that Switzerland must and may rely on the accuracy of documents and processes in the country of origin. If a child is recognised as

"abandoned", then there should be no reason for "follow-up enquiries" or "doubts". In addition, documents in Switzerland are thoroughly checked. It was objected that in light of the factual framework conditions, the susceptibility of international adoption to non-systemic purposes/abuses and the lessons learnt from the past, "overly trusting in good faith" would fall short of the mark. Switzerland's *due diligence* (i.e. the due/required care) is also required with regard to compliance with the requirements in the countries of origin. In this respect, the question of *(joint/shared) responsibilities in the cooperation between host countries and countries of origin* was addressed. A conceptualisation according to which "state responsibility" more or less ends at the respective national border does not hold water. More recent approaches can be found in various cross-border areas of law (cf. e.g. Art. 5 StGB; corporate responsibility; data protection law; patent law).⁽⁸²⁾ In the case of international adoptions, for example, states should be obliged to exercise *due diligence* under the Convention on the Rights of the Child. They must demand evidence and proof that makes *compliance* - i.e. adherence to all requirements of the international adoption, including with regard to the processes or the procedural part in the country of origin - reliably verifiable. In this respect, transparency, cooperation, *accountability* and *due diligence* need to be expanded. Against the background of the breadth and severity of irregularities, the systematic nature of irregularities as documented for the second half of the 20th century and the systemic risks under which the Institute continues to operate today, it is not justifiable to assume that there are no or hardly any irregularities today when formulating recommendations for a Swiss policy on international adoption.⁽⁸³⁾ Although such an approach would assign a guarantor position to the structural legal framework, it would not rule out the possibility that more or less high risks continue to exist today. It is therefore recommended that gaps in knowledge regarding any irregularities in international adoptions in the recent past and present be closed and that mechanisms for the purpose of *due diligence* be consistently implemented.

⁸¹In this respect, the facts of the case and the procedure described in the judgement of a Lucerne court, which led to the conviction of an intermediary that subsequently had its accreditation withdrawn, are impressive; see judgement of the Criminal Court of the Canton of Lucerne of 24 April 2020.

⁸²Cf. in particular the extraterritorial applicability of the requirements under the GDPR for countries that offer goods and services in the EU, Art. 3 GDPR. As soon as countries trade across national borders, they are also obliged to comply with the respective data protection requirements.

⁸³In this context, see, for example, the decision by Belgium and the Netherlands to terminate cooperation with certain countries of origin following a screening of the procedures with the "alarm signals" uncovered here.

It should be added at this point that the problematic creation of a "fait accompli" by parents who have a child abroad outside of the regular procedures and structures/responsibilities is also a problem. "get".⁸⁴Such "quasi-wild" adoptions must be consistently prevented.

2.4 Short and long-term perspectives on children's welfare and rights and their relationships

(International) adoption must *primarily promote the best interests of the child and safeguard children's rights*⁽⁸⁵⁾ It is a *child protection measure* that must respect the *principle of subsidiarity* and is therefore *ul-tima ratio*.⁽⁸⁶⁾ It is also a legal act for the (complete in the case of full adoption) termination of the original child relationship with the simultaneous establishment of a new legal child relationship. It is therefore an *institution of family law*.⁽⁸⁷⁾ Parents are to be found for "parentless" children (and not children for childless parents) for whom no other care can be found that can better guarantee the promotion of the welfare and respect for the rights of the children. However, the idea that a child can be transferred with a one-off legal act/clean *break* does not properly reflect the Institute: Adoption is a lifelong process in the so-called adoption triangle.⁽⁸⁸⁾ This follows precisely from the legal framework, in which *the best interests of the child and children's rights* are *primary, but not exclusive, guiding principles* of international adoption.⁽⁸⁹⁾ The following should be said in this regard:

International adoption has a long and equally problematic history. The interests of the child and the family of origin have often been used as a pretext to realise other interests - the institution has been corrupted by other purposes. International adoption, which primarily realises the welfare and rights of children in reality and therefore deserves the title of child protection measure without any ifs and buts, therefore requires a *comprehensive reform*: it is about the welfare and rights of adopted minors and adults who have already been adopted as well as about any children to be adopted in the future in their legally protected integration into family and cultural relationships.⁽⁹⁰⁾

The best interests of the child and children's rights are paramount, but not exclusive criteria (paramount consideration). Accordingly, the rights of the biological parents must also be taken into account: On the right to the protection of family life, cf. in particular Art. 8 ECHR, Art. 16 UDHR, Art. 10 UN Covenant I. The adoptive parents/families only enjoy comparable (family) legal protection after the adoption has taken place (the legal position during the foster care relationship is somewhat different).

The *best interests of the child* are concretised through the interdisciplinary (integration of psychological findings in particular) and legal approach (integration of fundamental decisions and developments in the law).⁽⁹¹⁾ Under the heading of *children's rights*, the CRC and its additional protocols are particularly relevant in the context of international adoption, in addition to the relevant national constitutional law.

⁸⁴Cf. ATF 5A_341/2020, arrêt du 17 novembre 2020: "In these circumstances, the cantonal authority ruled that it was not admissible, in view of the principle of good faith and equality of treatment in relation to persons who wish to comply with the rules applicable in Switzerland, to allow people to ignore Swiss law for a certain period of time - which is even longer - the time to maintain close relationships with their children, and then to allow them to invoke these same relationships in order to benefit from the exception granted by Swiss law. The requirements of Swiss law do not apply according to the wishes of each of us, especially in an area as sensitive as that of taking charge of minors' children, the interests of the primary child and not necessarily confusing them with those of adults who have children."

⁸⁵Cf. Art. 3 and Art. 21 CRC, Art. 4 lit. b Hague Convention, Art. 9 lit. b BG Hague Convention.

⁸⁶Cf. Art. 4 lit. b Hague Convention.

⁸⁷Cf. for Switzerland Art. 264 ZGB.

⁸⁸In more detail w. w. H. PFAFFINGER 2007, N 74 ff., N 91 ff.

⁸⁹In more detail on this, see also PFAFFINGER 2007, N 76 et seq.; *paramount consideration*.

⁹⁰In this respect, the findings at international level are also impressive, cf. second chapter, 1.3.

⁹¹Fundamental to the methodology PFAFFINGER 2007, N 74 ff. and PFAFFINGER 2011, 417 ff.

The physical and psychological integrity of the child is legally protected; in addition, the protection of the child with its relationship to the family of origin as well as the right to identity formation and in particular the right to knowledge of parentage are guaranteed.⁽⁹²⁾ In addition, there are criminal and human rights prohibitions on child trafficking.⁽⁹³⁾ The Hague Convention also provides for organisational and procedural requirements and standards for international adoption to protect the best interests of the child and children's rights.

International adoptions which - even if the determination of the law in force in each case is challenging - are to be assessed as *illegal adoptions* because children have been stolen, sold, etc., violate not only the welfare of the child and its rights, but also the relevant criminal and fundamental rights norms, at least according to current understanding and the body of law.⁽⁹⁴⁾ In view of the evidence presented, it can be assumed that a not insignificant proportion of international adoptions were illegal in this sense. It is true that steps have already been taken to make amends. However, the true extent of the injustice committed here can only be speculated about at present. The responsible UN committees are therefore calling for decisive action and, for example, reparations from the states involved, including compensation for damages despite any statutes of limitations.

Even when procedures have been carried out in accordance with the rules, adoptions are often associated with stress - not to mention the suffering of those affected by illegal adoptions.⁽⁹⁵⁾ Adoptees and birth parents alike sometimes describe considerable pain. The process can also be difficult for adopters/adoptive parents, especially in an international context. There is evidence of challenges for the children in forming their identity, including the aspect of cultural identity as well as feelings of loss, uprootedness, grief, disorientation and anger. For certain adoptees, it is very stressful not to have access to information about their origins that is relevant to their country of origin and thus affects their identity formation and possibly their health (in Western countries today, numerous genetically inherited diseases can be detected and treated accordingly as a precautionary measure; adoptees generally do not have access to such information). Withholding information about the child's origins therefore violates its welfare and rights.

Notwithstanding the fact that there are "successful" adoptions, both in terms of the process and the well-being of those involved, a Swiss policy on international adoption must address such critical findings concerning the best interests of the child and his or her rights.

A Swiss policy that is suitable for promoting the best interests of adopted children and safeguarding their rights must *also prioritise and a fortiori take into account the rights of those who have already been adopted and safeguard their interests* (even if they are no longer minors, they remain adopted children in the sense of adoptees). This includes the consistent processing of any serious violations of standards,⁽⁹⁶⁾ the implementation of *sustainable and free-of-charge support services for adoptees and their families*.

⁹²Cf. Art. 24 and Art. 8 CRC, Art. 30 Hague Convention.

⁹³Cf. in more detail, in particular on the challenge of unlawful financial benefits, second chapter, 3.4.

⁹⁴In addition, under the concept of genocide, thematised by the UN in Joint Statement: "In certain conditions as provided for in international law, illegal intercountry adoptions may constitute serious crimes such as genocide or crimes against humanity."; on child trafficking and Switzerland also UNICEF 2007

⁹⁵Media on illegal adoptions e.g. <<https://www.letemps.ch/opinions/adoption-illegale-lenfant-devient-une-marchandise#:~:text=Ce%20cas%20illustre%20une%20fois,qu'elles%20abandonnent%20leurs%20enfants>>; <<https://www.reuters.com/article/us-ar-menia-trafficking-adoption-insight-idUSKBN1ZT1CN>>; <<https://www.channelnewsasia.com/asia/babies-for-sale-an-investigation-into-philip-pines-adoption-trade-779076>>; <<https://www.reuters.com/article/us-ethiopia-adoption-ban/ethiopia-adoption-ban-may-curb-trafficking-but-poorest-families-need-support-idUSKBN1F427L>>; <<https://www.reuters.com/article/us-uganda-children-adoption-idUSKCN0W61OI>>; pioneering adoption research has been carried out by SWIENTEK, among others, since 1986; on the basis of interviews/portraits cf. e.g. BREITINGER 2011, *passim*. ⁹⁶Cf. in this respect in particular also the claims against Switzerland, second chapter, 1.1.

in general and in the context of the search for origin in particular (post-adoption services) as well as the verification of the conformity of recent adoptions with the rules.

In the context of international adoption and taking into account the findings of the *initial critical phase*, specific attention must be paid to the guiding principles of the best interests of the child, children's rights and subsidiarity: This includes recognising the protection of the child's original integration into its traditional (familial, cultural, state) systems. It is also relevant from the point of view that *the best interests of the child and children's rights are primary, but not exclusive criteria*.⁽⁹⁷⁾ The rights of other members of the family of origin/biological family must also be respected. Women who have been "left alone" (by the child's father, the wider family, the state) and who, as a result of stigmatisation, poverty or abandonment, see no other way than to give the child up for adoption often feel compelled to adopt.⁽⁹⁸⁾

Under the heading of child welfare and children's rights, a critical examination of the currently implemented adoption effects (incognito full adoption vs. semi-open and open adoption⁽⁹⁹⁾) and a systematic survey of the current situation of early adoptees are recommended.

Various demands for reform result from the requirement to prioritise the protection of the best interests of the child and children's rights, including the protected legal positions of biological parents/originating families and then adopters/adoptive families.

2.5 Adoption as a multidimensional institution

The persistent idea that adoption as a one-off legal act with a *clean break* erases all realities and makes the child the quasi biological child of the adopters falls short of the mark.⁽¹⁰⁰⁾ What is needed is a broad-based, systemic view of *the framework conditions, the actors involved and the timeline*. This requirement is linked to 2.4.

International adoption has always played a role in political, demographic, cultural and historical "major weather situations".⁽¹⁰¹⁾ The institution of international adoption has repeatedly been misused in the course of military or political conflicts.⁽¹⁰²⁾ Currently, reference should be made to the events in the course of the war in Ukraine, where children were abducted from Ukraine and forcibly adopted in Russia.⁽¹⁰³⁾ Even under this facet, the institution - to this day - has a dark side.

⁹⁷Fundamental to this is m. w. w. H. PFAFFINGER 2007, *passim*.

⁹⁸Cf. with further references BOÉCHAT/FUENTES 2012, 61; specifically for India the explanations in the working document of the working group consisting of BOÉCHAT/AESCHBACHER.

⁹⁹In more detail w. w. H. PFAFFINGER 2007, esp. N 107 ff.; under its own title 2.12.

¹⁰⁰In more detail w. w. PFAFFINGER 2007, esp. N 107 et seq.

⁽¹⁰¹⁾ "The deportation of children is a particularly vicious crime", see MEYER in an interview, NZZ of 28 March 2023, also on the arrest warrant issued by the International Criminal Court in this context, available at <https://www.nzz.ch/international/haft-befehl-gegen-putin-der-icc-setzt-ein-wichtiges-signal-ld.1731781>; on the abduction of Ukrainian children to Russia for adoption in the course of the Russian war of aggression KRASTEV, Der Krieg in der Ukraine und die Zukunft Europas, Sternstunden der Philosophie of 22 January 2023; on Ukrainian children as "spoils of war", see < <https://www.tagesanzeiger.ch/putins-kinderdiebin-514574483465>; with regard to the Second World War, see the contributions by HEINEMANN/SCHMITZ-KÖSTER 2022.

¹⁰²On the deportation of Polish children for the purpose of adoption and "Germanisation" during the Second World War, cf. the contributions by HEINE-MANN/SCHMITZ-KÖSTER 2022; on the start of the reappraisal project of forced adoptions in the former GDR: <<https://www.bmi.bund.de/DE/themen/heimat-integration/gesellschaftlicher-zusammenhalt/ddr-zwangsadoptionen/ddr-zwangsadoptionen-node.html>>; then VAN STEHEN 2019, *passim*.

¹⁰³Cf. <<https://www.nzz.ch/international/kinderraub-wie-russland-ukrainische-kinder-entfuehrt-ld.1708772>>; <<https://kurier.at/politik/au-land/russland-ukraine-deportationen-kinder-adoption/402182526>>; <<https://www.merkur.de/politik/russland-ukrainische-kinder-entfuhrung-adoption-krieg-menschenrechte-un-91776202.html>>; <<https://www.merkur.de/politik/lwowa-belowa-ukraine-krieg-kinder->

Another structural feature of the Institute is the framework conditions in the countries of origin: poverty and economic precariousness, social values and realities, stigmatisation, (lack of) contraception and abortion options, environmental disasters and war, weak or collapsing state systems, organisations and registers, corruption, etc. In this context, the phase of a woman's pregnancy and the birth must be neuralgic moments for compliance with the legal requirements. Added to this is the disparity/asymmetry of power between the countries of origin and host countries. This is fertile ground for extraneous interests that corrupt adoption as a child protection measure instead of the welfare and rights of the child.

Adoption is not just a child protection measure and legal act for the legal termination/establishment of legal family relationships. On a relational and personal level, it is a lifelong process in a complex system with numerous references. This points to the high relevance of the search for origin - both as a legal right of the adoptee and as an instrument for verifying the legal conformity of adoption processes - as well as the necessary support *after* the adoption. In this respect, the child's welfare and rights are of the utmost importance - in addition, the interests and rights of birth parents and then of adopters must be integrated. It is particularly important to recognise the fact that the birth family and the family of origin have a specific role to play, especially as the child's relationship with its birth family is subject to special protection (see 2.4 above).

2.6 "Adoptability" under scrutiny

"Adoptability" and "adoption approval" with the requirements of information and voluntariness are problem areas. Several challenges need to be addressed in this regard:

Various cases have been investigated in which the "adoptability" of a child or its proof was fabricated/falsified. For example, there are documented cases in which a declaration of release was never issued because the children were not returned to their parents after the birth. The "status" was often falsified on paper and *did not* correspond to reality.⁽¹⁰⁴⁾

There are also reports of situations of great pressure, even coercion, being exerted on the biological parents. These include, in particular, the influence of monetary or material gifts, desperate situations of excessive demands and ignorance/lack of clarity regarding the consequences of consenting to adoption. The viability of "adoption approval" and "informed and voluntary adoption consent" must be questioned in the light of the realities of poverty, inadequate support, stigmatisation and so on. Many studies show that relinquishing mothers/parents suffer from the loss of their children for the rest of their lives.⁽¹⁰⁵⁾ In countries where the general conditions are better, the "giving up of children for adoption" hardly ever occurs.⁽¹⁰⁶⁾ As a rule, "giving up" a child is an extremely painful decision that is usually only made under precarious conditions.

[abduction-russia-vladimir-putin-child-rights-representative-maria-92032400.html](https://www.welt.de/politik/au-land/plus241900459/Kindesentfuehrungen-in-Putins-Auftrag-Tausende-Kinder-nach-Russland-verschleppt.html);

<[https://www.welt.de/politik/au-](https://www.welt.de/politik/au-land/plus241900459/Kindesentfuehrungen-in-Putins-Auftrag-Tausende-Kinder-nach-Russland-verschleppt.html)

stand/plus241900459/Kindesentfuehrungen-in-Putins-Auftrag-Tausende-Kinder-nach-Russland-verschleppt.html>.

¹⁰⁴Cf. with further references BOÉCHAT/FUENTES 2012, 80.

⁽¹⁰⁵⁾ E.g. Terre des Hommes Foundation and UNICEF 2008, Adopting the Rights of a Child: A Study on Inter-country Adoption and its Influence on Child Protection in Nepal, 2008.

¹⁰⁶England is an exception: according to official statistics, there are 82,000 children in *alternative care* (i.e. homes or *foster families*) in England, and 2950 adoptions per year (national). In Switzerland, it is estimated that there are around 20,000 children in *alternative care*, but only 150 adoptions per year (including stepchild adoptions).

This should take into account any social and cultural differences in relation to the concept of family and thus be recognised by parents/families all over the world.

Secondly, even today it is not always possible to be convinced beyond doubt that facts stated in documents and registers actually correspond to the facts and legal requirements in each individual case. Following in-depth investigations, "alarm signals" have prompted the Netherlands, Belgium and Switzerland to terminate their cooperation with certain countries of origin.⁽¹⁰⁷⁾

One thing is certain: As the receiving state, Switzerland is obliged to exercise *due diligence* in verifying the correctness of the relevant documents and the integrity of the processes within the framework of cooperation with the respective country of origin. It should define criteria, also with regard to documentation and proof of the correctness of the information relating to the handover of the child. The necessary and well-developed transparency and control must be guaranteed. However, doubts remain as to whether mechanisms can be established in the context of international adoption with countries affected by disasters, with countries without a robust registry and organisational structure and with third world and emerging countries to ensure that documents are always correct, that no unauthorised funds flow, that the release is truly voluntary and informed, etc. Host countries and countries of origin should expand joint efforts to implement the requirements, and host countries should also provide specific support to countries of origin in setting up robust processes, procedures, registers, controls, etc.⁽¹⁰⁸⁾

Discrepancies between document and reality often become apparent in the context of the search for origin.⁽¹⁰⁹⁾ Currently, conducting searches for origin of adoptees who are still minors could be informative (regardless of the currently unsatisfactory rule in the Swiss Civil Code, see Art. 268c para. 1 CC) in order to verify the congruence of content and form on the documents and thus also the integrity of current adoption procedures. This would be accompanied by a decision to critically reconsider the regime of "secret full adoption". This would include the abolition of register fictions, which characterise the institution of adoption itself in Switzerland to this day.⁽¹¹⁰⁾

2.7 Subsidiarity principle put to the test

The principle of subsidiarity requires that "a child may only be given up for international adoption after all measures in the country of origin have failed to enable the child to remain in his or her previous family or to find a suitable host family."¹¹¹ The child should first and foremost receive protection and care in his or her *family of origin*. The state must take appropriate measures to prevent the disintegration of the family of origin. If appropriate preventive measures fail, reintegration should be sought. Only if this fails or is ruled out for other reasons can an out-of-home placement be considered. Out-of-home care in an institution or family in the respective country has priority over international adoption.⁽¹¹²⁾ The *principle of subsidiarity* is of paramount importance. *There are no indications for*

¹⁰⁷E.g. with Ethiopia, available at <<https://www.bj.admin.ch/bj/de/home/gesellschaft/adoption/herkunftslander/aethiopien.html>>; for the other two countries, see Chapter 2, 1.2.

¹⁰⁸For this requirement, see Art. 1 lit. b and Art. 7 Hague Convention.

¹⁰⁹For this reason, too, the provision under the Civil Code, according to which the right to information is in principle only granted upon reaching the age of majority, should be reviewed.

⁽¹¹⁰⁾M. W. H. PFAFFINGER 2007, N 320 ff., and on this practice, which serves to overcome stigma, N 133.

¹¹¹Cf. FOJ, available at <<https://www.bj.admin.ch/bj/de/home/gesellschaft/adoption/haue.html#:~:text=Was%20besagt%20das%20Prinzip%20der,eine%20geeignete%20Aufnahmefamilie%20zu%20finden>>; cf. in particular Art. 4 lit. a and lit. b Hague Convention; w. w. LAMMERANT 2001, 48 et seq.; on the principle of subsidiarity already VAN LOON 1990, 54 et seq.

¹¹²Cf. Art. 21 CRC, in particular lit. b; also Art. 4 Hague Convention; on the principle of subsidiarity also HCCH 2008, Guideline No. 1, 30; LAMMERANT/HOFSTETTER 2007, 4.

international adoption are poverty as the sole reason or stigmatisation, e.g. towards unmarried mothers.⁽¹¹³⁾ Compliance with the principle is still questionable in some cases to this day. In this regard, a dossier on the case of a one-month-old baby from the USA was discussed critically in the expert group. Also under the subsidiarity principle, the question of the review/verifiability of dossiers/documents that identify children as "adoptable", "orphaned", "parentless", etc. was again discussed (problem of *child laundering*⁽¹¹⁴⁾).

2.8 Formal law and de facto realisation or implementation deficits

The CRC and its protocols as well as the Hague Convention (including the implementing decrees and measures) are milestones in guaranteeing the basic rights of children and safeguarding adoption procedures with integrity. They mark impressive progress in the protection of children, including in the context of (international) adoption. However, aspirations and reality are not the same.

The rather sporadic evaluation of compliance with and the effectiveness of the Hague Convention's regulatory mechanisms is problematic.⁽¹¹⁵⁾ It is true that the Federal Council report already contains certain critical comments on the procedure under the Hague Convention and other areas, and the recommendations of the Hague Conference's specialised commissions also contain important information on observed shortcomings in the implementation of the agreement. Nevertheless, it is currently not possible to conclusively assess, based on a broad range of data, how well the Hague Convention functions, whether the standards, guarantees and requirements of intercountry adoption are consistently observed in reality, whether they are effective or whether a more or less pronounced "implementation deficit" can be assumed.⁽¹¹⁶⁾

2.9 Narratives of international adoption in the light of reality

Adoption has a long tradition and is still underpinned by powerful narratives today.⁽¹¹⁷⁾ As a child protection measure, it is intended to promote the welfare and safeguard the rights of children in precarious circumstances. The "rescue narrative" in particular has characterised the Institute for decades.⁽¹¹⁸⁾ However, this concept of finding parents for "parentless" children has often been turned into its opposite. The expert group does not ignore the precarious realities of countless children around the world. It also recognises that some international adoptions were or are carried out in accordance with the rules and that the children concerned develop well. Sometimes international adoption has indeed been able to protect the welfare and rights of the child. Nevertheless, the practice is characterised by *irregular adoptions* and reports from those affected of great stress. These risks and the price that those affected by irregular/illegal practices have to pay cannot be weighed up against "success stories" - especially not when the former are systemic in nature. A realistic assessment of international adoption with its opportunities and risks is therefore required. The practices analysed show that international adoption often does not live up to the name of a child protection measure in reality.

¹¹³Cf. in this respect w. w. H. SMOLIN 2022, 21; HCCH 2008, Guideline No. 1, 75.

¹¹⁴Fundamentally SMOLIN 2006 and 2010.

¹¹⁵Cf. after all < <https://assets.hcch.net/docs/f9f65ec0-1795-435c-aadf-77617816011c.pdf>.

¹¹⁶Federal Council Report 2020, 50 et seq.; on the criticism of the Hague Convention with its "manque de mordant" PICHE 2012, 268; critical references then in LAM-MERANT/HOFSTETTER 2007, esp. 9.

¹¹⁷Cf. illustrative and exemplary KAISER 1979, 273: "Terre des Hommes en appelle à votre humanité et votre justice. First of all, the families to welcome never again our abandoned children. Because it is death that is at stake. But it is a question of life whether you have a duty as adults to consume, to nourish and to love."

¹¹⁸On the relevance of narratives, see with references SMOLIN 2004, fn. 3; DERS. 2021, 16; BUNN 2019, 687; on the rescue narrative, e.g. CANTWELL 2017, 17.

and has recently also been negotiated under aspects of structural racism and in the sense of "postcolonial studies".⁽¹¹⁹⁾

2.10 Risks inherent in the system and interests outside the system

The evaluation of international adoption practices over the last century provides insights into the Institute's deficits and risks. Derived from the description of the Institute's functioning and framework conditions, the term *systemic risks* can be established. The decisive question is whether and to what extent measures can be taken to reduce the risks of irregular practices to an absolute minimum. Abuses and breaches of the rules can never be completely prevented. However, as children are involved, every effort must be made to *minimise* these risks. It must be possible to provide a sufficiently robust regime and a resounding catalogue of measures that not only promise the protection of children and compliance with the law on paper, but also make it a reality in practice.

International adoption as a child protection measure must be guided primarily by the principles of the best interests of the child and children's rights. It is confronted with the problem that *interests outside the system* - namely financial ly, but also political (sometimes imperialist) interests¹²⁰- can corrupt these goals and rationalities. The risks of such *effects eroding* the institution of a child protection measure are accentuated *when power asymmetries* are present. At both the macro and micro levels, international adoption takes place in asymmetrical relationships: Highly developed and financially strong as well as politically powerful Western states meet developing and emerging countries, countries with weak state structures, countries devastated by war or natural disasters and the people and families living in them. These power imbalances and systemic risks make international adoption susceptible to irregularities and influences/abuses that are alien to child protection.

2.11 Searching for origins - the right to know one's own origins

Adoption is a lifelong process, a lifelong issue for all persons involved. The right to know one's own parentage is a fundamental right, as is the right to the protection of personality and thus identity, which includes cultural identity. One of the reasons for the obstacles to the realisation of the fundamental right to know one's own parentage - in addition to illegal practices per se - is the privileging of anonymity for the (supposed) protection of biological parents/mothers (e.g. in India). Poor, incomplete, non-existent or falsified documentation presents many of today's adult adoptees with challenges and burdens in relation to clarifying the question of their origin/history/family/identity. The development of effective and free offers of help in the search for origins must be given the highest priority.⁽¹²¹⁾

The right to know one's own ancestry and its assertion/realisation or failure is also a "detector" of any falsified or incomplete documents etc. and thus of illegal practices. The implementation of the measures required here must be a priority element of a Swiss policy on international adoption that recognises the rights of children and young people.

¹¹⁹HÖGBACKA 2019, 271 ff.; BERTHET/FALK U.A. 2022, 1 ff., 57 ff.

¹²⁰For more on this, see Chapter 2, 3.4.

¹²¹Cf. draft recommendations on the search for origin, < <https://www.bmfsfj.de/bmfsfj/aktuelles/alle-meldungen/adoptionshilfe-gesetz-bundesrat-bundestag-163414>>; see also the Adoption Assistance Act, which came into force on 1 April 2021, with its broad approach to increased openness in Germany; on the demands at international level in this context, second chapter, 1.3 and specifically with regard to Switzerland 1.1.

adoptees and promote their welfare in the best possible way. This also includes the review of secret full adoption; see 2.12 below.

2.12 Clean break - review of secret full adoption as an adoption effect

A reform of adoption that maximises the welfare and rights of adoptees should adapt the effects of adoption: The *clean break*, as established in the last century via secret full adoption (incognito full adoption), has long been criticised in adoption research.⁽¹²²⁾ A *clean break*, as implemented by secret full adoption - which pretends that the adopted child is the biological child of the adoptive parents and that there is no family of origin and no culture of origin - does not reflect the realities. Incognito full adoption puts the best interests of the child and several children's rights to the test. Seen in the light of day, it must be acknowledged that the shadow of the secrets of full incognito adoption (including register fictions) has favoured illegal practices and their exposure. The implementation of semi-open and open forms of adoption should be examined; full adoption should also be evaluated. The anchoring of semi-open and open forms of adoption contributes an important element to the necessary paradigm shift in adoption law. It emphasises transparency, honesty, trust and integrity. It overcomes the concept of the *clean break*, recognises the complexity of relationship systems and protects the child in its relationship to the family and culture of origin as well as to the receiving family and the receiving country. In particular, semi-open adoptions require the creation of appropriate official responsibilities and processes. Overcoming the incognito full adoption goes hand in hand with the more open thematisation of the reality of adoption, which in turn requires appropriate support and assistance; see below. 2.13.

2.13 Expansion of pre- and post-adoption services, counselling and support

Counselling, support and assistance *services (pre- and post-adoption services)* for existing adoptees and future adoptees, as well as families of origin and adoptive parents/families, are an indispensable part of a Swiss policy on international adoption. Regardless of the scenario chosen, these services must be *substantially expanded* as elements of consistent child and family protection.⁽¹²³⁾ The "family is private" argument does not hold water at this point, i.e. in the context of (inter)national adoption as a state child protection measure. The expansion of pre- and post-adoption care, counselling and support is an expression of the recognition of those affected and the assumption of responsibility towards them.⁽¹²⁴⁾ It also makes a partial contribution to acknowledging responsibility for the injustice established in the past in particular. The offers are to be organised free of charge.

This interim report and mandate does not address the remaining questions of restitution for injustices committed in the context of international adoption, as recently raised by the international committees.

¹²²See also PFAFFINGER 2007, *passim*, with regard to the presentation of the relevant literature and developments; for more on the current state of research, see BRÄNZEL 2019.

¹²³See already chapter two, 1.1, then chapter three, 1.1.

¹²⁴The extent to which further mechanisms of reparation are appropriate is not discussed in this interim report; cf. in this respect also LOIBLE 2021, 477 et seq.

2.14 Further

Firstly - The expert group repeatedly raised the problem that *too many actors* are involved in the various adoption processes.⁽¹²⁵⁾ This applies with regard to the federal organisation in Switzerland and the placement agencies as well as the number of countries of origin with which cooperation takes place. Bundling is seen here as the most valid strategy for the future (cf. in this respect also the findings in the working groups and the scenarios).

Secondly - Consequences of the scenarios established by the expert group for neighbouring fields, in particular the field of *surrogacy*, cannot be ruled out - coordination is outside the scope of this mandate and must therefore be dealt with separately.

Thirdly - A consistent reform of the international adoption system requires comprehensive resources to be made available.

3 Preliminary examination of the sub-questions for the purpose of scenario building

Preliminary answers to the specific questions were developed in *working groups and sub-working groups*, also in order to generate conclusions for the scenarios. The answers outlined have different effects on, within or as a result of the scenarios. They are to be understood as initial analyses which, depending on the decision in favour of the first or second scenario, are to be subjected to a more in-depth re-evaluation/elaboration by the expert group.

3.1 Proposals for optimising the institutional organisation

The expert group was tasked with submitting "concrete proposals on the issues of optimising the institutional organisation, including the position of the accredited intermediaries". The proposals presented here by the working groups are neither conclusive nor final.⁽¹²⁶⁾ Rather, if the first scenario - the reduction-plus-reform scenario - is chosen, it should be analysed in greater depth. As emphasised in several places, it is in any case too short-sighted to consider institutional/organisational improvements in isolation to a "Swiss part of international adoption". The gateway for abuses is provided by circumstances long before an adoption takes place, including the framework conditions in the countries of origin and the clash of power imbalances.

There are currently too many players involved in the international adoption process, especially as only around 50 international intercountry adoptions have recently been carried out in Switzerland each year.⁽¹²⁷⁾ This has consequences not only for the Swiss/international part of the institutional organisation.⁽¹²⁸⁾

With regard to the *domestic organisation*, the reduction in the number of intercountry adoptions carried out in Switzerland jeopardises the maintenance of experience and expertise at federal level,

¹²⁵For more on this, see the second chapter, 3.1 and 3.3.

¹²⁶Members of the (sub)working group and authors of the comments on this issue are S. KÖRBER/Y. BIDERBOST/S. INEICHEN/M. JAVAUX JENA.

¹²⁷Cf. in this respect <<https://www.bfs.admin.ch/bfs/de/home/statistiken/bevoelkerung/geburten-todesfaelle/adoptionen.assetde-tail.22804212.html>>.

¹²⁸On the demand to reduce cooperation to certain countries of origin as an element of the first of the two proposed scenarios, cf. chapter three, 2.1.1.

of the cantonal authorities and the mediation centres. The decentralised organisation also has a negative impact on the guarantee of the right to know one's origins. For the organisation of the *Swiss part of international adoption, a centralisation and bundling* of competences is therefore necessary.

In Switzerland, international third-party adoptions are mainly, but not exclusively, carried out with host countries that have ratified the Hague Convention, the CRC and the relevant Additional Protocol. *Reducing cooperation* to only those countries of origin that have ratified the Hague Convention, and possibly even more narrowly to Hague Convention countries that fulfil further criteria, is *the core element of the first proposed scenario*⁽¹²⁹⁾

Ensuring that adoption processes are carried out with integrity and in accordance with the rules, and that the promotion of the welfare and respect for the rights of children is a primary, but not the only, interest, must be achieved in relation to the institutional organisation *of the system as a whole*: The child, born in the country of origin (usually a third world or newly industrialised country), with its links to the family and culture of origin (which are protected under human rights law), is "transferred" across national borders to another country as part of international intercountry adoption and adopted there by people who are not related to the child. In order to implement effective organisational and procedural protection mechanisms, it is not enough to focus solely on the Swiss part of the process. Nor is it sufficient to view adoption as a one-off legal act. Adoption must be set up as an overall process/system with joint responsibilities.

The main risks to the integrity of the adoption process in the countries of origin lie in the phase from pregnancy to the birth of the child and in the (alleged/mutual) "relinquishment" of the child for adoption or in the run-up to adoption. The receiving states have a duty of *due diligence* with regard to the *compliance* of the cooperation partners in the country of origin. Important findings from other approaches, such as data protection and patent law or corporate responsibility, which have redefined and further defined questions of responsibility in the context of international cooperation, could be applied: The key lies in ensuring increased transparency and, as a result, expanded *accountability, due diligence and assessment* obligations. Irrespective of this, measures that consistently prevent unlawful practices or move towards a zero risk/zero error rate and thus reduce them to individual cases are hardly conceivable. This has consequences for the recommended scenarios (see chapter three).

The working group has submitted the following proposals for the further development of the organisational and procedural design of institutional cooperation for the *Swiss part of international adoption*:

The aim and purpose of adjustments must be to ensure the conditions for the lawful, effective and efficient fulfilment of tasks and to maintain expertise and experience in the entire field of national and international adoption. The application and realisation of the Hague Convention - and the adoption system in general - stands and falls with professional competence and integrity. The primary task is to comprehensively promote the welfare of the child, i.e. throughout the entire procedure, and to safeguard the child's rights while always taking into account the interests of the family of origin. In addition, the adopted person and the family of origin must be guaranteed standardised psychosocial support and care as part of the information and disclosure requirements (search for origin). For these purposes, tasks and decisions should be centralised in a few or one authority. Centralisation or at least implicit regionalisation are

¹²⁹See chapter three below, 2.1.1.

This has been repeatedly requested by experts. It is argued that the structures in the area of adoption have proven themselves as follows: Each canton has a central authority and fulfils its tasks. Regular joint meetings and exchanges of experience take place, which also enables and promotes coordination. Maintaining the status quo is not a solution, however, especially as the Federal Council clearly stated in its report that the division of competences between the Confederation and the cantons should be reviewed and adapted in view of the development of international adoption. The expert group was set up expressly to identify reforms to the institutional organisation.

The working group outlined *four organisational options* with regard to the division of competences between the Confederation and the cantons:

One - creation of a Federal Adoption Authority. The Confederation would perform all tasks in the area of adoption, from the assessment of persons willing to adopt to the adoption decision, post-adoption support, the search for origin and the supervision of the placement centres.⁽¹³⁰⁾ Against the background of and following the development of the two recommended scenarios, a bundling of competences is the obvious choice.

Two - Transfer of certain tasks to the (single) central federal authority. Communication with foreign countries would go through the federal government. It would decide on the certificate of suitability, matching and authorisation to take in the child. It would also be centrally responsible for the search for the child's origins and for supervising the placement centres. The decision on adoption would remain with the cantons, whereby a single cantonal authority would have to make the decision (centralisation within the cantons, Art. 268 para. 1 ZGB). Legal protection would have to be guaranteed at cantonal level. The cantons would remain responsible for the assessment of persons willing to adopt, the supervision of the year of care and post-adoption support.

Three - Creation of regional competence centres for adoption (intercantional body; cf. Art. 2 para. 3 AdoV: TG/ZH model). The Confederation would be involved in the processing of specific adoption cases in its current role, in particular with regard to correspondence (sending parent dossier, receipt of child proposal, preparation of laissez-passer if necessary; also relevant for intra-family adoptions). The material decisions would be made by the regional adoption competence centres. They should have the necessary expertise and experience. They would clarify the persons willing to adopt and decide on the continuation of the procedure. They would also supervise the one-year fostering relationship and pronounce the adoption. They would then be responsible for post-adoption support and, if necessary, the search for the child's origins (to be evaluated/checked). The organisational separation of the adoption authority and the tracing authority would have to be guaranteed. Further tasks would exist in the area of adoption, e.g. with regard to stepchild and adult adoptions. The existence of legal protection is questionable, as an intercantional body must clearly define legal protection in an intercantional treaty. It would also be important to create the legal basis in the ZGB and BG-HAÜ; AdoV. The costs and financing of the competence centres as well as other legal details remain open questions.

Four - Regional competence centres (light). The focus of the Confederation's tasks would continue to be on communication with other countries and coordination in accordance with the requirements for HAÜ contracting states and for intra-family adoptions, including those with international connections (cf. in this respect

¹³⁰To be discussed in more detail: Compatibility with Art. 122 para. 2 BV; legal protection via the Federal Administrative Court; knowledge of country-specific, procedural and general knowledge from the national and international adoption system; creation of a legal basis in the ZGB and BG-HAÜ; AdoV; creation of a department in a federal office.

third chapter, 1 and 2, in particular 2.1.1 on the demand for a limitation of cooperation with selected Hague Convention contracting states). The Confederation would be involved in the processing of specific adoption cases in its current role. In the event of retention, it would be responsible for supervising the placement centres. The competence centres would be responsible for the persons willing to adopt. The cantons would retain the authority to decide on certificates of suitability, matching and approvals, as well as the supervision and pronouncement of the adoption (in some cases to be centralised within the cantons). The only difference between Model 4 and Model 3 is that the cantons would continue to make the material decisions (certificate of suitability, matching, authorisation, adoption) (however, this would have to be centralised within the cantons). In both models, the competence centres would clarify the persons willing to adopt. Various options are conceivable with regard to responsibilities in the context of the search for origin abroad - these would have to be examined/elaborated in detail (priority field of action).

Table 5: Summary of the four organisational options

Option	+	–	Placement centre	Open questions
① Federal Adoption Authority	All tasks in the field of adoption.	Federal budget.	Disappearance due to absorption of competences.	Cantonal agreement to relinquish competences; legal basis; Budget.
② Transfer of certain tasks to the (only) central federal authority/the adoption decision would remain with the cantons.	Bundling of specific expertise.	The organisational separation between the adoption authority and the tracing authority must be guaranteed.	Maintenance or partial absorption of competences.	Legal basis; budget.
③ Regional competences in adoption	The task of the Federal Government still on the communication with the foreign country and at the Coordination. The material decisions are made by the regional competence centres.	The organisational separation between adoption authority and search of origin authority must be guaranteed.	Maintenance or total Absorption of competences.	Legal basis; budget.
④ Regional Centre of competence in adoption (light)	The regional Centre under supports the federal and the cantons. It is a resource without	occurrence of a additional actor.	maintenance and partial absorption of competences.	Legal basis; budget.

	decision-making authority.			
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On the role of intermediaries: The working group recognises that there is no ideal option in this respect. Mediation agencies/intermediaries play a double-edged and ambivalent role.

From a historical perspective, it should be noted that mediators were often organised in small associations run by volunteers; gradually, the increasing number of cases, the complexity of the procedures, the large number of players and the lack of training made it impossible to provide professional support for each individual procedure. Nevertheless, their role and place were recognised and even supported for a long time. The Hague Conference issued a guide to good practice dedicated to recognised organisations, which states, among other things: "The use of recognised organisations is considered good practice".¹³¹

The Dutch report is different, stating: "Intermediaries were a factor that facilitated the abuse. (...) The Dutch intermediaries were aware of the abuse from the beginning, when the number of international adoptions increased. Some were themselves implicated in these abuses, for example by deliberately ignoring the rules, issuing false documents and working with local actors who were known to be corrupt and guilty of fraud."¹³²For Switzerland, it is worth recalling the criminal conviction of a person operating an intermediary agency for attempted bribery. The case documents that international adoptions, even for the Swiss part, are subject to the risk of unlawful payments and that accreditation is no guarantee for acting in accordance with the rules. The case led to the withdrawal of accreditation. For its part, the historical review also described a poor role played by certain intermediary organisations/persons in Switzerland.

Looking at the receiving countries, there are different models for the intermediary organisations: the intermediaries are privileged partners of the State in the management of international adoption procedures because of their knowledge of the countries of origin and the networks established there (Italy); the State imposes a grouping of intermediary organisations (Netherlands, Denmark); the State sets up its own public structure, which plays the same role as the private intermediaries (France).

With regard to the placement centres in Switzerland, the working group argued that they are well structured and have specialist and country-specific knowledge. The placement centres take on tasks that the child protection authority or the central authority should actually take on. Accordingly, the question arises as to whether mediation is/should be a state task and should be performed accordingly. In this respect, a resource problem and insufficient expertise, including on procedures in countries of origin, are being addressed. Currently, the placement centres provide detailed advice and support to those willing to adopt/procedures. The federal government exercises supervision and can intervene if necessary. Communication difficulties are criticised

¹³¹Cf. HCCH 2012, Guideline No. 2, 33, available at <<https://assets.hcch.net/docs/d35f2d3c-60d2-45b3-b751-24744c9a510f.pdf>>.

¹³²Cf. Consideration, Analysis, Conclusions, Recommendations and Summary Committee investigating intercountry adoption, also on the role of the placement centres, esp. 9: <<https://www.government.nl/documents/reports/2021/02/08/summary-consideration-analysis-conclusions-recommendations>>.

with persons willing to adopt and cantonal central authorities, as well as financial problems due to the decline in the number of proceedings opened.

With regard to the private, accredited placement centres, there are several options for adaptation, in particular the following: A *merger of the private placement centres* could solve the problem of the financial survival of the intermediaries (the financial pressure of the placement centres presumably inevitably leads to a corresponding pressure on the Institute of International Adoption). However, the success of the model does not seem guaranteed. *State mediation* (e.g. competence centre for adoption) would therefore appear to be preferable: Child protection as a comprehensive state task would thus be guaranteed (cf. Art. 11 BV) and mediation would be performed as a state task. Compatibility with the Hague Convention would have to be examined, as would supervisory and control functions. A competence centre could act as a mediation centre for (national and international) adoptions. This would keep all the expertise in one or more central centres. It would then be conceivable to *abolish the placement centres and have various central authorities work together directly*. A closer examination would be necessary (presumably this would not be permitted or feasible in all contracting states).

Irrespective of the scenario chosen, the remaining adoption constellations (see Chapter 3, 1 and 2) must be bundled, streamlined and centralised in terms of tasks and competences, and the proposals presented must be examined in detail.

3.2 Proposals for the harmonisation of HAÜ and non-HAÜ procedures

The group of experts was tasked with submitting "concrete proposals for harmonising the treatment of proceedings that do not take place in accordance with the Hague Convention 93 and proceedings in accordance with the Hague Convention 93".¹³³⁾

The existence of two regimes for Hague Convention Contracting States and non-Hague Convention Contracting States is problematic. The standards for international adoptions should be uniform (high). The Hague Convention and the CRC with the relevant Additional Protocol provide - not only on paper - better protection for adopters/adoptees in the context of international adoption.

Consequently, the provisional or final *termination of intercountry adoption with non-Hague Contracting States* in which the minimum standard derived from the conventions is completely or partially lacking was discussed. States wishing to carry out intercountry adoptions should and must be prepared to accept and implement (minimum) standards by ratifying the aforementioned conventions. A temporary or complete termination of co-operation with non-member states could create pressure to act and encourage other states to commit to higher standards (in the sense of the Hague Convention). In the event of a decision to end international adoption with non-Hague Convention contracting states and possibly certain Hague Convention states, it would be necessary to work out in detail how to deal with adoptive parent candidates and possibly states that circumvent this ban (or at least attempt to do so). It is legally difficult to impose Hague Convention standards on non-Hague Convention states. The protection mechanisms could be increased through *bilateral treaties with corresponding standards*. However, this approach would not be in line with Switzerland's general stance of favouring multilateral treaties where they exist. Efforts should be made to ratify the Hague Convention. As the termination of cooperation with non-Hague treaty states and possibly also with other or even all states has emerged as preferable - various

¹³³⁾Cf. the analysis with the exposed weaknesses of both types of procedure in the Federal Council Report 2020, 50 ff.

moratoria were rejected - such considerations become obsolete in some cases (cf. the third chapter on the termination of cooperation in international intercountry adoption with non-Hague Contracting States and certain Hague Contracting States in the reduction-plus-reform scenario and the exit scenario, as well as the comprehensive termination in the exit scenario). The working group's suggestion that the federal government should be responsible for correspondence and coordination with the respective states in all cases and that federal approval should be obtained for the creation of competence centres in non-HATC contracting states is therefore also superfluous.

In the opinion of the expert group, ratification of the Hague Convention and the CRC is a necessary but not sufficient criterion for being recognised as a cooperation partner. Further qualifying/strengthening criteria are called for in the first scenario (the reduction-plus-reform scenario). In this scenario, it is recommended that cooperation be limited to certain HATC countries. With regard to future HATC cooperation countries, Switzerland should take on a supportive, cooperative role, establish a sustainable relationship of trust and contribute to the establishment of robust organisations, functioning registers and compliant processes and procedures in the countries of origin⁽¹³⁴⁾

In any case, an assessment of all proceedings from at least the last five years is recommended, which can result in a re-evaluation of the initial continuation/termination decision.

3.3 Proposals for a revision of the IPRG

In addition, "concrete proposals for a revision of the IPRG chapter of the Federal Act on Private International Law on Adoption" are to be submitted. A revision of the IPRG norms depends to a large extent on the choice of scenario. Accordingly, a final discussion and analysis of the revision of the PILA will only take place once the chosen scenario has been finalised. The following is the summary of a detailed memorandum prepared by G.P. Romano⁽¹³⁵⁾

The group of experts intends to propose *two scenarios* for a Swiss policy in the field of intercountry adoptions.⁽¹³⁶⁾ The first scenario consists of limiting cooperation to certain contracting states to the Hague Convention - namely those that fulfil certain requirements set by Switzerland - and refraining from cooperation with all other states, as well as implementing a broad-based reform. The second scenario consists of stopping international (Swiss-foreign) adoptions, with a few exceptions.

Articles 75-78 PILA, the wording of which was laid down in 1972, have a far wider scope of application than the Hague Convention. They extend to a wide variety of situations whose spatial and temporal relationship to Switzerland can be very different: from adoption applications by Swiss nationals resident in Switzerland for children resident in Switzerland ("quasi-internal adoption"), to a whole range of intermediate situations, to adoptions of foreign children resident abroad by foreign nationals resident abroad (adoptions that are completely foreign to Switzerland at the time they occur and whose relationship to Switzerland is only established much later).

¹³⁴Cf. third chapter, 2.

¹³⁵Working group consisting of G.P. ROMANO and M. JAVAUX VENA.

¹³⁶Cf. third chapter.

The *first scenario* would require stricter requirements for the countries of origin with which cooperation is to take place in future. In this respect, it may not be necessary to amend the IPRG. Consideration could be given to inserting a new para. 1a in Art. 78 IPRG with regard to adoptions abroad, which would incorporate the requirements that Switzerland now imposes on the contracting states in the form of the concretisation of international public policy (as generally reserved in Art. 27 para. 1 IPRG) and - if necessary - remove the connecting factor of the national state of the adopter(s) from the indirect competences accepted by Switzerland. Since, according to the first scenario, Switzerland would oblige the respective "partner state" to accept that Swiss law regulates the search for origin if the adopted child is to be adopted in Switzerland, one could also consider introducing a new provision - for example in Art. 78a IPRG - that establishes such a principle in general. Even if such a provision is not always effective, it would nevertheless have pedagogical and symbolic significance.

The *second scenario* would deprive Swiss residents of the opportunity to initiate proceedings in Switzerland to adopt a child located abroad. As a result, it cannot be ruled out that "international adoption tourism", which is already practised today by some people resident in Switzerland, will increase. It can also be assumed that certain countries will no longer accept adoption applications from Swiss residents. Others, however, could offer their "internal" procedures. Quite apart from this, if Switzerland decides in favour of a complete exit, it cannot be ruled out that it could be more interesting for Swiss residents to try to obtain an adoption in a non-contracting state.

In order to curb adoption tourism, an attempt could be made under the second scenario to threaten to penalise the non-recognition of such adoptions and to restrictively amend Art. 78 IPRG through the following measures:

- (i) Deletion of the "national state" of the adopter from the indirect competences accepted by Switzerland;
- (ii) Clarification of the clause on international public policy by specifically listing a series of requirements (as in scenario 1);
- (iii) Exclusion of the recognition of adoptions obtained abroad in circumvention of Swiss law (following the example of Art. 45 para. 2 IPRG with regard to marriages concluded abroad "in circumvention" of Swiss law).⁽¹³⁷⁾

Any legislative amendment to the IPRG would have to address the requirements of the European Convention on Human Rights (ECHR) (a more detailed analysis of this can be found in the detailed memorandum already prepared). Even if the limits set by the European Court of Human Rights (ECtHR) are unclear, its case law shows that the consequences of not recognising an adoption carried out abroad can run counter to the rights of the children, as they could be deprived of a number of rights arising from the status of the adopted child. In the Wagner case, the ECtHR obliged Luxembourg to recognise an adoption that had taken place in Peru, which was contrary to Luxembourg law prohibiting adoption by a single woman. In the Michel case, it is not certain whether the strictness of Art. 78 IPRG, which

¹³⁷According to the discussion at the 5th meeting of the expert group, the integration of a hardship clause in the case of circumvention of international adoptions that are carried out despite the prohibitions should be examined.

The case of a daughter adopted by two Swiss nationals in Brazil who was denied the right to inherit her father's estate and the right to maintenance payments would have passed the test of the child's right to respect for her private and family life under Art. 8 ECHR.

The fate of a child who was adopted abroad through an adoption that is not recognised in Switzerland, but is now in Switzerland, is delicate: (i) Taking the child away from the person who adopted it and has been caring for it ever since may be contrary to the best interests of the child.

(ii) Allowing this person to apply for adoption in Switzerland - an option that may be in the best interests of the child and should therefore remain open - would lead to exactly the kind of international adoptions that the second scenario is designed to prevent. (iii) Entrusting the child to other Swiss applicants for adoption would have the same effect.

(iv) Sending the child back to their country of origin assumes that the country of origin is willing to take the child back; often this process would be traumatising for the child. (v) Creating a guardianship relationship between the child and the person who adopted the child abroad is less likely to be in the child's best interests than offering the child the benefit of a "full" parentage or legal filiation relationship.

The number of couples living in Switzerland who experience difficulties in reproducing is increasing. It is likely that in the second scenario, the number of couples interested in surrogacy will increase - even more so if the conditions for recognising foreign adoptions are tightened. As can be seen from the judgement *D.B. et al. v. Switzerland* of 22 November 2022, in which Switzerland was convicted of violating Art. 8 ECHR, Switzerland is in practice forced to confirm, in the name of the best interests of the child, the filiation relationship established abroad between the child and each of the intended parents - both resident in Switzerland - after *surrogacy* in Switzerland, at least if one of them is the legal parent, which is often the case with the father (or one of the fathers).

3.4 Suggestions regarding financial issues

The aim is to submit "concrete proposals as part of the review of financial issues in adoptions and integrating the instruments and recommendations developed at international level". In this regard, the sub-working group as follows:⁽¹³⁸⁾

On the basis of the CRC, Switzerland must ensure that "*no undue pecuniary advantages* accrue to the parties involved in international adoption", Art. 21 lit. d CRC. This provision must be read in conjunction with Art. 32 para. 2 Hague Convention and Art. 3 para. 1 of the Additional Protocol to the CRC on child trafficking: Only the coverage of costs and expenses is permitted. It is implemented in the Swiss legal system via Art. 18 AdoV (remuneration of intermediary organisations), Art. 23 BG-HAÜ, criminal sanction in the event of the procurement of inadmissible pecuniary advantages, and Art. 24 BG-HAÜ, child trafficking.

As has been well documented in various international and Hague documents, there are *several problem areas* related to the financial aspects of intercountry adoption. The UN Special Rapporteur on the sale of children, child prostitution and child pornography concludes in her report on illegal adoptions: "One of the main factors favouring illegal adoptions is the amount of financial gain that can be obtained by providing children for intercountry adoption. As long as adoption fees and the

¹³⁸Members of the sub-working group and authors of the considerations on this issue are J. WYTENBACH/J. SCHICKEL-KÜNG.

The costs involved are not appropriate and transparent and as long as there are contributions and donations, the incentive for illegal adoptions will remain high". The key challenges include, for example, payments made by adoptive parents in various grey areas, excessive "fees", "royalties" and the like, as well as contributions (e.g. for "fees", "honorariums" and the like, as well as contributions (e.g. for maintenance costs) and donations to institutions. Evidence of this can be found in several documents⁽¹³⁹⁾

For Switzerland, this means various things: *national regulation regarding the financial aspects is not sufficient*. The legislation would have to be supplemented, e.g. by including legal definitions, by more extensive transparency regulations and prohibitions, for example in connection with donations and donation-like payments, by principles for the systematic information, support and ex-post questioning of adoptive parents, by guidelines on the permissibility or prohibition of humanitarian sister associations associated with the placement centres, by guidelines and cost tables for implementation in practice, etc. The control effort is considerable. The control effort must also be set in relation to the number of cases per year and the number of countries of origin: With a small number of cases per year, but originating from many different countries, maintaining broad expertise to control the financial aspects is difficult or costly. This argues in favour of *further centralisation of enforcement at federal level*⁽¹⁴⁰⁾

Processes abroad can only be scrutinised to a limited extent or indirectly. This applies in particular to non-Hague Convention states parties and, among these, especially to so-called *failed states*, corrupt systems and the like. This argues in favour of limiting cooperation to a few states (Hague Convention contracting states) with which cooperation is reliable and good and with which it is possible to agree on common minimum transparency points with regard to financial aspects⁽¹⁴¹⁾ Even with significantly greater effort, Switzerland cannot always guarantee that the standards will be met. The financial problems and the fact that establishing transparency and exercising effective supervision and control of the actors is sometimes only possible with considerable effort and sometimes not at all are arguments in favour of ending the mediation agency system⁽¹⁴²⁾, for a moratorium or for a far-reaching restriction of international adoptions to intra-family constellations⁽¹⁴³⁾

3.5 Proposals in connection with unlawful practices

Concrete proposals were then commissioned "in the context of the review of the issues related to unlawful practices and integrating the instruments and recommendations developed at international level." ¹⁴⁴

¹³⁹Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, 2016, A/HRC/34/55, recommendations 1e, 1f, 1g, 1h, available at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/440/24/PDF/G1644024.pdf?OpenElement>>; Federal Council Report 2020, 4.3.6; HCCH, Note on the Financial Aspects of Intercountry Adoption, 2014, available at <https://www.hcch.net/up-load/wop/note33fa2015_en.pdf>; HCCH, Summary List of Good Practices on the Financial Aspects of Intercountry Adoption, 2014, available at <https://www.hcch.net/upload/wop/list33fa2015_en.pdf>; HCCH, Draft Toolkit for Preventing and Addressing Illicit Practices in Inter-country Adoption, Fact sheet No. 3 "Improper Financial and other Gain", (draft 2002), available at <<https://as-sets.hcch.net/docs/a1c8b531-a0f2-422a-b76e-8b27a5c02bd4.pdf>>.

¹⁴⁰See second chapter, 3.1.

¹⁴¹See second chapter, 3.2.

¹⁴²See second chapter, 3.1.

¹⁴³See second chapter, 3.1, and third chapter, 1.2.

¹⁴⁴The terminology of "unlawful practices" is used here in accordance with the wording in the mandate; otherwise, the expert group works with the term "irregular adoptions".

The working group involved initially commented on the terminology, in particular the terms "illegal adoption" and "unlawful adoption".¹⁴⁵ Illegality is primarily understood as an act which is contrary to the law, which does not conform to a rule of law, public policy or morality, while illegality (antonym of legality) refers to the character of what is contrary to the law, that is, what it defends, prohibits or forbids. The Hague Conference's Guide to Good Practice defines illegal adoptions as adoptions that come about "through abuses such as abduction, sale or trafficking of children", the prevention of which is one of the main objectives of the 1993 Hague Convention.⁽¹⁴⁶⁾ In her 2016 thematic report on illegal adoptions, the UN Special Rapporteur on the sale of children, child prostitution and child pornography states: "Adoptions that are the result of crimes such as abduction, sale or trafficking of a child, fraud in the declaration of "adoptability", falsification of official documents or coercion, as well as any unlawful activity or practice such as lack of appropriate consent of birth parents, unjustified material gains in favour of placement agencies and related corruption, are illegal adoptions and must be prohibited, incriminated and punished as such." The term "unethical adoptions" is also used. Ethics comprises a series of rules that differ from and complement the legal rules. Under the figure "Bad practices" are actions or behaviours that do not meet certain standards but do not fall under the law.

In the context of intercountry adoption, certain acts can be labelled as illegal (under private and/or criminal law), unethical or bad practice, depending on their nature and when they occur. Some acts fall under all three qualifications, while others do not, depending on whether they are judged against the social and cultural values that prevailed in certain countries at certain times. Instead of distinguishing between these three categories, a general term should be chosen that covers all possibilities. It is proposed to use the term "irregular adoptions" to cover all acts that can or have affected an international adoption procedure.

This working group, like the expert group as a whole, also specifically addressed the need for *chronological clarity*: International adoption is a social phenomenon that has changed significantly over the course of its history (from 1950 to the present day). The values and motivations that have characterised it have emerged directly from the different eras observed ("humanitarian" adoption, "religious" adoption, adoption as a response to infertility, etc.). The view of this particular form of family is different today than in previous eras. The same applies to the current legal framework: Whether the best interests of the child should be at the centre of every procedure was assessed differently in the past than it is today. At a time when many initiatives seek to better understand the mistakes of the past, a clear distinction must be made between what is clearly recognised as irregular practices today, based on a strict application of the relevant legal framework, and past practices where the same criteria cannot be applied. The working group's comments should therefore be read as part of a vision of the possible future of international adoption. They are based on the current legal framework.

¹⁴⁵The members of this sub-working group and the authors of the comments on this issue are H. BOÉCHAT/P. AESCHBACHER.

¹⁴⁶Cf. HCCH 2012, Guideline No. 2, available at < <https://assets.hcch.net/docs/d35f2d3c-60d2-45b3-b751-24744c9a510f.pdf> >

On the issue of illegal practices: The problem of irregular adoptions is complex not only because it has many causes (inadequate socio-legal structures, lack of professional training, a multitude of actors, corruption, etc.), but also because these causes influence the adoption process before it has actually begun. For example, if a flawed birth registration system allows a false birth certificate to be issued, leading the child into an adoption process, the national and international legal framework in this area will not allow the mistake to be "fixed". Irregularities can also occur in the receiving countries in this context, especially when issuing the licence that allows the applicant to adopt. There is therefore an "unavoidable" risk that must be dealt with. However, experience shows that there are a number of measures that can reduce this risk. So what follows?

Casuistry: The "Working Group on the Prevention and Remedying of Unlawful Practices in Intercountry Adoption"⁽¹⁴⁷⁾ set up by the Hague Conference has published a series of documents on unlawful practices. These make it possible to distinguish between different types of abuse that have been identified. Of particular note here is the Summary Fact Sheet No. 3: Preventing and remedying illegal practices.⁽¹⁴⁸⁾ Another important source is the report of the UN Special Rapporteur on this topic.⁽¹⁴⁹⁾ The "Joint statement on illegal intercountry adoptions", which was drawn up by the UN human rights bodies on 26 September 2022 and goes beyond the Special Rapporteur's report in some respects, is based on this.

Enclosed is a *proposal for a catalogue of measures to combat irregular adoptions*. It contains what the working group considers to be the most suitable means of ensuring the greatest possible transparency of international adoption procedures and their full legality. The measures take into account that certain structural conditions are required in the receiving country so that it can assume responsibility for the processes in question and the resulting consequences.⁽¹⁵⁰⁾

With regard to the *host country*, i.e. Switzerland, a *strong federal central authority* is required.⁽¹⁵¹⁾ The federal central authority plays an essential role in the procedures, as it acts as a link between Switzerland and the countries of origin. It is therefore best placed to exercise careful control over the entire system, but only if it is adequately resourced to do so. The Federal Central Authority for Adoption should not only be responsible for Hague procedures, but should also manage procedures "outside" the Hague procedure (see, however, the restriction to specific Hague countries in the third chapter of the proposed scenario). Its competences in this regard should be based on the Hague proceedings (aspect largely obsolete after the two recommended scenarios have been finalised). In terms of resources, the central federal adoption authority must have highly specialised staff who are able to "read" procedures and files, recognise alarm signals and interact with the countries of origin. An annual budget for visits to the partner countries is also important.

¹⁴⁷Cf. < <https://www.hcch.net/fr/publications-and-studies/details4/?pid=6309> >.

¹⁴⁸Cf. < <https://assets.hcch.net/docs/77e76043-585f-4434-9102-f869b534dd24.pdf> >.

¹⁴⁹Cf. < <https://www.ohchr.org/en/special-procedures/sr-sale-of-children/tackling-illegal-adoptions-and-addressing-rights-victims> >.

¹⁵⁰The working group described exemplary mechanisms for India, which are set out in the corresponding document, but are not included in the interim report.

¹⁵¹Cf. the analysis of organisational issues, also in relation to the "Swiss part of international adoption", second chapter, 3.1.

With regard to the *countries of origin*, a limitation is necessary to prevent irregular practices: The "ordinary procedures"¹⁵² must be developed in close cooperation with those countries of origin with which a relationship of trust could be established.⁽¹⁵³⁾ This requires an analysis of the current status of cooperation with the various countries of origin that are open to international adoptions. It also requires a sound knowledge of the competent authorities and actors on the ground and the relevant legal system. Finally, processes must be established to accompany the entire procedure. Compliance with the principles of the treaty requires that the countries of origin express their need for international adoption. Such consultation will form the basis for any further co-operation.

Great importance is also attached to the aspect of *cooperation with the host countries*: Considerations in this regard are currently being made in various host countries (e.g. the Netherlands, Switzerland, Belgium-Flanders, Denmark). In order to bundle efforts and avoid competitive phenomena, effective cooperation must be established between the central authorities of the receiving countries.⁽¹⁵⁴⁾

In order to prevent irregular adoptions, it is essential *to clarify the role of private actors*:¹⁵⁵ There is currently no consensus on which roles should and should not be assigned to recognised organisations. Reflection is therefore needed, followed by decisions that make it possible to clearly define their competences in the adoption process. If knowledge of the country of origin is recognised as a key element in the implementation of transparent adoptions, recognised organisations could/should continue to have a place in the landscape.

Strict control of financial flows: In consultation with the cooperating countries of origin, all costs of the procedure must be clearly explained and kept to a minimum. The adoptive parents should be informed of this before travelling to the country of origin.⁽¹⁵⁶⁾

Extended responsibility for "extraordinary procedures": The central federal adoption authority must be able to process all special applications, e.g. applications for international adoptions within the family, for changes of residence or for the recognition of decisions made abroad, regardless of the country of origin. The processes in the countries of origin are of particular relevance.⁽¹⁵⁷⁾

It is then important that the central authority can deal with "specific cases" that do not necessarily fall within the definition of standard cases. Consider, for example, the recognition of adoptions granted abroad, adoptions within the family, etc..⁽¹⁵⁸⁾

¹⁵²Cf. < <https://assets.hcch.net/docs/77e76043-585f-4434-9102-f869b534dd24.pdf> >.

¹⁵³Cf. also Chapter 3, 2.1.1.1. and 2.1.1.4.

¹⁵⁴For integration into the reduction-plus-reform scenario, see chapter three, 2.1.1.4.

¹⁵⁵On this, see Chapter 2, 3.1, especially on the at least ambivalent, often equally critical role of intermediary organisations.

¹⁵⁶For more details on financial issues, see Chapter 2, 3.4.

⁽¹⁵⁷⁾ With regard to the establishment of specific mechanisms or processes, the working group has outlined the situation/mechanisms specific to India, focussing on the following aspects: Child welfare, subsidiarity principle, informing birth parents, birth parents' right to anonymity (which was critically discussed by the expert group), and causes of adoption clearance by often young, unmarried girls or women who are unable to keep their child due to social stigmatisation (fear of rejection by the family etc.). Although some support services are available, a large proportion of the population has no access to them. In cases where children are found or the parents do not want to keep the child, the Indian authorities have laid down precise procedures that must be followed before the child can be officially given up for adoption by the authorities. It is difficult for the receiving state to verify whether these procedures have been followed correctly in individual cases. For a more detailed description of the process/procedure for India, please refer to the working document of the working group.

¹⁵⁸See also Chapter 2, 3.3 and Chapter 3, 1.2 and 1.3.

4 Conclusions for the scenarios - evaluated and rejected scenarios

Based on the comprehensive analyses and the conclusions drawn from them, a dedicated evaluation of scenarios for a Swiss policy on international adoption that is best suited to promoting the best interests of the child and safeguarding children's rights was carried out *at the 4th meeting on 9 December 2022*. The discussion was conducted on the basis of a working document developed by the chairwoman.

The starting point was the step-by-step sequence of possible scenarios, beginning with the "extreme scenarios" and continuing with multi-faceted, differentiated intermediate solutions. The *exclusion procedure* was used in this phase to prepare the scenario recommendation. The following comments are made in this regard:

Firstly - The expert group is also convinced that the continuation of international third-party adoption under the status quo regime with open recognition and acceptance of the identified weak points and risks is ruled out.

Secondly - The idea that selective adjustments to the status quo regime could be sufficient to achieve the desired goals was rejected. The expert group is convinced that only a consistent reform can address the challenges of international intercountry adoptions (including the effective guarantee of the right to know one's own parentage, an appropriate hearing of the children, post-adoption support, a review of secret full adoption, etc.).⁽¹⁵⁹⁾ A revision must also go beyond the tasks and areas of action addressed in the mandate.

/fields of action addressed in the mandate.

Thirdly, the so-called *two-stage moratorium or indirect reform moratorium* proposed by the Chair *did not meet with majority approval*. The proposal was based on the conviction that good policy is based on precise knowledge of the facts, the risks, the weak points of the regime and so on. Before deciding whether a reform of the system should be implemented and what form it should take, or whether and how or with which countries international adoption should be continued, a consolidation of the informational situation by means of empirical investigations and field studies on the practice of international adoption *from around 1998 to the present day* would be appropriate (integrating social science, anthropological and statistical expertise).⁽¹⁶⁰⁾ Adoption practices *since the adoption of the Hague Convention* should be examined precisely and in depth. The scenario would have a retrospective and an anticipatory component. On the one hand, responsibility would be assumed by analysing any illegal/criminal practices from the past decades. On the other hand, an evaluation of recent practice under a regime with provisions qua Hague Convention (with implementing decrees) and CRC would be guaranteed. Based on the information thus consolidated (international adoption practices from 1997 to the present), viable solutions for the future would be developed. This approach would have a strong signalling effect; it would make it possible to claim a reappraisal, a pause for reflection, a critical look and the breaking up of narratives. However, the scenario was rejected by the expert group due to the high level of effort involved and the associated loss of time, especially as its necessity and the gain in knowledge were questioned. The already existing

¹⁵⁹On recognising the need for fundamental reform, see chapter three, 2.1.

¹⁶⁰The Netherlands has chosen a comparable approach, albeit with a moratorium in advance: Moratorium to generate better empirical evidence (analysing international adoptions between the Netherlands and the different countries of origin). Subsequently, a decision is made on how to proceed. A differentiated strategy is now chosen here: Termination of cooperation with certain countries, continuation with a few countries, various institutional/organisational adjustments; see BALK/FRERKS/DE GRAAF, 2022, on the investigation of historical abuses in international adoptions in the Netherlands; partly critical in this respect

Information and findings are sufficient to proceed without further empirical investigations and field studies. Nevertheless, with the limited investigation of practices over the last five years (at least), one aspect of this proposal should be incorporated into the first of the two final scenarios to be presented. Such assessments and their results would then lead to a re-evaluation of the decision to continue or terminate cooperation. Irrespective of this, the expert group believes that Switzerland should stand up for the consistent effectiveness review of the Hague Conference at the level of international cooperation.

Fourthly - Against the background of the systematic violations of standards in the previous phase, it is not appropriate to retreat to an "uncritical trust" that practices from the phase after the one in which the adoption scandals were dealt with cannot be repeated. The expert group recognises that it is desirable to strive for a "zero error/minimum risk rate" - simply because there is too much at stake in the institution of international adoption. A system and regime must be guaranteed in which irregularities are contained as far as possible and in which the risk of unlawful practices as a result of de facto effective measures is marginalised. In this respect, the Hague Convention/CRC still fall short.

Fifth - A reform *without reducing the number of co-operating states* is not recommended.

Sixth - The need for *partial or total moratoria, which are conceivable in various variations and starting points*, was discussed.⁽¹⁶¹⁾ In the expert group, moratoria were primarily discussed in relation to the implementation of the adaptation proposals formulated by the group within scenarios: Fundamental reform is essential for reasons of child welfare and children's rights. Until this is implemented, a moratorium would provide undisputed and effective protection against repetition, as well as granting the necessary critical pause for reflection and thus enabling a more distanced view to be generated. In the reduction-plus-reform scenario, significant progress is achieved through the immediate/immediate reduction of the co-operating states based on the requirement to comply with high standards. Cooperation is terminated directly and promptly, with a decision being made between a hard or soft exit (see third chapter, 2.1.1.2). The reduction-plus-reform scenario also rejects a moratorium on international adoptions with those countries of origin with which cooperation is to be continued until the necessary reforms have been implemented. The practice should not be suspended for years or even decades. For the implementation of the *exit scenario*, a decision must also be made between a hard or soft exit; moratoria were also not deemed to be expedient here (cf. second recommended scenario, third chapter, 2.2). However, a slightly different, quasi-upstream "administrative moratorium" should be considered: This could be used as an immediate measure to stop adoption procedures *until the decision in favour of the first or second scenario* has been made by the competent authorities in the relevant procedure. Such a moratorium is based on the *political process in Switzerland*.⁽¹⁶²⁾

¹⁶¹Various states have implemented moratoria due to the identification of irregular practices; see WITTNER 2003, 595 ff.; SMOLIN 2021.

¹⁶²If necessary, by the Federal Council until Parliament has decided on the procedure in the relevant decision-making process.

Chapter three - Evaluated and recommended scenarios

Based on the above, *two scenarios* are recommended for a Swiss policy on international adoption that is best suited to promoting the welfare of adoptees and safeguarding their rights: the reform scenario with a reduction in the number of cooperating states (2.1) and the exit scenario (2.2).

These two scenarios have emerged after several alternative scenarios were rejected in open and extensive discussions. The two recommended scenarios are considered (equally) valid by the expert group. The sentiment can be summarised as follows: Around half of the members tend to favour the first scenario (reduction plus reform, without moratorium), but are solidly in favour of the second scenario (phase-out). The other half tend to favour the second scenario, but support the first scenario as equally convincing. Accordingly, this interim report does not provide an opinion on whether the first or second scenario is preferable.

What both scenarios have in common is that they consider the measures for implementing the right to know one's own parentage, addressing the challenges in relation to the search for origin, better and free support/care for those affected as constitutive elements.⁽¹⁶³⁾ Both scenarios thus refer both to *international adoptions that have already taken place* and to future adoption procedures/adoptions *that have not yet taken place*. They also refer to "pending adoption cases". *The case* analysed here was international intercountry adoption. According to both scenarios, there is (the same) need for action with regard to specific adoption constellations, in particular intra-family adoption; in addition, according to both scenarios, a revision of the IPRG will be necessary (see second chapter, 3.3). In both scenarios, an examination of the integration of a hardship clause for the circumvention of international adoptions that are carried out despite the prohibitions is also required.

An "administrative moratorium" could be considered as an immediate measure until a legally effective decision is made in favour of one of the two recommended scenarios in accordance with the relevant political process in Switzerland. In addition, the group of experts for the creation and implementation of the policy scenarios discussed and trialled different variations of moratoria.

¹⁶³The extent to which further measures of "reparation" are indicated as a result of the suffering caused by illegal adoptions is not discussed here - however, this is an issue that does not yet appear to have been conclusively dealt with; m. w. H. LOIBLE, 2021, 477 ff.

1 Need for action in both scenarios

1.1 Measures to be prioritised, as they are absolutely necessary

First and foremost, demands for restitution must be examined, as they have also been formulated by international organisations in relation to Switzerland (see Chapter 2, 1.1 and 1.3). Further, additional or possibly newly established support for adoptees in their search for their origins and with regard to the realisation of the right to know their own origins (this applies in particular to adoptees who were adopted during the period under review and who may have to face a painful reality) is of the highest relevance and should be treated as a priority. The consistent implementation of measures to support the search for origins is still urgent and must be prioritised (see the Federal Council Report 2020, 25 ff., and the recommendations of the KKJPD working group on the search for origins). Specific attention should be paid to organisational issues, as well as to the fact that the sometimes diminished trust of adoptees in the authorities needs to be addressed. The creation of a neutral and independent body that is well equipped with the appropriate competences and resources is worth examining. The recommendations from the report of the KKJPD working group on tracing the origins of adoptive parents, which are to be evaluated, elaborated and implemented in greater depth, provide indications of the steps required here. It is not only the specific aspect of support in the search for origin that needs to be considered. In general, a reform and expansion of support services should be promoted (so-called *pre-* and *post-adoption services*). The expansion must also include those affected who were not adopted in accordance with HAÜ. One issue here is free of charge. Germany's newly enacted Adoption Assistance Act, which is based on four building blocks, may provide suggestions.⁽¹⁶⁴⁾ One consequence of the numerous challenges/problems described above is the call for a *revision of the effects of adoption*: Adoption should be designed as a respectful, open, transparent, trust-building and continuity-guaranteeing lifelong process.

1.2 Specific adoption constellations

The distinction between intercountry adoption and intra-familial adoption is also partly relevant for adoption in an international context. In the international context, regardless of which scenario is chosen, adoption will continue to have an area of application in intra- or intra-family adoptions. A comparison with intercountry adoption reveals differences, but also similarities in the challenges to be overcome in each case. A separate evaluation of the necessary legal adjustments is indicated for intra-/intra-family adoption. In addition, considerations should be made that also have an impact on national adoptions, such as reviewing the effects of adoption. Secret full adoption should be overcome. Because intra-family adoption is a specific constellation - particularly in connection with the case law of the ECHR and the IPRG - there is a need for reform in its own right, regardless of the scenario chosen.

¹⁶⁴Cf. < [51](https://www.bmfsfj.de/bmfsfj/aktuelles/alle-meldungen/adoptionshilfe-gesetz-bundesrat-bundestag-163414#:~:text=Einen%20offenen%20Umgang%20mit%20Adoption, die%20Tatsache%20ihrer%20Adoption%20aufzukl%C3%A4ren>.</p></div><div data-bbox=)

1.3 Revision of the IPRG

The main focus of the expert group was on *international intercountry adoption as understood under the Hague Convention*.⁽¹⁶⁵⁾ In the context of international adoptions, some very specific (individual) constellations are conceivable. The revision of the IPRG will therefore be of central importance regardless of which scenario is chosen. However, a reform will vary depending on the scenario chosen. In this respect, a memorandum was drawn up, the summary of which is reproduced above.⁽¹⁶⁶⁾ The overall analysis is to be considered in greater depth following the decision in favour of a scenario as part of the second stage of the mandate.

2 Two recommended scenarios

Based on its comprehensive analyses, the group of experts recommends *two equally valid scenarios* (without a ranking due to a lack of preferability - the system therefore says nothing about a ranking/preference). Both scenarios appear to be in line with Switzerland's obligations under the CRC and the HCCA: Since the CRC authorises any state to refrain from adoptions altogether, it also allows *a fortiori* any state not to allow international adoptions. The Hague Convention, on the other hand, allows each contracting state to refrain from giving its citizens the opportunity to make use of the "inter-state" adoption procedure organised by it. For the phase of the decision-making process in Switzerland in favour of the first or second scenario (and thus in connection with the political process), a "administrative moratorium" should be considered: The ordering of a suspension of adoption procedures until such time as the scenario decision has been legally adopted as a decision in principle by the competent authorities.⁽¹⁶⁷⁾

2.1 First scenario - reduction-plus-reform scenario

The reduction-plus-reform scenario is a reform scenario (without a moratorium, as soon as/after the decision in favour of this first scenario has been taken by the competent authorities in the relevant procedures) with an immediate reduction in the number of countries of origin. The practice of international adoption should only be continued if a *fundamental change* is implemented. This is achieved by *combining two approaches*. Both are indispensable as "cumulative prerequisites" and must therefore be ensured in combination: firstly, a *limitation to certain countries of cooperation* should be *implemented* (2.1.1 below); secondly, a *comprehensive reform* must be carried out (2.1.2 below; this includes: organisation of authorities in Switzerland, new regulations to prevent financial advantages, examination of the role of placement agencies, the effects of adoption, etc.). Both approaches, which constitute this scenario, are presented below with their concretising design elements.

¹⁶⁵For the definition and this case, see Chapter 2.1.

¹⁶⁶Cf. second chapter, 3.3.

¹⁶⁷Such an approach could be described as a kind of provisional or super-provisional measure.

2.1.1 First constitutive element - reduction of the co-operation states

2.1.1.1 Selection criteria and assessment

Principle, criteria for limiting cooperation partner countries: Switzerland should only carry out international adoptions with countries of origin that formally *and* de facto demonstrably comply with minimum standards and requirements.⁽¹⁶⁸⁾ The countries of origin that are to be cooperated with in the context of international adoption in the future must also demonstrate and prove a need in such a way that international adoption is actually the appropriate and necessary protection measure for the children concerned.

The scenario also involves a partial withdrawal.

Regarding the criteria for the continuation or termination of cooperation: Countries of origin with which Switzerland will continue to carry out international intercountry adoptions must have ratified and implemented *the Hague Convention and the CRC, including the Second Additional Protocol (2000)* on the sale of children, child prostitution and child pornography (cumulative).

The group of experts is convinced that ratification of these conventions is a necessary, but not a sufficient criterion for the decision to continue to implement international adoption.⁽¹⁶⁹⁾

Additional qualification criteria must therefore be added, in particular the following: In addition to the quantity of adoptions carried out, qualifying selection criteria include, in particular, the willingness of the countries of origin to cooperate transparently and to *be accountable*. Co-operating countries should demonstrate that adoptions are carried out *in a compliant manner*, that effective risk mitigation measures are taken, etc. Well-established and trusting co-operation should also be taken into consideration. In addition, the guarantee of the right to know one's own parentage should be a criterion. If the right to know one's parentage is given high priority, as it is in Switzerland, a similar assessment must also apply to international adoption. A restriction to countries that guarantee the implementation of this right is obvious.

In the opinion of the expert group, significant progress will be made if Switzerland only carries out international adoptions based on this catalogue of criteria (which may need to be modified) with countries of origin where there is a guarantee that international adoptions are carried out with integrity in the light of the welfare and rights of the children as the primary, but not exclusive, criteria,

"standard-compliant" and lawful. The process of the corresponding evaluations, decisions and implementation measures must be defined in more detail.

The catalogue of criteria and, above all, the list of countries of origin should be regularly reviewed in line with a compliance and governance approach and adjusted if necessary. The decision to continue or terminate cooperation in the context of international adoption with certain countries of origin, which has now been taken for the first time on the basis of the assessment of compliance with the criteria, is not a final decision. A standardised assessment procedure is to be established.

¹⁶⁸The decision on which countries of origin to continue intercountry adoption with and which to end it with (based on an evaluation of compliance with predefined criteria) can be seen as a kind of "appropriateness decision"; the Netherlands has chosen a similar approach.

¹⁶⁹ International adoption in co-operation would not be continued for lack of ratification of said decrees, e.g. with the USA.

2.1.1.2 Timing

The reduction of cooperation within the framework of international adoption to countries of origin that fulfil these criteria, or the termination of cooperation with countries that are deemed not to fulfil these criteria in a "preliminary assessment", must be *implemented immediately, promptly and swiftly*.

The expert group discussed a partial moratorium (in relation to the exit states) or a moratorium until the implementation of the overall reform. It does not consider this modality to be appropriate under the principle of proportionality. The *immediate reduction* to a small number of cooperating states with an increase in the requirements for cooperation makes a direct and effective contribution to security. A moratorium until the implementation of broad-based reforms, which will take years or even a decade, is therefore not necessary and would be disproportionate.⁽¹⁷⁰⁾

The partial country reduction must be implemented *immediately*, but must also be well planned. In particular, there are the options of a *hard or soft exit*: In the case of a so-called *hard exit*, only adoption procedures in which the child proposal has already been accepted would be continued. With the so-called soft exit, no new certificates of suitability would be issued; only the procedures for adopters for whom suitability has been certified in Switzerland and for whom the central authority of the country of origin has examined and approved the dossier of the prospective adoptive parents and the suitability of the applicants would be continued, placing them on the waiting list.

Table 6: Overview of the certificates of suitability that are still valid (source: FOJ)

Canton	Country of origin	Number
AG	Thailand	1
AG	Haiti	2
AI	-	0
AR	Thailand	1
BE	Brazil	1
BE	Haiti	1
BE	Mexico	1
BE	Peru	1
BE	Philippines	3
BE	Russia	1
BE	Thailand	6
BL	Burkina Faso	1
BL	India	1
BS	Haiti	1
BS	Portugal	1
BS	Mexico	1
BS	Togo	1
FR	Thailand	4
FR	USA	1
FR	Philippines	2
GE	Colombia	1

¹⁷⁰This should be distinguished from the question of a moratorium for the decision-making process phase with regard to the two recommended scenarios, cf. introductory section in Chapter 3, 2.

GE	Thailand	2
GE	Philippines	1
GE	Portugal	1
GE	Haiti	1
GE	Tunisia	2
GL	-	0
GR	Ecuador	1
GR	Brazil	1
GR	Thailand	1
GR	Colombia	1
GR	Honduras	1
GR	Czech Republic	1
JU	Thailand	2
LU	Sri Lanka	1
LU	Thailand	2
NE	Thailand	3
NW	Thailand	2
OW	-	0
SG	Peru	1
SH	-	0
SO	Thailand	3
SO	Armenia	1
SO	Sierra Leon	1
SZ	Thailand	1
TI	Bulgaria	1
TI	Burkina Faso	6
TI	Ivory Coast	3
TI	Haiti	1
TI	Rwanda	1
TI	Thailand	13
TI	Peru	1
TG	-	0
UR	-	0
VD	Dominican Republic	2
VD	Haiti	3
PD	Thailand	6
VD	India	2
VD	Burkina Faso	3
VD	Togo	1
VD	Romania	3
VD	Brazil	1
PD	Colombia	2
VD	USA	1
VS	Thailand	6
VS	Philippines	3
VS	Romania	1
VS	Mexico	1

VS	Peru	1
VS	Burkina Faso	1
VS	Algeria	1
ZG	Burkina Faso	1
ZG	Russia	1
ZG	Sri Lanka	1
ZG	Thailand	1
ZG	USA	1
ZH	Burkina Faso	3
ZH	Dominican Republic	2
ZH	Haiti	1
ZH	India	3
ZH	Colombia	2
ZH	Nigeria	1
ZH	Peru	2
ZH	Thailand	16
ZH	Tunisia	1
ZH	USA	1
ZH	Vietnam	1
Total		165

2.1.1.3 Review and evaluation

An assessment/evaluation of all international adoptions (HAÜ and non-HAÜ procedures) carried out in the last five years (at least) is recommended, as well as the recognition practice. The analysis is intended to provide empirical and in-depth findings on the question of how the practice of international adoption is currently carried out, in particular with regard to actual compliance with the relevant legal requirements. The expert group has repeatedly recognised the problem of the lack of information. Although a broad-based and in-depth study of adoption practice over the last thirty years would appear to be welcome.⁽¹⁷¹⁾ However, it does not form part of the recommended scenario; rather, a focussed study of the last five years should provide a more precise picture of current international adoption practice. Such an analysis serves as an instrument for refining or adapting the catalogue of criteria. It will also serve to review (in depth) the list of cooperating states and the list of states with which cooperation is being terminated.

¹⁷¹Cf. the comments on the rejected scenarios and the so-called "factual moratorium", second chapter, 4.

2.1.1.4 Strengthening cooperation

In addition to country reduction, cooperation should be expanded *bilaterally*.⁽¹⁷²⁾ Switzerland should further stabilise and build trust with the selected future cooperation states, provide support in establishing functioning organisations and processes in the countries of origin in question, gain in-depth insights into the situation there through on-site visits, etc. It should advocate due diligence, thereby increasing transparency and accountability. It should *advocate due diligence*, which is intended to increase transparency and *accountability*. Mechanisms developed in other areas of law should be utilised for international adoption.⁽¹⁷³⁾ In addition, Switzerland should work towards ensuring that guarantees in the context of international adoption are also implemented more consistently at international level.

2.1.2 Second constitutive element - comprehensive reform

The reduction of co-operating states means the termination of co-operation with non-Hague Convention states and with certain Hague Convention states. It is appropriate to introduce (legal) measures that serve to prevent circumvention, in particular by creating a "fait accompli". The necessary decisions, measures and legal adjustments must be developed for this partial exit. Specifically relevant in this respect are a revision of the IPRG and the development of mechanisms to safeguard the partial adoption ban.⁽¹⁷⁴⁾

The continuation of cooperation with selected states is taking place *in parallel* with the implementation of reforms. Any decision taken to continue international adoptions with certain states and to terminate them with others should be reviewed for its appropriateness in accordance with the assessment of the procedures over the last five years or more. This assessment may also result in even more precise reform findings.

Only a *broad-based and far-reaching reform* will take the best possible account of the principles of the welfare and rights of adoptees as well as the legally protected interests of other parties involved, in particular the biological parents. This includes the issues/fields of action specified in the mandate and in the Federal Council report (see also the preliminary answers in Chapter 2, 3) as well as other fields, in particular the effects of adoption and the associated problems of tracing the adoptive parents' origins and aftercare. Adoption must be recognised as a lifelong process in which numerous actors are involved. An overall view of all systemically relevant dimensions should be the starting point for reforms. Accordingly, the expert group identifies a need for adaptation in other areas: The effects of adoption and the concept of the *clean break* (incognito full adoption) should be critically examined. In connection with this, it is essential for a Swiss policy on international adoption that respects the welfare and rights of adoptees in their relationships with their family and culture of origin to support adoptees in Switzerland with any problems they may have in relation to their search for origin (whereby the costs of this should not be imposed on the adoptees). Post-adoption counselling and support should also be expanded.

A Swiss policy on international adoption must prioritise the guarantee and implementation of the right to know one's own parentage and focus on this.

¹⁷²Cf. in this respect second chapter, 3.5.

¹⁷³Keyword: corporate responsibility initiative.

⁽¹⁷⁴⁾ For more details, see Chapter 2, 3.3, Summary of the revision of the PILA, and in particular the memorandum.

The recommendations of the KKJPD Working Group on Origin Search are to be taken into account in a guiding manner. The considerations on which these recommendations are based are likely to yield further insights into the functioning of international adoption, including in the recent past.

2.2 Second scenario - exit scenario

The complete withdrawal was repeatedly debated⁽¹⁷⁵⁾ In these discussions, the decision was consolidated to recommend the *complete withdrawal from international intercountry adoption* as a second scenario. With regard to the international context, this means a restriction to intra-family adoptions.⁽¹⁷⁶⁾

In reality, controlling systemic risks and achieving de facto compliance with formal guarantees appears difficult, if not impossible. In any case, it is only possible with a great deal of effort to implement measures that are able to consistently guarantee the best interests and rights of the child and the legally protected interests of the other parties involved, in particular the biological parents, in the context of international adoptions. The necessary reforms are associated with an extremely high level of effort and will require enormous resources - without it being possible to guarantee beyond doubt that abuses will not be repeated more or less systematically. Without the willingness to make these resources available, international adoption, which can be qualified as a genuine child protection measure, cannot be realised. The question arises as to whether this effort is proportionate in relation to the number of international intercountry adoptions still being carried out - especially since an analysis of the risks and possible sufficiently effective mitigation measures led to the following conclusion: Despite all reform efforts, adjustments and improvements - against the background of the framework conditions of international adoptions (power asymmetries, poverty, difficult to structure and control phases around pregnancy and birth, as well as alleged, presumed or fictitious "clearance"), there remains a risk of irregularities, including illegal adoptions, being realised that goes beyond the individual exceptional case. In Switzerland, there has been a marked reduction in the number of international third-party adoptions carried out, particularly in the last fifteen years, for various reasons (termination of co-operation due to a decision by Switzerland or the country of origin, cessation of activities by placement agencies, changed profiles of potential adoptive children, new legislation in Switzerland, e.g. with regard to age difference, possible switch to surrogacy, etc.). Currently, no more than around fifty international third-party adoptions are carried out each year. The trend towards phasing out has therefore been underway for some time. In this respect, the exit scenario is the logical continuation of a development that has long been progressing in Switzerland anyway. Switzerland could take on a pioneering role with the phase-out, especially as it has the political independence required for such a decision. It bases such a decision on the recognition that international adoption has also played a very problematic role.

The group of experts is of the opinion that Switzerland is under no obligation to carry out international adoptions, which could prevent it from withdrawing. It is also of the opinion that there is no right to adopt a child. It is true that the withdrawal from international adoption could possibly lead to a further switch, e.g. to the field of surrogacy. The group of experts pleads

¹⁷⁵Cf. above as an element of the first of the two proposed scenarios.

¹⁷⁶In addition, national intercountry adoption and national intra-family adoption should be retained; see Chapter 3, 1 for the necessary legislative amendments; the revision of the IPRG is of particular importance here.

In this respect, it is in favour of the creation of an appropriate legal framework, the design of which goes beyond the remit of this group of experts. The exit specifically requires an in-depth analysis of the IPRG norms, not only with regard to the recognition of adoptions pronounced abroad, but also with regard to possible standardisation in relation to the circumvention of an "adoption ban". Awareness-raising measures should be taken with civil status authorities, embassies and migration authorities. Two options are also conceivable for a complete exit with regard to pen-dent cases: the so-called hard exit and the so-called soft exit (see 2.1.1.2 and Table 6). An exit from the TCA would also need to be evaluated. An "administrative moratorium" could be considered for the period until the decision in principle for this second scenario has also been legally adopted by the competent authorities in the relevant procedure⁽¹⁷⁷⁾

Zurich, 28 March 2023

Monika Pfaffinger, Chair of the Expert Group

¹⁷⁷See introductory section in Chapter 3, 2.

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