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REPORT OF THE ECONOMIC AND SOCIAL COUNCIL

Draft declaration on social and legal principles relating to
 adoption and foster placement of children nationally and
 internationally

Report of the Secretary-General

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I. INTRODUCTION

1. At its twenty-sixth session, the Commission for Social Development considered the report of the Secretary-General entitled "Draft Declaration on Social and Legal Principles Relating to Adoption and Foster Placement of Children Nationally and Internationally" (E/CN.5/574), which presented the social and legal principles recommended by an expert group meeting convened at Geneva from 11 to 15 December 1978 specifically for that purpose.

2. The Commission expressed appreciation for the work of the expert group and agreement with the content of the proposed declaration. It also acknowledged the need for such an international instrument and proposed that the guidelines requested by Economic and Social Council resolution 1925 (LVIII) be developed at a later stage (E/CN.5/582, paras. 150-154). Finally, the Commission expressed its conviction that appropriate measures should be undertaken to educate the public in order to increase community awareness of the existence of children with special needs, its awareness of the urgent need for more active involvement of Governments in matters of family and child welfare, and its recognition that it is the responsibility of Governments to determine the adequacy of their national services for children and to recognize those children whose needs are not being met by existing services.

3. The Economic and Social Council, at its first regular session of 1979, adopted resolution 1979/28 entitled "Adoption and foster placement of children" in which the Council, *inter alia*, took note of the report of the Commission for Social Development at its twenty-sixth session relating to this subject and decided to submit the draft declaration to the General Assembly for preliminary consideration at its thirty-fourth session. The Council also requested the Secretary-General to transmit the text of the draft declaration to all Member States with a view to obtaining their comments on the matter and submitting the results of the inquiry to the General Assembly at its thirty-fifth session.

4. Pursuant to that resolution, a note verbale from the Secretary-General was sent to all Member States requesting their comments and observations on the draft declaration. As at 30 May 1980, Governments of the following Member States had replied:

Argentina, Austria, Barbados, Canada, Chile, Cyprus, Denmark, Dominica, Ethiopia, Finland, Germany, Federal Republic of, Guyana, Indonesia, Jamaica, Japan, Kuwait, Netherlands, Norway, Peru, Poland, Romania, Singapore, Spain, Sweden, Tunisia, United Kingdom of Great Britain and Northern Ireland, Uruguay and Venezuela.

The purpose of this report is to present those comments. It sets out the views expressed regarding the draft declaration in its entirety (section II); the observations made on the first section of the draft declaration entitled "General family and child welfare" (articles 1 to 6 - section III); the views on the second section of the draft entitled "Foster placement" (articles 7 to 11 - section IV); the comments on the third section of the draft dealing with adoption

(articles 12 to 25 - section V); and alternative formulations of some articles of the draft based upon comments made by the Member States (section VI).

II. COMMENTS ON THE ENTIRE DRAFT DECLARATION

5. Almost all Governments expressed strong support for the draft declaration and greeted it as a welcome step in developing generally accepted guidelines which would permit application of Principle 6 of the Declaration of the Rights of the Child (General Assembly resolution 1386 (XIV) of 20 November 1959). It was also seen as promoting the legal protection of the child and child welfare as well as a happy family life.

6. Some Member States felt however that the draft declaration should have a preamble stating the principles underlying it.

7. However, one Member State expressed its reservations regarding the draft declaration in its entirety. It recalled General Assembly decision 33/406 and the serious differences on the question that had emerged during the consultations leading to that decision. At that time it had indicated that preliminary steps should be taken at the regional and subregional levels to make possible a reconciliation of the various legal, cultural, religious and other positions relating to adoption. For the time being, therefore, it was considered to be neither appropriate nor necessary that measures should be adopted within the United Nations.

III. GENERAL FAMILY AND CHILD WELFARE

8. Comments on this section as a whole were favourable and included expressions of support for the articles as well as indications that they were compatible with existing statutes of certain Member States. No reservations were expressed regarding this section.

9. Article 1 reads as follows:

"It is in the best interest of every nation to give a high priority to family and child welfare as it plans for the use and further development of national resources."

10. Intending to make the text clearer and more precise, one Member State proposed that article 1 should read: "In planning the use and further development of national resources, every nation should give a high priority to family and child welfare." Still another proposal was that the article should read: "Every nation should give a high priority to family and child welfare", while the remainder of the sentence would be deleted. A third suggestion called for changing the words "... as it plans ..." to "... in its plans ...".

11. Article 2 reads as follows:

"It is recognized that the best child welfare is good family welfare."

12. This article was supported in all comments. One Member State however suggested a different wording: "All nations recognize that the best child welfare is good family welfare", while another proposed: "It is recognized that the best method of providing for the welfare of the child is by providing for the welfare of the family."

13. Article 3 reads as follows:

"It is affirmed that the first priority for a child is to be cared for by the biological parents. Other family members should be the first alternative if the biological parents cannot provide care for the child."

14. A number of Member States stressed that if a child could not remain with its biological parents, the best interest of the child must be the paramount concern. Placement with other family members should not be preferred on principle as they may not be the best choice in all cases, but should be considered only if they are well qualified and if it would be in the best interest of the child.

15. With a view to strengthening the child's right to security, a suggestion was made by a Member State that "every minor has an inalienable right to be cared for and protected. The duty to provide this security falls first to his biological parents. If the biological parents cannot provide care for the child, responsibility for it should devolve upon other family members. When biological family care is unavailable or inappropriate, substitute family care should be favoured."

16. Article 4:

"When biological family care is unavailable or inappropriate, substitute family care should be considered."

17. One Member State suggested that article 4 should be merged with article 3 and suggested a new article 4 to read as follows: "Specialized agencies of the State, of an administrative or judicial nature, shall ensure that the right of minors to security is respected." This was proposed in order to establish the responsibility of the State for defending the legal precept which is to be protected.

18. Article 5 reads as follows:

"It must be recognized that there are parents who cannot bring up their own children and where the children's rights to security, affection and continuing care should be of greatest importance."

19. One Member State proposed that the present article 5 should be deleted and replaced by the first part of article 19 of the draft declaration since this concept was a general principle and it therefore seemed more appropriate to place

it in this section. The wording would also be modified to read: "Governments should determine the inadequacy of their national child care services in the light of what is required for children's normal development." A second Member State called for the word "where" to be replaced by "here".

20. Article 6:

"Providers of service should have professional social work training in family and child welfare."

21. This wording seems to have given rise to some confusion, particularly with regard to the meaning of "providers of service". Most comments seemed to take the position that those employees of family and child welfare agencies who have a responsibility for making placements, as well as for the selection and supervision of foster care homes, should have received training in professional social work. It was not expected, however, that foster parents should have had professional social work training.

22. Believing that the problem was more one of professional specialization rather than of a particular type of profession, one Member State suggested that the wording might be: "It should be ensured that providers of family and child welfare services have specialized professional training."

23. Still another Member State cautioned that the implementation of the article in developing countries where manpower resources were very limited might not be feasible.

IV. FOSTER PLACEMENT

24. General comments on this section also included many statements of support which, in some cases were based on national experience with legislation founded on principles similar to or identical with those set forth in the draft declaration.

25. Article 7 reads as follows:

"Every child has a right to a family. Children who cannot remain in their biological family should be placed in foster family or adoption in preference to institutions, unless the child's particular needs can best be met in a specialized facility."

26. Comments on this article repeated the concern that foster placements be chosen according to the needs of the child. When a child is placed in foster care or in an institution, the primary objective should always be the return of the child to the biological parents. Only after this objective becomes impossible or inappropriate should continued foster care or adoption be considered.

27. One suggestion to improve the wording of the second sentence was as follows: "Minors who cannot remain in their biological family should preferably be placed

in foster families or adopted, thus avoiding placing them in institutions, except in very specific cases where their particular needs make this necessary."

28. Article 8:

"Children for whom institutional care was formerly regarded as the only option should be placed with families, both foster and adoptive."

29. Because of the similarity between articles 7 and 8, comments made by Member States were applicable to both, with one exception where it was suggested that article 8 should be re-worded as follows: "An effort should be made to place minors who are in institutions with foster families or to put them up for adoption, unless it is essential for their well-being that they should remain institutionalized."

30. Article 9 reads as follows:

"Provision should be made for regulation of placement of children outside of their biological family."

31. In this regard it was proposed that Governments should be responsible for the standard of care and for the upbringing of children cared for outside their biological families. For this reason, the agencies providing service should be authorized by legislation or by a decision of a competent authority, unless they are part of the public administration whose task it is to arrange foster care. Reformulating the article to give expression to this principle, one Member State proposed that "legal provision should be made for the regulation of the placement of children outside their biological family and specialized bodies should supervise and check its implementation. In this proposal the problem was seen as primarily a juridical one, but the importance of supervision was also recognized.

32. Another Member State cautioned, however, that in countries with limited resources it might be difficult to implement minimum standards as it would involve registration and monitoring of private foster homes.

33. Article 10:

"Foster family care should be a planned, temporary service as a bridge to permanency for a child, which includes but is not limited to restoration to the biological family or adoption."

34. The suggestion was made by one Member State that "Foster family care should be a temporary measure, and greater stability should be sought for the child by restoring him/her to the biological family, if any, placing him/her in an adoptive family or applying other measures of protection which will be of the greatest benefit".

35. Other comments on this article expressed concern that foster care might not be only a temporary service leading to restoration to the biological family or

adoption. At times it might lead to neither, but become a continuing form of care until adult life.

36. Also, since foster care should be seen, at least at the beginning, as a temporary condition, the primary goal being the child's restoration to the biological family, some comments proposed that the child ought to have the possibility of maintaining contact with its biological parents.

37. One Member State expressed its reservations regarding this article because of the reference to adoption since the practice of adoption was not in conformity with the precepts of Islam.

38. Article 11:

"Planning for the child in foster family care must involve the biological family, foster family and child, if appropriate, under the auspices of a competent authorized agency."

39. One Member State expressed reservations about the participation of the child in the planning for foster placement. It held that programmes sponsored by specialized agencies concerning the placement of children in foster family care must consider the child, the biological family and the foster family.

40. Comments by other Member States, however, indicated that the child should participate in the planning and that the term "if appropriate" should in no way serve to diminish the rights of the child. Whereas the participation of the child in the planning should not be subject to any judgement as to its appropriateness, the form of that participation may be. For example, the child should be entitled to legal representation or redress irrespective of whether the child were able to be personally involved in the planning process. In cases where biological parents had been relieved of custody or had neglected their child, they might not always be involved in the planning for their child. It was therefore proposed that the words "as a rule" be inserted after the word "care".

41. Concern was also expressed that there should be supervision to ensure the well-being of the child and that the foster family remained faithful to the concept of such a family. While there was no objection to supervision on principle, it was indicated that such supervision was not always feasible in developing countries.

V. ADOPTION

42. With one important exception, Member States expressed general support for this section and some indicated the similarity between the principles expounded in the draft declaration and those underpinning current national legislation.

43. One Member State, in its comments on articles 12, 16 and 23, expressed the view that there was a basic incompatibility between the precepts of Islam and the concept and practice of adoption, especially as set forth in article 12.

Because of the importance of this incompatibility, the reservations are mentioned here and should be seen as applying to the entire section on adoption.

44. Article 12 reads as follows:

"The primary purpose of adoption is to provide a permanent family for a child who cannot be cared for by his/her biological family."

45. Comments on this article again emphasized that adoption should serve only the best interests of the child. It was also suggested that the following clause should be added to the principle set forth in this article so that the end would read: "... or the biological family feels that it is unable to care for the child". Still another recommendation involved the shifting of clauses so that the article would read: "The primary purpose of adoption is to provide a child who cannot be cared for by his/her biological family, with a permanent family."

46. Article 13:

"Adoption procedures should be flexible enough to meet the child's needs in various situations."

47. While most comments strongly supported this article as being necessary to avoid the possible discouragement of prospective adoptive parents, the following re-wording, slightly restricting the sense, was also proposed: "Adoption procedures should be flexible enough to meet the child's needs while the adoption is in process."

48. Article 14:

"In considering possible adoption placements, those responsible for the child should select the most appropriate environment for the particular child concerned."

49. A question was raised as to the meaning of the term "those responsible for the child" and whether the child or his/her legal representative would not have some rights in this matter.

50. It was also suggested that more specific recommendations be made regarding the legal status of the adoptive parents, their age, capacity to assume parental functions, their financial resources, the maximum age difference between the adoptive parents and the adopted child as well as the prohibition of adoption between brothers.

51. Article 15:

"Sufficient time and adequate counselling should be given to the biological parents to enable them to reach a decision on their child's future, recognizing that it is the child's best interest to reach this decision as early as possible."

52. Comments were based for the most part on national experience and no changes were suggested except by two Member States. One called for time and counselling also to be extended to the adopters so that they and the child could make the necessary adjustments to adoption. The other called for the replacement of the last clause beginning with "recognizing..." by the clause: "... but they should be urged to reach this decision as soon as possible".

53. Article 16:

"Legislation and services should ensure that the child becomes an integral part of the adoptive family."

54. Comments included the suggestion that the agency with responsibility for overseeing the adoption should observe the relationship between the child to be adopted and the adoptive parents prior to the confirmation of the adoption by the court. One Member State suggested that the period of observation should be about six months.

55. One Member State observed that since services only implemented legal provisions, mention of them was superfluous. It therefore proposed the deletion of "and services" and, at the same time, expressed a preference for the term "a member" instead of "an integral part".

56. Article 17:

"The need of adult adoptees to know about their background should be recognized."

57. Most Member States supported this article in their comments. One suggestion was that the word "adult" should be omitted. Other suggestions were that counselling be provided to the adoptive parents as well as the adopted child during the disclosure process, especially since the most important questions of adoptees concerned the reasons why they had been given for adoption and what had happened at that time. It was also suggested that the wishes of the biological parents should be taken into account in deciding on such disclosure. Another proposal was that the draft declaration should introduce a reference to the necessity of requiring the consent of the minor to be adopted (at an age to be determined) and thus ensure uniformity with article 11 which calls for the involvement of the child in the foster placement process.

58. One Member State expressed reservations about the wisdom of including this article in the declaration, while the reservations of another Member State led it to propose that "it is advisable for adopted persons to be aware that they are adopted".

59. Article 18:

"There should be recognition, in the law, of traditional adoption within the family, to ensure the protection of the children and to assist the family by counselling."

60. One Member State proposed that the words "... in those countries where it exists ..." should be inserted after the word "... law ...".

61. Another Member State indicated that, according to its national law, adoption within the family was comparable to adoption in general. A third Member State indicated that, under its law, adoption of lineal descendants was only permitted if it were by a biological parent or a step-parent. Thus, grandparents may not adopt a grandchild. The law, however, did not prohibit other types of adoption within the family.

62. Article 19 reads as follows:

"Governments should determine the adequacy of their national services for children, and recognize those children whose needs are not being met by existing services. For some of these children, inter-country adoption may be considered as a suitable means of providing them with a family."

63. It was recommended that such adoptions should take place while the child was still very young, provided that the adoptive parents had been conscientiously checked in advance and that there could be a trial period.

64. In accordance with the proposal made by one Member State to transfer the first sentence of this article to article 5, article 19 would now be modified to read: "If a child cannot be adopted in his country of origin, inter-country adoption may be considered as a suitable means of providing him/her with a family."

65. Article 20:

"When inter-country adoption is considered, policy and legislation should be established to protect the children concerned."

66. This article was viewed by many Member States as being particularly important.

67. Article 21:

"In each country, placements should be made through authorized agencies competent to deal with inter-country adoption services and providing the same safeguards and standards as are applied in national adoptions."

68. One Member State indicated that since under its national law adoptions may take place without going through an authorized agency, the phrase "... placements should be made ..." should be replaced by "... placements should preferably be made ...".

69. Another Member State, to improve the drafting, proposed that the article should read: "Inter-country adoption should be carried out through the competent

authorized agencies. Each country should have specialized services permitting application of the same safeguards and standards as for adoption in the country of origin."

70. Comments by other Member States supported article 21.

71. Article 22:

"Proxy adoptions are not acceptable, in consideration of the child's legal and social safety."

72. One Member State indicated that it had no objection to article 22 provided that insofar as 'proxy adoption' did not include the case of a child represented by a legal representative who gave assent to the child's adoption. If, however, the said term was intended to include the said case, the Member State said that it could not agree with this article.

73. Another Member State wished the wording to be changed to the following:
"Proxy adoptions must not be accepted, in consideration of the child's legal and social safety."

74. A third Member State, concerned that undue complications of adoptions should be avoided, felt that greater justice could be done to a proscription of proxy adoptions by a regulation requiring the adopter, as a rule, to take the child into his or her care for an adequate period of time prior to the adoption. Other Member States expressed support for the article without reservation.

75. Article 23:

"No adoption plan should be considered before it has been established that the child is legally free for adoption and the pertinent documents necessary to complete the adoption are available. All necessary consents must be in a form which is legally valid in both countries. It must be definitely established that the child will be able to immigrate into the country of the prospective adopters and can subsequently obtain their nationality."

76. With regard to the first sentence, two Member States were concerned that for practical reasons it may sometimes be impossible to have all the "pertinent documents necessary to complete the adoption" available at the time when an "adoption plan" is to be considered. An absolute condition in this respect, it was felt, could therefore jeopardize a substantial number of international adoptions. Another Member State proposed the addition of "inter-country" after the word "no" and the substitution of the words "may" for "should" and "complete the procedure" for "complete the adoption".

77. With regard to the second sentence, one Member State indicated that adoption of a foreign child was examined on the basis of the national law of the adoptive parents and that it was not necessary for national courts to ascertain what was required with regard to consents, etc. according to the national law of the child.

However, in practice, when an application concerned a child under the age of 18, attention should be paid to whether the child had a connexion with a foreign State as a result of citizenship or domicile or otherwise, and whether it would cause considerable inconvenience for the child if the adoption were not to become valid in that foreign State. A second Member State warned that it might not always be possible for all material conditions to be met for the consent to be valid in both countries. Still another proposal involved the substitution of "the documents" for "necessary consents".

78. The third sentence, which reads: "it must be definitely established that the child will be able to immigrate into the country of the prospective adopters and can subsequently obtain their nationality", drew several comments. One Member State considered the wording to be too stringent since the national law of that country did not explicitly provide that an adopted foreign child be granted a residence permit or citizenship. In practice, however, these questions were resolved without delay after the adoption had been completed, the Member State indicated.

79. A second Member State considered the wording of the third sentence to be inappropriate since, if the granting of an entry permit was a prerequisite for an inter-country adoption, there was the possibility of such an adoption being made use of by any person as a means for getting himself or herself immigrated into the country where he or she wished to live. On the other hand, an application for such an entry permit might eventually be turned down in the light of various factors surrounding it. Moreover, it might be technically difficult for the authorities concerned to know how to handle the particular person who failed to effect the adoption after being admitted into the country concerned on condition of his or her adoption in that country. It was recommended in this connexion that this particular clause should be modified either by the insertion of a phrase like "as a principle" or by replacing part of the clause by a more moderate expression like "efforts should be so exerted that ...". This Member State also said that, if the said clause was interpreted to imply that the country of the adopter concerned was required as a matter of course to provide the adopted child with the nationality of that country at the time when adoption was effected, it could not agree with the article on that point.

80. A third Member State agreed that the acquisition of the adopter's nationality must not be a prerequisite for adoption.

81. A fourth Member State also proposed changes in the third sentence so that it would read: "It must be established that the child will be able to immigrate into the country of the adopters and can opt for their nationality once he/she is of age to do so."

82. Support for the article was expressed in all other comments.

83. Article 24 reads as follows:

"In inter-country adoptions, legal validation of the adoption should be assured in the countries involved."

/...

84. Comments generally emphasized the desirability of this article. For example, one Member State proposed that the wording be changed slightly to read: "In inter-country adoptions, legal validation of the adoption should be assured between the countries involved." Three Member States, however, indicated that since their national laws did not provide for or require that the adoption in their country had to be valid in the child's country of origin as well, some difficulties might be encountered.

85. Article 25:

"The child should at all times have a name, nationality and legal guardian."

86. Comments strongly supported this principle. Only one Member State proposed a change. Its suggestion was that "In all stages of the adoption process and throughout its duration, the child should have a name, nationality and legal guardian."

VI. CONCLUSION

87. Taking into account the comments made by the Member States as well as the deliberations of the expert group meeting on adoption and foster placement of children, the General Assembly may wish to consider the amendments and reformulations of certain articles set forth below:

88. Article 3:

"It is affirmed that the first priority for a child is to be cared for by the biological parents. When care must be provided for a child, the child's best interest should be the sole criterion. In such circumstances, other family members should be considered as an alternative."

89. Article 6:

"Providers of service, who have oversight or supervisory responsibilities for the foster placement and adoption procedures, should have professional social work training in family and child welfare."

90. Articles 7 and 8: Because of the similarity between these two articles, they could be combined conveniently as follows:

"Every child has a right to a family. Children who cannot remain in their biological family should preferably be placed in foster family care or adopted, thus avoiding placing them in institutions, unless the child's particular needs can best be met in a specialized facility."

91. Article 10:

"Foster family care should be a planned, temporary service as a bridge to permanency for a child, which includes but is not limited to restoration to the biological family or adoption. In certain circumstances, foster family care may become continuing until adult life."

92. Article 11:

"Planning for the child in foster family care must involve the biological family, foster family and the child, who is entitled to legal representation, under the auspices of a competent authorized agency. The agency should also be responsible for supervision to ensure the well-being of the child and that the foster family remains faithful to the concept of such a family."

93. Article 15:

"Sufficient time and adequate counselling should be given to the biological parents, adoptive parents and the child to enable them to reach a decision on their child's future, recognizing that it is in the child's best interest to reach this decision as early as possible."

94. Article 16:

"The relationship between the child to be adopted and the adoptive parents should be observed prior to the confirmation of the adoption by the court. Legislation and services should ensure that the child becomes an integral part of the adoptive family."

95. Article 17:

"The need of adoptees upon attaining of their majority to know about their background should be recognized."